
(1870) 06 CAL CK 0006

Calcutta High Court

Case No: Regular Appeal No. 138 of 1869

Rajkumar Ramgopal
Narayan Sing

APPELLANT

Vs

Ram Dutt Chowdhry
and Another

RESPONDENT

Date of Decision: June 14, 1870

Judgement

Sir Richard Couch, Kt., C.J.

If the question in this case was simply whether a bond for payment of money, with a simple covenant not to alienate until payment, constitutes a mortgage, I should doubt whether it ought not to be answered in the negative; but the question referred to us is whether the document of the 8th April 1858 is to be considered a mortgage of the lands comprised therein. No precise form is required for a mortgage, and I think it is sufficient if it appears to have been the intention of the parties to create a charge upon the lands, and in ascertaining the intention, "the form of expression, the literal sense is not to be so much regarded as the real meaning which the transaction discloses"-- 6 M.I.A. 393 (Privy Council) . Now, upon the translation of the bond agreed upon by the pleaders, I might have had some doubt as to the intention of the parties, although I am inclined to think that the latter part of it, which declares that any instrument of alienation shall be "invalid and of no avail, and a transaction set up to avoid payment of the debt," shows an intention that the lands should be charged.

2. But the translation with which we have been furnished by the Court translator, makes the intention clearer. It is, should we make all these transactions with respect to the said lands, the instrument relating thereto shall be deemed invalid and as executed in favour of nominal parties for evading payment (literally digesting) of the money covered by the said land. I think these words show that it was the intention of the parties that the lands mentioned should be a security for the debt. If so, that would create a charge. I am not prepared to say, as the late Sudder Court seems to have held in the case quoted, that if a party does not adopt one of the ordinary forms of mortgage, the transaction is invalid against a purchaser. If the intention can be collected from the instrument, the form of

expression is not material. In my opinion, the question referred should be answered in the affirmative.

Kemp, J.

3. I am of the same opinion. The words in the bond sufficiently indicate the intention of the parties to pledge the property. The whole of the bond was not translated for the Judges who referred the case to the Full Bench; the latter part of the bond was not properly submitted for their consideration. The whole bond having now been translated, the intention of the parties is rendered quite clear, and, as observed by the Chief Justice, no formal words are necessary to create a charge on the property if the intention of the parties is sufficiently expressed by the words used in the instrument. There is also a decision of the Agra High Court, by Morgan, C.J., and Roberts, J., of the 30th January 1867, *Martin v. Pursram* 2 Agra H.C. Rep., 124, which takes the same view.

L.S. Jackson, J.

4. I concur in the judgment delivered by the Chief Justice.

E. Jackson, J.

5. I am of the same opinion.

Markby, J.

6. This case was referred to the Full Bench by Mr. Justice Bayley and myself, because we thought the document which we were called upon to construe was a simple covenant not to alienate until payment of the money due under a bond of the same date, and we thought it desirable to ascertain whether such a document constitutes a mortgage. For the translation which was then agreed upon by the pleaders on both sides as the basis of our judgment, the Full Bench has substituted one made by an officer of the Court, upon which, I understand, our present judgment proceeds.

7. All the members of the Court, except myself, think that there are to be found in this new translation expressions which amount to more than a mere covenant not to alienate--expressions which indicate an intention to create a mortgage. Of course if this is so, the general question upon which Mr. Justice Bayley and myself expected the decision of the Court to turn does not arise; but I own that I have had some difficulty in discovering, even in the new translation, the expressions which indicate an intention to create a mortgage apart from a covenant not to alienate; and I should have still preferred that the decision of the Court should have turned upon the mere general question which we suggested. As, however, this will not be the case, I think it is sufficient for me to say, that I doubt whether the document before us is any thing more than a simple covenant not to alienate until payment of the bond.