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Court : Kolkata

Decided On : Sep-15-1876

Reported in : (1877)ILR2Cal58

Judge : Richard Garth, C.J. and ;Macpherson, J.

Appellant : Moran and ors.

Respondent : Mittu Bibee and ors.

Judgement :

Richard Garth, C.J.

1. I have felt considerable difficulty in arriving at a proper conclusion in this case.

2. The question we have to decide is not only a very serious one to both parties concerned, but it has also an important bearing upon the relations which exist in this country between the owners and managers of large factories on the one hand, and brokers and others, who are in the habit of advancing money for the carrying on of those factories, on the other.

3. His Lordship then stated the facts, and continued with reference to the objection to the stamp borne by the three letters of assignment given to the plaintiffs by Macrae:

It may, perhaps, be convenient here that I should deal with a preliminary objection which has been made by the defendants. They contend that these documents, upon which the plaintiffs' claim depends, and without which it is of course impossible for them to launch their case, are insufficiently stamped, and, consequently, not receivable in evidence. It is said by the defendants that the documents are 'mortgages of property not delivered at the time of the mortgage,' within the meaning of Clause 10 of scheduled I of the Stamp Act, XVIII of 1869.[1].

5. On the other hand, the plaintiffs contend that, if they are mortgages at all, they are not mortgages of property within the meaning of that clause, because the word 'property' as defined by the Act in Section 3, means ' property being in British India.'

Phear, J.

6. At the trial did not think it necessary to decide this point, and he reserved his judgment upon it until he had determined how he should dispose of the whole case; and, as he decided it eventually in favour of the defendants, he did not give any opinion upon the stamp objection. I have great doubt whether it was right to go into the plaintiffs' case at all, or to deal with the document in question as proved, without first deciding whether or not they were admissible under the provision of the Stamp Act; but, at any rate, I think it right to decide the point now, before stating what conclusions I have arrived at upon the merits of the case.

7. I am of opinion that the proper stamp to be affixed to documents of this description is a stamp of 8 annas.

8. The documents are, no doubt, in the nature of equitable mortgages, but it cannot be said that the property which is the subject of mortgage exist in British India; and, as an instrument must be stamped at the time it is made, the words ' being in British India' would appear to mean being in British India at the time of the making of the instrument. Thus, for instance, if a mortgage were made of property which, at the time of the execution of the deed, was in England, that mortgage would not be subject to stamp duty, although, subsequently and before it took effect, the property might be conveyed into British India See Megji Hanaraj v.

Ramji Joita 8 Bom. H.C. Rep. O.C. at p. 180. The question of stamp must depend on the state of things existing at the time when the mortgage was made; and, as in the case which I have just instanced, it was possible that the property mortgaged might never find its way to British India, so, in the case of the documents in question, it was possible that the property might never have come into existence at all. If this was not the intention of the Legislature, they should have made their meaning more clear.

9. I am, therefore, of opinion that the stamp affixed to these documents is sufficient, and that, consequently, they are admissible in evidence.

10. But then comes the main question in the case, how far they are of any force, or validity, as against the defendants' mortgage.

11. The plaintiffs, on the one hand, insist that, so far as their advances were necessary for the realization of the indigo of the season 1872-73, Mr. Macrae had authority, either expressed or implied, to pledge the indigo to them, and secure those advances. The defendants, on the other hand, say that Mr. Macrae had no such authority.

12. Undoubtedly, prima facie, the defendants' title being first in order of date, and founded upon the mortgage of the 1st of February, the terms of which are as clear as they can be, ought to prevail; but the plaintiffs put their case in this way :

13. In the first place they say, on the strength of Mr. Macrae's own statements, supported by the evidence of other witnesses, that, at the very time when the deed of the 1st of February was in course of execution, it was agreed between him and Monohur Das, who was representing the Mussamuts, that Macrae should borrow from the plaintiffs, or others, any further sums that might be required for the purpose of the concern, and that he should give the lenders the first charge upon the indigo of the season for securing those sums. Monohur Das and other witnesses for the defendants, who were present on the occasion referred to, deny that any such agreement was made; but, although Mr. Macrae's story may not be correct in all particulars--and, of course, after the lapse of several months, it is hardly probable that he should remember exactly what occurred--I have no doubt

that something was said at that time as to further advances being required, and that Monohur Das assented to the same course being pursued in that respect as had been adopted in previous years.

14. But, assuming that the conversation took place precisely as Mr. Macrae describes it, it is impossible to escape from the conviction that it was an agreement made in direct contravention and defeasance of the deed which Mr. Macrae was at that very moment executing to the Mussamuts. It was, therefore, not admissible in law, as contradicting the express terms of the mortgage (see Section 92 of the Evidence Act); and I consider that the learned Judge in the Court below was perfectly right in rejecting it for that reason.

15. The only possible way in which it occurred to me at one time that the arrangement might be rendered effectual, was to treat what passed between Mr. Macrae and Monohur Das, not as an agreement, properly so called, but as a direction given by Monohur Das, acting for the mortgagees, to Mr. Macrae, acting as the manager for all parties interested in the production of the indigo, to borrow on behalf of the Mussamuts as well as others, such further sums as he might find it necessary to raise, and upon the same terms as money had been borrowed for the same purpose in previous years.

16. But there is great difficulty in construing what actually passed on that occasion, in this way: In the first place, this construction is not in accordance with Mr. Macrae's own version of what transpired; and I feel strongly that, in a case of this nature, we ought not to assume anything inconsistent with absolute truth, which would have the effect of depriving the Mussamuts of their vested rights. And, again, we have no right to infer, in the absence of evidence, that Monohur Das had authority from the Mussamuts at that time to invest Mr. Macrae with powers directly at variance with the deed which it was his special duty to perfect. He might have been for general purposes their mooktear and man of business, but, as he was present on that occasion for the very purposes of seeing the deed executed, the contents of which had been approved by the Mussamuts, I cannot say that he had authority, in the absence of any special powers, and without communication with the Mussamuts, to give Macrae directions, the effect of which, if acted upon,

would be to defeat their rights.

17. On the other hand, I cannot look upon Mr. Macrae himself, as we are asked to do by the plaintiffs, as the agent and manager of the property on behalf of the Mussamuts. It is true that, in one sense, he was acting as manager of the factory, under the direction of the Court, for all parties concerned; but, as regards the mortgage to the Mussamuts, and the rights which they acquired under it, he was acting on behalf of the mortgagors as against the mortgagees, and he had clearly no power to invade those rights, by virtue either of his general authority derived from the Court, or of anything that passed on that occasion between him and Monohur Das.

18. Failing, then, to establish either a substantive agreement as put forward by Mr. Macrae or any directions from the Mussamuts which would justify the pledge of the indigo to the plaintiffs, the case is likened by the plaintiff's Counsel to that of a West India estate, where the consignee, or manager, who has charge of the property for the benefit of all parties concerned, has been held, in a long series of authorities, entitled to charge upon the produce of the property any expenditure or advances which he may have necessarily made for the general benefit of the concern, and to repay himself by that means before any other claims upon the estate have been satisfied. It will be found, however, that the doctrine and principle of these cases do not apply to the present. In the first place, as pointed out by Phear, J., in the Court below, the plaintiffs in this suit are not themselves in the position of consignees or managers of the property which they seek to charge; nor can they legally or equitably place themselves in the position of Mr. Macrae, and treat the advances which they have made for the purposes of the factory as advances made by Mr. Macrae himself. The truth is that both the plaintiffs and defendants have advanced their money on the self-same security. Mr. Macrae has obtained the money from both parties upon the faith of each having a first charge upon the indigo, and the question in this case, as I pointed out in the first instance, is not between Mr. Macrae, the general manager of the concern, and the concern itself, but between two conflicting sets of mortgagees, each of whom has advanced money upon the same security. The cases, therefore, of West India estates, as very fully explained by Phear, J., in the Court below, have no

application to the present.

19. I therefore now come to another, and the principal, ground of contention on behalf of the plaintiff's, as to which I confess I have felt very considerable difficulty.

20. It is urged by the plaintiff's that, however many obstacles of a technical nature may affect their right in this claim, there is no doubt of the fact that the indigo in question could not have been produced, or manufactured, without the aid of the money which the plaintiffs have advanced. They contend that this was a fact well known to Monohur Das, if not to the defendants themselves; and that Monohur Das was not only aware that the plaintiff's were making these advances, and that they were absolutely necessary for the production of the indigo, but that they were making them upon the usual terms--that is to say, that the advances were to be a first charge upon this indigo itself. It is argued, therefore, that the Mussamut defendants have for their own benefit, and in order to secure the production of the indigo in which they were deeply interested, knowingly allowed the plaintiff's to advance their money upon the faith of having a first charge upon the indigo produced; and that, having done this without making any claim adversely to the plaintiff's, or giving them any notice or information that they objected to the plaintiffs' advances, or that they themselves were entitled to the security upon which the plaintiffs were relying, they ought not inequity and good conscience to be allowed now, having had all the advantage of the plaintiff's money, to turn round and deprive them of their security.

21. The plaintiff's say that the case comes within the principle which has been acted upon in a great number of cases commencing with Pickard v. Sears 6 A. & E. 469 and which was laid down thus by Lord Chancellor Campbell in the House of Lords in Cairncross v. Lorimer 3 Macq. H.L.Ca. 829: 'The doctrine is found, I believe, in the laws of all civilized nations that, if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not lawfully have been done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act which he has so sanctioned, to the prejudice of those who have so given faith to his

words, or to the fair inference to be drawn from his conduct.'

22. If a case of this kind could be established by evidence, as clear and strong as that which has been pressed upon us in argument by the plaintiffs Counsel, I should be very much disposed to decide upon this ground in the plaintiff's favour; but I am of opinion that, in order to defeat and override an engagement as solemn and distinct as that of the mortgage to the Mussamuts, the evidence that they either themselves, or through their agents, were perfectly aware, not only that the advances were being made by the plaintiffs, but of the amount of those advances and of the terms upon which they were made, should be clear and unmistakeable.

23. With this view, I have carefully considered the evidence in the present case, and I have reluctantly come to the conclusion that it is by no means sufficient to support the plaintiffs' contention. As regards the Mussamuts themselves, there is no pretence for saying that they were personally made aware either of the necessity for the advances, or of the advances themselves, or of their amounts, or of the terms upon which they were made. On the contrary, at the time when Mr. Macrae says that he made the arrangement with Monohur Das, the Mussamut defendants were having the mortgage deed read over to them, which would certainly convey to their minds that the expenses of the year had been estimated at the sum which they themselves were advancing, viz., Rs. 1,31,325-15-0, and that, in consideration of the large amount of money which they were entrusting to the concern, they were to have a first charge upon the whole of the indigo produce. They distinctly deny that they were made aware of any advances by the plaintiffs, except the Rs. 5,000, which was borrowed for their own necessities; and there is no proof whatever, nor indeed is there any attempt to prove on the part of the plaintiffs, that these ladies were personally made aware of anything further.

24. But then it is said that Monohur Das was not only their agent for the purpose of carrying out the mortgage transaction, but that he was their karpardaz, or general man of business for all purposes, and, more particularly, the only person through whom they negotiated with Macrae; and it is also stated (which is perfectly true) that during the whole season these ladies kept two servants in constant attendance at the factory, in order to see how matters were going on there. Now, I

quite agree that it has been proved, not only by the plaintiffs' witnesses, but also by Monohur Das, and by the Mussamuts themselves, that Monohur Das did in fact act as their general man of business, and that he was cognizant, at the time when the mortgage was executed, of the intention of Macrae to borrow some further money for the purposes of the factory. He knew also that, in former years, sums had been borrowed from the plaintiffs upon the security of the indigo, though it does not appear that those sums were anything like so large as those borrowed by Mr. Macrae on this occasion; and Banwarilal himself had always personal knowledge of those loans. Moreover, I fully believe Mr. Macrae, when he says that Monohur Das afterwards proposed that the money borrowed by him from the plaintiff's should pass through the hands of the Mussamuts, in order that he (Monohur Das) should get a commission upon it; and I think it extremely likely that, if that request had been complied with, Monohur Das would have been the means of smoothing the plaintiffs' path, and of preventing this litigation. But I do not find any evidence, nor do I in fact believe, that Monohur Das was aware of the large amount of money which Mr. Macrae was borrowing, or of the actual terms upon which he was obtaining it; and he certainly was not aware of the fact that Macrae was borrowing a large sum, not only for the season 1872-73, but also for the season of 1873-74, upon the securiry of the indigo which had been mortgaged to the Mussamuts.

25. It would, undoubtedly, have been far better, and only consistent with fair and open dealing, that the Mussamuts should have been personally informed of Mr. Macrae's requirements, and that they should at least have had an opportunity either of advancing the money themselves, or of obtaining it from the plaintiffs, or other persons. They would then have known precisely what was borrowed; they might have satisfied themselves of the necessity for borrowing it; and they might also have made their own terms with the lenders.

26. Giving Mr. Macrae, as I am quite disposed to do, credit for all honesty of purpose, and for endeavouring to do the best he could for the factory, I must say that the inconsiderate manner in which he transacted these loans, without taking any steps to make the Mussamuts aware of them, argued not only a want of business-like qualities, but also of that ordinary prudence and consideration which

the manager of such a concern may fairly be expected to possess. Although he himself carried out the mortgage security with the Mussamuts, and was the only person then representing the mortgagors, he states in his evidence, that he does not know whether he ever read over the contents of the instrument, and we find him, according to his own account, making an agreement with Monohur Das, at the very time when the mortgage was entered into, directly at variance with its most important provisions. Having regard to those provisions, it was clearly his duty, as it seems to me, before he ventured to borrow further moneys on the security of the indigo produce, or to give any third person such a charge on that produce as would conflict with the Mussamuts' rights, to give those ladies distinct notice of what he was about to do, and to inform them not only of the amounts which he proposed to borrow from time to time, but of the persons from whom, and the terms upon which, he proposed to obtain them; and under no circumstances should he have undertaken to pledge the indigo produce for the requirements of the season of 1873-74.

27. Strange to say, the conduct of the plaintiff's themselves also appears remarkable for a want of business-like caution. They were perfectly aware that the indigo had been previously mortgaged; and yet, without any enquiry or any notice to the mortgagees, they advance no less a sum than Rs. 88,000 upon the faith of Mr. Macrae's statements, and the informal documents upon which they now rest their claim.

28. I should have no hesitation in finding, as a fact, that the sums advanced by the plaintiffs were, in great measure, at least bond fide required for the purposes of the factory. Mr. Macrae was not cross-examined with regard to the necessity for the advances, nor as to the items of the plaintiffs' account, nor as to the due expenditure of the sums advanced. It would certainly have been more satisfactory, if, in a case of this nature and importance, instead of being examined under a commission, he had himself appeared in Court, and produced his books, and frankly tendered himself and them for thorough investigation; but, as he was not advised to take this course, and as he was not cross-examined with regard to his expenditure, or the necessity which existed for borrowing the money, I think the defendants were not justified in suggesting that the money was either not required,

or that it was improperly expended.

29. But, when the case of the plaintiffs is put upon this ground, that they acted with proper caution in making these advances, and that the defendants, with full knowledge of all the circumstances, stood by and allowed the plaintiffs thus to advance their money upon the faith of a security which they themselves possessed, and upon which they intended to insist,--I must say that I think in that respect the case of the plaintiffs is not proved.

30. However much, therefore, I may regret the result (because I quite believe that the plaintiffs acted in perfect good faith, and that the defendants have reaped the benefits of the money which the plaintiffs have been induced to advance), I am satisfied that the conclusion which we have arrived at is the only one consistent with equity and good conscience.

31. The claim which the Mussamut defendants make to the property in question is undoubtedly well-founded in point of priority; and I think that, upon neither of the grounds contended for by the plaintiffs, can their title to it be legally displaced.

32. The appeal will, therefore, be dismissed with costs on scale No. 2.

Macpherson, J.

33. I also think that this appeal must be dismissed.

34. The matter in dispute is a simple question between two mortgagees as to which of them is to have priority. If the plaintiffs could make use of the arrangement which Macrae says was made at the time of the execution of the mortgage deed, of course they would be entitled to a decree. But they clearly can make no use of it; for, if any such arrangement or understanding then existed between the parties, it was essential that it should be embodied, or provided for, in the mortgage deed.

35. Then, again, I think it impossible to say that the plaintiffs have proved that the advances were made by them with the knowledge and acquiescence of the defendants (the Mussamuts). Nothing is proved on this issue against them

personally; and as regards Monohur Das, the evidence is vague, and not such as it might have been, had Macrae taken the commonest precautions, for there ought to have been no difficulty in bringing home to Monohur Das, at any rate, express notice and knowledge of all the details of what went on between Macrae and the plaintiff's. Even as to the bill for Rs. 5,000, which Monohur Das certainly knew was drawn against Moran and Co. there is nothing to prove that he knew the terms on which it was drawn, and there is nothing to show his knowledge of any other particular advance made by the plaintiffs.

36. The plaintiffs failing to prove knowledge and acquiescence on the part of the defendants (the Mussamuts), there is nothing, as it seems to me, in the contention that the matter can be treated as in the nature of a case of salvage. The defendants (the Mussamuts) had a first mortgage, as security for a large sum advanced for the season's manufacture, and no reference was made to them before the further advances were taken from the plaintiffs. I am wholly at a loss to comprehend on what principle of equity they, who were present on the spot, and might at any time have been appealed to, can be held liable to give priority to the plaintiffs who were strangers, brought in over their heads, without their consent, by the mortgagor's manager. I say this even on the supposition that the amount now claimed by the plaintiffs was absolutely necessary in order to enable the indigo to be manufactured, and that no indigo could have been made without it. Of course, the position would have been wholly different, had knowledge and acquiescence on the part of the defendants (the Mussamuts) been proved.

37. The plaintiffs, no doubt, had, in previous years, made similar advances, and had been allowed a first charge on the indigo; but, on this occasion, they knew that Banwarilal, the former mortgagee, had died, and that his representatives were mortgagees of the factory and the season's indigo. Knowing that there were new mortgagees, ordinary prudence ought to have suggested the necessity of procuring their assent before making the advances.

38. I agree in the opinion that only an eight-anna stamp was required for the agreement between Macrae and the plaintiffs.

39. I regret the conclusion at which we are compelled to arrive, because it is clear that the plaintiffs acted perfectly honestly throughout, and because I have very little doubt that Macrae also acted honestly, and that his story is substantially true, although it is impossible to say that it is proved to be so. The looseness of Mr. Macrae's mode of doing business is quite wonderful, and it is remarkable that the plaintiffs should have been ready to lend their money on such slender security.

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[Schedule I, Clause 10:

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Mortgage deed when Posses- Fee Payable.

sion of the property comprised

therein is not given by the The stamp-duty with which

Mortgagor at the time of exe- a Bond of the amount secured

cution. is chargeable (No. 5).]

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