

United Bank Of India Ltd. vs Lekharam Sonaram And Co. And Ors. on 1 February, 1965

Equivalent citations: AIR 1965 SC 1591, 1965(0)BLJR480, [1965]35COMPCAS471(SC), AIR 1965 SUPREME COURT 1591

Bench: Raghubar Dayal, J.R. Mudholkar, R.S. Bachawat, V. Ramaswami

JUDGMENT

Ramaswami, J.

1. In the suit which is the subject-matter of this appeal the plaintiff alleged that on August 11, 1945, the defendants created an equitable mortgage to secure advances made by the plaintiff up to the limit of one lakh of rupees as overdraft to carry on their business. It was further alleged that the mortgage was created by the deposit of two title deeds at Calcutta on August 11, 1945, with regard to two houses and there was a letter of authority dated August 9, 1945 [exhibit 7(a)] as addressed by defendant No. 2--Lekharam--to the plaintiff authorising defendant No. 4 --Babulal Ram--to deposit the title deeds. On August 10, 1945, Sonaram--

defendant No. 3, brother of defendant No. 4--addressed a letter to the manager of the plaintiff bank authorising defendant No. 4--his younger brother--to deliver the title deed for deposit and " to negotiate further in this respect ". The letter of Sonaram is exhibit 7 (b). On August 11, 1945. Babulal Ram, defendant No. 4, wrote a letter (exhibit 12) addressed to the manager of the plaintiff-bank containing the schedule of documents said to have been deposited with the plaintiff-bank at Calcutta, namely, the title deeds of 17th September, 1927, and 13th December, 1937. The suit was contested by the defendants on the ground that the title deeds were not deposited at Calcutta with a view to create an equitable mortgage, and that, in any case, the document--exhibit 7 (a) constituted a bargain between the parties and required registration under Section 17 of the Registration Act. It was contended on behalf of the defendants that in the absence of the registration the plaintiff was not entitled to a mortgage decree.

2. The trial court considered that exhibits 7(a) and 7(b) were not merely a record of past transactions but created an equitable mortgage and, therefore, required registration under Section 17 of the Registration Act. The trial court, therefore, granted a money decree in favour of the plaintiff for the amount claimed in the plaint along with interest at 6 per cent. per annum from the date of the decree and costs. The plaintiff took the matter in appeal before the High Court which expressed the view that exhibits 7(b) and 12 were not of much consequence and exhibit 7(a) was the material document to be construed in the case and the High Court took the view that exhibit 7(a) written by Lekharam, defendant No. 2, was meant to be an integral part of the transaction and was not intended to be mere evidence for the deposit of the title deeds. The High Court accordingly held that

the plaintiff was not entitled to a mortgage decree and therefore dismissed the appeal.

3. The letter written by Lekharam--exhibit 7(a)--on August 9, 1945, reads as follows:

" I hereby authorise my son, Mr. Babulal Ram, to deposit with you on my behalf at your Calcutta office the following title deeds with a view to create an equitable mortgage on the said properties to make your advances in the a/c of Messrs. Lekharam Sonaram & Co., Giridih, better secured. I hereby further declare that I am the sole owner of the Giridih property as per schedule below and am legal joint heir with my sons dealing in the name of Messrs. Lekharam Sonaram & Co. of the Malho property as described in the schedule below. I hereby further declare that both the properties described in the schedule are free from all encumbrances and nobody else has any claim, right or title to the properties. And I hereby declare that the deposit will give you a valid legal title over my said properties as mortgagee until all the obligations of the Messrs. Lekharam Sonaram & Co. with your Giridih branch are duly satisfied. Particulars of properties.

1. Giridih property,

2. Malho Property."

4. On August 10, 1945, Sonaram, defendant No. 3, brother of defendant No. 4, addressed a letter [exhibit 7(b)] to the plaintiff-bank to the following effect:

" We hereby authorise Mr. B. L. Gupta, my younger brother, to deliver you the title deeds for depositing and to negotiate with you further in this respect. We hope, you will do the needful and oblige us.

Your Mr. Basak had been to our office and assured us to allow us an extra O/D against our mica stock, for another Rs. 40,000. We have already had the facility of a lakh for which we thank you but still, it is insufficient for the volume of our business.

We hope, you will surely extend your favour and make us one of your obliged clients.

Thanking you once more.

N. B.--Though Rs. 40,000 will not serve our purpose, we request Mr. Basak to increase it further. At this for the time being he asked us to manage with it and later on he will raise it further.

Yours faithfully, (Sd.) Lekharam Sonaram & Co.

(Sd.) Sonaram, Partner."

5. On August 11, 1945, another letter--exhibit 12--was written by Babulal Ram--defendant No. 4--to the manager of the plaintiff-bank to the following effect:

" This is to place on record that I have this day deposited with you at your head office at Clive Street, Calcutta, the undernoted documents of title relating to my properties, viz., Giridih Malho properties as described in the title deeds with intent to create an equitable mortgage upon all my rights, title and interest in the said properties to secure due repayment on demand of all moneys now owing or which shall at any time hereafter be owing from me or from M/s. Lekharam Sonaram & Co. either singly or jointly or otherwise to Bengal Central Bank Limited, whether on balance of account or by discount or otherwise in respect in any manner whatsoever and including interest with monthly rests, commissions and other banking charges and any law costs incurred in connection with the account. I do hereby put on record that the properties mentioned below are free from all encumbrances.

Yours faithfully, Babulal Ram.

Schedule of documents :

1. Hindi sale deed dated 17-9-27 from Sonaram V. Gangal Ram to Babu Hemon Ram.
2. Hindi sale deed from Mosammat Bhim Kumari to Babu Lekharam, dated 13-12-37."

6. The main question presented for determination in this case is whether the view taken by the High Court as to the legal effect of these documents --exhibits 7(a), 7(b) and 12--is correct.

7. A mortgage by deposit of title deeds is a form of mortgage recognised by Section 58(f) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) where a person " delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon." In other words, when the debtor deposits with the creditor title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under Section 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under Section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and

the transaction itself cannot be proved by oral evidence either. In the case of *Kedarnath Dutt v. Shamloll Khettry*, 11 Ben. L.R. (O.C.J.) 405 Couch C.J. stated as follows :

" 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. "

8. In a later case, in *Pranjivandas Mehta v. Chan Ma Phee*, (1916) L.R. 43 I.A. 122 the Judicial Committee observed as follows:

" The law upon this subject is beyond any doubt: (i) 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, 339, 340 ' 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 where 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 were no document, is put out of the case and reduced to silence by the document by which alone you must be governed.' "

9. In *Obla Sundarachariar v. Narayana Ayyar*, (1933) L.R. 58 I.A. 68 the plaintiff had verbally agreed at Madras to make a further advance to the defendants, making Rs. 60,000 in all, upon the deposit of certain documents of title. The defendants' agent signed and handed to the plaintiff a memorandum stating " As agreed upon in person I have delivered to you the undermentioned documents as security "--a list of the documents following, also a promissory note for Rs. 60,000. After examination of the documents the agreed amount was handed over to the plaintiff. It was held by the Judicial Committee that the memorandum was not a document which required registration, even if the agreed advance was conditional upon it being given; and that, there being no written agreement, the memorandum as well as oral evidence, was admissible in evidence to prove the intent to create a security by deposit of the documents named. The same view was expressed by this court in *Rachpal Mahraj v. Bhagwandas Daruka*, [1950] S.C.R. 548 in which it was pointed out that the question whether a memorandum of deposit of title deeds is compulsorily registrable under Section 17 of the Indian Registration Act, 1908, depends on whether the parties intended to reduce

their bargain regarding the deposit to the form of a document. If so, the document required registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, there being no express bargain, the document being merely evidential did not require registration. In that case, accounts were taken relating to the appellant's dealings with the respondents on a certain date and the appellant gave certain title deeds to the respondents for being held as security for the amounts then found due and which may become due, and on the same day the appellant gave a memorandum to the respondents in the form of a letter addressed to the respondents which stated as follows :

" We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7, Sambhu Mullick Lane, relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions ..."

10. It was held by this court that the parties did not intend to create a charge by the execution of the document, but merely to record a transaction which had already been concluded and under which rights and liabilities had already been created and the document did not require registration.

11. Applying the principle to the present case, we consider that the letter at exhibit 7(a) was not meant to be an integral part of the transaction between the parties. -The letter does not mention what was the principal amount borrowed or to be borrowed. Neither does it refer to rate of interest for the loan. It is important to notice that the letter does not mention details of title deeds which are to be deposited with the plaintiff-bank. We are, therefore, of the opinion that the view of the High Court with regard to the construction of exhibit 7(a) is erroneous and the document was not intended to be an integral part of the transaction and did not, by itself, operate to create an interest in the immovable property. It follows, therefore, that the document--exhibit 7(a)--did not require registration under Section 17 of the Indian Registration Act.

12. On behalf of the respondents it was argued in the alternative that exhibits 7(b) and 12 were integral parts of the transaction and would require registration. We are unable to accept this argument as correct. As the High Court has pointed out, the letter written by Sonaram--exhibit 7(b)--is not of much consequence, for it does not contain the material particulars of the loan and does not mention details of title deeds intended to be deposited with the plaintiff-bank. On the other hand, the letter--exhibit 7(b)--suggests that the transaction was not finally completed as Babulal Ram--defendant No. 4--was authorised in the letter " to negotiate further in this respect". As regards exhibit 12 also, it is not possible to accept the argument of the respondents that it created a charge for the reason that the language in exhibit 12 suggests that it recorded a transaction which had already been concluded and under which rights and liabilities had already been agreed upon. It is also significant that exhibit 12 is written not by Lekharam--the karta of the joint family--but by Babulal Ram. It recites that he had deposited the title deeds with an intent to create an equitable

mortgage " upon all my rights, title and interest in the said properties ". The language of exhibit 12 is identical in material respects with the language of the document construed by this court in Rachpal Mahraj v. Bhagwandas Daruka, [1950] S.C.R. 548 and is covered by the decision in that case. We accordingly reject the argument addressed by the learned counsel for the respondents on this aspect of the case.

13. For the reasons expressed we hold that the view taken by the High Court must be overruled and the plaintiff must be granted a mortgage decree for the amount of Rs. 31,000 odd, as claimed in the plaint together with interest at 6 per cent. per annum from the institution of the suit and costs. The plaintiff is accordingly granted the usual mortgage decree under Order 34, Rule 4, Civil Procedure Code, and it should be stated in the decree that if the defendants do not pay the amount within the period of six months from this date the mortgaged properties described in the schedule to the plaint would be sold for the satisfaction of the amount owing to the plaintiff.

14. We accordingly allow this appeal with costs.