

CALCUTTA HIGH COURT

Baldeo Parshad Sahu

Vs

A.B. Miller

(Brett and Mitrta, JJ.)

30.03.1904

JUDGMENT

Brett and Mitrta, JJ.

1. The suit out of which this appeal arises was brought by the plaintiffs to recover the sum of Rs. 14,000, the price of certain indigo-cakes and interest thereon at 12 per cent. per annum from the 12th March 1898 to the 2nd April 1900, amounting to Rs. 3,458. The plaintiffs, Babu Baldeo Parshad Shahu and others, are the members of a firm of money-lenders in the town of Mozufferpore. Defendant No. 1 is the Official Assignee in charge of the bankrupt estate of Messrs. Moran & Co., late merchants in Calcutta. Defendants Nos. 2, 3 and 4 are members of that firm, and defendant No. 5 is Mr. Robert Wilson, the late proprietor of Jaintpoor, alias Pupri, Indigo Factory in the district of Mozufferpore.

2. In order to carry on the business of the factory Mr. Wilson borrowed at various times sums of money from Chowdhry Mahadeo Pershad, and on the 22nd September 1891 he executed two mortgages of the factory, its outworks and produce, in favour of Chowdhry Mahadeo Pershad to cover the debt then outstanding due to him, which amounts to nearly two lacs of rupees. I Afterwards Chowdhry Mahadeo Pershad sued Mr. Wilson on the, two mortgage bonds in two suits, numbered 147 and 148 of 1893, in the Court of the Subordinate Judge of Mozufferpore and obtained decrees, and on the 3rd November 1896 he assigned his interest in those two decrees over to Messrs. Moran & Co. The decrees were in accordance with the terms of the mortgage bond.

3. On the 14th March 1896, the 14th August 1896 and 9th October 1896, Mr. Robert Wilson borrowed the sums of Rs. 6,000, Rs. 3,000 and Rs. 10,000 from the present plaintiffs for the purpose of carrying on the work of the factory, and as security hypothecated under three mortgage bonds of those dates the indigo-cakes, which might be manufactured in 1895 and 1896 and in 1896 and 1897 On the 4th November 1897 Mr. Wilson is alleged by the plaintiff to have made over to their servant 96 maunds 4 seers 7 chitak of indigo-cakes, being those produced in

the season 1896-1897.

4. On the 17th November 1897, the firm of Messrs. Moran & Co. having meanwhile become bankrupt, the Official Assignee in charge of the estate applied in the Court of the Subordinate Judge of Muzaffarpur for the attachment of those indigo-cakes in execution of the two decrees against Mr. Wilson, which had been assigned to Messrs. Moran & Co. by Chowdhry Mahadeo Pershad, The cakes were attached on the 19th November 1897, and the plaintiffs then put in a claim to them, but the claim was disallowed to the 5th March 1898. That order of the Subordinate Judge, which purported to have been passed under Section 278, Civil Procedure Code, was, however, set aside by the High Court on the 18th December 1900 on an application made under Section 622, Civil Procedure Code. Meanwhile the indigo-cakes had been sold with the consent of both parties, and the sale-proceeds had been deposited in the Court of the Subordinate Judge. On the 10th March 1898 the Official Assignee was allowed by the Court to withdraw the money in satisfaction of the mortgage decrees. The present suit was instituted on the 3rd April 1900 to recover that sum with interest, as already mentioned, from the Official Assignee. The partners in the late firm of Messrs. Moran & Co. and Mr. Wilson were also made parties defendants.

5. The Official Assignee pleaded in bar that the Court of the Subordinate Judge had no jurisdiction, as the claim was against the members of the insolvent firm of Messrs. Moran & Co., and the insolvent estate had been vested in him by an order of the High Court in Calcutta in its Insolvency Jurisdiction, and that the only Court which had jurisdiction to entertain the claim was the High Court in Calcutta.

6. A separate written statement was put in on behalf of the defendants Nos. 3 and 4, in which it was pleaded that the plaintiffs had no right to the indigo-cakes in question as under the mortgage bonds executed by Mr. Wilson in favour of Chowdhry Mahadeo Pershad in September 1891 and the decrees obtained thereon in 1893, which had been assigned to Messrs. Moran & Co., the indigo-cakes from the first and second cuttings, etc., of every season belonging to the Pupri Indigo Concern, until such time as the total mortgage money with interest and costs of Court should be paid, were in express terms hypothecated by Mr. Wilson together with the factory and its out-works. The hypothecation of the cakes to the plaintiff by the deeds executed by Mr. Wilson in 1896, being subsequent to the decrees obtained on the deeds of 1891, could not take priority over the previous hypothecation. Evidence was adduced on both sides, and on the 13th June - 1901 the Subordinate Judge dismissed the suit as against defendants Nos. 1, 3 and 4, and decreed the plaintiffs' claim in full against Mr. Wilson. The plaintiffs have appealed.

7. The judgment of the Subordinate Judge is far from satisfactory, and he does not appear to have at all grasped the real points in issue between the parties.

8. He has in the first instance allowed the plea in bar of the Official Assignee on the basis of a

decision in the case of *A.B. Miller v. Budh Singh Dudhuria*¹ which has no application to the present case.

9. He has next held that, as under the Transfer of Property Act there is no provision for a mortgage or pledge of indigo-cakes to be produced at some future time, the plaintiff under the deed executed in 1896 obtained no rights as mortgagees to the cakes in suit. He seems then to have been of opinion that the transactions entered into by Mr. Wilson with Chowdhry Mahadeo Pershad as well as with the plaintiffs were of the nature of agreements, and, as Messrs. Moran & Co. had enforced the former agreements by executing the decrees and selling the cakes, that they were entitled to the sale-proceeds, and the plaintiffs could not enforce against them the claim, which was based on the agreements made in 1896 between them and Mr. Wilson. This latter conclusion arrived at by the Subordinate Judge is, we may observe, inconsistent with the oases set up by both parties.

10. In support of this appeal it has first been contended that the Subordinate Judge was in error in accepting as valid the plea in--bar set forward by the Official Assignee. The other side do not seriously attempt to support this finding, and we may say at once that in our opinion it is unsound. The plaintiffs do not come forward in this suit as Creditors of the insolvent estate. Their case is that property rightly belonging to them has been improperly seized by the Official Assignee as part of the assets of the insolvents, and they seek to recover that property or rather its value with interest. It is no part of the duty of a Court for the relief of insolvent debtors to adjudicate on such a claim, and it cannot in our opinion be justly held that the only remedy open to the plaintiffs in a case like the present is to apply to be included in the list of scheduled creditors, and so to be allowed to participate rateably with the other creditors in the distribution of the assets of the insolvent estate. In our opinion the plaintiffs sought their proper remedy in bringing a suit in the Civil Court, which alone had jurisdiction to decide as to the justness of their claim. The finding of the Subordinate Judge on this point is therefore set aside.

11. The real contest in the appeal centres, however, round the following points which have been taken on behalf of the appellants: It has been contended that the Subordinate Judge is in error in holding that there could be no mortgage or pledge of property which is to come into existence in future. No doubt in law there could be no such mortgage, and the Transfer of Property Act on that account makes no mention of it. But equity will enforce such a mortgage, and the Courts in India, which are bound to follow the principles of equity in the case of such a transaction, equally bound to enforce it. It may be observed that it is the case of both parties that such mortgages are valid in enquiry. But it is argued for the appellants that though ordinarily such mortgages are valid, the mortgage or pledge of the produce to Chowdhry Mahadeo Pershad, on which Messrs. Moran & Co. base their title, is bad in law because the terms of the agreement are too vague.

12. Secondly, it is argued that the titles of both parties being equitable, the appellants are entitled to priority, as they perfected their title by possession.

13. And, thirdly, it is contended that the appellants are entitled to priority over Messrs. Moran & Co. because the money which they lent was for the purpose of cultivating the compact of which the indigo-cakes in suit were manufactured, and therefore they held a privileged lien, which should take priority over all others, on the same principle as that on which priority is allowed to salvage liens.

14. There is ample authority, both in England and in this country, that a mortgage of property which is to come into existence in the future is a valid transaction, which Courts of Equity will enforce. The principles governing such transactions in England are set out in Principles of Equity by Ashburner, pp. 333 et seq. together with the cases in which they have been laid down and applied. It is only necessary to refer to the following passages: "Courts of Equity, however, hold that possibilities and expectations might be the subject of contract. If the contract was of a kind of which specific performance was nominally given, the Court enforced it specifically, although it related to a possibility or expectation, and if a contract related to a possibility or expectation and one of the parties had executed the consideration, the Court bound the property from the time when it vested in interest or was acquired, even though the contract was not one of which specific performance strictly so called was nominally given or could be given." The oases of *Clements v. Matthews*² and *Holroyd v. Marshall*³ are instances in which such contracts have been enforced. In India the cases of *Bansidhar v. Sant Lal*⁴ and *Misri Lal v. Mozhar Hossain*⁵ afford instances in which similar transactions have been held to be valid and have been enforced. The following remarks of Jessel, *M.R. in Collyer v. Isaacs*⁶ which are quoted in the judgment of the Allahabad Court may be referred to: "A man can contract to assign property, which is to come into existence in the future, and when it has come into existence, equity treating as done that which ought to be done fastens upon that property, and the contract to assign them becomes a complete arrangement;" see also *Holroyd v. Marshall*⁷

15. The Subordinate Judge was therefore dearly in error in holding that there could be no valid mortgages of future indigo crops and their produce, such as both parties rely on in support of their claims in this case.

16. We have next to consider whether the terms of the mortgages and of the decrees based thereon, on which the defendants Messrs. Moran & Co. relied, were so vague as to render the transaction invalid in law. The property hypothecated was the indigo-cakes manufactured every season by the Pupri Indigo Factory from the crops grown on the lands of the factory from the date of the mortgage deeds, until such time as the total mortgage money with interests and costs of Court shall be paid by the mortgagor. The vagueness in the terms on which the learned pleader for the appellant relies is that they fail to specify distinctly the number of years for which the crops were hypothecated. In our opinion this contention cannot be supported.

17. It is true in the oases which have occurred in the Courts in India the years, for which the

crops have been hypothecated, have been stated. In the case of *Clements v. Matthews (1883) L.R. 11 Q.B.D. 808(Supra)*, however the bill of sale was inter alia for the High House Farm together with all growing and other crops "which at any time thereafter should be in or about the same or any other premises," and it was held that the description in the bill of sale of the future crops on the farm was sufficiently specific to make a valid assignment of them in equity. The Master of the Rolls in his judgment remarked: "The bill of sale, however, in my opinion relates to two different sets of future crops--one of crops which should thereafter be upon this High House Farm and the other of crops, which might thereafter be anywhere. With regard to the last I think it is too indefinite, but this cannot affect the description of, the future crops on the farm, which appears to me to be sufficiently distinct and definite to identify the property meant to pass, and which therefore in equity did pass, between parties to this bill of sale." In the case of *Holroyd v. Marshall (1862) 10 H.L. 191* the mortgage deed contained a covenant to ensure certain machinery in a mill, and another covenant that all the machinery which during the continuance of the deed should be placed in the mill, in addition to or substitution for the original machinery, should be subject to the same trusts, and some of the old machinery was sold and some new was purchased and set up in the mill during the continuance of the mortgage. It was held that this conveyed a valid title all the machinery to the mortgagee, which was preferable to that of a subsequent execution creditor. In the case of *In re Clarke Coombe v. Carter (1887) L.R. 36 Ch. Div. 348(Supra)* a mortgage deed by which the mortgagor assigned to the mortgagee all his household goods and farming stock and also all moneys, of or to which he then was or might during the security become entitled under any settlement, will, etc., was held to be sufficiently definite to cover moneys, to which the mortgagor had become entitled under a will during the term of the mortgage. In his judgment in that case Cotton L.J., remarked: "That the property cannot be identified at the time when the contract is made does not signify, if it can be identified ; the time when the Court is asked to carry the contract into defect." Bowen L.J. in his judgment in the same case said: Vagueness is a misleading term. A contract may be so vague at it cannot be understood, and in that case it is of no effect at war in equity. There is another kind of vagueness which arises on the property not being ascertained at the date of the contact, hut, if at the time when the contract is sought to be enforced, the property has come in case, and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent Court of Equity from enforcing the contract."

18. The facts of the case before us are in our opinion similar to those in the English cases to which we have referred. The indigo-cakes mortgaged are described as those to be manufactured from the crops to be grown on lands of the Pupri Factory from the date, of the execution of the mortgage up to the date of its being paid off. It is not disputed that the indigo cakes in dispute were manufactured from the crops grown on the lands of the Pupri Factory in 1896 and 1897, and that the mortgage debt due to Messrs. Morun & Co. from Mr. Wilson, under the decrees which had been assigned to thorn by Chowdhry Mahadeo Pershad, had not, then been discharged. The description of the property mortgaged was in our opinion sufficient to cover those indigo-cakes, and after they had been manufactured there was no vagueness as to them

which would hinder equity from enforcing the contract. The first point in our opinion therefore fails.

19. The second contention advanced for the appellants is that, the titles of both parties being equitable, the appellants are entitled to priority, as they perfected their title by possession. Apparently-what is meant by this is that after the mortgagor had consented to the plaintiffs taking possession of the indigo-cakes, which by the deeds he purported to hypothecate to them, the legal title to the indigo-cakes became vested in the plaintiffs and so defeated any equitable title, which Messrs. Moran & Co, may have had. We are, however, of opinion that the proposition is not sound. We think that it is clear that, where, as in this case, there were mortgages to the creditor of property which was to come into existent in future, and when the creditor had already paid the consideration the property, that is to say the indigo-cakes, were bound from moment that Mr. Wilson acquired them, and from that moment became the trustee of the property for the creditor, who as cest qui trust acquired an equitable estate or interest in the property The delivery after acquisition of the cakes to the plaintiff's servant if there was in fact such a delivery, could not have destroyed the equitable interest of Messrs. Moran & Co. already existing in them, unless indeed the plaintiffs were bonafide transferees for value without notice.

20. The Subordinate Judge has held that the plaintiffs had full knowledge of the prior incumbrance existing at the time when they made their loans to Mr. Wilson and took the deeds from, him by hypothecating the indigo-cakes as security. In our opinion the facts fully support that conclusion. Mr. Wilson had evidently been in an embarrassed state financially for some time, and the decrees had been obtained by Chowdhry Mahadeo Persbad in Muzaffarpur, where the plaintiffs carry on their business. It is improbable that they would have lent money to Mr. Wilson without some inquiry as to his financial position, and the existence of the decrees obtained against him could not have been concealed from them. Moreover, the conditions imposed in the deeds executed in their favour leave little doubt that they were aware of the existence of other claims against Mr. Wilson; otherwise it appears difficult to understand the necessity for the stipulation that the indigo-cakes, as soon as they were prepared, were to be made over to their servant. We are satisfied that the plaintiffs had notice of the previous decrees and that they are not entitled to set themselves forward as bonafide transferees without notice. Even if the plaintiff had not received notice directly of the incumbrances, we think that the circumstances were such as ought to have put them on enquiry; and that, if they willfully failed to make such an enquiry, they must be held in law equally to have had notice as provided in Section 3 of the Transfer of Property Act.

21. As to the delivery of possession, at best it appears to have been normal. The indigo-cakes appear to have remained in the factory make-house in nominal possession of the plaintiff's servant. The residence of Khoob Lal, who alone deposes to the delivery of possession, is not conclusive, and we are unable to accept as valid the intention that after his evidence had been given the Subordinate Judge was in error in refusing to add a fresh issue as to possession, (sic) to

take fresh evidence from the plaintiffs to prove their possession. In our opinion the evidence fails to prove an actual delivery possession, on which the plaintiffs could rely as, giving them a full legal title to the indigo-cakes.

22. The last contention of the appellants is that they are entitled to priority over Messrs. Moran & Co., because the money which they lent was devoted to the promotion of the indigo-cakes, the value of which they claim, and it is suggested they had a privileged lien over the indigo-cakes, which should take priority on the same principles as priority is allowed to salvage liens. The fatal objection to this contention appears to lie in the fact that the lien claimed by the plaintiffs had nothing in common with a salvage lien. The case of Moran v. Mittu Bibee (1876) I.L.R. 2 Calc. 58 is also authority for the view that the loans made by the plaintiffs under the circumstances stated would not entitle them to any lien such as they claim. They themselves had no interest in the factory, when they made the loans, and the loans were not made for the purpose of protecting the factory. We have not to consider the propriety of Mr. Wilson's conduct in his transaction with the plaintiffs, but it is clear that, after he had hypothecated the produce of the factory up to the time of his paying off his debt to Chowdhry Mahadeo Pershad, he borrowed money from the plaintiffs for his own purposes to carry on the factory. The stipulation which he gave in his bonds to the plaintiffs, that he would hand over the indigo-cakes, when manufactured, in liquidation of his debt to them, was clearly intended to defeat the rights of the prior mortgage, and it appears to us far from improbable that the plaintiffs were not aware of this. Possibly as the value of indigo had not then fallen in the market they may have imagined that the prior mortgage could be paid off otherwise than by delivery of the indigo-cakes to the prior mortgage, but, even if they have been under that belief, that would not entitle them to any priorities over the prior mortgagee. "We consider therefore that the this point taken by the appellants fails.

23. The result of the above findings is that we agree with the Subordinate Judge, though for different reasons, in holding that the suit of the plaintiffs as against defendants Nos. 1, 3 and 4 may be dismissed.

24. We accordingly dismiss this appeal with costs.

Cases Referred.

- 1(1890) I.L.R. 18 Calc. 43
- 2(1883) L.R. 11 Q.B.D. 808
- 3(1862) 10 H.L. 191
- 4(1887) I.L.R. 10 All. 133
- 5(1886) I.L.R. 13 Clac. 262
- 6(1881) L.R. 19 Ch. Div. 342
- 7(1862) 10 H.L. 191