

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904.
July 20.

MOTICHAND JIVRAJ GUZARATHI, OWNER AND MANAGER OF THE SHOP STYLED MANIKCHAND KHUSHALCHAND GUZARATHI (ORIGINAL PLAINTIFF), APPELLANT, v. SAGUN JETHIRAM GUZARATHI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Registration Act (III of 1877), sections 17 (b) and 47—Date of execution of deed—Date of registration—Priority—Mortgage-deed—Construction—Execution of the deed on plain paper—Subsequent registration—Complete transaction—Unpaid consideration money.

*On the 24th May, 1900, the defendant No. 1 mortgaged certain lands to plaintiff for Rs. 1,300, of which Rs. 775 were in respect of past debts and Rs. 525 were to be advanced in cash. This latter sum the defendant No. 1 did not attempt to receive. The deed was written on a plain paper bearing one anna receipt stamp, and it was attested by two witnesses. The deed itself contained a recital that the mortgagor (defendant No. 1) was, within 15 days from its date, to execute a mortgage on a stamped paper and get it registered. This he failed to do. The plaintiff thereupon presented the original deed for registration on the 30th July, 1900, and it was duly registered at a subsequent date on the payment of stamp duty and penalty. In the meantime, on the 4th June, 1900, the defendant No. 1 sold five Survey Nos. from out of the above lands to the defendant No. 2; this sale-deed was registered on the 4th July, 1900. On this latter date, the defendant No. 1 mortgaged 4 more Survey Numbers out of the same property to defendant No. 3; and the deed was registered on the same day. The plaintiff then brought this suit to recover his money by sale of the property mortgaged to him.

Held, that it was clear from the terms of the plaintiff's deed that legally the mortgage therein contained began to operate from the date of the document, that is, in other words, it was not a document which merely created a right to demand another document, but created as between the parties a charge in the nature of a mortgage.

Purmanandas Jivandas v. Dharsey Virji⁽¹⁾, followed.

Held, further, that the non-payment of Rs. 525 by the plaintiff could not affect the nature of the document itself or vary its terms: the defendant No. 1 could sue to recover the unpaid remainder or for damages.

Held, also, that the plaintiff's document, though registered later than the deeds of defendants Nos. 2 and 3, was, by virtue of its prior execution, entitled to priority over them under section 47 of the Registration Act (III of 1877).

* Second Appeal No. 215 of 1904.

(1) (1885) 10 Bom. 101.

SECOND APPEAL from the decision of C. D. Kavishwar, First Class Subordinate Judge, A. P., at Násik, amending the decree passed by P. J. Talyarkhan, Joint Subordinate Judge at Násik.

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Suit to recover money by sale of mortgaged property.

On the 24th May, 1900, the defendant No. 1 passed in favour of the plaintiff a mortgage-deed for Rs. 1,300, whereby he mortgaged his lands and houses. The deed was written on plain paper and the mortgagor's signature underneath it was taken on one anna receipt stamp. It was attested by two witnesses. The deed itself contained recitals that it was passed on a plain paper because no stamped paper could be procured that day, and that the mortgagor was, within 15 days of its date, to procure a stamped paper, pass the deed thereon and get the same registered. The deed was in these terms:—

Mortgage-deed. * - * * On this day to the person taking the mortgage-deed in writing Rajeshri Motichand and Jivraj Vani. * * * I, the person passing this mortgage-deed in writing, Ganpati valad Sakharam * * * pass this mortgage-deed in writing for a reason which is as follows:—I borrowed from you the principal sum of Rs. 1,300, viz., thirteen hundred, of the Surat currency. * * * * *

In all Rs. 1,300. In security of the same (I mortgage to you) immovable property, viz., lands and houses. * * * * *

I have mortgaged to you this day the above-mentioned lands and house and vacant lands for the amount of money mentioned above and have given the possession of the same to you. You will therefore carry on the management of the same either yourself or through somebody else whom you may choose. As to the income which may be realized the same is to be credited at first on account of the interest in respect of the said amount, and if there should remain any surplus the same is to be credited on account of the principal amount. The houses may be given to any person whom you like on rent, and rent noted in respect thereof taken from him. As to whatever may be realized in respect of rent, the same may be credited on account of the said amount. As to any breakage or pulling down and tiling and turning up of the tiles and such other things, the same will be done by me. I will not put you to trouble in regard thereto. In case you are required to do it, I will pay off the expenses which may be incurred (together) with interest at the rate of 2 per cent. per mensem, and I will myself pay the Government dues in respect of the land and the local fund cess also. In case you are required to make any payment in respect of the properties mortgaged, I will pay interest in respect of the said amount at the rate of Rs. 2 per centum per mensem. Till then the lands are to remain in your possession. I will pay in full the said amount, i.e., principal amount, together with interest, whenever you make demand for the same. In case of default of payment you may recover

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the same by effecting sale through (the intervention of) the Court. Should there be deficit, I am to pay the same personally. Should any person cause any obstruction to the said lands, houses and vacant piece of land, I am to get the same removed at my own expense. I will not allow you to be troubled for it. The particulars in respect of payment by you are as follows:—Rs. 775 which were found payable to your shop and Rs. 525, viz., five hundred and twenty-five, which were taken in all for the purpose of my marriage, assessment and making payment to the Sowcárs, making in all Rs. 1,300, the payment whereof I have received in full. There is no dispute as to the receipt of money. I ought to have on this lunar day given you in writing this mortgage-deed on stamped paper as mentioned above in a proper manner, but as a stamp could not be had at this place I have given in writing this mortgage-deed on ordinary paper. I will, therefore, within fifteen days from this day, having brought a stamped paper, give you in writing the mortgage-deed on stamped paper and get it registered. This mortgage-deed is duly given in writing in my presence of my own free will and pleasure.

Attestations—

1. Damodar Muaji Marwadi—
my signature, my own hand-
writing.
2. Ramdatt Belganmkar—my
signature, my own hand-
writing.

One anna Receipt Stamp.

1. Ganpati valad (son of)
Sakharam Muthal—my
own handwriting

Out of the consideration money of Rs. 1,300 for the above bond, Rs. 775 were on account of past debts and Rs. 525 were to be paid in cash. This Rs. 525 the defendant No. 1 (mortgagor) was to receive later on; but he subsequently changed his mind and never tried to receive it. Neither did he procure the stamped paper as stipulated in the deed, and took no steps whatever to execute the promised document and get it registered.

On the 30th July, 1900, the plaintiff presented the mortgage-deed on plain paper for registration. The registering officer received Rs. 15 as stamp and Rs. 5 as penalty on the 16th August, 1900, and endorsed on the document a note that the document was properly stamped. It was duly registered later on.

In the meantime, defendant 1, on the 4th June, 1900, sold 5 of the survey numbers included in the plaintiff's mortgage-bond to defendant 2 for Rs. 500, of which Rs. 400 were for past debt and Rs. 100 were paid in cash. This sale-deed was registered on the 4th July, 1900.

On the 4th July, 1900, defendant 1 mortgaged 4 other survey numbers, also included in the plaintiff's mortgage-bond, to defendant 3 for a past debt of Rs. 300. This deed was registered on the same day.

The plaintiff thereupon filed this suit to recover Rs. 775 and interest by sale of the mortgaged property and the deficit (if any) from the defendant 1 personally.

The Subordinate Judge passed a decree in plaintiff's favour for the amount claimed; and ordered "On default, the amount to be recovered, first by selling such of the mortgaged properties as are not transferred to defendants 2 and 3, and in case there is a deficit, then by recovering the same rateably from the properties transferred to defendants 2 and 3 on their failing to pay the same within three months from the date of its ascertainment. If even then there is a deficit, the same to be recovered from defendant 1 personally."

On appeal the First Class Subordinate Judge, A. P., held that the plaintiff's mortgage-deed was not a complete mortgage-deed on the date it was executed, but it was something more than a draft, and that it did not take effect in preference to the purchase-deed of defendant 2. He therefore amended the decree passed by the Court of first instance by rejecting the claim as against 5 survey numbers sold to defendant 2.

The plaintiff appealed to the High Court.

R. R. Desai, for the appellant.

V. V. Ranade, for respondent No. 1.

M. R. Bodas, for respondent No. 2.

CHANDAVARKAR, J. :—The lower Appellate Court has held that the plaintiff's deed was not "a complete mortgage" on the date of its execution, because, that Court observes, "the statement in the document and the plaintiff's deposition show that it was not the intention of the parties to get the document registered and use it as a mortgage-deed." But the terms of the document are clear and they cannot be varied or contradicted by any oral evidence. According to those terms, the property stood mortgaged on the day the document was executed and

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that by virtue of the document itself. Defendant No. 1 begins by saying in the document: "In security for Rs. 1,300 I mortgage to you immovable property," and then the property is described. That is a term creating an actual mortgage, not one merely agreeing to create one. That such was the intention of the parties is rendered clearer by what follows in the document after the description of the property. Defendant No. 1 there says: "I have mortgaged to you this day the above-mentioned lands and house and vacant lands for the amount of money mentioned above." It is clear from these terms of the document that legally the mortgage began to operate from the date of the document—that, in other words, it is not a document which merely created a right to demand another document, but created as between the parties a charge in the nature of a mortgage. The transfer of the property to the plaintiff was by the terms contemplated with the execution of the document itself. The lower Appellate Court has held otherwise and treated it virtually as a bargain paper on the ground that it is a term of the document that the defendant should within 15 days from the date of its execution give in writing a mortgage-deed on a stamped paper and get it registered. But, as was held by this Court in *Purmananddas Jiwandas v. Dharsey Virji*⁽¹⁾, "although such a proviso has an important bearing on the question whether an actual demise was intended, still it has been often ruled that where words of present demise have been used, the question must depend on the paramount intention of the parties: *Jones v. Reynolds*⁽²⁾ and *Chapman v. Towner*"⁽³⁾.

It is true that the plaintiff must be treated as having paid to defendant No. 1 at the date of the document only Rs. 775 out of Rs. 1,300, because Rs. 775 represented a debt then due from the defendant to the plaintiff, and that debt formed a part of the consideration for the mortgage. But the non-payment of Rs. 525 cannot affect the nature of the document itself or vary its terms. According to those terms, the defendant had a right to receive the full amount of the consideration the moment the document was executed. It was not a term of the document that the right

(1) (1885) 10 Bom. 101 at p 104.

(2) (1841) 1. Q. B. 506, 516.

(3) (1840) 6 M. & W. 104.

of the plaintiff as mortgagee should come into operation as to the whole or part of the consideration money only on payment of the whole. If a part remained unpaid, the defendant could sue to recover it or for damages; but all the same the plaintiff would be entitled from the date of the document to hold the land as security for so much as was paid then. The fault was not the plaintiff's that only a part but not the whole of the consideration money was paid. It was the first defendant who was to blame, because, as found by the lower Courts, after having executed the mortgage to the plaintiff and promised to receive the rest of the money (Rs. 525) later on while executing a mortgage on a stamped paper, he, in breach of that agreement, went and mortgaged the same property to defendant No. 2 for the same amount which the plaintiff had bound himself to advance. Under these circumstances, the plaintiff is entitled to hold the mortgage good for the sum of Rs. 775. Though the plaintiff's mortgage was registered after the 2nd defendant's, yet as it was prior in point of execution, it operated from the latter date, and the case is governed by our decision in Second Appeal No. 221 of 1904 delivered this day⁽¹⁾.

We reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with costs of both the appeals on defendants 1 and 2, except defendant No. 3's costs in this Court, which must be paid by the appellant. Defendant 3's cross-objections are rejected as no Court-fee was paid.

Decree reversed.

(1) *Ante* p. 42.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.

BACHOO HARKISONDAS (ORIGINAL PLAINTIFF), APPELLANT, v. MAN-
KOREBAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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January 25.

*Hindu Law—Adoption by widow—Authority to adopt—Joint Family—
Gift to daughter out of joint property—Limits of proprietary.*

Where the widow of a deceased coparcener in a joint Hindu family, under an authority to adopt, given to her by her husband's will, adopted a son, and, prior to such adoption, a posthumous son was born to the other coparcener,

* Suit No. 128 of 1901; Appeal No. 1244.