
(1895) 02 AHC CK 0004
In the Allahabad High Court

The Himalaya Bank, Limited, in Liquidation	APPELLANT
Vs	
F.W. Quarry and Another	RESPONDENT

Date of Decision : 11-02-1895

Acts Referred:

Citation : (1895) ILR (All) 252

Hon'ble Judges : Burkitt, J; Blair, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Blair, J.—This suit was instituted in the Court of the District Judge of Saharanpur, thence transferred to the High Court by its order of 13th August 1894, and now comes before us in the exercise of our extraordinary original civil jurisdiction. Mr. Strachey and Mr. Vansittart appear for the plaintiff bank.

2. The defendant, F.W. Quarry, appears in person for himself and as vakil for his wife, the second defendant.

3. He takes the preliminary objection that the whole liquidation proceedings, including the appointment of the liquidator, are invalid, on the ground that they were taken in a Court which had no jurisdiction to entertain such proceedings. The Court in which a suit must be brought for a Company's Liquidation is thus defined by Section 130 of Act No. VI of 1882: "'Court" shall mean the principal Court having original civil jurisdiction in the place in which the principal registered office of the Company is situate."

4. The principal registered office of the plaintiff Company is at Mussooree. The same person possesses both the powers of a Subordinate Judge and those of a Small Cause Court Judge, and in both capacities holds his Court at Mussooree, in which place no higher Court possessing civil jurisdiction sits. The liquidation proceedings, it was contended, should therefore have been brought in the Court of the Subordinate Judge, and the Court of District Judge at Saharanpur had no jurisdiction. To adopt that construction of Section 130 of Act No. VI of 1882

would require us to read into that section after the words "jurisdiction in" the words "and sitting in the place, &c." No authority was cited in favour of this contention nor was it raised either in the Court below or in this Court upon the hearing of the application to transfer. It was suggested to us that the policy of the Act was to provide prompt and inexpensive means for the disposal of the numerous cases which arise in small liquidations. I am of opinion that the policy of the Act was to provide a Court of high competence to deal with matters often involving large interests and complex questions. We overruled this objection to our jurisdiction, which indeed hardly needed the elaborate refutation of Mr. Strachey, who appears for the plaintiff Company. A further objection to our jurisdiction was taken at the close of the first defendant's speech, and was taken for himself only. He claimed as an Englishman to be entitled to have his case tried by sworn Judges, and impeached the enactment of Section 13 of the Oaths Act as ultra vires of the Indian Legislature. The contention was not supported by even a decent semblance of legal argument. The inconsecutive and inconclusive observations addressed to us at great length by Mr. Quarry were in my opinion a gross abuse of the indulgence of the Court which had been extended to him in his difficult position as uniting the two characters of party and advocate. It was also a scandalous waste of public time. The objection was overruled.

5. The suit, in so far as it involves matter of contention, is a suit for the payment of Rs. 20,000 and for a declaration that a good and valid mortgage had been made of certain immovable property called Powys Cottage as a security for an overdrawn floating banking account, and, failing payment, for the enforcement of that mortgage.

6. The Rs. 20,000 is part of a larger sum, probably about Rs. 50,000,"alleged to be due the remainder of the debt being relinquished by the plaintiff Company as beyond hope of recovery.

7. The material allegations of the plaint are that in 1878 the second defendant was indebted to the plaintiff-bank with which she had a current account, and that on May 3rd in that year the first defendant, as her agent, deposited with the bank the title-deeds of Powys Cottage as a security. That in 1880 the plaintiff-bank was directed to make a joint account of the separate accounts of the two defendants, which henceforth stood in their joint names, both of them severally operating upon both sides of the account, the title-deeds of Powys Cottage remaining in the possession of the bank as security for the joint account. That on or about October 1884, the first defendant, upon his own account and on that of his wife having promised to effect a good legal mortgage of the Powys Cottage estate, took away for that purpose two of the deeds from the bank. No legal mortgage was ever executed. The defendants in 1891 refused to make the legal mortgage, and the plaintiff alleges that such failure to execute was due to the fraud of the defendants.

8. The case which was proved differs in some respects from that set up in the plaint. The allegation that the direction to make the account a joint account was

given in 1880, was obviously founded upon an entry in the bank's books in that year of Mr. Quarry's name at the corner of the ledger in addition to that of Mrs. Quarry with which that account was headed. It appears on that part of the account for the first time. The liquidator could have had no personal knowledge of the matter, and it was alleged by Mr. Strachey, and not denied by Mr. Quarry that no communication had passed in relation to this suit between the liquidator and the only person who possessed a personal knowledge of all facts in relation to the account, Mr. Moss, who had been the bank's manager through the whole period of the bank's existence. It is notorious that Mr. Moss had been confined in Naini Jail from a time prior to the commencement of this suit up to the moment of his appearance in Court as a witness for the plaintiff. Mr. Moss allegation differs from the plaint in this that he alleges the account to have been a joint account from the very commencement in August 1874, and that from that date continuously the first defendant operated upon both sides of the account. The complaint of Mr. Quarry that his defence had been prejudiced by not having his attention called by the plaint to the items anterior to 1880, seems to me to be groundless; for he had himself applied in a letter of January 9th, 1886, (Ex. X) for a pass-book relating to the earlier items, and it is not disputed that the pass book relating to the whole account had been before him, and had been to some extent examined by him. His letter of January 29th, 1886, (Ex. 66) shows that among the items of the vouchers for which he desired copies, none were of as earlier date than 1879. I understand that the vouchers for every item were in Court ready to be produced if asked for, and that Mr. Quarry had been allowed every facility for their inspection.

9. After carefully considering every case that has been cited in argument, I have come to the conclusion that there is no substance in any of the technical contentions argued for the defence. It seems to me that there can be no question whatever that the deposit of deeds as security for an overdrawn account constitutes in English law a good equitable mortgage and in Indian Law a good simple mortgage. It seems to me clear that upon grounds of common sense as well as authority it is reasonable to infer from the continuance for a long time of the deposit of title-deeds that they are intended, as between the parties, as security for a continued contemporaneous overdraft. I feel no doubt, therefore, that if the facts set forth by the plaintiff are proved, a perfectly good and efficient security was created by the deposit of these deeds in 1878, and that they remained as such security until the close of the bank.

10. The remainder of the judgment is occupied solely with the questions of fact arising in the case and is, therefore, not reported.

Burkitt, J.

11. This suit has been instituted by the Official Liquidator of the Himalaya Bank, Limited, to recover from the defendants the sum of Rs. 20,000 on the allegation that the defendants were on July 8th, 1891, in debt to the bank on their joint overdrawn banking account to an amount of more than Rs. 50,000, including

interest; but as the plaintiff-bank did not hope to be able to realise more than Rs. 20,000 from the defendants it relinquished its claim to anything more than Rs. 20,000 and asked for a decree for that sum only. The plaint further prayed for a declaration that a deposit of title-deeds alleged to have been made by the first defendant in the bank on May 3rd, 1878, is a good and valid mortgage of the Powys Cottage estate in Mussooree, and for an order that if the Rs. 20,000 be not paid the Powys Cottage estate be sold and the proceeds applied towards payment of that sum. There is also a prayer for costs and future interest on Rs. 20,000 from date of suit. The plaint finally contains a prayer that the plaintiff bank be authorised to sell or accept the surrender value in part payment of the Rs. 20,000 of a certain policy of insurance granted on the life of the first defendant in favour of his wife, the second defendant, by the Positive Government Security Life Insurance Co., Ltd., which had been assigned to the plaintiff-bank by Mrs. Quarry on October 28th, 1884. As to this last prayer I may say that the defendants admit the claim of the bank. This question need not again be referred to.

12. The suit was instituted in the Court of the Subordinate Judge of the Dehra Dun district, but, on the application of the plaintiff bank, was transferred for trial to this Court in the exercise of its extraordinary original civil jurisdiction. The plaintiff-bank was represented at the trial by Mr. Strachey and Mr. Vansittart. The defendants were not represented by counsel, but the first defendant, (who is a vakil of this Court) conducted the defence on his own behalf and also on behalf of his wife, the second defendant, from whom he held a vakalatnamah. Only two witnesses were examined, namely, F Moss, the late manager of the Himalaya Bank, and the first defendant: the second defendant was not called.

13. Stated generally--and without going into any details for the present--the case for the bank, on the evidence of the witness Moss and on the numerous exhibits filed, is that in August 1874, a floating current account was opened in the bank in Mrs. Quarry's name under instructions from the first defendant; that both defendants were to operate on that account, both of them paying in and drawing out money; that in May 1878, that account was overdrawn by nearly Rs. 6,500; and that on May 3rd, 1878, the title-deeds of the Powys Cottage estate were deposited in the bank by the first defendant as security. It is further contended that the defendants from time to time promised to execute a regular mortgage of the Powys Cottage estate to the bank, and that two of the title-deeds were in October 1884, handed back to the first defendant for the express purpose of drafting the mortgage; that despite of frequent promises and expressions of regret at the delay by the first defendant the mortgage was not executed, though the overdraft continued to increase, and that the first defendant retained possession of the two title-deeds till the bank went into liquidation, when he was ordered to restore them by the Judge of Saharanpur, in whose Court the liquidation proceedings were pending.

14. No written statement was put in by either defendant, but the Subordinate

Judge, before the suit was removed to this Court for trial, questioned the first defendant generally as to the allegations of the plaint. The first defendant in that examination traversed or declined to admit any of the material facts stated in the plaint, except as to the matter of the insurance policy which he admitted. He also, as vakil for his wife, adopted a similar line of defence. As to the sum alleged to be due from him, he asserted that, if the accounts were properly examined, it probably would be found that he was owed some Rs. 5,000 or thereabouts by the bank, for professional services, which he had not drawn.

15. Among the issues framed by the Subordinate Judge is one for which, as far as I can see, no foundation had been laid in the pleadings. It is the first issue, and is as follows: "Were the proceedings to liquidate the plaintiff-bank taken in a Court which was without jurisdiction for that purpose?" The Subordinate Judge on this issue called on the first defendant to state and support his plea to the jurisdiction of the District Judge of Saharanpur to liquidate the plaintiff-bank. His argument in this Court was that as the registered office of the Himalaya Bank, Limited, was at Mussooree in the Dehra Dun district, the Court of the Subordinate Judge of Dehra, a Court which sits in Mussooree for six months in the year and at Dehra during the remaining months, was u/s 130 of the Indian Companies Act, "the Court" in which the liquidation proceedings should have been taken, and not the Court of the District Judge of Saharanpur. On the basis of this contention it was argued that the appointment of the liquidator by the District Judge was bad and that this suit by the bank in the name of that liquidator could not be maintained. We overruled this contention, as we were of opinion that before we could accept it we should have to read the words "and sitting at" into Section 130 after the words "jurisdiction in" in the third line of that section. The "principal Court having original civil jurisdiction" in Mussooree, where the registered office of the bank was situate, is the Court of the District Judge of Saharanpur and not the Court of the Subordinate Judge of Dehra. The jurisdiction of the District Judge of Saharanpur, as such, extends over the three revenue districts of Muzaffarnagar, Saharanpur and Dehra, in the latter of which Mussooree is situate, and though the District Judge does not usually sit at Mussooree, or indeed at any place other than Saharanpur within his jurisdiction, for civil business, he is none the less throughout all the three revenue districts within his jurisdiction the "principal Court having original civil jurisdiction" in every place within those districts. This is clear from the General Clauses Act (No. I of 1868), Sections 2 and 12, the Bengal, N.W.P. and Assam Civil Courts Act (No. XII of 1887), Section 10, and Act No. XXI of 1871, Section 3, as modified by Act No. XII of 1891. The District Judge of Saharanpur is therefore "the Court," as that term is used in Part IV of the Companies Act, and the liquidation proceedings were properly taken in his Court at Saharanpur.

16. One of the most important prayers of the plaint is that a mortgage by deposit of title-deeds said to have been made to the bank in May 1878 should be declared to be a good and valid mortgage. The position taken up by the first defendant as to this is (1) that no such mortgage was in fact made, (2) that a

mortgage of the kind known to English law as an equitable mortgage by deposit of title-deeds was unknown to Indian law in the Mufassal (as distinguished from the Presidency towns) and could not be enforced. I propose first to take up and discuss the second contention. Broadly stated, the first defendant's contention is that Section 59 of the Transfer of Property Act, No. IV of 1882, did no more than codify the law as it existed when that Act was passed, and that as the first clause of that section undoubtedly now prevents the creation in the Mufassal of a mortgage by delivery of documents of title to Immovable property by a creditor with intent to create a security for one hundred rupees or upwards, it follows that such a mortgage was unknown to the law in the Mufassal previous to the coming into force of Act No. IV of 1882, and cannot be enforced by suit.

17. To that contention I am unable to accede. I am of opinion that Section 59 of the Transfer of Property Act did make a very great and important change in the law. Before that Act came into force there was no law at all resembling the Statute of Frauds in force in the Mufassal. There was no enactment which required that a transaction of the nature of a mortgage securing Rs. 100 or upwards should be in writing and registered. The law then made no provision requiring contracts, e.g., of mortgage or sale, to be in [261] any particular form. Contracts might be oral or in writing, but, if reduced to writing, the Registration Act required that in certain circumstances they should be registered. As remarked by Mr. Macpherson at the commencement of Chapter IV of his well known treatise on the Law of Mortgage in British India,--"Previous to the 1st of July 1882, when Act IV of 1882 came into force, parties might throughout India enter into a contract of mortgage in the same manner as they might make any other contract, that is to say, their agreement might be either verbal or in writing." This extract contains, I have no doubt, a correct exposition of the law as it stood before July 1882, and the defendant has failed to cite any authority to the contrary. That which a Court, bound to decide according to "justice, equity and good conscience" in the absence of any express enactment, has to look at is the intention of the parties to an agreement, and, on ascertaining that agreement, it is the duty of the Court to enforce it, if it be a lawful contract, without imposing on the parties to it a particular form which the law, as it stood when the contract was made, did not require. Their Lordships of the Privy Council in *Waghela Rajsanji v. Shekh Masludin* ILR All. 89, interpret "equity and good conscience to mean the rule of English law, if found applicable to Indian society and circumstances." Now, bearing in mind who the parties to this suit are and the strong probabilities that they intended to contract according to English law, it is difficult to imagine why the alleged contractual agreement (which is one of a nature recognised and enforced by English law) should be considered to be inapplicable to them. In *Varden Seth Sam v Lackpathy Royjee Lallah* 9 Moo. I.A. 307, at pages 324 and 325, their Lordships of the Privy Council, applying the rule of "justice, equity and good conscience" and distinguishing between the *lex loci rei sitae* (i.e., the Mufassal) and the *lex loci contractus* (i.e., the Presidency town of Madras), held that the former law did not forbid the creation of a lien by a

contract such as that sued on in the present case, (i.e., by deposit of title-deeds. The first defendant contends that the case is not in point, as the deposit was made within the Presidency town. I however regard the observations of their Lordships as a clear authority for the proposition that no law existed forbidding the creation of a mortgage lien by deposit of title-deeds in the Mufassal of the Madras Presidency. It has not been shown that the law in the N.W.P. Mufassal was different. Similarly in *Buvsee Dhur v. Heera Lall* 1869 N.W.P.H.C.R. 166 it was held by this Court that "by the deposit of deeds a security resembling a simple mortgage is created," but the Court was in that case unable to give effect to the security as the opposite party had a registered sale-deed which took effect against the oral agreement by which the security had been created and had had no notice of the lien by deposit. The first defendant, as to that case, contends it was unnecessary for the Court to decide whether a valid mortgage had been created as the registered sale-deed must have prevailed. But surely that is not so. Unless the Court had come to the conclusion that a good mortgage security had been created, it would not have been necessary, in the face of the registered sale deed, to inquire into the question of notice. And as further authority for the proposition that in the Mufassal no writing was a necessary condition precedent to the creation of a good and valid mortgage or sale before the passing of Act No. IV of 1882, and that there is no Statute of Frauds in force in this country, I would refer to the case of *Lalji v. Gobind Ram Jani* 6 Select Reports, 185, and to *Mirza Muhammad Ali v. Nawab Salat Jang* 4 Select Reports 168. On the above authorities I have come to the conclusion that up to July 1st, 1882, there was no difference between the law in the Mufassal and that prevalent in the Presidency towns as to the validity of a mortgage created by a deposit of title-deeds with a creditor with intent to secure a debt. Such a transaction is quite consistent with the principles of justice, equity and good conscience as interpreted by the Privy Council, and is not inapplicable to Indian society and circumstances. And even in the absence of authority, I would have but little, if any, difficulty in holding that such contract, if proved, was one which a Court ought to enforce, if not forbidden,, as is the case since July 1882, by statute.

18. It has been held in English cases that the possession of the title-deeds raises a *prime facie* presumption that they are held as security for an advance, so as to give the holder an equitable mortgage, and that such a mortgage can be created without even a word passing. In short an existing debt or a contemporaneous advance, plus a deposit of documents of title, is evidence of the creation of an equitable mortgage. "The intent to create such a security may be established by written documents, alone or coupled with parol evidence; by parol evidence only that the deposit was made by way of security; or by the mere inference of an agreement drawn from the very fact of the deposit." (Fisher on the Law of Mortgage, 2nd ed., p. 32). That such a security may be held to cover future advances as well as the existing debt or contemporaneous advances is shown by the case of *Ex parte Langson*, 17 Vesey Jr., 227 in which the Lord Chancellor is reported to have said: "It has been long settled that a mere deposit of title-

deeds upon an advance of money, without a word passing, gives an equitable lien, and, as the Court would infer from that deposit that the money then advanced should be charged as if there was a written agreement, there is no doubt that if it was made out by oath uncontradicted, additional advances would also be charged. It is not probable that a person having made an advance upon a security which he holds should make further advances without security." Other cases to the same effect will be found cited at p. 789 of White and Tudor's Leading Cases in Equity, in the notes to the case of Russel v. Russel the rule to be deduced from which is stated to be that "a deposit of deeds, whether it be accompanied by a memorandum or not, may, by evidence either written or parol, be held to extend to subsequent advances upon proof that the deposit was originally made as a security for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it." The same rule is also thus stated in Fisher on Mortgages, 2nd ed., p. 37,--"As to future advances an equitable mortgage may, by parol evidence, and also (as it seems to have been intimated) by inference alone arising from possession of the deeds, be extended to cover such advances."

19. The judgment then proceeded to deal with the questions of fact arising in the case, finding that the title-deeds were in fact deposited with the plaintiff-bank by way of security for a then existing debt and for future advances. The Court accordingly gave the plaintiff a decree for the sum claimed, with costs and future interest, with power to the plaintiff, in default of payment by August 11th 1895, to bring to sale the Powys Cottage estate.