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Court : Chennai

Decided On : Jan-22-1930

Reported in : AIR1930Mad512; (1930)59MLJ28

Appellant : Ahmed Sait and Ors.

Respondent : The Bank of Mysore, Ltd., by Its Manager, P.W. O'Brien

Judgement :

1. This is an appeal from the judgment of our brother Kumaraswami Sastri, J., decreeing a suit by the Bank of Mysore based on a mortgage deed, dated the 6th May, 1925, for Rs. 1,00,000.

2. The plaint (paragraph 6) alleges that the defendants paid on the whole Rs. 18,672-2-0 up to 6th February, 1927, which the plaintiff Bank appropriated in a particular manner. The suit is to recover the balance. The defendants admit the allegations contained in paragraph 6 of the plaint but plead that 'on account of the relationship existing between them and at their request, the said Sir Haji Ismail Sait has paid to the plaintiff the entire amount due on the mortgages referred to in the plaint. The actual date of the payments are not known personally to these defendants but they are informed and believe the same to be true that by 3rd March, 1926 or thereabouts the payments aforesaid by Sir Haji Ismail Sait were completed'. The defendants also pleaded in the course of the trial as probalising

the above plea of discharge that Sir Haji Ismail Sait had a large sum of money amounting nearly to two lakhs belonging to them in his hands and that the payments made by Sir Haji Ismail Sait were made out of those funds. A third plea which was not raised either in the written statement or in the issues or at the trial before the Court below is that the Memorandum of Association of the plaintiff Bank prohibits the Bank from lending on mortgage, and the suit transaction is, therefore, void as being ultra vires and is not enforceable at the instance of the plaintiff.

3. The last point will be taken up first. The learned Advocate for the appellants relied on the decision in *Ashbury Railway Carriage and Iron Co. v. Riche* (1875) L.R. 7 H.L. 653 and the decision in *Sinclair v. Brougham* (1914) A.C. 398 which follows it. In the first case it was held that a transaction which was ultra vires of the company could not be enforced against it. In the latter case questions of priority arose between the outside creditors, the unadvanced shareholders and the depositors of a building society formed under the Building Societies Act of 1836, the assets being insufficient to pay off all the claimants and it was held that the depositors were not entitled to priority over other claimants as the contracts of loan were ultra vires. The question before us is not similar to the questions raised in those two cases. In *Brice on the Doctrine of Ultra Vires* it was laid down that 'property legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation, even though the corporation was not empowered to acquire such property'. Under the Indian Law a mortgage is a transfer of interest in immoveable property. The case of *Ayers v. South Australian Banking Co.* (1869) 3 P.C. 548 is given as an illustration. There the transaction was ultra vires as it was prohibited by the charter of the company. Still it was held that the company could recover and Mr. Brice observed that the reasoning applies equally to reality. Another case relied on by the learned Advocate for the respondent is *In re Coltman. Coltman v. Coltman* (1882) 19 Ch. D. 64 in which the Court of appeal reversing the judgment of Fry, J., held that all contracts which were ultra vires were not necessarily illegal. This was a case of the trustees of a friendly society. In *Turner v. The Bank of Bombay* I.L.R. (1901) B. 52 it was held by Sir Lawrence Jenkins, C.J., and Tyabji, J., confirming the judgment of Russell, J., that notwithstanding Section 37 of the Presidency Banks Act, the Bank was entitled to realise money lent on equitable mortgages. The above-mentioned

decision in the Ashbury Railway Carnage and Iron Co. v. Riche (1875) L.R. 7 H.L. 653 case was referred to by Russel, J., and the decision in Ayers v. South Australian Banking Co. (1869) 3 P.C. 548 was applied and followed by the learned Judges. For examples of the same principle The National Bank of Australia v. Cherry (1869) 3 P.C. 299 and G.E. Railway Co. v. Turner (1873) 8 Ch. 149 were also relied on. Russel, J., observes that it is unfortunate that the words 'ultra vires' should be used to describe two classes of cases, namely, those which are merely ultra vires and those which are also illegal. Following the above decisions we think that the Bank of Mysore is entitled to sue. It is unnecessary to describe what exact position the Bank occupies with reference to Sir Haji Ismail Sait on the facts of the case, that is, whether the Bank is a benamidar or a trustee or an agent of an undisclosed principal or does not occupy any of those positions.

4. I now proceed to the merits of the case of the three defendants.

5. [The learned Judge then discusses the evidence and concludes]

6. On a proper reading of the documentary and oral evidence in the case it is clear that the defendants' plea of discharge must be found against.

7. Agreeing with the Trial Judge we dismiss the appeal with taxed costs. We certify for two counsels.

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