Privy Council Appeal No. 38 *of* 1934.

Parashram Balaji Deshmukh and Another - - *Appellants*

v.

Asaram and Others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY 1936.

Present at the Hearing:

LORD THANKERTON.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* SIR SHADI LAL.]

The plaintiffs, who are the appellants before their Lordships, seek to enforce a mortgage, which was executed on the 7th April, 1914, and registered on the 8th April, 1914. The mortgaged property consisted of six items, two of which were purchased from the mortgagors by the defendants Nos. 2-4 in 1925. These defendants impeach the registration of the mortgage deed upon a ground, which as set out in paragraph 6 of their written statement, is in the following terms:—

> ". . . that the registration of the mortgage deed covering as it did the mango trees, Jambhul trees, Babul trees and all other kinds of trees situate in occupancy fields Nos. 195, 106 and 207 of Kelod, is void as being in contravention of section 46, clause (5) of the Tenancy Act, 1898. The mortgage deed is thus not duly registered and being as good as not registered, cannot operate as a mortgage."

On the issue, which was founded upon this plea, the trial Judge expressed his opinion in favour of the plaintiffs, but, on appeal by the purchasers, his judgment was reversed by the Court of the Judicial Commissioner at Nagpur, who " find it impossible to hold that the mortgage is a valid mortgage or that it was validly registered." They accordingly accepted the appeal, and dismissed the suit as against the purchasers.

The mortgagees have appealed to His Majesty in Council, and the question raised by them relates to the validity of the mortgage deed, and of its registration. The answer to the question depends upon the interpretation to be placed upon the following provisions of the Central

Provinces Tenancy Act, No. 11 of 1898. Section 46, subsection 3 enacts that—" No occupancy tenant shall be entitled to sell, make a gift of, mortgage . . . or otherwise transfer his right in his holding or in any portion thereof, and every such sale, gift, mortgage . . . or transfer shall be voidable in the manner and to the extent provided by the two next following sections."

Section 46, subsection 5, is in these terms:—

> " Notwithstanding anything contained in the Indian Registration Act, 1877, no officer empowered to register documents shall admit to registration any document which purports to transfer the right of an occupancy-tenant in his holding or in any portion thereof, unless the document recites that the transferee is a person who, if he survived the tenant, would inherit the right of occupancy, or is a person in favour of whom as co-sharer the right of occupancy originally arose or who became by succession a co-sharer therein."

The respondents maintain that, as the transfer of one of the properties was prohibited by subsection 3, the document, embodying, as it did, the mortgage of a non-transferable property, could not be validly registered.

The property in question, as described in the written statement, consists of trees standing on occupancy land, but, with regard to the land itself, the document states in clear terms that the mortgagees shall have " no concern " with it. This fact is emphasised in the concluding sentence of the description of the property.

Now, subsection 3 prohibits a transfer of a right of occupancy in land, and if the trees in an occupancy holding amount to a right of occupancy, the mortgage of those trees would, no doubt, be invalid. The deed would be inoperative, in so far as the trees are concerned, but there is no law which can be invoked to invalidate the mortgage of the remaining five properties. If the matter rested there, the mortgagees should get a decree as against the properties which could be validly transferred. It is, however, argued that when a document, which embodies invalid as well as valid transfers, is presented for registration, the Registering Officer cannot split it up into two parts, and register only that part which deals with the valid transfer. There must be either a registration of the document as a whole, or a refusal to register it in its entirety. As the registration of the whole of the document could not be effected by reason of the inclusion therein of a transfer prohibited by the statute, the only alternative open to the Registering Officer was to refuse its registration altogether.

But the deed in question has been registered, and the point for determination is whether it should be treated as an unregistered document and excluded from consideration. The language of subsection 5 shows that the Registering Officer is forbidden to register a document " which purports to transfer the right of an occupancy tenant in his holding

or in any portion thereof." Does the document, which includes only the trees and expressly excludes the land on which the trees stand, purport to transfer a right of occupancy? The Registering Officer evidently thought that *ex facie* the instrument did not transgress the law, and he did not, therefore, refuse to admit it to registration. He was not required to enter upon an inquiry as to whether a certain property sought to be transferred would, or would not, amount to an occupancy right. Such an inquiry would obviously be beyond his province. His function was to peruse the instrument and to see whether it purported to make a prohibited transfer, and, if he thought that it did not embody any such transfer, he was bound to admit it to registration.

It is to be observed that subsection 5 does not determine the question of validity or otherwise of the transaction itself. For that purpose reference must be made to subsection 3, which alone interdicts certain transfers. Subsection 5 merely shuts out the evidence, which would furnish a proof of the transfer, but does not enlarge the sphere of the prohibition. The registration or non-registration of the document does not affect the inherent character of the transfer, which is to be judged by another provision.

Their Lordships do not think that it can be held that the Registering Officer had no jurisdiction to register the document, because it included a transfer which was of a doubtful validity. They consider that, while the registration cannot be avoided, the validity of the transfer must be tested by the language of subsection 3.

Now, it is admitted that no objection can be raised to the transfer of five items of the mortgaged property, and the dispute is confined to only one item. This item, as stated, consists of certain trees, but expressly excludes the land on which those trees stand. The judgment of the Judicial Commissioner in *Narayan* v. *Mahadeo*, 23 N.L.R. 174, shows that where a mortgage deed draws a distinction between the occupancy land and the trees which stand thereon, the land being excluded from the mortgage and the trees being included therein, it was implied that the trees were held under a different title from the land and were capable of being mortgaged. Their Lordships do not find it necessary to make any pronouncement on the correctness or otherwise of this view, because the question whether the transfer of the trees comes within the prohibition does not require determination in this appeal.

The trial Judge, while holding that the property in question did not constitute a right of occupancy, considered it " undesirable that trees standing on a holding should belong to anybody except the occupier of the holding "; and he accordingly excluded it from the properties to be sold for the realisation of the debt. The plaintiffs did not appeal

against the decree which followed upon that judgment, and they cannot enforce their claim against the exempted property.

For the reasons stated above, their Lordships are of opinion that the mortgagees are entitled to the decree granted by the trial Judge. Their appeal must, therefore, be allowed, and the preliminary decree made by the Court of the first instance must be restored, with the modification that the plaintiffs do recover Rs.8,974, annas 11, found to be due to them on the 5th March, 1928, with interest thereon at 6 per cent. per annum from that date to the date of payment; and that the defendants shall pay the amount due to the plaintiffs on, or before, the 20th December, 1936. The costs incurred by the appellants both here and in India must be paid by the respondents. Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council.

PARASHRAM BALAJI DESHMUKH
AND ANOTHER

v.

ASARAM AND OTHERS

DELIVERED BY SIR SHADI LAL.

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