

Privy Council Appeal No. 83 of 1918.
Bengal Appeal No. 39 of 1915.

Mathura Prasad, since deceased (now represented by Biswanath
Prashad and others) - - - - - *Appellants*

v.

Chandra Narayan Chowdhury and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 1ST MARCH, 1921.

Present at the Hearing :

VISCOUNT HALDANE.

VISCOUNT FINLAY.

LORD DUNEDIN.

LORD SHAW.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* VISCOUNT FINLAY.]

The action to which this appeal relates was brought to enforce a mortgage upon land. Its validity was challenged by the defendants on the ground that it has not been registered in accordance with the Indian Registration Act, 1877, and was, therefore, inoperative. A registration had been effected, but it was alleged for the defence that it was void, as no part of the property to which the mortgage related was situate within the district of the Sub-Registrar in whose office the mortgage was presented for registration.

The High Court held, reversing the District Judge, that the mortgage was invalid, on the ground that it had not been duly registered.

This appeal was brought by the representatives of the mortgagee, praying (1) that the mortgage should be put in force against the land; and (2) in the alternative, that under the head of General Relief judgment should be given against the defendants personally for payment of the amount of the debt.

There was no appearance on this appeal on behalf of the respondents, and the case was argued before their Lordships' Board *ex parte*.

In 1867 one Bhukhan Lal died intestate, leaving considerable property. He was succeeded by his daughter, Maharani Bibi, who by Hindu law had a life estate in the property. She effected alienations of various parts of the property, one of them being a sale in 1884 of a 7-annas share of a property known as Mahomedpur Boari to Nena Chowdhury. On the death of Maharani Bibi the estate of Bhukhan Lal devolved upon her son, Mathura Prashad, who brought suits challenging the validity of the alienations made by his mother. One of these suits (No. 133 of 1901) was brought against the representatives of Nena Chowdhury for the recovery of the 7-annas share of Mahomedpur Boari. In February, 1902, it was agreed that this suit should be compromised on the terms that Mathura Prashad should receive Rs. 14,000 in lieu of all claims upon the property. Rs. 6,000 were paid in cash, and the balance of Rs. 8,000 was secured by the mortgage bond now in suit. This bond was executed by Udit Narayan, the eldest son of Nena Chowdhury, as the head and managing member of the joint Hindu family of which the respondents are members. Default was made in payment of the sum secured, and this action was brought by Mathura Prashad for a mortgage decree and sale.

Two defences were set up. The first was that the mortgage was merely colourable, and was never delivered as an operative instrument. This defence entirely failed on the facts, and no more need be said about it. The second defence was that the mortgage bond is inoperative for want of proper registration.

The bond is dated the 27th February, 1902, and is executed by Udit. It recites the suit by Mathura Prashad for recovery of the 7-annas share of mouzah Mahomedpur Boari against Udit and the other members of the Chowdhury family, and the agreement of compromise for Rs. 14,000. It also recites the payment of Rs. 6,000, and that it had been agreed to take a mortgage bond for the balance, Rs. 8,000. The bond goes on to state that Udit undertakes to pay that sum with interest in the month of Bhadra 1309 Fusli, which month ends the 7th September, 1902. In security for the money, principal and interest, Udit states in the bond that he has mortgaged the properties mentioned below, the property of the joint family, "up to this time in possession of the joint family without participation and possession of others." The "properties mentioned below" are the 7-annas share in the mouzah Mahomedpur Boari in zillah Darbhanga, and one cowri share in the mouzah Kolhua in zillah Mozufferpur. The witness to the bond is Mahomed Osman, mokhtar.

The bond was registered in the Mozufferpur district, and the plaintiffs in the action attempted to justify this on the ground that the bond comprised one cowri share of mouzah Kolhua within that district. The defendants asserted that this cowri

share of the Kolhua property did not belong to the mortgagor, and that the statement in the bond that it comprised this share was, to the knowledge of both parties, a mere fiction introduced for the purpose of getting registration in the Mozufferpur district.

The mortgage on which this action is brought required registration as a registrable instrument under Section 17 of the Indian Registration Act of 1877. Section 28 of that Act requires that every registrable document "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"; and Section 49 enacts that no registrable instrument shall affect any immovable property comprised therein unless it has been registered in accordance with the provisions of the Act. Section 65 provides for the transmission of copies to the offices of other districts in which any of the mortgaged property is situate.

The 54th Section of the Transfer of Property Act of 1882 requires that a transfer on sale of tangible immovable property of a value less than Rs. 100 may be made either by a registered instrument or by delivery of the property, while if it is of the value of Rs. 100 or more the transfer must be by registered instrument.

Mahomedpur Boari, on which the mortgage was to be given, is situate in the Darbhanga district, but for motives of convenience it was desired that registration should be effected in the Mozufferpur district. In this last district the mortgagor had no property, but it was alleged in support of the registration there that before the mortgage was executed Osman (the witness to the mortgage deed, who appears to have acted for all parties in carrying out the compromise) sold to the mortgagor, Udit Narayan, a 1-cowri share in the Kolhua property of which Osman was owner. Osman's account of the transaction as given in evidence by him was as follows :—

"I sold a share of one cowri in Kolhua. A kobala was executed, but it was not registered. The price was Rs. 50. I do not remember who witnessed the execution. It was executed two or three days before the execution of the bond in suit. I do not remember if Polai Lal was present. I sold the property at the request of Udit Narayan, who wanted to register the bond in Mozufferpur in order to complete the transaction quickly, and had no property in that district. He said if there was delay in registration the compromise might fall through. He paid me Rs. 50, the price of the property. I do not know if Udit Narayan pays revenue or road cess for that share or if he has since sold it or has had his name registered. Mathura Prashad has landed property in Mozufferpur District."

Polai Lal, mentioned in this evidence, had been guardian of Mathura Prashad during his minority, and had assisted him in bringing the seven suits above mentioned.

The alleged kobala was not produced, and no foundation was laid for giving secondary evidence of its contents. No such instrument was registered, and there was no delivery of possession of the cowri share, so that neither of the conditions necessary under Section 54 to make a good transfer on sale of property under the value of Rs. 100 was fulfilled.

Their Lordships cannot accept the suggestion made on behalf of the appellants that, for the purposes of Section 54, some sort of constructive possession resulting from the delivery of the alleged instrument of transfer might be sufficient. For this purpose there must be a real delivery of the property.

Assuming such a kobala existed, if it was intended to be effective as a transfer, it would have been registered or possession would have been given. There was neither registration nor delivery. Why? Only one reason can be given. There was no intention really to acquire this cowri share in the Kolhua property. All that was wanted was the use of its name for the purposes of registration, and it was for this use that the sum of Rs. 50 was paid.

The District Judge found in favour of the plaintiffs on this point. He was clearly mistaken in saying that Udit was the owner of the cowri share. The alleged kobala was unregistered and there was no delivery, so that the property never passed. His judgment in favour of the plaintiffs, though he said the sale was "merely nominal," appears to rest on the erroneous view that the cowri interest, though a small one, passed from Osman to Udit by the kobala, and from Udit to the mortgagee.

The view which their Lordships take of the facts is that which is compendiously stated by the High Court in the judgment of Coxe, J. :—

"I agree. The circumstances of the case leave no doubt that the parties never intended that the share of Kolhua should really be sold to Udit Narayan or mortgaged to Polai Lal. The so-called sale was a mere device to evade the Registration Act."

The more detailed judgment of Sharfuddin, J., is to the same effect.

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 1-cowri share in mouzah Kolhua should vest in Udit or should pass by the mortgage from him to the mortgagee. This case differs *toto cælo* 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.

On the view of the facts taken in the High Court and by their Lordships, this case falls within the decision of this Board in the case of *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi and others* (1914, L.R. 41 I.A. 110). The following passage in the judgment delivered in that case by Lord Moulton is applicable to the facts of the present case :—

"Their Lordships hold 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."

In the *Harendra* case the property was non-existent. In the present case, though the Kollhua mouzah existed, the mortgagor had no interest in it, and the parties to the mortgage never intended that it should form part of the security. The two cases stand on the same basis for the purposes of the Registration Act.

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. If the alternative claim be not made within six months before the High Court, or be dismissed, judgment should be entered for the defendants in the action.

Their Lordships will humbly recommend to His Majesty that an order should be made in these terms.

In the Privy Council.

MATHURA PRASAD, SINCE DECEASED (NOW
REPRESENTED BY BISWANATH PRASHAD
AND OTHERS

v.

CHANDRA NARAYAN CHOWDHURY AND
OTHERS.

DELIVERED BY VISCOUNT FINLAY.

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