
(1938) 04 AHC CK 0002
In the Allahabad High Court

Allahabad Bank Ltd.

APPELLANT

Vs

Benaras Bank Ltd. and Others

RESPONDENT

Date of Decision : 25-04-1938

Acts Referred:

Transfer of Property Act, 1882 — Section 79, 96

Citation : AIR 1938 All 473

Hon'ble Judges : Iqbal Ahmad, J; Harries, J

Bench : Full Bench

Judgement

Iqbal Ahmad, J.—This appeal arises out of a suit for sale brought by the Benares Bank Limited, Benares, hereinafter referred to as the plaintiff, on the basis of a security bond dated 20th December 1926, executed by Maharaj Kishore Khanna, defendant 3. It appears that a sum of Rs. 1,50,000 was due to the plaintiff from defendant 3 and his nephew, B. Krishna Chandra Khanna, and on 20th December 1926 Krishna Chandra Khanna executed a promissory note with respect to this sum of Rupees 1,50,000 in favour of the plaintiff. By the security bond, defendant 3 stood surety for his nephew Krishna Chandra Khanna and guaranteed payment to the plaintiff of the sum due on the basis of the promissory note. To secure the payment of the amount due to the plaintiff charge was created by defendant 3 on two items of zamindari properties, one situated in the District of Benares and the other in the Province of Bihar and Orissa. These very properties were subject to a prior mortgage in favour of the Allahabad Bank Limited, Calcutta, hereinafter referred to as the defendant Bank. The mortgage in favour of the defendant Bank was created by Maharaj Kishore by deposit of title deeds. It was provided in the security bond in suit that the charge created on the aforesaid properties would be subject

to a lien by way of equitable mortgage up to a maximum of Rs. 1,25,000 created by the guarantor in favour of the Allahabad Bank Ltd., Calcutta by a deed of agreement, dated 25th June 1926.

2. The plaintiff impleaded a number of defendants in the suit including the

defendant Bank. The present appeal is only by the defendant Bank and in this appeal we are concerned only with the pleas raised in defence by that Bank. The plaintiff claimed a decree for sale for a sum of Rs. 1,93,223-10-9 with pendente lite and future interest in accordance with the provisions of Order 34, Rule 4, Civil P.C., with respect to the two properties mentioned above that were detailed in Schedule A of the plaint. The other reliefs prayed for and the other schedules of properties embodied in the plaint are immaterial for the purposes of this appeal. The defendant Bank contested the suit inter alia on the following grounds:

The Allahabad Bank contends that the properties mentioned in Schedule A of the plaint are mortgaged to the Allahabad Bank to the extent of Rs. 3,00,000 and that such mortgage is in priority to the rights of all other parties to the suit. Alternatively, the Allahabad Bank contends that all other charges are subject to the mortgage to the Allahabad Bank to the extent of Rs. 1,25,000 together with interest accrued thereupon.

3. The contention that the defendant Bank had priority with respect to a sum of Rs. 3,00,000 was not pressed at the trial and we are not concerned with the same in this appeal. The defendant Bank however maintained that it had priority over the plaintiff's claim with respect to a sum of Rs. 1,25,000 together with the interest that had accrued on that amount. The learned Subordinate Judge accepted this contention of the defendant Bank to this extent, that he held that the defendant Bank had priority with respect to a sum of Rs. 1,25,000 but not with respect to the interest that had accrued on that amount. The defendant Bank has appealed and the only point that has been urged in this appeal is that the defendant Bank was entitled to priority even with respect to the interest on the sum of Rs. 1,25,000. The facts which have a bearing on the decision of the point raised in appeal are undisputed and are as follows : On 20th September 1924, Mr. Khanna, defendant 3, deposited with the defendant Bank title deeds with respect to the two zamindari properties mentioned above and the defendant Bank agreed to advance to defendant 3 a sum of Rs. 1,25,000 on the security of the said properties. This arrangement was oral, but in furtherance of the same defendant 3 executed a promissory note for a sum of Rs. 1,25,000 in favour of the defendant Bank on 26th March 1925. Further, on 27th March 1925, defendant 3 executed a "memorandum of deposit and agreement of mortgage" in favour of the defendant Bank. Reference was made in the last mentioned document to the promissory note just mentioned and to the deposit of the title deeds "as collateral security by way of equitable mortgage," and it was mentioned that that mortgage was to secure not only the repayment of the amount due to the Bank "to the extent of the said limit of Rs. 1,25,000...together with all interest, expenses and charges," but also to secure the repayment of any other amount which may be due from defendant 3 to the defendant Bank "on any other account."

4. On the execution of this memorandum the defendant Bank opened a cash credit account in the name of defendant 3 on 27th March 1925. This account is

printed at p. 75 of the paper book. By 25th June 1926, a sum of about Rs. 1,28,000 "was due in this account to the defendant Bank from defendant 3 on account of the advances made to defendant 3 and interest thereon. On the last mentioned date, viz. on 25th June 1926, defendant 3 executed a registered document styled as a mortgage deed in favour of the defendant Bank. This document is printed at p. 61 of the paper book. It is really an agreement evidencing the terms on which the mortgage by deposit of title deeds was effected by defendant 3 in favour of the defendant Bank. The document begins with a recital of the fact that on 20th September 1924, defendant 3 had deposited documents of title with the defendant Bank

as a continuing security for the payment by the borrower to the Bank on demand of all money at any time payable by the borrower to the Bank in respect of the cash credit account...or any other account for the time being existing between the borrower and the Bank, and also as a continuing security for the due payment and discharge on demand of all indebtedness and liabilities of the borrower to the Bank whether incurred before or after the said deposit....

5. It is then provided in the document that "the maximum principal amount secured by" the mortgage effected by the title deeds is

fixed for the purposes of Section 79, T.P. Act, 1882 but for no other purposes at rupees one lac and twenty five thousand for which amount I, the borrower, executed and handed to the Bank by way of further security a demand promissory note dated the twenty sixth day of March, one thousand nine hundred and twenty-five for rupees one lac and twenty-five thousand bearing interest at the rate of two per cent, per annum over Imperial Bank of India rate with a minimum of seven per cent, per annum.

6. The learned Judge of the Court below was of the opinion that this provision in the deed fixed a sum of Rs. 1,25,000 "as the maximum amount for the payment of which the properties were being charged by" defendant 3. He accordingly held that the defendant Bank could claim priority as against the plaintiff only as regards the sum of Rs. 1,25,000 and was not entitled to claim priority with respect to interest that had accrued on that amount. This finding of the learned Judge was apparently based on the supposition that the present case was governed by the provisions of Section 79, T.P. Act.

7. In my judgment the view of the learned Judge is erroneous and cannot be supported. The fact that on 20th September 1924, defendant 3 effected a mortgage in favour of the defendant Bank by deposit of documents of title in accordance with the provisions of Section 58(f), T.P. Act, is not disputed, nor is it alleged that the plaintiff had no notice of that mortgage. This mortgage of 20th September 1924, was referred to in clear terms in the "memorandum of deposit and agreement to mortgage" dated 27th March 1925, and in the registered agreement dated 25th June 1926, executed by defendant 3 in favour of the defendant Bank. Further in the agreement of 25th June 1926, it was clearly

stipulated by defendant 3 that the mortgage effected by deposit of documents of title was by way of continuing security for the payment of all debts that may be due or may there, after become due to the defendant Bank. Reference to this agreement of June 1926 was made in the security bond in suit executed by defendant 3 in favour of the plaintiff. The plaintiff had therefore full knowledge of the fact that the mortgage effected by defendant 3 by deposit of documents of title with the defendant Bank was to secure the payment of all the amount that may be due to the defendant Bank irrespective of the fact whether that amount was or was not in excess of Rupees 1,25,000. The position of the plaintiff is that of a subsequent mortgagee as the security bond in suit was executed on 20th December 1926, and the defendant Bank is therefore entitled as against the plaintiff to priority with respect to all amounts that may have been due to it from defendant 3 prior to 20th December 1926. It is to be noted in this connexion that there is no distinction in India between a legal and an equitable mortgage and it is provided by Section 96, T.P. Act, that all the provisions contained in that Act relating to simple mortgage shall, "so far as may be, apply to a mortgage by deposit of title-deeds."

8. It may here be stated that no further advances were made by the defendant Bank to defendant 3 after 20th December 1926, and the contest in this appeal has centred round the question whether or not the defendant Bank is entitled to priority with respect to the interest that accrued due on advances made to defendant 3 prior to the date of the execution of the security bond in favour of the plaintiff. Reliance has been placed on behalf of the plaintiff on Section 79, T.P. Act, in support of the contention that the defendant Bank is entitled to priority only with respect to a sum of Rs. 1,25,000 and not with respect to interest on that amount. Section 79 runs as follows:

If a mortgage made to secure future advances...or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

9. This section in my judgment has no application to the present case. The section was enacted with a view to protect a prior mortgagee and to give him priority over a subsequent mortgagee with respect to advances made by him (the prior mortgagee) after the second mortgage, provided the advances so made did not exceed the maximum amount secured by the first mortgage. The section has no application to cases where no advances have been made by the prior mortgagee after the creation of the second mortgage. In the present case no advances were made by the defendant Bank after 20th December 1926, and therefore no question about priority with respect to advances made subsequent to the execution of security bond in favour of the plaintiff arises. Further no "maximum amount" was fixed by the registered agreement of 25th June 1926

with respect to which the mortgage by deposit of title deeds was to hold good. The defendant Bank is therefore entitled as against the plaintiff to claim priority with respect to all amounts advanced by it prior to 20th December 1926, together with the interest accruing due on the amounts advanced. The stipulation in the registered agreement of 25th June 1926, that "the maximum principal amount secured" by the mortgage effected by deposit of title deeds was fixed "for the purposes of Section 79, T.P. Act...at Rs. 1,25,000" does not disentitle the defendant. Bank to claim priority with respect to interest accruing due on the advances made prior to 20th December 1926, for the obvious reason that Section 79 has no application to the present case.

10. Stripped of all unnecessary details the facts stand thus. The defendant Bank is a prior mortgagee and the plaintiff is a subsequent mortgagee. The defendant Bank claims priority as against the plaintiff not only with respect to the principal amount advanced by it prior to the execution of the security bond in favour of the plaintiff but also with respect to interest accruing due on that principal amount. It is not a case in which the prior mortgagee made any fresh advances to the mortgagor after the execution of the second mortgage. The plaintiff took the second mortgage with full knowledge of the fact that the defendant Bank held a prior mortgage to secure payment of the principal amount advanced by it together with interest thereon. All that the defendant Bank claims is that the plaintiff being a subsequent mortgagee should be postponed till the amount due to the defendant Bank on account of advances made prior to the execution of the subse. quent mortgage together with interest thereon is satisfied. This claim of the defendant Bank appears to me to be unanswerable. A first mortgagee is entitled to priority as against a second mortgagee" not only with respect to the principal advanced under the first mortgage but also with respect to interest on that amount and this is all that is claimed by the1 defendant Bank. It is not a case in which the defendant Bank claims priority with respect to any advances that it may have made to defendant 3 after the execution of the security bond in suit.

11. For the reasons given above I would allow this appeal and modify the decree of the Court below by ordering that the sale proceeds of the properties set forth in Schedule A should first be applied in satisfaction of the amount due to the defendant Bank on account of advances made to defendant 3 by the defendant Bank prior to 20th December 1926, together with interest thereon, and the balance of the sale proceeds, if any, should be applied in satisfaction of the plaintiff's claim. As the appeal succeeds I would order the plaintiff to pay the costs of this appeal to the defendant Bank. I would however make no order as to the costs incurred by the defendant Bank in the Court below as in that Court the defendant Bank without any justification claimed priority also with respect to a mortgage dated 25th August 1927.

Harries, J.

12. I agree and have nothing to add.

13. The order of the Court is that the appeal is allowed in part and the decree of the Court below is modified by ordering that the sale proceeds of the properties set forth in Schedule A should first be applied in satisfaction of the amount due to the Allahabad Bank, Ltd. Calcutta, on account of advances made to defendant 3 by that Bank prior to 20th December 1926, together with interest on those advances, and the balance of the sale proceeds, if any, should be applied in satisfaction of the plaintiff's claim. The Benares Bank, Ltd. Benares, will pay to the Allahabad Bank Ltd., Calcutta, the costs of this appeal. Both the Banks will however bear their own costs in the Court below.