

(1980) 07 CAL CK 0045

In the Calcutta High Court

Case No : A.F.O.D. No's. 481 of 1972 and 127 of 1977

Amulya Gopal Majumdar

APPELLANT

Vs

United Industrial Bank Ltd. and Others

RESPONDENT

Date of Decision : 02-07-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1
Transfer of Property Act, 1882 — Section 54, 58, 67, 91

Citation : AIR 1981 Cal 404

Hon'ble Judges : Bhabes Chandra Chakrabarti, J; Anil Kumar Sen, J

Bench : Division Bench

Advocate : Ranjit Kr. Banerjee, Abinash Ch. Basu, Nirod Baran Sen and Mihir Kr. Das, for the Appellant; R.C. Deb, C.N. Mukherjee, Ajit Kr. Chakraborty, Alok Kr. Mitra, Amar Nath Banerjee and Tapan Kr. Sengupta, for the Respondent

Judgement

Anil K. Sen, J.—These are the two appeals from original decrees arising out of two suits both of which were decreed by the trial Court. The two suits though heard and disposed of independently, are interlinked, and as such, we have heard these appeals analogously. While F. A. 481 of 1972 is directed against the judgment and decree dated Sept. 5, 1970, passed by the learned Subordinate Judge, 7th Court, Alipore in Title Suit No. 119 of 1965, F. A. 127 of 1977 is directed against the judgment and decree dated July 29, 1976, passed by the learned Subordinate Judge, 4th Court, Alipore in Title Suit No. 29 of 1973. United Industrial Bank Limited, a banking company incorporated under the Indian Companies Act had instituted both the aforesaid suits and Amulya Gopal Majumdar, a common defendant (being defendant No. 6 in Title Suit No. 119 of 1965 and defendant No. 1 in Title Suit No. 29 of 1973) alone contested the said two suits, at their hearing and feeling aggrieved by the decrees passed therein he alone has preferred the aforesaid two appeals.

2. Title Suit No. 119 of 1965 was a suit for realisation of an alleged mortgage debt due on an overdraft account from Eagle Plywood Industries Private Limited, defendant No. 1 and two of their guarantors, namely, defendant Nos. 2 and 3. In

that suit the plaintiff's case shortly was that in the year 1951 Eagle Plywood Industries Private Limited opened an open current account with Banker's Union Limited later renamed as Metropolitan Bank Limited with overdraft facility to the extent of Rs. 2,50,000/- and by way of security therefore created an equitable mortgage by deposit of title deeds in respect of an immovable property being a plot of land at Mahendra Banerji Road, within the South Suburban Municipality, P.S. Behala, District 24 Parganas, described in items 1 to 4 of Schedule B to the plaint (hereinafter referred to as the Behala property) and the factory appliances described in item 5 of the said Schedule. That by mutual agreement between the said Eagle Plywood Industries Private Limited and the said Metropolitan Bank Limited, the overdraft limit was extended to Rs. 2,75,000/- in the year 1954 when it was further agreed that the title deeds already deposited with the bank would be held by the bank as security for the extended loan facility granted to the defendant No. 1 and a deed was executed to that effect on June 28, 1954. That being, in need of further sum, Eagle Plywood Industries Private Limited requested the said Metropolitan Bank Limited to raise the overdraft facility limit up to Rs. 5,00,000/- which was agreed to and on November 21, 1962, the said Eagle Plywood Industries Private Limited further deposited the title deeds in respect of immovable properties set out in item 6 of Schedule B to the plaint (hereinafter referred to as the Coochbehar property) by way of security for repayment of the entire loan due on such account and the defendants 2 and 3 stood guarantors for such repayment. The said Metropolitan Bank Limited having been amalgamated with the plaintiff bank, all its assets, rights, powers, claims and demands stood transferred to and became the properties and assets of the plaintiff bank in terms of a sanctioned scheme. The plaintiff accordingly claimed that a sum of Rs. 5,79,977.22 which stood due towards principal and interest as on October 31, 1965, from the said Eagle Plywood Industries Private Limited on the said account was payable to the plaintiff and for recovery thereof the aforesaid suit was instituted. It was further claimed that the transaction between the parties constituted an equitable mortgage, so the plaintiff is entitled to realise the amount on enforcement of such a mortgage.

3. In this suit it later transpired that, Amulya Gopal Majumdar, the appellant before us, had in the meantime auction-purchased the Behala properties in execution of a mortgage decree on enforcement of an earlier mortgage in respect of that property though neither Metropolitan Bank Limited nor the plaintiff, the puisne mortgagee was made a party to the suit for enforcement of that mortgage. Hence, Amulya Gopal Majumdar was added as a party defendant, being defendant No. 6 as the purchaser of the equity of redemption.

4. In this suit, though the defendant No. 1 and defendant Nos., 2 and 3 filed two sets of independent written statements, they did not ultimately contest the suit. The added defendant No. 6, the appellant before us contested the suit by filing a written statement. His defence shortly was that he was not bound or affected by any of the transactions said to constitute equitable mortgage between Eagle Plywood Industries Private Limited and the bank, he being a prior mortgagee

from the real owner and he having auction-purchased the property in execution of the mortgage decree as against the said owner. His further defence was that all those subsequent transactions with the bank were not bona fide but were sham and colourable. He strongly denied any liability on his part for redemption of any alleged mortgage to the predecessor-in-interest of the plaintiff bank.

5. On the pleadings of the parties, several issues were framed including an issue as to whether the defendant No. 1 (Eagle Plywood Industries Private Limited) created any equitable mortgage in respect of the suit property for the loan advanced to them on their overdraft account with the Banker's Union and the Metropolitan Bank Limited.

6. Evidence was led, both oral and documentary, on consideration of such evidence, the learned trial judge answered all the issues substantially in favour of the plaintiff. The learned Judge found that the first mortgage was created on the basis of a pro note (Ext. 1) followed by a memo acknowledging deposit of title deeds in respect of the Behala property. He further found that there were two successive enhancements of the overdraft limits in favour of the mortgagor, one in 1954 and another in 1962 for which securities were furnished in terms of Ext. 5 and Ext. 13. According to him, these transactions did not constitute 3 separate and independent mortgages but on each occasion the earlier one merged in latter. He then found that though the defendant No. 6, the appellant before us, is a prior mortgagee who has purchased the Behala properties in execution of a mortgage decree obtained by him, yet the plaintiff would not be bound by that decree as the plaintiff being a puisne mortgagee was not made a party thereto. According to the learned Judge, the plaintiff would legally be entitled to put the said Behala properties on sale in enforcement of the mortgage in their favour subject, however, to the prior encumbrance in favour of defendant No. 6 so that the property being sold the sale proceeds be first applied to meet the dues of defendant No. 6 and the balance left being applied to meet the dues of the plaintiff. Since the plaintiff had appointed a Receiver in respect of the Behala properties in terms of Section 69A of the Transfer of Property Act, and was realising rents therefrom through the Receiver, the learned Judge directed accounts to be taken. The suit was accordingly decreed on the following terms:--

"That the suit be decreed in preliminary form on contest with costs against defendant No. 6 and ex parte with costs against defendant Nos. 1, 2, 3 and 7 and dismissed against the rest without costs in terms of Order 34, Rule 4 read with Rule 2 (1) (a) of the Code of Civil Procedure. It is also ordered that an account be taken with regard to the dues in favour of the plaintiff on account of principal and interest at the contractual rate of Rs. 6 1/2% per annum on his mortgage as mentioned in the plaint. On the accounts being taken and the total dues being finally ascertained and declared and on the basis of such accounts, the defendants shall be given 6 months" time for payment of the dues from the date of such declaration, failing which the plaintiff shall be entitled to pray for final decree and put to sale so much of the mortgaged property as may be

deemed necessary to realise his dues including interest till the date of realisation in the manner and with the condition set out in the judgment. A personal decree is passed against defendants Nos. 2 and 3, the guarantors. It be further decreed that any sale of the property described in items 1 to 4 of Schedule B of the plaint comprised in the prior mortgage in favour of defendant No. 6 shall be subject to such previous encumbrance."

7. A few years after the aforesaid decree, the plaintiff bank instituted another suit being Title Suit No. 29 of 1973 principally against the defendant No. 1 Amulya Gopal Majumdar for redemption of the prior mortgage in his favour. Their case made in the plaint shortly was that they never knew of the prior mortgage and that they came to know of it only during the pendency of their prior suit for enforcement of the mortgage in their favour being Title Suit No. 119 of 1965. Since the plaintiff was not made a party to the suit brought by defendant No. 6 on his prior mortgage, they are not bound by that decree and as a puisne mortgagee they have a right to redeem the prior mortgage in favour of defendant No. 6 Amulya Gopal Majumdar. By filing the suit they sought for such a decree for redemption.

8. Defendant No. 1 Amulya Gopal Majumdar alone again contested the suit denying the loan on the overdraft account and also denying any mortgage in favour of the plaintiff or their predecessor-in-interest. In short his defence was that the plaintiff was not a puisne mortgagee and as such had no legal right to claim any redemption.

9. This suit again was decreed by the learned trial Judge. The learned trial Judge found that admittedly the defendant No. 1 was a prior mortgagee for Rs. 40,000/- in respect of the self-same Behala properties. That being the accepted position, the learned Judge held that if it be established that the plaintiff is a puisne mortgagee then the plaintiff would undoubtedly be entitled to redeem the prior mortgage to defendant No. 1 since admittedly again plaintiff or its predecessor-in-interest had not been made a party to the suit brought by the defendant No. 1 for enforcement of the mortgage in his favour. On the disputed issue as to whether the plaintiff was a puisne mortgagee or not, the learned Judge held that in view of the decree passed in Title Suit No. 119 of 1965 (just referred to hereinbefore) between the parties it must be held to be concluded that the plaintiff is a subsequent mortgagee in respect of the same property and that such a mortgage is valid and legal. The learned Judge accordingly decreed the suit directing redemption of the mortgage in favour of the defendant No. 1.

10. Feeling aggrieved by the decrees as aforesaid, Amulya Gopal Majumdar has preferred the present two appeals in this Court. Mr. Banerji appearing on behalf of the appellant in both these appeals has raised two points, the first of which is common to both the appeals while the second one being a specific point for the second appeal. The first point raised by Mr. Banerji is to the effect that the learned Judge failed to consider and decide the most important issue as to whether the transaction pleaded by the plaintiff to be constituting an equitable

mortgage does so constitute in law or not. For reasons given by him which would be referred to more specifically hereinafter while we consider that issue, he has contended that neither of the 3 transactions relied on by the plaintiff constitute any mortgage, far less an equitable mortgage. In assailing the decree for redemption, the second point raised by Mr. Banerji is to the effect that even upon the plaintiff's own case the appellant Amulya Gopal Majumdar having purchased the equity of redemption had a preferential right of redeeming the mortgage in favour of the plaintiff, and as such, the plaintiff is not entitled to foreclose that right by instituting the suit for redemption treating the appellant to be a prior mortgagee only.

11. These appeals are being contested by plaintiff bank only. Mr. Deb appearing on their behalf has seriously contested both the points raised by Mr. Banerji. According to Mr. Deb when the overdraft account was first opened against a promissory note for Rs. 2,50,000/- on a security created by deposit of title deeds and when subsequently those loans were extended on the basis of the same security with a clear intention of the parties appearing from the transaction to the effect that the security originally furnished should continue to remain as such for the enhanced loan the transactions do constitute equitable mortgage enforceable as such. So far as the second point raised by Mr. Banerji is concerned, it has been contended by Mr. Deb that the plaintiff as a puisne mortgagee is entitled in law to redeem the prior mortgage in favour of Amulya Gopal Majumdar, the appellant. No doubt the appellant having purchased the equity of redemption did acquire a right to redeem the mortgage in favour of the plaintiff but that right he never exerted so that he cannot plead mere existence of such right as a bar to the plaintiff's right in law to claim redemption in respect of the prior mortgage. In any event, according to Mr. Deb when the appellant had already been made a party defendant in the earlier suit for enforcement of the mortgage such an objection becomes academic since in terms of that decree the appellant can still redeem the mortgage in favour of the plaintiff by paying off the dues.

12. We now proceed to consider the points raised by Mr. Banerji in support of these appeals. So far as the first point raised by Mr. Banerji is concerned, it is true that though a specific issue in that regard being issue No. 5 was raised before the learned trial Judge, he failed to consider and answer that issue in an appropriate manner. He never considered the question as to whether the transactions pleaded by the plaintiff constitute equitable mortgage in law or not. On the other hand, he appears to have proceeded on the basis that each of the three transactions referred to and relied upon by the plaintiff constitutes a mortgage. Perhaps the failure on his part to consider this issue in an appropriate manner is due to the fact that the point was not argued before him from the angle it is now being argued before us by Mr. Banerji. Be that as it may, such a definite issue having been raised at the trial and having been argued before us by Mr. Banerji on the materials on record we are of the view that it is necessary for us to reconsider the matter and decide the issue properly.

13. It is not in dispute that the Behaia property originally belonged to one Naresh Chandra Nag who had mortgaged the same to Amulya Gopal Majumdar, the appellant before us in the year 1949. Naresh had been running a factory there and on July 18, 1950, he entered into an agreement for sale of that property along with the factory machineries with Eagle Plywood Industries Private Limited on certain terms embodied in the agreement (Ext. 3). Eagle Plywood Industries Private Limited on their turn entered into an arrangement with the predecessor-in-interest of the plaintiff for loan on overdraft advance on a mutual and open current account opened in the name of the said Industry to the maximum limit of Rs. 2,50,000/- and to secure such loan deposited the said agreement for sale dated July 18, 1950, with the plaintiff's predecessor-in-interest on July 10, 1951. On October 31, 1951, Eagle Plywood Industries Private Limited purchased the Behaia property from Naresh Chandra Nag vide Ext. 4. On June 28, 1954, the plaintiff's predecessor-in-interest, the Metropolitan Bank Limited agreed to extend the overdraft limit in favour of Eagle Plywood Industries Private Limited to the extent of Rs. 2,50,000/- for which the said Industries furnished the Behaia property as security in terms of a registered deed Ext. 13. On November 21, 1962, the said Metropolitan Bank Limited further extended the overdraft limit in favour of Eagle Plywood Industries Private Limited to the extent of Rs. 5,00,000/- on the said Industries furnishing further security in Coochbehar property and on the guarantee of 2 other persons, defendant Nos. 2 and 3 in Title Suit No. 119 of 1965 on the basis of a deed of agreement Ext. 5. According to Mr. Banerji none of these three transactions constitutes any mortgage in law, far less an equitable mortgage. In regard to the first transaction, Mr. Banerji's contention is that though it has been claimed by the plaintiff that the loan to the extent of Rs. 2,50,000/- was secured by deposit of title deeds in respect of the Behaia property there was no effective equitable mortgage in law because of two reasons, namely, (i) the material memorandum dated July 10, 1951 of Eagle Plywood Industries Private Limited does not indicate any intention on the part of the said Industries to create any security for the debt and (ii) the debtor at the relevant time having no title to the Behaia property could not have created any equitable mortgage in respect thereof by deposit of the agreement to purchase which is not a deed of title. In regard to the second transaction Mr. Banerji's contention is that the parties purported to create a formal mortgage by the deed (Ext. 13) itself which, however, fails for non-compliance with the requirement of Section 59 of the Transfer of Property Act and the said document cannot be read as a memo acknowledging deposit of title deeds for creating any equitable mortgage. The very same objection has been raised by Mr. Banerji with reference to the third transaction dated November 21, 1962, which again according to Mr. Banerji does not relate to the Behaia property.

14. Referring to the first transaction it appears from the evidence on record that sometime in March 1951, the Eagle Plywood Industries Private Limited arranged for loan on an overdraft account from the Banker's Union Limited (since renamed as Metropolitan Bank Limited), the predecessor-in-interest of the

plaintiff to the extent of Rs. 2,50,000/-. They executed a pronote for the said amount (Ext. 1). On July 10, 1951, they acknowledged deposit of their agreement for purchase dated July 18, 1950, by way of security for the loan in a memorandum, the material part whereof reads as follows :--

"Referring to the arrangement for overdraft account to the extent of Rupees 2,50,000/- (Rupees two lakhs fifty thousand) this is to place on record that we have this day deposited with you the deed as described in the Schedule below with the intent to create security on the property comprised in the said deed against any or all of our indebtedness to the bank from time to time or at any time arising, accruing or due whether on current account, loan account or any other account whatsoever and whether in our common or trade name or whether jointly with others or not together with interest, commission or other charges to the debt for payment.

This is further to declare that we have agreed to sign, execute and complete any or all other deeds, documents or instruments etc., in order to secure to you simple mortgage of the above-named property subject to such condition or conditions as you may consider necessary or proper."

15. This memo is Ext. 1 in the other Title Suit being Title Suit No. 29 of 1973 but such a mortgage by deposit of the agreement for purchase is otherwise established on evidence in Title Suit No. 119 of 1965 (Extract thereof being Ext. 2) and is confirmed by the certificate issued by the Registrar, Joint Stock Companies dated July 26, 1951 (Ext. 7a). Mr. Banerji's first contention with regard to this transaction is that the memo dated July 10, 1951, really establishes an intention to create a simple mortgage in future but does not constitute acknowledgment of a mortgage by deposit of title deeds, there being no intention to create such a mortgage especially be the memo. We are, however, unable to accept this contention of Mr. Banerji in view of the first paragraph of the memorandum set out hereinbefore. Three requisites for an equitable mortgage are:-- (1)-debt, (2) deposit of title deeds and (3) an intention that the title deeds so deposited shall be security for the debt. Though on the contention of Mr. Banerji the impugned transaction lacks the third element, we are unable to agree with him. In the first paragraph, the borrower clearly acknowledges that having entered into an arrangement for an overdraft account to the extent of Rs. 2,50,000/- they had already deposited the deed dated July 18, 1950, with the bank to create a security for the debt There being a clear and unequivocal expression of such an intention in the first paragraph of the memorandum we are unable to accept the contention of Mr. Banerji that the third element is lacking in the present case. No doubt in the second paragraph there is a further agreement by the borrower agreeing to create a simple mortgage but obviously that would be only for the purpose of further consolidating the mortgage already created by deposit of title deeds. For this reason, we are unable to accept the first of these objections raised by Mr. Banerji with respect to the first transaction.

16. The second objection raised by Mr. Banerji in respect of the first transaction requires a more careful consideration. According to Mr. Banerji at the time when this transaction was entered into the mortgagor Eagle Plywood Industries Private Limited, had acquired no title to the Behala property; they had merely entered into an agreement for sale in their favour in respect of that property and in law such an agreement created neither any interest nor any charge on the property in favour of the mortgagor, Eagle Plywood Industries Private Limited. Reliance is placed by Mr. Banerji on Section 54 of the Transfer of Property Act and on the decision of the Privy Council in the case of AIR 1940 1 (Privy Council) and the decision of the Supreme Court in the case of Rambaran Prosad Vs. Ram Mohit Hazra and Others, . As such, according to Mr. Banerji Eagle Plywood Industries Private Limited could not have created any mortgage over that property at that point of time by deposit of such an agreement which does not show any title in the property for the mortgagor. We agree on principle with Mr. Banerji that the agreement for sale by itself created no interest in the property in favour of the mortgagor. That is what the law prescribes in Section 54 and it is well settled that the English equitable doctrine that a contract for sale of real property makes the purchaser owner in equity thereof has no application in India, But even then a distinguishing feature in the present case brings in a point of distinction. It appears to be well established on the evidence on record that Naresh Chandra Nag having entered into an agreement for sale in respect of Behala property made over possession thereof to the mortgagor Eagle Plywood Industries Private Limited on the terms incorporated in the said agreement. The mortgagor prior to the creation of the equitable mortgage had already started running a plywood factory, the machineries whereof were furnished as security for the loan along with the Behala property itself. That would appear from the memorandum dated July 10, 1951, Ext. 2. Therefore, at the time when the disputed transaction was entered into the mortgagor Eagle Plywood Industries^ Private Limited had entered into lawful possession of the Behala property on the basis of an agreement for sale dated July 18, 1950. Such possessory title could very well in law be furnished as security for the mortgage. On this point we are in respectful agreement with the view taken by M.M. Dutt and R.K. Sharma, JJ. in the case of Usha Rice Mills Company Limited v. United Bank of India (1978) 82 Cal WN 92, since the view taken by their Lordships is based on high authorities. This apart we are unable to sustain this objection of Mr. Banerji for another reason, namely, that the sale in favour of the mortgagor by Naresh Chandra Mag was completed within a short time from the date of the aforesaid transaction and when the mortgagor continued to overdraw the loan account on the basis of the purported equitable mortgage, the mortgagor's subsequent acquisition of title would render the equitable mortgage perfect on and from the date the mortgagor acquired title to the property. The objection of Mr. Banerji that the agreement for sale not being a title deed, no equitable mortgage could be created by the deposit thereof can have no importance on the aforesaid background of facts since in order to create a valid mortgage, it is not necessary that the whole or even the material of the documents of title to the property should be deposited

nor that the document deposited should show a complete or good title; it is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereof. Reference may be made to the Full Bench decision of Rangoon High Court in the case of Chidambaram v. Aziz Mia AIR 1938 Bang 149. In this view we overrule both the objections raised by Mr. Banerji to the first transaction constituting an equitable mortgage by Eagle Plywood Industries Private Limited in favour of the plaintiffs predecessor-in-interest and we hold that the said industry did create an equitable mortgage by deposit of title deeds in respect of Behala property for securing a loan not exceeding a sum of Rs. 2,50,000/-together with interest at the rate of 6% per annum with monthly rests.

17. Next we proceed to consider the second transaction between the parties. The plaintiff's case with regard to this transaction is that by mutual agreement between the mortgagor and the said Metropolitan Bank Limited, the overdraft limit was extended to Rs. 2,75,000/-in the year 1954 and it was further agreed that the title deeds already deposited with the bank would be held by the bank as security for the extended loan to the mortgagor and a deed was executed for that purpose on June 28, 1954. The oral evidence adduced on behalf of the plaintiff does not establish any agreement between the parties apart from the fact of the mortgagor executing a fresh pronote for a sum of Rupees 2,75,000/- Ext. 1a and a registered deed of agreement Ext. 13, both executed on June 28, 1954. Therefore, there is no evidence on record independent of the aforesaid two documents to establish the plaintiff's case that when the overdraft limit was extended to Rs. 2,75,000/- there was any agreement between the parties that the title deeds already deposited with the bank would be held by the bank as security for the extended loan. We are, therefore, to consider whether Ext. 13 establishes any such agreement or not. The material part of this document may be set out as hereunder:

"Whereas the company has deposited with the Bank title deeds as stated in schedule "B" below to the properties as described in Schedule "C" below with intent to create security thereon against payment on demand of any or all monies now or hereafter from time to time or at any time owing by the company to the Bank, whether on. current accounts, loan accounts, advances, cheques,, encashed, bills discounted, or on any other account or accounts whatsoever and whether in the name of the company or in any assumed conventional or trade name, or whether as guarantor or principal or whether jointly with others or not together with interest, commission, charges and costs (including those between Attorney and client) accruing to the date of payment, whereas the company requests the bank to allow the company to continue to overdraw the current account maintained by the company in Mission Row Branch of the Bank and/or any other account or accounts to be maintained from time to time or at any time at any other branch or office of the Bank to the extent of Rupees 2,75,000/- (Rupees two lacs and seventy-five thousand only) whereas in consideration of the premises and on the terms and conditions appearing below the Bank

consents thereto; it is agreed by and between the parties as follows :--

(1) That by way of security against any or all monies now or hereafter from time to time or at any time owing by the company to the Bank, whether on current accounts, loan accounts, advances, cheques, encashed, bills discounted or on any other accounts whatsoever and whether in the name of the company or in any assumed conventional or trade name, whether as principal or guarantor, or whether jointly with others or not, the company mortgages and/or hypothecates and/or assigns to the bank all its assets, book-debts, rights, properties and interests as described in the schedule below, and also as may now or from time to time hereafter exist, accrue, arise or be acquired or be perfected. That the company undertakes not to create any charge on its assets in favour of any person other than the Bank without previous written consent of the Bank, so long as this deed remain in force."

18. We agree with Mr. Banerji that by this document the mortgagor purported to create a simple mortgage but it fails as such because the requirements of Section 59 of the Transfer of Property Act had not been fulfilled. Though registered as a deed of mortgage there are no two witnesses to attest execution of the deed as required by the said provision. Mr. Deb appearing on behalf of the plaintiff fairly conceded that by this document no simple mortgage could be created but nonetheless according to Mr. Deb even if the document fails as such, on its contents the Court would find an acknowledgment of creation of an equitable mortgage by deposit of title deeds. Strong reliance is placed by Mr. Deb on the preamble of this document which we have set out hereinbefore and on the term "The company..... continues to mortgageall its assets, book-debts, rights, properties and interests as described in the schedule below." We are, however, unable to accept this contention of Mr. Deb. Reading the document as a whole it is not possible for us to spell out any acknowledgement of any prior agreement between the parties to create any equitable mortgage on the extended loan by deposit of title deeds. The preamble relied on by Mr. Deb only recites the factum of the prior equitable mortgage and nothing more. Moreover, the other part of the document relied on by Mr. Deb must be read in its context. So read by the term "continue to mortgage", the mortgagor merely indicated their intention to create a simple mortgage in continuation of the prior equitable mortgage. It does not establish any intention to acknowledge extension of the prior equitable mortgage to cover the extended loan. That apart it is now well established on the decision of the Supreme Court in the case of *Rachpal Mahraj Vs. Bhagwandas Daruka and Others*, that the question whether a memorandum of deposit of title deeds is compulsorily registrable u/s 17 of the Registration Act, depends on whether the parties intended to reduce their bargain regarding the deposit to the form of a document. If so, the document requires registration. If, on the other hand, its proper construction and surrounding circumstances lead to the conclusion that the parties did not intend to do so, there being no express bargain the document being merely evidential did not require registration. Judged in the aforesaid light, there can be no doubt that the parties intended to

incorporate all their bargains in respect of this transaction in writing in the deed the same never being intended merely to be an acknowledgement of any independent transaction of the nature of an equitable mortgage between the parties. Such a transaction when it fails for reasons given, it must fail and it cannot be salvaged in the manner -suggested by Mr. Deb. In this view we accept the contention of Mr. Banerji in respect of the second transaction and hold that no effective mortgage, far less an equitable mortgage was created in respect of the Behala property for securing the extended loan of Rupees 2,75,000/-.

19. So far as the third transaction is concerned, the position is no better. This transaction is evidenced by an agreement Ext. 5. It relates to the Coochbehar property and not to the Behala property. No doubt there is an acknowledgment in this agreement that subject to the provisions therein contained "the conditions, stipulations and covenants made by the borrower by the deed dated June 28, 1954 and the securities created and offered by the said deed will remain in full force and will be available to the bank for realisation of any or all moneys from time to time or at any time owing by the borrower to the bank whether on the said account or otherwise as stated in the said deed." Such a recital merely reaffirms the old transaction but does not extend the equitable mortgage to cover any extension of the loan, more so when on our findings made hereinbefore the deed dated June 28, 1954, created no such equitable mortgage. That apart this document merely records an agreement to create a formal mortgage for the extended loan in respect of Coochbehar property. Whether the preamble of this document records any acknowledgment of creation of an equitable mortgage between the parties or not need not be gone into for the simple reason that even if it does so that would be in respect of Coochbehar property and not with regard to Behala property with which we are now concerned. We, therefore, accept the contention of Mr. Banerji that by the third transaction which is evidenced by the agreement Ext. 5, no equitable mortgage was created in respect of Behala property for securing the extended loan of Rupees 5,00,000/- by the bank in favour of the mortgagor.

20. On our findings as aforesaid, we are unable to accept the view of the learned trial judge that the plaintiff is entitled to a mortgage decree in respect of both the Behala property and the Coochbehar property for the amount claimed. In our view, therefore, the plaintiff would be entitled to a mortgage decree to the extent of Rs. 2,50,000/- together with interest at the rate of 6% per annum with monthly rests thereon in respect of Behala property. There being no appeal preferred by the other defendants, we would however, uphold the decree passed as against the machineries and the Coochbehar property. We further uphold the decision of the learned Subordinate Judge that since the plaintiff had been realising rents out of Behala property through a Receiver appointed by it in terms of Section 69A of the Transfer of Property Act there should be a decree for accounts.

21. This appeal, therefore, succeeds in part. The decree as passed by the learned

Judge in the trial Court in so far as it relates to Coochbehar property, namely, item (6) of Schedule B of the plaint and the machineries specified in item (5) of the said Schedule is hereby affirmed. Such decree so far as it relates to Behala property being items (1) to (4) of the said Schedule is modified to the extent as herein. It being declared that there was a valid equitable mortgage created by defendant No. 1 in respect of the said Behala property with the plaintiff for securing a loan of Rs. 2,50,000/- with 6% interest thereon with monthly rests, let accounts be taken by adjusting the realisation made by the plaintiff out of that property and the total dues of the plaintiff on such a loan of Rs. 2,50,000/- be determined. To the extent of such dues there would be a preliminary mortgage decree in terms of Order 34 Rule 4 read with Rule 2 (1) (a) of the Code as against defendants Nos. 1, 2, 3 and 4 and 6 with proportionate costs. Such amount being made payable within 6 months from such determination. For the rest of the plaintiff's dues on the claim made in the plaint and as may be found still payable on the accounts taken there will be personal decree with costs thereon as against defendants Nos. 1, 2, and 3 subject again to the mortgage decree in respect of the machineries and the Coochbehar property hereby affirmed by us. Be it further decreed that any sale of the Behala property being items 1 to 4 of Schedule B to the plaint will be subject to the prior mortgage of that property in favour of defendant 6 so that from the sale proceeds the dues of defendant No. 6 on the mortgage in his favour shall be first paid out.

22. We now proceed to consider the other appeal, viz., F. A. 127 of 1977. This appeal may be disposed of shortly. It arises out of a suit for redemption instituted by United Industrial Bank as a puisne mortgagee as against the appellant Amulya Gopal Mazumdar who stands in the position of a prior mortgagee so far as the plaintiff Bank is concerned though he has also purchased the equity of redemption. Amulya in his suit on the prior mortgage had not made the plaintiff Bank a party as required under Order 34, R. 1 of the Code. The inevitable result is that the decree and the consequent purchase by Amulya in the sale in execution of that decree would not affect the plaintiff Bank's rights in any way. His right to sue for sale subject of course to the prior mortgage and his further right to redeem the prior mortgage before putting up the property for sale to satisfy his own claim were not lost and the plaintiff Bank is entitled to enforce both these rights. Hence the learned Judge in the trial Court was right in decreeing the plaintiff's claim for redemption.

23. Mr. Banerji appearing in support of this appeal raised two points. In the first place it was contended by him that, transactions entered into with the plaintiff Bank not amounting to an equitable or any other form of mortgage, the plaintiff does not stand in the position of a puisne mortgagee. This point, however, stands overruled in view of our findings recorded in the other appeal, viz., F. A. 481 of 1972. We have therein found that at least one of the transactions with the plaintiff Bank constituted an equitable mortgage. The second point raised by Mr. Banerji is that when the appellant has purchased the equity of redemption in his mortgage sale, he has got a preferential right of redemption as against the

plaintiff. We, however, find little substance in this contention of Mr. Banerji. In law as the purchaser of an equity of redemption, he might have a preferential right of redemption but when at no stage did he exert that right of redemption, he cannot simply plead that right to defeat the right of the present plaintiff. The appellant was added as a party defendant in the earlier suit as early as on 22-7-1969. He contested the said suit throughout, suffered a decree therein and yet he took no steps to enforce his preferential right of redemption as against the plaintiff Bank who instituted the present suit on 26-5-73. Moreover this objection of Mr. Banerji is more academic than real because the appellant can in effect redeem the mortgage in favour of the plaintiff Bank by paying the amount decreed against the original mortgagor and the appellant in the earlier mortgage suit of the plaintiff Bank. In this view we overrule both the points raised in support of this appeal. The appeal, therefore, fails and is dismissed. We affirm the preliminary decree as passed by the trial Court subject, however, to this direction, viz., if on the accounts taken in the earlier suit it be adjudged that nothing stands outstanding towards the mortgage dues to the plaintiff Bank on the mortgage of Behala property or if plaintiff be paid off his mortgage dues on that account in terms of the preliminary decree of that suit, then in that event the plaintiff's claim in this suit would stand dismissed at the stage of drawing up the final decree.

Parties to bear their respective costs in both the cases throughout.

24. Mr. Chandra Nath Mukherjee, learned Advocate appearing on behalf of respondent No. 1, prays for grant of a certificate under Article 133(1) of the Constitution. In our view, this is not a fit case where such certificate should be granted, because we have merely interpreted three transactions one of which was found to constitute a mortgage while the other two were found not to constitute a mortgage.

B.C. Chakrabarti, J.

25. I agree.