
(1871) 08 CAL CK 0007

Calcutta High Court

Case No: Regular Appeal No. 87 of 1871

W.D. Cruickshank

APPELLANT

Vs

Ibrahim Azim

RESPONDENT

Date of Decision: Aug. 14, 1871

Final Decision: Dismissed

Judgement

Macpherson, J.

By the 4th section of Act IV of 1862, "for regulating the Bank of Bengal," the bank is competent to acquire and hold any description of property whatever, and to transfer and convey the same." Sections 27, 28, and 29 describe what the general nature of the bank's business is to be; section 27 giving the bank power to sell "property and securities" deposited in the bank as security for loans and not redeemed, or property or securities recovered by the bank in satisfaction of debts and claims." Section 30 enacts that the bank shall not make any loan or advance on mortgage, "or in any other manner on the security of any land, houses, or immoveable property, or the title-deeds relating thereto." The object of the present suit, in which the Bank of Bengal was the plaintiff, is to enforce an equitable mortgage, which is in the plaint stated to have been given to the bank on the 7th of June 1869 to secure a debt. The main question to be decided is, whether the Bank of Bengal, not having power to make any loan or advance on mortgage, or on the security of any immoveable property or the title-deeds relating thereto, has the power to take security of this nature for any debt actually already accrued due.

2. The equitable mortgage relied on was given by Mulla Ahmud. On the 14th of March 1870, the appellant (defendant in the Court below) purchased the right, title, and interest of Mulla Ahmud in the property the subject of the mortgage, at a sale in execution of a decree against Mulla Ahmud, the property having been attached under that decree on the 5th of February 1870.

3. The appellant purchased with notice of the mortgage or lien claimed by the bank; but he claims to hold the property free from any such lien, on the ground that the bank acted ultra vires in taking such security, and that it is therefore worthless as against him.

4. It was argued for the bank that, whether the taking such security was ultra vires or not, the appellant cannot set up that defence, the provisions of the Act being intended merely for the regulation of the affairs of the bank as amongst the shareholders, or as between them and the directors. But this is not so; and the contrary was decided by the Privy Council in *The National Bank of Australasia v. Cherry* 3 L.R., P.C., 299, a case which in very many respects resembles the case now before us. I have no doubt that if the taking of this security was ultra vires as being forbidden by section 30, the appellant has a good defence and is entitled to our judgment.

5. But, if the security was given to secure a debt already incurred and due, I do not think that the taking it was ultra vires. It is one thing to say that the bank shall not make a business of lending money on mortgage of land and the like, and another thing to say that money being actually due and owing to the bank, the bank shall not take the security of land or other immoveable property, or any other kind of good security not expressly prohibited, with a view to its own protection. The original lending of money on the security of immoveable property is quite a different thing (and affects the general position and business of a bank quite differently) from taking such security for a debt due. The forbidding the entering into loan transactions on the strength of such security, does not appear to me necessarily to include a prohibition against taking such security as a protection against loss in respect of a debt due: and, in the absence of any express prohibition, I do not see why I should infer an intention to impose it, when very possibly, not to say probably, it was never intended that it should be either expressed or implied. Prima facie, a debt having been actually incurred, it appears to me to be clear gain to the creditor to get any security for it, whether by way of mortgage or otherwise; and I think that the taking of such security bond fide is within the general scope of the business of the Bank of Bengal, as it is not expressly declared not to be so.

6. I proceed to consider whether what occurred on the 7th of June 1869 constituted a giving on that date by Mulla Ahmud to the bank, of an equitable mortgage or lien on this property, by way of security for a debt then due from him to the bank, for that is the case stated in the plaint, and relied on before us by the Advocate-General, who appeared for the respondent.

7. The circumstances are somewhat peculiar and the evidence as to the details of what occurred is remarkably meagre. There is no doubt that, on the 7th of June 1869, the title-deeds in question were in deposit in the bank, and had been so for some considerable time. But we have no precise information as to how, or when, or why they came to be in deposit there. Mr. Cruickshank, the manager of the branch of the Bank of Bengal in Rangoon, says that he took charge of his office on the 1st of April 1869, and that the title-deeds were then in deposit: he cannot say when they were so deposited, but

they had been in the bank more than a year; they had been deposited to secure certain bills on which Mulla Ahmud was liable. The deeds were deposited after the bills had been discounted; but I cannot say whether the bills were due at this time. There was perhaps a sum of Rs. 40,000 due by Mulla Ahmud to the bank at the time. The whole was not covered by the bills." Mr. Pascal, the assistant accountant of the bank, deposes that on the 31st August 1868, Mulla Ahmud owed the bank Rs. 47,300; on the 30th September 1868, he owed Rs. 46,300; and on the 7th of June 1869, Rs. 41,000, the whole amount on each occasion being the balance of over-due bills.

8. In this state of things, the title-deeds being as a matter of fact in deposit in the bank, and Mulla Ahmud being indebted to the bank in the sum of Rs. 41,100, Mulla Ahmud came to the bank on the 7th of June 1869, was pressed for payment by Mr. Cruickshank, and declared himself unable to pay. We are not told what further passed between the parties, save that Mr. Cruickshank wrote a letter addressed to himself which Mulla Ahmud signed and delivered to him there and then.

9. The title-deeds were not produced or re-deposited upon this occasion, but they are the title-deeds of the properties specified in the letter. The bank contends that whatever may have been the previous dealings between them and Mulla Ahmud, an equitable mortgage or lien upon these properties for a debt then due was created by this transaction of the 7th of June. For the appellant it is said that no new equitable mortgage or charge was thus created, but that a mere authority to sell was given with reference to properties, the title-deeds of which had been deposited under some previous and unproved contract.

10. I think that the bank is right in its contention, and that whatever the circumstances may have been under which the title-deeds were originally placed in the hands of the bank, an equitable mortgage or lien upon these properties to secure payment of the debt then actually due was created on the 7th June 1870. And I think this is so, even supposing it to be the case (which it is not shown to be) that the deposit was originally made under circumstances which made this transaction one which was ultra vires of the bank. For the decision of the Privy Council in the case of *The National Bank of Australasia v. Cherry* 3 L.R., F.C., 299 already referred to, shows that the debt, as security for which the deposit was made, would remain and be enforceable against the debtor, though the security might be worthless even as against the debtor, as being security which it was ultra vires of the bank to take; and that decision further shows that in such a case the debtor might subsequently, and in a manner so as not to be ultra vires of the bank (it having general power to take such securities for a debt actually due), make afresh and valid agreement with the bank authorizing the bank to retain the deeds, and promising that they should remain as a security for his debt.

11. It appears to me that under whatever circumstances the deeds were in the first instance deposited, a large debt was due from Mulla Ahmud on the 7th June 1869, and that he did then, being pressed for payment, make a fresh arrangement, by which he gave an equitable mortgage, or lien, upon these properties, as a security for debt incurred

previously; and that that fresh arrangement was binding upon him, and is binding as against the appellant who purchased with notice of the claim of the bank, and can stand in no better position than Mulla Ahmud himself.

12. Something was said as to its being only a case of a general banker's lien. But it is not a case of general banker's lien at all. It is a specific appropriation of certain properties, the title-deeds of which are in the hands of the banker, as security for a specific debt which has been incurred, and is due and payable. It was also contended that the letter of the 7th June was inadmissible in evidence, because not stamped. But it has been repeatedly ruled in this Court,-- [S.V. Mutu Ramen Chetty and Another Vs. Mark Ridded Currie and Another](#) ; Lalji Sing v. Syad Akram Ser Id., 235; Srinath Saha v. Saroda Gobindo Chowdhry 5 B.L.R., App., 10, that the want of a proper stamp is not a ground for reversing the decision of the lower Court, when the receiving the document without a stamp does not affect the merits of the case or the jurisdiction of the Court. To the like effect is the decision of the N.W.P. High Court in Crawley v. Maling 1 Agra H.C. Rep., 63. The Madras High Court, I admit, has ruled differently in Adinarayana Setti v. Minchin 3 Mad. H.C. Rep., 297: but I am bound to follow the rule adopted here. It is therefore unnecessary for me to express any opinion as to whether the document in question required any, and if any, what stamp.

13. Mr. Ingram, for the appellant, mentioned, but did not much rely upon the fact, that, on the 7th June 1869, the property was under attachment. But as that attachment was removed in September 1869, it left the plaintiff's security untouched--Ananda Lal Das v. Radha Mohan Shaw 2 B.L.R., F.B., 49. The attachment under which the appellant claims was not made till the 5th of February 1870.

14. I think the judgment of the Recorder ought to be affirmed with costs. I may remark that it seems to me that (as was suggested by the Advocate-General) a decree for sale would have been the better decree to make under the circumstances.

15. On the 14th August 1871, the Advocate-General moved on notice to the appellant, that the decree made and signed in this appeal should be amended, and that the decree of the lower Court should be varied by ordering a sale instead of a foreclosure of the property mentioned in the plaint.

The appellant did not appear.

Macpherson, J.

16. No cause is shown against the application; and I think that it ought to be granted, because, but for a misapprehension on my part, we should have originally drawn up our decree as the Advocate-General now asks that it may be drawn up.

17. As I have said in my judgment, it appears to me that a sale was the most natural relief to have granted. In the course of the hearing of the appeal, the Advocate-General stated

that he had a ground of cross-appeal which he desired to raise u/s 348 of Act VIII of 1859, adding that the plaintiff had originally sought a sale and not a foreclosure. If I had understood [as it appears that Mr. Justice Ainslie did] that the Advocate-General intended formally to ask us, and did in fact ask us, to decree a sale, I should certainly have so ordered it. As I now find that I misunderstood him, it was by a mistake on my part that the decree below was simply affirmed; therefore I think the decree should be now varied, and that a sale after three months should be decreed in lieu of foreclosure. It will be altered accordingly.

Ainslie, J.

I concur in varying the decree as proposed.

¹ Act IV of 1862, sec. 30.--"The Directors of the said bank shall not make any loan or advance on shares or consolidated stock of the said bank, nor in mortgage, or in any other manner, on the security of any lands, houses, or immoveable property or the title-deeds relating thereto."