

(1922) 12 BOM CK 0018
In the Bombay High Court

Dronamraju Rama Rao and Others

APPELLANT

Vs

Vissapragada Vedayya and Others

RESPONDENT

Date of Decision : 09-12-1922

Acts Referred:

Transfer of Property Act, 1882 — Section 54

Citation : (1923) ILR (Bom) 435

Hon'ble Judges : Phillips, J;Devadoss, J

Bench : Division Bench

Judgement

Phillips, J.—In this suit it has been found that one square yard of house-site was included in the mortgage deed merely to give jurisdiction to the Peddapur Sub-Registrar, who registered the document, whereas the property really intended to be mortgaged was situated in Amalapur. Following the decisions in Harendra Lal Roy Chowdhuri v. Haridasi Debi ILR (1914) Calc. 972 and in Biswanath Prasad v. Chandra Narayan Chowdkury I.L.R.(1921) Calc. 509 it has been, held that the mortgage deed is invalid as being "in fraud of the Registration Law." The learned Subordinate Judge has however found that the personal covenant to repay is not invalid and has given a decree for that part of the claim that is not barred by limitation, holding that Article 116 of the Limitation Act is applicable in accordance with the ruling of Amir Ali, J., in Joginee Mohun O'hatterjee v. Bhoot Nath Ghoml I.L R. (1902) Calc. 654. In appeal it is contended that that ruling is wrong, and that as the registration of the mortgage-deed is invalid, the document as a whole must be treated as unregistered, and consequently the covenant to repay must also be treated as an unregistered covenant.

2. What was held by the Privy Council in Harendra Lal Roy Chowdhuri v. Haridasi Debi ILR (1914) Calc 972 and upheld in Biswanath Prasad v. Chandra Narayan Chowdhury ILR (1921) Calc 509. was that

3. an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists is a fraud on the Registration Law and no

registration obtained by means thereof is valid.

4. The principle which I take to underlie this decision is that no person shall be allowed to take advantage of his own fraud. If that principle be applied to the present case, the object attained by the fraud was the registration of the mortgage-deed as such, for had the document been merely a covenant to repay, the Peddapur Sub-Registrar would have had jurisdiction u/s 29 of the Registration Act (Act XVI of 1908); for under that section parties are at liberty to choose their own place of registration. In so far then as the document evidenced a mere covenant to repay there was no fraud upon the Registration Law, and to hold that such registration was invalid would be to extend the principle above mentioned so as to deprive a party of a right which he had not obtained by fraud as well as of the advantage gained by his fraud. To do this appears to me to extend the principle to inequitable length and I am supported in this view not only by the direct ruling of *Amir Ali, J.*, in *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal* I.L.R (1902) Calc. 654 but also by the action of the Privy Council in the case reported in *Biswanath Prasad v. Chandra Narayan Chowdhury* ILR (1921) Calc 509 for that case was remitted to the Calcutta High Court for a decision as to whether the plaintiff had a valid alternative claim for a personal judgment for the mortgage debt. No doubt there was no finding that the claim for a personal decree was based upon a contract in writing registered but it would appear from a perusal of the argument in the case reported in *Mathura Prasad v. Chandra Narayan Chowdhury* 25 C.W.N. 985 that a period of limitation of six years was contemplated, the argument being that a payment of interest in 1903 would save limitation for the suit brought in 1908. Unless it was the opinion of the Court that the debt was secured by a registered instrument, the argument would have been of no avail, for such a payment was not within three years of institution of the suit, and as the suit would have been barred if based upon the personal covenant. Had that been the case it appears to me improbable that the case would have been remitted for a consideration of the claim. I am therefore of opinion that the decision in *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal* ILR (1902) Calc 654. is right and that the registration of the personal covenant to repay is not procured by fraud and is consequently valid. The other cases cited viz. *Amba alias Padmavathi v. Shrinivasa Kamathi* 26 C.W.N. 369. and *Ram Narayan Singh v. Adhindra Nath Mukherji* ILR (1917) Calc 388 do not appear to have any bearing on the present case and the facts reported in *Sham Lal v. Tehariya Lakhmi Chand* (1920) 18 All. L.J. 476. are too vague to give that case any value here.

5. The Second Appeal is accordingly dismissed with costs.

6. The memorandum of objections must also be dismissed with costs as the lower Court exercised its discretion in awarding a personal remedy and was entitled in so doing to reduce the rate of interest contracted for in the mortgage-deed.

Devadoss, J.

7. The plaintiff brought the suit as transferee of an hypothecation bond executed by the first defendant in favour of one Seshayya, impleading defendants Nos. 2 to 4, the sons of the first defendant, defendants Nos. 5 to 7, the undivided sons of Seshayya, and the alienees of some portions of the hypotheca. Various contentions were raised by the defendants. The District Munsif of Amalapuram dismissed the suit on the ground that the registration of the document was invalid as a parcel of land not belonging to the defendants Nos. 1 to 4 was included in the document only for the purpose of giving jurisdiction to the Sub-Registrar who registered the document and that the claim was barred by limitation. On appeal the Subordinate Judge of Rajahmundry held that the document was invalid as a mortgage-deed and that the suit was not barred by limitation and gave a money decree to the plaintiff. The defendants Nos. 1, 2, 4 and 11 have preferred the Second Appeal.

8. It is contended by Mr. Narayanamurti for the appellants that the registration of the document was in fraud of the registration law and that the document cannot be treated as a registered document for any purpose and therefore Article 116 of the Limitation Act did not apply to the case, and he relied upon *Harendra Lal Roy Chowdhuri v. Haridasi Debi* ILR (1914) Calc. 972 *Biswanath Prasad v. Chandra Narayan Chowdhury* ILR (1921) Calc. 509 *Amba alias Padmavathi v. Shrinivasa Kamathi* 26 C.W.N. 369 and *Kulka v. Mathura Das* (1919) 50 I.C. 220 In *Harendra Lal Roy Chowdhuri v. Haridasi Debi* ILR (1914) Calc. 972 the plaintiff brought the suit upon a mortgage-deed registered in Calcutta. The defendant contended among other things that the deed had not been legally registered because no portion of the property mortgaged was situate in Calcutta. It was found that the only portion of the property alleged to be in Calcutta was described as "25, Guru Das Street." But the property so described was found to be non-existent. Their Lordships of the Privy Council held

"that this parcel is in fact a fictitious entry and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration Law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item.

9. In *Biswanath Prasad v. Chandra Narayan Chowdhury* I. L. R. (1921) Calc 509 a mortgage bond for Rs. 8,000 which purported to mortgage a seven-anna share in a village in the Dharbanga district and a one kauri share in the Muzhaffarpur district was registered only in the Muzhaffarpur district. The mortgagor had purchased the one kauri share shortly before the execution of the mortgage in order that he might register in Muzhaffarpur. He paid Rs. 50 for the one kauri

share, but there was no registered instrument or delivery of possession as required by Section 54 of the Transfer of Property Act, 1882. Their Lordships found that none of the parties intended that the one kauri share should vest in the mortgagor or pass under the mortgage. Viscount Finlay in delivering the judgment of their Lordships observed:

In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one kauri share in Mauza Kolha should vest in Udit (Narayan) or should pass by the mortgage from him to the mortgagee. This case differs *toto coelo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument and which both parties had intended should form part of the security.

10. With regard to the contention that a personal decree should be passed in favour of the plaintiff, the noble Viscount observed:

As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to deal with such a claim. At the same time their Lordships think it desirable in this case that the plaintiffs should have an opportunity of bringing this matter before the High Court. If any such application is made, it will be for the High Court to consider whether any such claim is open upon the present pleadings and, if not, whether any amendment raising it should be made and further whether under all the circumstances the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of this claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs. The appeal so far as it relates to the enforcement of the mortgage on the land must in their Lordships' opinion be dismissed.

11. In that case the mortgage bond was dated 27th February 1902 the amount of the bond was payable on 7th September 1902. The suit was instituted on 11th September 1908. It may be safely assumed that the plaintiff could not have expected to get a personal decree against the mortgagor unless Article 116 was held applicable to the case. No doubt the respondents were not represented before the Privy Council. But it is quite clear from the order of their Lordships remanding the case to the High Court to enable the plaintiff to amend his plaint and claim a personal decree that they thought that the personal remedy was not barred. Though their Lordships did not say so in so many words in their judgment, it is quite apparent what their view was from the observation of their Lordships in the course of the argument.

12. With reference to the contention of the appellant's counsel that "in any case there is no reason why we should not have a personal decree for money", Sir

John Edge observed "if this was merely a suit to recover money would not limitation have run? " and counsel for the appellant answered "no, payment of interest saves it." Then Lord Suaw said: "Last payment of interest was in 1903."

13. The contention that the registration which is ineffectual to validate a document required by law to be registered cannot avail for any other purpose seems untenable.

14. u/s 17 of the Registration Act certain classes of documents---

(1) gifts of Immovable property;

(2) non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any title or interest in Immovable property of Rs. 100 and upwards in value.

(3) Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right or interest.

(4) Leases of Immovable property from year to year, or for any term exceeding one year or reserving a yearly rent---

15. are required to be registered in order to be valid and if they are not registered, u/s 49 of the Act, they cannot affect the Immovable property comprised therein or shall be received as evidence of any transaction affecting such property. Other documents are registrable at the option of the parties. u/s 28 of the Act the class of documents mentioned in Section 17, Sub-section (1), Clauses (a), (b), (c) and (d), and Section 18, Clauses (a), (b) and (c), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. By Section 29 every document other than those referred to in Section 28 may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document is executed, or in the office of any other Sub-Registrar at which all the parties desire the same to be registered. There is nothing in the Registration Act therefore to prevent the registration of a simple money bond in the office of any Sub-Registrar at which the parties desire to have the document registered.

16. A simple mortgage usually contains a personal covenant to pay. In fact in almost all the mortgage transactions in this Presidency there is a personal covenant by the mortgagor to repay the mortgage amount personally. The portion of the document in which there is a transfer of specific Immovable property as security for money is severable from the portion in which the mortgagor undertakes to repay personally the money advanced or to be advanced to him. Where a document consists of two or more parts, or where there are two or more covenants in a document, the mere fact that one part becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act need not necessarily make the other parts

of the document invalid or inoperative. Though that portion of the document which by law is required to be registered would be invalid unless registered in accordance with the rules governing registration of documents, yet the portion of the document optionally registrable would be valid as the parties have consented to present it in the office of the Sub-Registrar by whom it is registered. It is clear from the observation at page 517 in *Biswanath Prasad v. Chandra Narayan Chowdhury* ILR (1921) Calc. 509 the appeal so far as it relates to the enforcement of the mortgage on the land, must, in their Lordships opinion, be dismissed

17. that their Lordships did consider the document to be a valid one so far as the claim for a money decree was concerned.

18. *Amba alias Padmavathi v. Srinivasa Kamath* 26 C.W.N. 369 has no application to this case. Their Lordships observe.

It was not and is not disputed that those two deeds cannot be given in evidence or enforced if they have not been duly registered. Their Lordships are clearly of opinion that as the appellant was not only a minor but a married woman, her father had ceased to be her natural guardian and had never been appointed her legal guardian and was not therefore her assignee or representative within the meaning of Section 3 of the Registration Act, 1877. He was not an executant of the said deeds or either of them. Neither was he within the meaning of Section 34 of that Act the representative, assignee or agent duly authorized on behalf of Krishna Kamathi deceased, the only executant. The presentation by him of the two deeds for registration was in direct conflict with the express provisions of the 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity, and if that be so, as in their Lordships' opinion, it must be held to be, it is not disputed that the deeds would be void and unenforceable.

19. In that case there was no valid presentation of the document and not as in the present, all the parties to the document wanted to get round the provisions of the Registration Act by recitals intended to mislead the Sub-Registrar to do what he would not otherwise have done. The registration of a document by false personation would be no registration at all, and the document being a fraudulent document becomes unenforceable against the party sought to be bound by it as he never consented to the registration being effected by a person falsely personating the executant. That class of cases differs from the present where both parties with their eyes open get a document registered with the intention of treating the document as a validly registered document, but for purposes, of convenience or other reasons they violate the specific provisions of Section 28 which requires that documents of a certain class should be registered by a Sub-Registrar within whose sub-district the whole or any portion of the property comprised in the document is situate. The case in *Kalka v. Mathura Das* (1919) 50 I.O. 220 is of the Judicial Commissioner's Court of Oudh. No doubt the Judicial Commissioner held that when registration is invalid for one purpose it is

invalid for all purposes. This view is evidently on the assumption that all the covenants in a document and all the parts of the document form one indivisible whole. A mortgage-deed, as I have said above, contains more than one part and more than one covenant. A mortgagee can give up his security and sue on the personal covenant alone. He may choose to sue for all or any of the remedies in respect of it. To read an ordinary mortgage document as one indivisible whole is opposed to the recitals therein and the intention of the parties to the document.

20. Mr. Lakshmanan for the respondent relied upon *Bam Narayan Singh v. Adhindra Nath Mukherji* ILR (1917) Calc. 388. It was a case in which a mortgage document which by law is required to be attested by two or more witnesses was not so attested. Their Lordships of the Privy Council held that the document could not be treated as a mortgage document as it contravened the provisions of law which laid down the essentials for a valid mortgage-deed and the absence of the necessary requisite prevented the document taking effect as a mortgage. But it was treated as a simple money bond. The case which is directly in point is the decision of Mr. Justice Ameer Ali (now a member of the Judicial Committee of the Privy Council) reported in *Joginee Mohun Chatterji v. Bhoot Nath Ghosal* ILR (1902) Calc 654. The learned Judge observed:

I am not satisfied that there was any such property as No. 251-2 belonging to the defendant within the jurisdiction of the Sub-Registrar of Sealdah so as to give him u/s 28 of the Registration Act jurisdiction to register the document. If I am right in that conclusion, it follows that the document cannot take effect as a mortgage-deed; but as it is registered, although the suit has been brought more than three years after the date of execution, the claim is not barred as was contended for by the defendants' counsel.

21. This decision was long before the ruling of the Privy Council reported in *Harendra Lal Roy Chowdhuri v. Haridasi Debi* ILR (1914) Calc 972. which settled the law on this point. Though the learned Judge did not give reasons for holding that the document which was invalid as a mortgage on account of want of jurisdiction of the Sub-Registrar who registered the document was a valid document for purposes of limitation, yet his opinion is entitled to great weight, and it is in consonance with reason. The Registration Act does not prohibit the use of a document as a registered one if the provisions r. of Section 28 of the Act are contravened. If a document is otherwise properly registered there can be no objection to the use of it as a registered one. I therefore hold that the plaint document is a registered document so far as the personal covenant contained in it is concerned, and therefore Article 116 of the Limitation Act applies to the case. The Subordinate Judge has rightly held that the suit is not barred by limitation. The Second Appeal fails and is dismissed with costs.

22. The plaintiff did not sue in the first instance on the personal covenant alone. He based his suit on the footing of a valid mortgage and prayed for a mortgage decree. In the circumstances the rate of interest allowed to him by the lower Appellate Court is fair, and there is no reason to interfere with the discretion of

the lower Appellate Court.

23. The memorandum of objections is dismissed with costs.