
(1938) 07 CAL CK 0022
In the Calcutta High Court

Ram Ratan Das Bagri and Others

APPELLANT

Vs

Mt. Sew Kumari Bibi and Others

RESPONDENT

Date of Decision : 13-07-1938

Acts Referred:

Registration Act, 1908 — Section 17

Citation : AIR 1938 Cal 823

Judgement

1. This appeal is on behalf of the plaintiffs in a suit to enforce an equitable mortgage, said to have been made by defendants 1 to 3, herein called the Mukherjis, on 19th October 1928. Defendant 4, Sew Kumari Bibi has been impleaded on the ground that as she had taken a permanent lease from the Mukherjis after the mortgage, she was entitled to redeem but that her lease was not binding on the plaintiffs mortgagees. The case of the plaintiffs is as follows : Defendants 1, 2 and 3 were partners of a firm which carried on business under the name and style of B. N. Mukherji & Co. and they had business dealings with the plaintiffs. They wanted a loan of Rs. 7500 but the plaintiffs were not willing to advance the money except on security. They agreed to give as security their immovable property being premises, formerly No. 98, now No. 7, Jaya Bibi Lane, in the town of Howrah. This was a few days before 19th October 1928 for, we have in evidence that the premises, No. 7 Jaya Bibi Lane, was inspected on behalf of the plaintiffs two or three days before the actual loan was made. The plaintiffs' further case is that on 19th October 1928, a sum of Rupees 7500 was advanced to the Mukherjis, Birendra, defendant 2, having come to the plaintiffs' gadi to receive the money. This advance was made between 12 and 1 in the day time and at that time Bisendra who had come to receive the money on behalf of himself and his two other brothers deposited the title deeds, namely three original conveyances concerning premises No. 7, Jaya Bibi Lane, that later on in the evening Biren came with a memorandum signed by himself and his two brothers, defendants 1 and 3, and delivered the said memorandum to the plaintiffs. The said memorandum has been marked as Ex. 2 and is printed at p. 27, Part II of the paper book. One of the questions raised before us, as also in

the lower Court, is whether this memorandum requires registration. We will deal with that point later on.

2. To follow up the plaintiffs' case some additional facts must be stated here. At the time of the advance of the said sum of Rs. 7500, two hundis were executed, one for Rs. 5000 in favour of the firm of Ram Kissen Das Bagri represented by plaintiffs 1, 2 and 3, and another hundi of Rs. 2500 in favour of the firm of Sew Chand Bagri represented by plaintiffs 4 to 6. The amounts mentioned in these hundis. were not repaid by the Mukherjis in cask but after maturity they were renewed. It is not necessary for us to go through the various renewals but it is sufficient for us-to state that the plaintiffs' case is that the money lent by them to the Mukherjis-on 19th October 1928 was never repaid to them by the Mukherjis, the hundis being; renewed from time to time. The last renewal was made on 14th November 1931-and at the time of each of these renewals, there was an agreement that the said mortgage created by the deposit of the title* deeds on 19th October 1928 would continue and would be subsisting till the amount originally lent on 19th October 1928 and which loan was kept up by the successive-renewal of the hundis had been paid up by the Mukherjis. Then they stated that during the continuance of their mortgage the* Mukherjis granted a permanent lease to defendant 4, on 20th September 1930, and that lease was not binding on them. In. para. 7 however of the" plaint they stated an alternative case that in any event defendant 4 had constructive notice of their mortgage and therefore she was bound by the said mortgage. It is this alternative case that has led to the framing of an issue" as to whether defendant 4 at the time of the lease had any notice of the mortgage and there is conflicting evidence on that point.

3. We will review this evidence later on in. the judgment but we can at once say that the alternative case as set out in para. 7 off the plaint; was an unnecessary case. In paras. 8 and 9 of the plaint the plaintiffs stated that the sum of Rs. 7500 for the principal on account of the loan mentioned in para. 3 of the plaint together with interest from certain dates mentioned therein, was due to them and that the cause of action arose on 14th November 1931. The date 14th November 1931 was mentioned because that was the date of the last renewal of the two hundis. Just before arguments began, the plaintiffs put in an application for amendment of para. 9 of the plaint. This application is dated 26th November 1935 and is printed at p. 80, Part 1 of the paper-book. They wanted to substitute 19th October 1928 in place of 14th November 1931 as the date of the cause of action and they wanted to introduce the word "original" just before the word "hundis." Unfortunately this application for amendment was refused by the learned Subordinate Judge. Beading the plaint as a whole, the meaning was quite clear. The plaintiffs' case was that the loan was advanced on 19th October 1928 and the security had continued. On a misapprehension the date of the cause of action was put in as 14th November 1931. The amendment was, at the most, a formal amendment and ought to have been allowed and even without that formal amendment it does not, in the least, affect the plaintiffs' case. If it

had been necessary for us to consider the question as to whether the order refusing the amendment had been a proper order or not, we would have no hesitation in saying that the learned Subordinate Judge was not right in rejecting that application for amendment. But as we have already taken the view that the amendment was only a formal one and without it the plaintiffs' case had been stated correctly in the plaint, it is not necessary for us to pursue the matter further.

4. Of the Mukherjis, only one of them, namely defendant 1, filed a written statement, but his written statement not being filed within time was not accepted, but still the written statement has been included in the paper-book, We do not see why that written statement has been included in the printed record. However, be that as it may, he never took any further part in this suit. Defendant 4 filed a written statement. She, after stating that she did not know anything about the loan said to have been advanced by the plaintiffs to the Mukherjis as mentioned in para. 3 of the plaint, stated that all those transactions between the plaintiffs and the Mukherjis were "fraudulent and collusive transactions entered into with a view to destroy her independent leasehold right." Then she stated that the memorandum, which has been marked Ex. 2 constituted the bargain between the parties and was registrable u/s 17, Registration Act; that the plaintiffs could not claim a charge upon the properties, that she was to be regarded as a bonafide purchaser for value without notice of the mortgage and on that ground her mokarari mourashi interest in the property which she had obtained from the Mukherjis was not affected by the plaintiffs' mortgage and that in any event the plaintiffs could claim "neither priority over her registered lease nor any mortgage right in the said property" on account of "their fraud or gross negligence." This is the defence which she put forward. In her written statement she did not specifically deny the facts stated in para. 4 of the plaint where the plaintiffs alleged that the original loan was kept alive by the successive renewals of the hundis and at each such renewal the mortgage created by the deposit of title deeds was kept alive by agreement.

5. The learned Subordinate Judge, by his judgment, which cannot be considered to be satisfactory in all respects, has given a money decree against the Mukherjis only. He held that the plaintiffs had not been able to prove their mortgage and that the property in the hands of the defendant 4 was not affected by the plaintiffs' claim. The learned Subordinate Judge seems to have come to a finding at one place in his judgment that the plaintiffs had not been able to prove the advance of money as loan to the Mukherjis on 19th October 1928. He says that the account books of the plaintiffs are only corroborative evidence u/s 34, Evidence Act, and they could corroborate nothing because the learned Subordinate Judge had disbelieved the plaintiffs' witness Manickchand. We will hereafter deal with the question as to whether the learned Subordinate Judge was right in disbelieving Manickchand. The learned Subordinate Judge however did not consider one very important question in the case, namely as to whether in fact the title deed had been deposited by the Mukherjis with the plaintiffs on

19th October 1928.

6. The points which have to be considered in this appeal by reason of the contentions raised by the respective parties are six in number. They are : (1) Whether Rs. 7500 was advanced by way of loan by the plaintiffs to the Mukherjis on 19th October 1928; (2) whether the memorandum Ex. 2 requires registration. If these two questions are answered against the plaintiffs, no further question would arise but if they are answered in favour of the plaintiffs the remaining four questions will have to be considered. They are: (3) Whether the mortgage created on 19th October 1928 was extinguished before the lease granted by the Mukherjis to defendant 4; (4) whether the lease granted by the Mukherjis to defendant 4 is binding on the mortgagees; (5) whether the structures on the land are included in the plaintiffs' security; and, (6) what is the amount for which the mortgage decree has to be passed.

7. (1) Two witnesses have been examined on behalf of the plaintiffs to prove the advance by way of loan of Rs. 7500 to the Mukherjis on 19th October 1928. They are Manickchand, who is a partner of the firm Sew Chand Bagri and the manager of other firm Ram Kissen Das Bagri and the second witness Ballavdas, an ex-officer of the firm of Ramkissen Das Bagri. Both these witnesses depose to the payment of Rs. 7500 to Birendra, defendant 2, between 12 and 1 o'clock on 19th October 1928. The learned Subordinate Judge considers Manickchand to be an unreliable witness simply because the plaintiffs have not produced a letter which Biren is said to have written to the plaintiffs asking for the production for inspection of the title deeds deposited with them. We fail to understand how this letter has any bearing in the case. Manickchand has been disbelieved by the Subordinate Judge on a very flimsy ground and we can not attach any importance to the estimate formed by the learned Subordinate Judge of the evidence of this witness. We see no reason to disbelieve him nor Ballavdas. In fact, Mr. Ramaprosad Mukherjee, appearing on behalf of defendant 4, has frankly conceded that he cannot say on the evidence that Rs. 7500 had not been advanced on 19th October 1928. We accordingly answer the first point in favour of the plaintiffs, that is to say, our finding is that Rs.7500 was advanced by way of loan by the aforesaid two firms of Bagris to the Mukherjis and the money was paid into the hands of Biren defendant 2, who had come to their gadi at midday. This conclusion of ours is supported, as we have said, by the evidence of Manickchand and Ballavdas, which is corroborated by the relevant entries in their account books which are printed at pages 8, 9 and 11 part 2 of the paper-book. The next question (2) is whether the memorandum Ex. 2 requires registration. The question of principle is well settled since the decision of Sir Richard Couch in *Kedar Nath Dutt v. Sham Lall Khettry* (1873) 20 WR 150. The principle there stated has been approved by the Judicial Committee, one of the cases being *Subramonian v. Lutchman* (1923) 10 AIR PC 50. After considering *Kedar Nath Dutt v. Sham Lall Khettry* (1873) 20 WR 150 and the decision of the Board in *Pranjivan Das v. Chan Ma Phee* AIR (1916) PC 115 and the observations of Lord Cairns in *Shaw v. Foster* (1872) 5 HL 321 Lord Carson makes the following

observation:

Applying the principles thus laid down to the present case what this Board has to determine is, did the document of 15th July 1908, constitute the bargain between the parties or was it merely the record of an already completed transaction?

8. In the former case the document would come within the purview of Section 17, Registration Act, and in that case the mortgage cannot be proved as Ex. 2 has not been registered; but if it was merely the record of an already completed transaction it would not be a document which would create etc., right in the immovable property and would not require registration. The equitable mortgage would be created by the fact of the loan being advanced and the deposit of the title deeds, coupled with evidence oral and circumstantial from which the Court would be entitled to draw the inference that the deposit was made with intent to create security. For the purpose of considering whether a mortgage is to be taken as embodying a bargain between the mortgagor and the mortgagee or as merely evidencing a transaction which had already been completed before the memorandum was executed or delivered, not only the terms of the document must be looked to but also the attending circumstances. In AIR 1931 36 (Privy Council) Lord Tomlin makes the following observation:

The question which falls to be determined is whether the memorandum having regard to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff is an instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest whether vested or contingent of the value of Rs. 100 and upwards to or in immovable property.

9. This passage lays down the principle that in considering the aforesaid question which we have to determine in this case not only the terms of the document have to be taken into account or as Lord Tomlin puts it, not only the meaning of the document in vacuo is to be taken into consideration but also the circumstances under which the document came into existence and passed into the hands of the plaintiffs. The circumstances under which Ex. 2 came into existence have been described in the evidence of both Manickchand and Ballavdas. Their evidence is clear. The proposal of a loan came from the Mukherjis a few days before the loan was actually advanced. As soon as the proposal was made the lenders, namely the plaintiffs, wanted security. The Mukherjis were prepared to give security and gave the particulars of the property which they intended to offer as security for the advance for which they had applied. The security was tested two or three days before the advance. The loan was made at midday on 19th October 1928 and at that time one of the Mukherjis who had come to take the money deposited the three original title deeds of this property. Later on in the evening this letter Ex. 2, which had been signed by all the three Mukherjis was brought by Birendra and handed over to the plaintiffs, and the explanation is that as at the time of payment of the money and the

deposit of title deeds all the three Mukherjis had not come to receive payment, such a letter signed by all the three was insisted on and delivered later on after the transaction had been completed by the advance of the money, the execution of the hundis and the deposit of the title deeds. This evidence is one sided, and, as we have already said we do not agree with the learned Subordinate Judge in disbelieving any of these two witnesses examined on behalf of the plaintiffs. These being the attending circumstances, we have no doubt that Ex. 2 did not require registration because the parties never intended it to be the contract between them. It did not embody, in the language of Lord Carson, "the bargain between the parties, but it was merely intended to be evidence of a transaction which had already been completed at midday of 19th October 1928.

10. We accordingly answer the second point also in favour of the plaintiffs. The conclusion therefore is that on 19th October" 1928 an equitable mortgage was made in favour of the plaintiffs to secure a loan of Rs. 7500 advanced to the Mukherjis on that date. This leads us to consider the third point in the case. (His Lordship then discussed the evidence on the point and proceeded.) We accordingly hold that the loan which was advanced on 19th October 1928 was never repaid; that the new hundis were merely renewals and that the old loan continued and with it the security. The plaintiffs moreover took the precaution * of taking memoranda in the same form as Ex. 2 as and when renewed hundis were issued. We therefore find that the mortgage which was created by the deposit of title deeds on 19th October 1928 was never extinguished and. that it subsisted at the date of the suit.

11. Regarding the fourth point our view is this : A mortgagee is not affected by any lease granted by a mortgagor after the mortgage and without the concurrence of the mortgagee unless the lease be in the usual course of management. In this case the lease which was granted by the Mukherjis to defendant 4 was not in the usual course of management. In the first place it was a permanent lease fixing the rent in perpetuity and in the second place the selami was a huge amount and the rent, the nominal sum of Rupees 15, which after payment of head rent to the Mahanta of Bhotbagan would leave the Mukherjis the profit of Rupees 3-4-0 a year for a piece of land measuring 1 bigha 8 cottas in area, in an important part of the town of Howrah, which has developed and is in the course of further development near about the mill sites and the coolie lines. So far as dealings by the mortgagors with third parties, mortgagees in whose favour a mortgage has been created by an indenture stand on the same footing as a mortgagee who has got his mortgage right by the deposit of title deeds. A mortgage created by the deposit of title deeds and a mortgage created by an indenture in India stand on the same footing. A mortgage created by the deposit of title deeds in India does not create only an equitable estate liable to be defeated or postponed, as in England, by a subsequent purchaser for value without notice. In this view of the matter, whether defendant 4 was a bona fide lessee without notice of the plaintiffs" mortgage or not is immaterial. Notice or no notice she is equally affected. Her

lease cannot prejudice the plaintiffs mortgage rights. As between her and the Mukherjis no doubt she has acquired an interest but she has only acquired an interest in the equity of redemption, which would entitle her to redeem; but in case she does not wish or fails to exercise right of redemption and if the mortgage is not redeemed by the Mukherjis at a mortgage sale, the mortgaged premises would pass to the purchaser free from her leasehold interest.

12. But as the alternative case was made in para. 7 of the plaint, the parties led evidence on the point. The plaintiffs' evidence comes to this : that the documents of title, namely the three original Bengalee bills of sale mentioned in Ex. 12 (1), p. 63, Part II of the paper-book, were deposited with the mortgagees by the Mukherjis on 19th October 1928 and they remained all along with the plaintiffs, except for two brief intervals of time. These documents have been filed by the plaintiffs with their plaint. It appears that in pursuance of a requisition from Messrs. A. P. Roy & Co., Solicitors of this Court, the mortgagees, the plaintiffs sent these documents through Messrs. Dutt & Sen to Messrs. A. P. Roy & Co., on an accountable receipt. The documents were received by Messrs. A. P. Roy & Co., from Messrs. Dutt & Sen in the middle of July 1930, and they were returned to Messrs. Dutt & Sen on 30th August 1930. On 27th August 1930, however the Mukherjis entered into an agreement for sale of the property to defendants. Eventually defendant 4 did not buy the property from the Mukherjis but took a permanent lease from them, the lease being executed on 20th September 1930. It is the case of defendant 4 that about two weeks before the agreement for sale her lawyer Babu Khagendra Nath Ganguly inspected the title deeds in respect of this property in his house and the evidence of Mr. Ganguly is that the original title deeds including the three Bengalee bills of sale were handed over to him by the Mukherjis and he inspected them in his own house and kept them there for 15 days. The evidence of Mr. Ajit Kumar Roy, a partner of the firm of Messrs. A. P. Roy & Co., however is that the documents never left his office during this period and that a pleader of Howrah inspected them in his office. In one part of his evidence he is positive that Khagen Habu inspected the documents but in his day book there is no name of the pleader. In his final answer to the Court he says that it may be a case of mistaken identity and that therefore he is not positive whether Khagen Kabu had inspected the documents in his office or not. The point whether Mr. Ganguly came to the office of Messrs. A. P. Roy & Co. or any other pleader of Howrah came is not-material; but the only material point is whether the documents alone remained in. the office of Messrs. A. P. Roy & Co. from the time they received it from Messrs,. Dutt & Sen till they had sent them back. On this point, as we have stated, there is a clear conflict of evidence of Mr. Ganguly and Mr. Ajit Kumar Roy. We have already stated that this point is not material for the case because we have already held that even when the mortgage is an equitable mortgage a lessee from the mortgagor who takes a lease which is not granted in the usual course of business is bound by the mortgage even if such lessee had no notice. That lease cannot prevail over the mortgagee's rights. If it had been necessary for us to decide the

matter we would have heard Mr. Rama Prosad Mukherji who appears on behalf of respondent 4 in reply. But the matter has not been argued fully on either side. In these circumstances it would not be proper for us to come to a definite finding on the point but we may state that the evidence on the record points to the fact that the said original documents did not leave the office of Messrs. A. P. Roy and probably Mr. Ganguly suffered from a lapse of memory when he said that he had with him for 15 days the said original documents in this instance. In this view of the evidence a case of constructive notice to defendant 4 could be supported. Regarding the fifth point, namely whether structures on the land are included in the security, the parties are not at variance. Mr. Sushil Chandra Sen, who appears on behalf of the plaintiffs has conceded that his clients have got no right over these structures which did not belong to the Mukherjis at any time. The land only is the subject-matter of equitable mortgage and his clients can only get a decree in respect of this.

13. The last point is about the amount for which the decree is to be made. Mr. Mukherji contends that from 14th November 1931 no interest can be claimed by the plaintiffs and secondly the plaintiffs have included a sum of Rs. 200 on account of interest for which they had already taken a promissory note. With regard to the last mentioned objection, we do not see any substance in it. The promissory note was a further security for interest. That amount has to be added to the mortgage claim and only the promissory note has to be cancelled and delivered up. With regard to the question as to whether interest could be claimed after 14th November 1931, Mr. Mukherji says that in the two hundis which were renewed on that date there was no stipulation for the payment of interest. The original loan carried interest at the rate of 15 per cent. per annum. The rate of interest was reduced ultimately to twelve per cent, when some of the renewed hundis were issued and there is no evidence that there was any further modification as to the rate of interest. We accordingly hold that the plaintiffs are entitled to the interest as also for the principal amount as claimed in the suit.

14. The result is that this appeal is allowed. A preliminary mortgage decree would be prepared giving to all the defendants, namely defendants 1, 2, 3 and 4, the right to redeem the properties on payment of the mortgage dues within three months of this date. The interest would be calculated at the rate of 12 per cent. per annum, simple interest, from the date of the institution of the suit till the period of grace and thereafter the whole amount to carry the usual rate of 6 per cent. In default of redemption within the said time the learned Subordinate Judge would pass a final decree for sale. The costs of this appeal would be added to the mortgage claim as also the costs of the lower Court to which the plaintiffs are entitled. Inasmuch as we have allowed the appeal the cross-objection filed by defendant 4, which was directed only with regard to the order for costs passed by the lower Court, does not arise. That is accordingly dismissed but without costs. The application moved on 12th July 1938 on behalf of the appellants is rejected.