(1931) 09 BOM CK 0017

Bombay High Court

Case No: O.C.J. Suit No. 1170 of 1925

The National Bank of India Ltd.	APPELLANT
Vs	
R.C. Nazir and Co.	RESPONDENT

Date of Decision: Sept. 1, 1931

Acts Referred:

- Evidence Act, 1872 - Section 91, 92
- Transfer of Property Act, 1882 - Section 59

Citation: AIR 1932 Bom 401 : (1932) 34 BOMLR 748

Hon'ble Judges: Tyabji, J

Bench: Single Bench

Judgement

Tyabji, J.
The point I have to determine is, whether a valid equitable mortgage by deposit of title deeds has been made between the parties.

2. There is, in the case, an unregisted document, Ex. YI, consisting of a letter addressed by the original defendant No. 4 to the plaintiffs, in the following terms:-

I beg to state the fact that the title-deeds of my immovaable property-situate at Chinchpookly, Bombay, were lodged by me with your bank on May 30, 1919, as guarantor for any possible indebtedness of Messrs. R.C. Nazir & Co.

I also beg to state that my guarantee is not to be affected at any time or indulgence given or shown by you to Messrs. R.C. Nazir & Co. whether I have knowledge thereof or not.

3. The questions arise whether the letter ought to have been registered; and whether, in the absence of registration, it can be relied upon by the plaintiffs, or the transaction can be otherwise proved.

4. The letter refers to the deposit with the bank of title-deeds. The object was to create an equitable charge on the property to which the deeds establish title. The purpose of the charge was to guarantee the payment of the debt owed by defendants, R.C. Nazir and Company, to the plaintiffs. The deeds deposited belonged, not to the principal debtors (Nazir and Company), but to one Pashoo Parbat (the original defendant No. 4) who was the guarantor.

5. The law relating to equitable charges is contained in the last paragraph of Section 59 of the Transfer of Property Act IV of 1882, which governs the parties. The corresponding section of the Transfer of Property Act XX of 1929 is Section 58. The last paragraph is in the nature of an exception to the rule in the first part of the section. Omitting reference to the fact that registration of a document is not necessary (whether under the Transfer of Property Act or the Indian Registration Act) unless the value of the interest created in Immovable property is of the value of Rs. 100 or upwards, the rule is, that,

a mortgage can be effected only by a registered instrument, signed by the mortgagor, and attested by at least two witnesses.

6. To that rule an exception is made in the following words:

Nothing in this section shall be deemed to render invalid mortgages made by delivery to a creditor, or his agent, of documents of title to Immovable property, with intent to create a security thereon.

7. In order to appreciate the legislative provisions by which the exception in favour of equitable mortgages without a registered document is prevented from being availed of in certain cases, it is best to start with Sections 91 and 92 of the Indian Evidence Act.

8. By these sections two classes of contracts are (if I may so put it) brought out as exceptions to the implied general rule that contracts need not be in writing: the exceptions are:-

(1) when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document (this may be called the voluntary or conventional exception, being brought into operation by the act of the parties); and

(2) all cases in which any matter is required by law to be reduced to the form of a document (this may be called the compulsory exception, being independent of the will or act of the parties).

9. In regard to cases falling under either of these two heads, Sections 91 and 92 of the Indian Evidence Act provide a specific rule of proof: the terms of such contract cannot be proved by any evidence except the document itself, or secondary evidence of it.

10. Secondly, Section 59 of the Transfer of Property Act (IV of 1882) first places all mortgages under the compulsory exception, and then saves an equitable mortgage; viz.,-if a mortgage is created by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon, such a mortgage is not invalid by reason of there being no registered instrument.

11. Thus, the exception in Section 59 of the Transfer of Property Act brings the law relating to equitable mortgages by deposit of title-deeds back to the same footing as the general law relating to contracts (viz., that they need not be in writing): that general law, however, still remains subject to the first of the two exceptions mentioned above,-the conventional exception contained in Sections 91 and 92 of the Indian Evidence Act.

12. Or, to put it in another way, the Transfer of Property Act first places all mortgages under the second of the two exceptional categories mentioned in a 91 of the Indian Evidence Act: it makes mortgages subject to the compulsory exception it declares that a mortgage is a matter required by law to be reduced to the form of a document-and then it exempts equitable mortgages (by delivery of title-deeds) from the requirement of that exceptional category, so as to bring equitable mortgages back to the position of the general law, which permits contracts by parol: nevertheless equitable mortgages continue to remain subject to the conventional or voluntary exception in Section 91, the exception which is brought into operation by the act of the parties themselves,- by their reducing their contract to the form of a document.

13. Thirdly, Sections 17(1)(b), and Section 49 of the Indian Registration Act, read together, provide (so far as now material) that a document "which purports or operates to create, declare, assign, limit, or extinguish any right, title, or interest to or in Immovable property, shall be registered; and shall not affect any Immovable property comprised therein, or be received as evidence of any transaction affecting such property, unless it has been registered."

14. In the result, the exception in Section 59 of the Transfer of Property Act (that there need not be a registered instrument to evidence an equitable mortgage) remains subject to an exception that has a two fold effect. First, that if the terms of the contract relating to the equitable mortgage have been reduced to the form of a document-if the intended equitable mortgage is created by a contract which is reduced to the form of a document-no evidence shall be given in proof of the terms of such contract except the document itself (or secondary evidence of its contents); Indian Evidence Act, Section 91. Secondly, since the object of such a document is to create a security, i.e. it purports or operates to create an interest in immovable property, that document itself shall not affect the property nor be received as evidence unless it has been registered : Indian Registration Act, Sections 17 and 49.

15. The point, therefore, that I have to consider is, whether, in the present case, there was a mortgage made by delivery to the creditor of documents of title to Immovable property with intent to create a security thereon, or whether though such an equitable mortgage by parol may have been in the contemplation of the parties, yet the security was in fact created by a contract reduced to the form of a document (which document would have to be registered).

16. These alternatives are contrasted in all the decisions on the question. Lord Carson, delivering the judgment of the Privy Council in Suhramonian v. Lutchman (1922) L.R. 50 IndAp 77 : s.c. 25 Bom. L.R. 582 refers to the earlier case of Pranjivandaa Mehta v. Chan Ma Phee (1916) L.R. 43 IndAp 122 : s.c. 18 Bom. L.R. 664 which is important for considering how the exception contained in the Transfer of Property Act may be interpreted. The transaction may take one of three forms (p. 82):-

(1.) Where titles (of property) are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2.) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3.) Lastly, when the Largain is a written bargain, it, and it alone, must determine what is the scope and extent of the security.

17. These words were originally used by Lord Shaw in Pranjivandas Mehta''s case where the question was whether the security (created by deposit of title- deeds) extended over one house only, or also over three other houses of which the title-deeds were deposited. But the words were cited six years later by Lord Carson as governing the general question which was then being considered by the Privy Council. Lord Cairn''s words in Shaw v. Foster (1872) L.R. 5 H.L. 321 which were also cited by Lord Carson, expand the third case mentioned above, as showing (to use as far as possible Lord Cairn''s language) that when you have a deposit accompanied by an actual written charge, the general rule about the equitable deposit of title-deeds, without more, will not apply; and in that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case, and reduced to silence by the document by which alone you must be governed.

18. Lord Carson thus formulates the ultimate question that arises: " Does the memorandum constitute the bargain between the parties ?" In Obla Sundarachariar v. Narayanna Ayyar (1931) L.R. 58 IndAp 58 : s.c. 33 Bom. L.R. 878 the same is put by Lord Tomlin in the following form : "Did the memorandum embody the terms of the agreement between the parties ?" and he adds on page 74:-

No such memorandum can be within the section unless on its face is embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit: is concerned it constitutes the agreement between the parties.

19. Their Lordships'' decisions remove any doubt that might otherwise have arisen whether-on the wording of Section 59 of the Transfer of Property Act-only mortgages created by the delivery of title-deeds "with nothing said," and "without more," (i.e., without any oral agreement) were exempted from the necessity of a registered document.

20. Summing up the results reached, the cases relating to equitable mortgages by deposit of title deeds come under one of the following three possibilities :-

(1) The title-deeds may be handed over with nothing said except that they were to be security : there may be a mere delivery to the creditor of documents of title with intent to create a security : the agreement may be constituted in fact by the act of deposit, and the payment of money, and nothing more may take place by way of agreement.

(2) The delivery of title-deeds may be accompanied with a bargain, which is not a written bargain. Though the terms of the deposit may at some time be embodied in a written document, that document may be a mere memorandum and may not constitute the contract, The memorandum may, e.g., merely record particulars of the deeds, the subject of the deposit; and may not embody the terms of the agreement between the parties. It may not itself be a document which declares a right in immovable property in the sense of implying a definite change of legal relation. It may be such a document that it would be impossible to hold that the document purported or operated to create or declare any right or title in the property, and that it was required to be registered u/s 17 of the Indian Registration Act: though when there is no written agreement, the intent to create a security by deposit of title deeds may be evidenced by written as well as oral evidence.

(3) There may be a written bargain-the contract between the parties being reduced to the form of a writing-a dooument which purports or operates to create the mortgage; or a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement. The memorandum may be the bargain between the parties, it may itself bring about a definite change in the legal relation to the property by an expression of will embodied in a document (Sakharam Krishnaji v. Madan Krishnaji ILR (1881) Bom. 232 so that without its production in evidence the plaintiff cannot establish his claim.

21. It was not the contention of the plaintiff bank that the present transaction could be brought under the first of the three heads mentioned above. It is their case that there was in fact an oral agreement prior to Exhibit Yl. There had to be an agreement in this case. The person who deposited the title deeds and whose property was to be subjected to the equitable mortgage was not the debtor of the bank; and his guarantee was not to be affected by any time or indulgence shown by the bank to the principal debtor. The question, therefore, that I have to decide is,

which of the two alternatives applies to this case- that mentioned under head (2) or that under head (3) above.

22. Yet, there is no evidence before me of any specific oral contract between the parties. The alleged oral agreement is not deposed to by the plaintiffs'' witnesses. Mr. O''Gorman on behalf of the plaintiffs relied mainly upon the fact that Mr. Harvey, the Assistant Manager of the plaintiff bank, deposed to the general practice of the bank. Mr. O''Gorman pressed that the terms of Exhibit Y1 itself show that there must have been an agreement before that letter was written. He skilfully directed my attention exclusively to the language of Y1, and compared it with the language of the document Lord Carson was considering.

23. It is true that parts of Y1, taken by themselves, may lend some support to the theory that there was an oral agreement completed before the letter was written. But when Y1 is read carefully, and in the light of the oral evidence, the doubt is dispelled. Y1 was the agreement; there was no agreement till Y1 was executed, no completed agreement outside it; not even a proposal formulated, except in the terms written out by Mr. James Almeida on behalf of the bank which were the terms copied out in Exhibit Y1.

24. Mr. O''Gorman was driven to contend, first, that the date on Exhibit Y1 must have been erroneous. As it purports to be dated May 30, 1919, and as its body refers to the documents being lodged in the bank on May 30, 1919, he contended that it must really have been written on a later date. Then he was met by the records of the bank; he was forced even to suggest that the records might themselves be wrongly dated ; ultimately he had to content himself with saying that the documents must have been already lodged on the same day, but at an earlier hour. Even then he encountered great difficulty in formulating what: the exact suggestion was, as to the time, place, and the terms of the alleged oral contract. There is no record of any oral contract in the books of the bank. There is no witness to depose to any oral contract having preceded Exhibit Y1.

25. The oral evidence adduced before me by both sides shows that the terms proposed by the bank were, at the very time of the proposal, put in the form of a writing, viz., in a draft letter written out in pencil. This part of the transaction accords with the practice of the bank deposed to by Mr. Harvey. The pencil draft was given to the witness, R.C. Nazir, who took it to Pashoo Parbat (defendant No. 4), the owner of the property of which the title-deeds had to be deposited. The draft for the first time put the bank''s proposal before the defendants in a concrete form. Pashoo Parbat agreed to the proposed contract by making a fair copy and signing a document in terms of the draft. It is evident, therefore, that it was the intention of the parties, from the first, that the terms as laid down in Exhibit Yl were to be the terms of the contract.

26. Tendering the pencil draft may in fact be taken, in the circumstances, to be a proposal prescribing the manner in which it was to be accepted, viz., that the proposal was to be accepted by the draft being made fair and signed and presented with the title-deeds to the bank: Indian Contract Act, Section 7(2). The letter itself brought about the contract by accepting the proposal made when the draft was tendered: the acceptance was in the manner prescribed in the proposal,-viz., the draft was reduced to the form of a stamped document, which then became the contract.

27. The bank insisted that the writing should be on a stamped paper. This fact was sought to be explained away. But I think it is an important indication that the bank intended to rely on the stamped document as embodying the terms of the contract. The letter of the bank dated August 6, 1923, specially refers to this circumstance, It is not the case of the plaintiffs that the owner of the property in question had come to the bank, that an oral agreement had already been entered into between him and the bank, that subsequently the letter was drafted, merely reciting the terms of the oral agreement as a fact, and that in accordance with that draft letter Exhibit Y1 was made out. But the case of the bank is, that it formulated its proposal in what was intended to be a letter written by the depositor or the debtor, and the terms of the proposal were exactly reproduced in Exhibit Y1.

28. By the second part of Exhibit Y1, it was agreed that the Surety Pashoo Parbat was not to be affected by any time or indulgence being given to the defendants Nos. 1 to 3, whether he had knowledge thereof or not. This stipulation was admittedly introduced for the first time into the terms of the (proposed) agreement by the draft letter. It is not even alleged that this stipulation had been orally agreed upon before the letter was written. It is difficult to say how in the face of this it can be argued that the agreement was oral and prior to the letter. It is clear that the terms of the agreement proposed by the Bank and ultimately accepted were not even completely put to the parties before the draft letter was handed over to R.C. Nazir. They could not be accepted by Pashoo Parbat except by writing the letter Exhibit Y1. It was the writing of the letter that gave rise to the contract. The writing fixed the purpose and intent of the deposit of the deeds.

29. The documentary evidence in the case is not very great, Before I refer to it, it will be best to turn to paragraph 12 of the plaint, which is in the following terms:-

On May 3"On May 30, 1919, the original 4th defendant by his letter of even date deposited with the plaintiffs the title deeds of an Immovable property situated at Chinchpoogly in Bombay as guarantor for any possible indebtedness of R.C. Nazir and Company to the plaintiff. By the said letter the original 4th defendant agreed that the guarantee is not to be affected by any time or indulgence given or shown to the defendants whether the said 4th defendant had knowledge thereof or not.

30. It might well have been argued that this paragraph of the plaint left no scope for the contention that there was any oral agreement for the deposit of the title deeds. I observe that Exhibit Y1 is annexed to the plaint as a document on which the plaintiffs sue. The letter is not merely included in a list of documents annexed to the plaint on which the plaintiff relies as evidence in support of his claim. The two paragraphs of the Civil Procedure Code, Order VII, Rule 14, make the distinction clear.

31. It was, however, not contended before me that the plaintiff was precluded by the plaint from denying that the deposit of the title-deeds was made by the letter of November 30, 1919. Had the point been taken, it is possible that there would have been no reply to it on the part of the plaintiff. The suit was placed before me as a part heard suit, in which it had been agreed between the parties that the issues I am now trying should be tried as preliminary issues. The pleadings were not read to me. I was not made aware of, and did not realise till after I had delivered part of this judgment, that this paragraph was the only paragraph in the plaint in which the equitable mortgage was] set up. I, therefore, refer to paragraph 12 of the plaint, not as precluding the plaintiff''s from setting up an oral agreement, but as indicating that the plaintiffs themselves considered that the deposit and the agreement between the parties were made by this letter.

32. Then, going backwards from the date of the plaint, I come to Exhibit 4, dated February 26, 1925. This is a letter of the attorneys of the plaintiffs. The case of the plaintiffs is put in this letter in the following terms :-" We find that you have by your letter of May 30, 1919, guaranteed any possible indebtedness of Messrs. R.C. Nazir and Company." Prior to that we have Exhibit 3, an entry in the books of the bank, in what Mr. Harvey called the " Security Register Book," and, under date of August 6, 1923, Y1 is referred to as the " Document authorising to hold the title-deeds against indebtedness." Again, on August 6,1923, the manager of the plaintiff bank wrote to Messrs, Patel, Ezekiel and Company stating that he "handed a copy of the document signed by Mr. Pashoo Parbat authorising to hold the title-deeds of his property against any indebtedness of Messrs. R.C. Nazir and Company to this Bank. The authority is signed on an eight anna bond." On August 8, 1919, there is an entry in the Security Register, Exhibit 6, which recites "that the title deeds and letter from Passoo Parbhat agreeing to us to hold the shares on account of R.C. Nazir and Company". And, lastly, on the same date as Exhibit Y1, viz., May 30, 1919, there is an entry in the Security Register, " Title deeds of property at Chinchpoogli belonging to Pahsoo Parbat with a letter from him lodging the deeds as a guarantee on account of R.C. Nazir and Company."

33. Nowhere is there any record, any mention, of an oral agreement; the bank itself, its solicitors, and its manager, considered that the agreement lodging the document was contained in the letter Exhibit Y1.

34. If it is possible to argue on the letter taken by itself, that its terms prove that the title-deeds had been deposited before it was written, it is not possible to do so when the oral evidence is considered. From the evidence of R.C. Nazir (which I accept) it would appear that the letter was given at the very time when the documents were brought. If his evidence is believed (and I considered him a good witness) there is no room for assuming that Pashoo Parbat came a few hours before the letter Exhibit Yl was presented to the Bank, and lodged the title deeds with the bank, and that subsequently, a Jew hours later, he appeared again with the letter. Nor is there any room for holding that, before the agreement had been entered into with reference to the equitable mortgage, Pashoo Parbat had sent the title deeds to the bank, and that they were with the bank prior to the pencil draft being given by Mr. James Almeida to R.C. Nazir, But, assuming that the deeds were in the bank before Exhibit Y1 was written, it does not take the case sufficiently far for the bank. The point is that the terms of the agreement were formulated for the first and only time in the pencil draft, and were accepted for the first and only time when the draft was made fair and signed by Pashoo Parbat. Assuming that the deeds were already with the bank before the letter was written, it was the letter that created a security on them.

35. Mr. Nazir''s evidence was subjected to a very searching cross-examination. He came out of it scatheless. His manner induced me to believe that he was speaking the truth.

36. A great deal of reliance was placed by Mr. O''Gorman on the evidence of Mr. Harvey as regards the practice of the bank, Mr. Harvey gave his evidence with admirable fairness and detatchedness. I am, therefore, desirous that his words should not be twisted against himself, but should be interpreted in a generous spirit. I say this because, if some of his replies were taken literally, there would be an end of the plaintiffs'' case. He said quite deliberately that Exhibit Y1 was a part of the transaction. I was very careful to take down his words, and I made him confirm them by putting them to him again after I had taken them down. Making all allowances it seems clear that neither Mr. Harvey nor the other members of the bank concerned realised the danger in which they were placing the bank by making the parties enter into Exhibit Y1 on the very day and as a preliminary to the documents being deposited ; or, in the other view of the facts, at the time when the purpose of the deposit was agreed upon.

37. A different practice (in regard to the time for taking the document) was no doubt deposed to by Mr. Harvey as having been laid down, viz., that such letters as Exhibit Y1 should not be taken till a day or two after the transaction had been entered into, and the title-deeds had been deposited. The person who laid down that course was evidently aware of the danger that such a document might bring to the validity of the transaction. But this practice was not observed in the present instance. Mr. Harvey conceded that the plaintiff bank had become slack in regard to such transactions at the period in question. Mr. James Almeida, who brought about the

transaction, and, what is more striking, Mr. Harvey himself, when he was giving evidence, did not realise the position. The bank entered into the transaction without realising the effect of making Exhibit Y1 the repository of the contract. It did not realise that it was essential in its interests that a document like Exhibit Y1 should be apart from the transaction ; that the contract should be completed prior to Y1, which should merely contain a subsequent reference to the contract. As it is, Ex. Y1 cannot be considered as merely refering to a fact that had taken place : it was the document that brought about the contract.

38. Referring again to Sections 91 and 92 of the Indian Evidence Act, the parties in such a case, by reducing the terms of the contract to the form of a document, subject themselves to the conventional exception in the sections. The writing being tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement-Kedarnath Dutt v. Shamloll Khettry (1873) 11 Beng. L.R. 405-the Indian Evidence and Registration Acts are brought into operation, and the document cannot be relied upon for creating an equitable mortgage unless it is registered. This principle which seems so simple, when stated in general terms, was not realised by the bank, as represented by Mr. James Almeida at the time of entering into the transaction; nor by Mr. Harvey when giving evidence, Exhibit Y1 was quite innocently made the repository of the terms of the contract, and, therefore, unless it is registered, it cannot be admissible in evidence.

39. Issue No. 20 should really be in the following form: "Whether the original defendant No. 4 created a valid equitable mortgage by depositing with the plaintiffs the title deeds of the Immovable property situate at Chinchpoogly as mentioned in paragraph 12 of the plaint ?" I answer that issue in the negative. There is no legally admissible evidence before me on which I can hold in the affirmative.

40. I also answer the new issue " Whether Exhibit I to the plaint (i.e. Exhibit Y1 in the case) is admissible in evidence, not being registered," in the negative.

41. The suit against defendant No. 4 is dismissed with costs. The costs of defendant No. 4 will include the costs reserved.

42. The counter-claim of defendant No. 4 that the plaintiffs be ordered to deliver back to him the title deeds of the Chinchpoogly property mentioned in the plaint is decreed with costs.

43. The suit against defendant No. 5 is dismissed.