

(1932) 02 CAL CK 0038
In the Calcutta High Court

Nabadwip Chandra Das and Others

APPELLANT

Vs

Loke Nath Roy and Others

RESPONDENT

Date of Decision : 02-02-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64

Transfer of Property Act, 1882 — Section 122, 41, 43, 59

Citation : AIR 1933 Cal 212

Judgement

1. These two appeals have arisen out of a suit for foreclosure on a mortgage by way of conditional sale and are from the preliminary and the final decrees passed therein. Defendants 6, 7, 8 and 11 are the appellants. Defendant 1 is the mortgagor. He executed the mortgage on 23rd June 1916. On the same day, after being duly signed and attested, the deed was presented for registration and the executant's admission was taken, but the registration was not complete till 27th June 1916, which is the date the certificate of registration bears. Defendant 26, having obtained a decree for money in Money Suit No. 153 of 1915 against defendant 1 on 18th May 1916, put it into execution, and on 20th June 1916 obtained an order for attachment in respect of eight out of the properties covered by the mortgage. Two out of these eight properties are concerned in this appeal. On 21st June 1916 the writ of attachment was signed and issued and made over to the peon. As regards the said two properties the prohibitory order was served in the locality on 22nd June 1916, but was not posted in the court-house till the 24th. On 24th February 1917 the attached properties were sold in auction and purchased by defendant 26. After the sale was confirmed and possession was delivered to defendant 26, he sold the said eight properties to defendant 29 on 25th May 1919. On 3rd January 1921 defendant 29 sold the two properties with which we are concerned to the appellants.

2. The first question we have been called upon to determine is what was the effect of the attachment upon the mortgage which defendant 1 made. In the Court below the appellants rested their claim upon the ground that the attachment was prior to the execution of the mortgage. This contention was

resisted on behalf of the plaintiffs on the ground that to render an attachment effectual the affixing of the prohibitory order on the court-house is absolutely necessary, and in as much as such affixing was later in date than the execution the mortgage lien was not affected by the attachment. The Court below upheld the plaintiffs' contention. It is not disputed now that the view which the Court below has taken is correct; and indeed the correctness of the view can no longer be disputed: see *Muthiah Chetty v. Palaniappa Chetty* AIR 1929 PC 139. But, in this Court, it has been argued on the appellants' behalf that in view of Section 59, T.P. Act, no right was created under the deed until it was registered and that in as much as the registration admittedly took place after the attachment had been effectively made the mortgage was, having regard to Section 64, Civil P.C., void against all claims under the attachment. There is very little authority directly bearing on the question that has to be considered; the only decision in which something like the present question was dealt with is the case of *Veerakutty Koundan v. Ramasami Asari* (1916) 32 IC 431. In that case it was held that where between the dates of the execution and of the registration of a mortgage deed another unregistered mortgage bond is sued upon and the mortgaged properties are attached, that mortgage does not acquire priority over the registered mortgage either by reason of the decree thereon or by an attachment, order obtained in the suit. The effect of an attachment however does not appear to have been specifically considered in that case and so the decision is not of much assistance.

3. A number of decisions have been relied upon by the appellants to fix the point of time at which a document can be said to be registered: *Mt. Rohimoonnissa v. Abdoolah Khan* (1874) 22 WR 319, *Hardei v. Ram Lal* (1889) 11 All 819, *Veerappa Chetty v. Kadiresan Chetty* (1913) 20 IC 385 and *Mohammed Ewaz v. Birj Lall* (1879) 1 All 465. It is unnecessary to discuss these because it can never be and indeed has not been contended on behalf of the respondent that the mortgage deed in the present case was a registered document at the date when the attachment was effected. It has then been contended that in the case of a document, of which registration is compulsory, title does not pass until registration has been effected: *Paperaddi v. Narasireddi* (1893) 1C Mad 464, *Sheonarain v. Darbari* 2 CWN 207 and *Tilkdhari Singh Vs. Babu Gour Narain*, . But Section 47 of that Act says that a document which is registered operates from the time of its execution and not from the time of its registration. The real question to be considered therefore is whether this operation by virtue of S, 47 of the Act in respect of a deed duly executed but not registered, is in any way affected by an attachment effected in the meantime, having regard to the provision contained in Section 64, Civil P.C.

4. In some recent decisions of Indian Courts the effect of non-registration in the case of deeds of gift of which registration is compulsory under the law has been considered, and these decisions have subsequently been examined by the Judicial Committee. In the case of AIR 1927 42 (Privy Council) the facts were these: a Hindu executed a deed of gift of part of his immovable property and

delivered it to the donee, and on the following day adopted a son and three days after he registered the deed. It was held that on delivery of the deed to the donee there was acceptance of the transfer within the meaning of Section 122, T.P. Act, 1882 and thereafter the gift became effectual subject to registration as required by 8. 123. The opinions of the learned Judges of the Division Bench of the Madras High Court in that case will be found in *Kalyanasundaram Pillai v. Krishnaswami Aiyar* AIR 1921 Mad 90 and the judgment in the Letters Patent appeal there in is reported in AIR 1923 Mad. 282. The same principle was laid down by the Judicial Committee in the case of *Venkatasubba v. Subba Rama* AIR 1928 PC 86, the judgment of the Bombay High Court in which case is reported in *Subba Rama Hegde Vs. Venkatsubba Hegde*, their Lordships repeating what they had said in the case of AIR 1927 42 (Privy Council) . In AIR 1927 42 (Privy Council) their Lordships said:

They are unable to see how the provisions of Section 123, T.P. Act, can be reconciled with Section 47, Registration Act, except upon the view that while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest, within the prescribed period. Neither death nor the express revocation by the donor, is a ground for refusing registration if the other conditions are complied with.

5. Applying these observations, if they are applicable, to the case of a mortgage it may well be said that while registration is a necessary solemnity in order to the enforcement of a mortgage of immovable property, it does not suspend the mortgage until registration actually takes place. It has been contended, however that what was laid down by their Lordships of the Judicial Committee in the case aforesaid has no bearing upon the question now before us. This has been said firstly, because by reason of Sections 2 and 129, T.P. Act, 1882, the Hindu law which requires delivery of possession to complete a gift applied, whereas it is too late now to contend that under the Hindu law possession is necessary to complete the title of the transferee in any other case of transfer *Kali Das v. Kanhya Lal* (1885) 11 Cal 121]; and secondly because what was really considered by the Judicial Committee was a very different question, namely, whether a donor having done all that he had to do to make a valid gift, and when all that was necessary to make it effective was done and the document was incomplete merely on account of non-registration, could himself turn round and revoke the gift.

6. As regards the first of these grounds it is difficult to see how the distinction

pointed out enures to the benefit of the appellants. The Hindu law or Section 122, T.P. Act, 1882, only imposes an additional condition for the gift to be effective the provision for registration remaining the same in the case of gifts as well as in the case of mortgages. So far as the second ground is concerned it is true that the present question was not the question before the Judicial Committee. But their Lordships' decision, carefully read, does not seem to us to proceed upon a disqualification attaching to the donor personally by reason of the fact that he had executed the deed of gift and handed it over to the donee; it proceeds upon a consideration of the legal position created by the fact that the gift was complete except for the registration. Their Lordships quoted a passage from the judgment of the learned Chief Justice of the Madras High Court in the case under appeal and did not express their dissent from it. On the other hand their Lordships affirmed the judgment and the decrees appealed from. The passage runs thus:

The effect of these sections (i.e. Sections 47 and 49, Registration Act), in my judgment, is that if a title is complete except for registration no subsequent alienation or dealing with the property by the vendor or donor as the case may be can defeat the title which on registration became an absolute title dating from the execution of the document.

7. It will be seen that the observations just quoted include not merely gifts but also sales. Their Lordships observed that they were in complete agreement with the Full Bench decision of the Bombay High Court in the case of *Atmaram Sakhambari Kalkye Vs. Vaman Janardan Kashelkar*, and also approved of the Full Bench decision of the Madras High Court in the case of *Venkati Ram Reddi v. Pillati Rama Reddi* (1917) 40 Mad 204 subject to a qualification as to acceptance of the gift arising by reason of Section 122, T.P. Act. These Full Bench decisions, as well as the two dissenting judgments in the former of the two cases, dealt very fully with the question whether an executant of a deed compulsorily registrable has any locus penitentiae to resile by reason of the fact that the title under it is incomplete for want of registration. These decisions are clear authorities for the proposition, which has thus obtained the approval of the Judicial Committee, that incompleteness due to want of registration is not a thing of which the executant can take any advantage, and that if the instrument is otherwise complete the executant is to be regarded as having done everything that was in his power to complete the transfer and to make it effective.

8. To consider the effect of Section 64, Civil P.C, the true nature of an order of attachment has to be realized. Form No. 24 of App. E to the Code, is the form of a prohibitory order for attachment of immovable property. It shows that by such an order the judgment-debtor is prohibited and restrained from transferring or charging the property by sale, gift or otherwise, and all persons are prohibited from receiving the same by purchase, gift or otherwise. At the stage at which the attachment in the present case was effected the transferor had done all that lay in his power to complete the transfer and to make it effective and the transferee

had already taken the charge which had been so created in his favour, and all that remained was the solemnity to be gone through which was necessary to make it enforceable. We are accordingly of opinion that the attachment, such as it was in the present case, did not effect the mortgage. The result is that, in our judgment, the purchase by defendant 26, cannot prevail over the plaintiff's mortgage lien. In the view we have taken of the aforesaid matter no other question calls for our decision. But as two other questions have been argued before us on behalf of the appellants we think it right to record our views thereon.

9. One of these contentions was that the Subordinate Judge was in error in holding that defendant 29 in the matter of the purchase that he made from defendant 26 was merely a benamidar for defendant 1. We have examined the materials, bearing upon this question, in the light of the arguments addressed to us and we must say we are unable to come to any different conclusion. A careful perusal of the deposition of defendant 29 himself, apart from the other materials to which the learned Judge has referred, confirms us in the view that we take of this transaction. The scheme involved in this benami is a matter of some nicety and complication. The Subordinate Judge has gone into it in detail and with care and we are of opinion that his appreciation of it is correct. It will serve no useful purpose to repeat it here. The other contention is that the equities arising in favour of the appellants, on the footing that they were bona fide purchasers for valuable consideration from defendant 29 and without notice of defendant 1's title, have not been considered by the Court below. The Subordinate Judge appears to have disposed of this question with the remark that Section 41(or Section 43?), T.P. Act, is not applicable to the case. This remark of his, no doubt, does not adequately dispose of the question, but we do not know in what form the question was presented before him. Be that as it may, we have tried to come to a conclusion of our own on this question and we are met with the difficulty at the outset that the materials before us are, in our view, utterly insufficient to establish the fact or show such conduct on their part as would lead to the inference that they were bona fide purchasers. The only materials on the record to which they may point for a finding in their favour, so far as this matter is concerned, is the evidence of defendant 8, Ramdayal which in some material respects is in conflict with what defendant 29 has deposed, and the evidence of the witness Jabbar Ali. We have perused this evidence with care, but we are unable to hold in favour of the appellants. Apart from everything else the evidence makes it clear that no inquiry was made by the purchasers to satisfy themselves as regards their vendor's title.

10. The result is that these appeals should in our opinion be dismissed with costs to the plaintiffs-respondents and we order accordingly. One set of hearing fee will be assessed in the two appeals. The appellants will be allowed time for three months more from today for redemption on payment of the amounts mentioned in the decree of the Court below.