

M. Subramonian and another - - - - - *Appellants*

v.

M. L. R. M. Lutchman and others - - - - - *Respondents*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH DECEMBER, 1922.

Present at the Hearing :

LORD ATKINSON.

LORD SUMNER.

LORD PARMOOR.

LORD CARSON.

MR. AMEER ALI.

[*Delivered by* LORD CARSON.]

On the 15th July, 1908, the firms of Chettys owed to the original plaintiff, Mallady Sathalingum, whose executors the present appellants are, a considerable sum of money, and as security for the same deposited with him by way of equitable mortgage title deeds relating to certain properties of the defendant Seedat and which had been deposited with the said firm by the said Seedat. On the occasion of such deposit a memorandum was signed and delivered to the said plaintiff in the following terms :—

“ From M. L. R. M. A. Soliappa Chetty
and A. L. A. S. R. M. Chetty,
Rangoon.

“ To Mallady Sathalingum,
Rangoon.

dated Rangoon, the 15th July, 1908.

“ DEAR SIR,

“ We hand you herewith title deeds relating to fifth class Lot, No. 78, 79 and 80, Block E, each measuring 25 by 50 with building thereon

belonging to Saleman Ahmed Seedat, also his promissory note for rupees sixty-three thousand (Rs. 63,000) due us, this please hold as security against advances made to us : we also hand you second mortgage executed in our favour by C. Ranga Sawny Moodaliar on 1st class lot No. 6 in Block F1. On this we had advanced Rs. 32,000. Please also hold this as further security against advances made to us. We promise not to deal with same till your amount due you is fully paid and satisfied.

“ Witness :—

“ (Signed) C. E. SOLOMAN.

“ Yours faithfully,

“ (Signed) M. L. R. M. A. SOLIAPPA CHETTY.

“ A. L. A. S. R. M. ALAGAPPA CHETTY.”

This document was not registered, and the effect of such non-registration will have to be considered later. On the 17th December, 1909, the said plaintiff sent to the said firms of Chetty and the respondent Seedat notices demanding repayment of the moneys due and interest. In the year 1910 a suit was brought for the dissolution of the said Chetty firms, and on the 5th April, 1910, Ramanathan Chetty was appointed Receiver by an order of the Court in the suit in the following terms :—

“ It is ordered that M. A. R. A. R. Ramanathan Chetty be and he is hereby appointed receiver on a monthly remuneration of Rs. 300 (three hundred only) to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of the suit for dissolution of partnership, with power to collect outstandings and do all things necessary for the realisation and preservation of the assets of the said firm.”

The Receiver so appointed and the members of the Chetty firms being anxious to realise the debt due to them by Seedat, wrote to the plaintiff for the promissory note and the title deeds deposited with the plaintiff on the 15th July, 1908, in order to enable them to carry on proceedings against Seedat, and the plaintiff handed them over on condition that he received payment from the fruits of the decree. No suit, however, was brought, but Seedat gave the Chetty firms a legal mortgage dated the 26th August, 1910, over the properties included in the original equitable mortgage and also other properties which were not so included. The plaintiff agreed to this compromise upon condition that the mortgage of the 26th August, 1910, was deposited with the plaintiff and also the title deeds relating to the properties included in it as collateral security for the monies owing by the Chetty firms to the plaintiff. This deposit was carried out, and on this occasion a memorandum setting forth such deposit was signed by the Receiver, and is dated the 4th September, 1910. The present action was brought by the plaintiff as equitable mortgagee to enforce payment of the debt due to him by sale of the properties mortgaged by the said mortgage of the 26th August, 1910.

At the trial of the action before Mr. Justice Young, it was contended that the original submortgage of 1908 was void inasmuch as it was effected by an instrument in writing which was

admittedly not registered and that it was inadmissible in evidence on the same ground.

The learned Judge, however, held that it was admissible as being a record of an already completed transaction.

It was also contended that the old equitable mortgage had been surrendered and that the plaintiff was suing on a new mortgage which was *ultra vires* the Receiver, who had not obtained the leave of the Court.

The learned Judge held, however, that so far as the new legal mortgage so deposited related to the property included in the former equitable mortgage "there was not an iota of difference between the return of the title deeds and the return of them accompanied by the deposit of the legal mortgage," and he accordingly gave a decree for the usual accounts and for sale in default of payment of the properties included in the original memorandum of deposit. There was an appeal by the plaintiff to the Chief Court of Lower Burma from this judgment so far as it disallowed his claim to an equitable submortgage on the new and additional properties included in the mortgage of the 26th August, 1910; and there was also an appeal from this judgment by the first defendant in so far as it allowed the claim of the plaintiff to an equitable submortgage of the properties originally pledged.

The appellate Court on the 24th January, 1916, set aside the decree of the original Court and dismissed the plaintiffs' claim, holding that by the events which had happened the original mortgage by deposit was extinguished and no deposit of deeds by the Receiver of the Chetty firms was authorised by the order appointing him.

The Chief Judge, Sir Charles Fox, who gave the judgment of the Court, stated that it was unnecessary to deal with the vexed question as to whether the memorandum of the 15th July, 1908, required registration. From this judgment and the decrees made under it the present appeal has been brought.

It was not seriously contended before their Lordships that the Receiver had any authority under the order of the 5th April, 1910, to mortgage property of the firms, and on this point their Lordships are in agreement with the decree of the appellate Court. The plaintiffs' chief effort before this Board was directed to supporting the order of Mr. Justice Young, basing their claim upon the original submortgage of the 15th July, 1908. The respondents' counsel, on the other hand, raised the objections which had also been made at the trial of the action (1) that the original submortgage was void inasmuch as it was affected by an instrument in writing which was admittedly not registered and relied upon sections 17 and 49 of the Registration Act, 1908; and (2) that oral evidence was not admissible, as the memorandum of the 15th July, 1908, constituted the contract between the parties (S. 91, Law of Evidence, Act 1 of 1872). The appellants, however, contended that though the terms of the deposit were embodied in a written document that document was

a mere memorandum of and did not constitute the contract and therefore did not require to be registered, and that on the same ground oral evidence was admissible to prove and explain the deposit.

As already stated, the trial Judge acceded to this argument.

This Board, however, cannot agree with the view taken by the trial Judge. The law upon the subject admits of no doubt. In the case of *Kedarnath Dutt v. Shamlall Khettry*, 11 Bengal Law Reports 405, Couch, C.J., says :—

“The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within section 17 of the Registration Act.”

This Board in *Pranjivandas Mehta v. Chan Ma Phee*, L.R. 43, Ind. Appeals, 122, laid down the law as follows :—

“The law upon this subject is beyond any doubt : (1) Where titles are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security.

“In the words of Lord Cairns in the leading case of *Shaw v. Foster* (1872), L.R. 5, H.L. 321, 341, ‘although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed.’”

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

The only evidence upon this subject in their Lordships’ opinion is conclusive that the memorandum of the 15th July, 1908, constituted the bargain between the parties. The plaintiffs’ agent swore “The arrangement to deposit their title deeds was made in the presence of the eldest son of E. Solomon,” and when we turn to S. Solomon’s evidence, he says, “The document was drafted and typed in my office after they had come to an agreement. The document was drawn up at the time they came together” ; and upon cross-examination he says :

“The agreement was signed and handed over in my presence. Unless the title deeds had been handed over he would not have accepted Ex. I. (the memorandum of 15th July, 1908). The transaction was completed in my office at the same time.”

Turning to the document, itself, one is led to the same conclusion. "We hand you *herewith* title deeds, etc. . . . THIS please hold as security, etc. . . . Please also *hold this* as further security." Their Lordships have no doubt therefore that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected.

It has already been stated that the Receiver was not under the order appointing him authorised to create any mortgages of the partnership property, and therefore the claim of the plaintiff fails both in respect of the original equitable deposit and the subsequent deposit in August, 1910.

For these reasons their Lordships will humbly advise His Majesty that the appeal of the plaintiff should be dismissed with costs.

In the Privy Council.

M. SUBRAMONIAN AND ANOTHER

v.

M. L. R. M. LUTCHMAN AND OTHERS.

DELIVERED BY LORD CARSON.

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