

Coggan Vs. Pogose

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Court : Kolkata

Decided On : Sep-11-1884

Reported in : (1885)ILR11Cal158

Judge : Pigot, J.

Appellant : Coggan

Respondent : Pogose

Judgement :

Pigot, J.

1. The question in this matter, which I thought it worth while to consider, is, whether the equitable mortgage of 1873, as to the factum of which there is no doubt, ought or ought not to be postponed to the subsequent written and registered charge in favour of the plaintiff by reason of the charge being registered under provision of Section 48 of the Registration Act. Or whether such an equitable mortgage, constituted as this was, by deposit of title deeds, is an 'oral agreement' under Section 48.

2. That section enacts that 'all non-testamentary documents duly registered, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of

possession.'

3. I can find no authority, and none was cited before me, nor am I aware of any authority, under rulings of the Registration Act in which this section is to be found, exactly bearing on this matter.

4. In judging of it as a matter, so far as I am aware, of first impression, I have only my own opinion, and that is, that an 'oral agreement' under this section must be understood to mean, so far as the present question is concerned, an agreement merely oral; now a mortgage by deposit of title deeds may well be created without any expression of agreement in words at all; the essence of the transaction is the deposit of the deeds, on which mortgage becomes complete. No doubt as one consequence of it the mortgagee may be entitled to a registered conveyance, but that right is an incident of the transaction, and is not of the essence of it, and hence I do not think counsel's argument can govern the decision of this question, viz., that argument in which he contended that an equitable mortgage was an agreement to execute a conveyance. It is in itself a mortgage, and carries with it a right to a conveyance, but that is not the essential character of the transaction. It is a complete act and not an executory agreement. For these reasons I do not think the case comes under Section 48; the matter is of less importance having regard to the provisions of Section 58, * 59 Transfer of Property Act. From the last paragraph of the latter section it would appear that where the Act is applicable, equitable mortgages outside the towns of Calcutta, Bombay, Madras, Karachi and Rangoon are no longer valid.

5. I therefore decide the question of priority against the Banks, and hold that the claim is established in the amount claimed, and in priority to the claim of the Banks.

6. The costs will, of course, be added to the claim.

*"Mortgage," "Mortgagor" and 'Mortgagee' defined.

[Section. 58:--(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be

advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Simple mortgage.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property--

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

Usufructuary mortgage.

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the

mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

English mortgage.

(e) where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.]

?Mortgage when to be by assurance.

[Section 59 :--Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property with intent to create a security thereon.]

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