

# CALCUTTA HIGH COURT

Harendra Lal Roy Chowdhuri

Vs

Srimati Hari Dasi Debi

(Dunedin and Moulton, JJ. J Edge and A Ali, JJ.)

25.03.1914

## JUDGMENT

### **Moulton, J.**

1. In this appeal the appellant Harendra Lal Roy Chowdhuri is the plaintiff in the action which was commenced by a plaint filed on the 16th September 1905. The claim of the plaintiff was based on a mortgage decree dated 28th July 1905, granted in a civil suit in the High Court of Judicature at Fort William in Bengal, acting under its ordinary original civil jurisdiction. That mortgage decree purported to enforce an English mortgage of the 23rd September 1895 executed by the pro forma defendant Mani Mohan Roy in favour of the plaintiff of certain properties, among which was an eight anna share of lands known as Mahal Gumokpota. The object of the present suit is to obtain a declaration that the female defendant, Hari Dasi Debi acquired no right of ownership or possession in that property by virtue of an auction purchase made by her on the 23rd of November 1904. It is therefore brought to establish the title of the plaintiff to those lands as being lands charged under his mortgage and subject to the decree free from any prior right of the female defendant.

2. The transactions between the parties to the suit and the litigation arising therefrom are of the most complex character, and raise questions of considerable difficulty, both in fact and But the respondents, at the hearing of the appeal, raised a preliminary point which goes to the root of the action, namely that the plaintiff shows no title enabling him to bring such an action. They submit that the mortgage of the 23rd September 1895 was not duly registered, and further that the Court which granted the mortgage decree of the 28th July 1905 had no jurisdiction to entertain the suit in which that decree was granted. If these contentions of the respondents can be sustained, it is clear that the plaintiff's action must fail, and that the decision of the High Court dismissing this action must be affirmed.

3. The facts of the case, so far as they are relevant to this preliminary point, are as follows: On 23rd September 1895 Mani Mohan Roy purported to mortgage to the plaintiff various properties set out in a Schedule to the mortgage deed for the purpose of securing an account current of Mani Mohan Roy with the plaintiff, and freeing him from certain liabilities. The properties in question as set out in the Schedule are 28 in all, the first being the eight anna share of Mahal Gumokpota, to which the suit relates, and the last a property described as follows:-

All that two-storied brick-built messuage, tenement, or dwelling-house, with the piece or parcel of rout-froe land on part whereof the same is erected and built, containing by estimation 1/2 cottah, situate, lying, and being promises No. 25, Guru Das Street, Jorasunko, in the town of Calcutta, and butted and bounded-on the north, by a private lane of Ashutosh Dey; on the east, by the dwelling-house of Nandakumari Dasi; on the south, by the dwelling-house of Khetra Mohan Dhara; and on the west, by a government drain.

4. This last property is the only one which purports to be in the town of Calcutta. All the other properties enumerated in the Schedule are outside Calcutta and outside the local limits of the ordinary original jurisdiction of the High Court of Judicature at Fort William in Bengal.

5. This mortgage was presented for registration at the Calcutta Registry Office by the executant Mani Mohan Roy on the day of its execution and registered by the Sub-Registrar in the usual manner. In 1903 the plaintiff brought a suit on this mortgage deed against the defendant Mani Mohan Roy and others, in the High Court of Judicature at Fort William in Bengal, and on the 28th July 1905 obtained the ordinary decree for sale. Neither of the two effective defendants in the present suit were parties to such action. The parties to the suit upon the mortgage seem to have set up that there was a mistake in the description of parcel 28, and that the words Ashutosh Dey Lane should be substituted for Guru Das Street. The learned Judge accepted this contention and accordingly held that property situate in Calcutta was included in the mortgage and that he had jurisdiction. No such decision, if erroneous, could extend the jurisdiction of a Court of limited territorial jurisdiction, and therefore the validity of this decree is open to challenge by the present defendants, who were no parties to the proceedings. Similarly, the direction of the said Judge that the description of the parcel in question should be amended (even if it was effective between the parties to that suit) cannot affect the present defendants, whose title is of earlier date, or render valid the registration if they can maintain their contentions relating thereto. It is difficult, indeed, to see how the direction to amend the description of the parcel which formed part of the decree came within the scope of the suit, which was in no respect a suit for rectification.

6. The defendant Mani Mohan Roy did not appear in the present suit. The female defendant Hari Dasi Debi, and the third defendant Hem Chandra Bose (who was interested in the suit as claiming an interest in the property through her), appeared and filed written statements clearly putting in issue the existence of the property No. 28 above set forth, and alleging that no portion of the property mortgaged by the mortgage bond lay within the jurisdiction of the High Court of Judicature at Fort William in Bengal in its original jurisdiction or within the jurisdiction of the Sub-Registrar of the Calcutta Registry. Accordingly they contended that the alleged mortgage was not legally registered, and that the decree was given by a Court which had no jurisdiction to entertain a suit on the mortgage bond in question.

7. At the hearing of the action the plaintiff called no evidence with regard to the parcel No. 28. Neither the plaintiff nor Mani Mohan Roy went into the box to give evidence as to there being any mistake in the description of the parcels. On the other hand, the defendants proved there is not and has never been any such property as No. 25, Guru Das Street, in Calcutta, and they further proved that the property lying within the metes and bounds set out in parcel 28 did not belong to Mani Mohan at the date of the mortgage bond, and that on the contrary he had not then and never has had any interest in the property within those metes and bounds. Such property has

always belonged to parties wholly unconnected with the parties in this suit and has been continuously registered in their names in the Calcutta Registry.

8. It follows therefore that No. 25, Guru Das Street, which is the parcel No. 28, was a non-existing property. It was no doubt open to the plaintiff to prove that there was a clerical or other error in the description of the property, and that in fact an existing property situate in Calcutta was intended by both parties to be mortgaged and to be described in parcel No. 28. But there is not a particle of evidence that such was the case. Neither the mortgagor Mani Mohan nor the mortgagee the plaintiff Harendra Lal Roy went into the box to give evidence as to this. As to Mani Mohan their Lordships cannot see how it would have been possible for him to give any such evidence because it would amount to stating that he intended that the deed should purport to mortgage an existing property in which he had not and knew that he had not any property or interest whatever. This being so their Lordships, in the absence of evidence, decline to accept an unsupported suggestion of Counsel that the description of the property mortgaged as No. 25, Guru Das Street, was inserted by mistake. It must be remembered that the proper description of houses in towns for the purpose of registration is by the street in which they are situated, and the number which they bear in that street, so that the description No. 25, Guru Das Street, is that to which one should primarily look.

9. It may well be that the above is sufficient to preclude any rectification of the mortgage bond. If the mortgagor intended it to stand as it appears in the deed there is no question of mutual mistake. But if the case of the mortgagee be considered, there is similarly no ground whatever for thinking that there was any mistake. The only witness whose evidence as any bearing on the point is Harakumar Chakravarti. He was clerk to Messrs. Sen and Co., who were the plaintiffs attorneys at the time, and drew up the mortgage, and he witnessed its execution by Mani Mohan and the admission of that execution before the Sub-Registrar. He does not refer to the matter in his examination-in-chief, but in cross-examination he says that he did not himself enquire about the house No. 25, Raja Guru Das Street, but sent the broker to ascertain the boundaries of the house which shows that it was the above description of the house that he relied on, and that it was a house so described that was intended by the parties to be included in the mortgage. But with regard to this house he makes some very serious admissions. He says :- I do not know whether there is such a house as No. 2j, Raja Guru Das Street. I did not keep any original title deed respecting this property. I did not see any original title deed regarding 25, Raja Guru Das Street, before or after the mortgage.

10. Considering that he was acting on behalf of the mortgagee, the fact that he took no steps to ascertain whether the mortgagor had any title in this property points strongly to the knowledge of the mortgagee that the entry was a fictitious one. Coupling this with the fact that neither this witness nor the plaintiff gave any evidence as to there being any mistake or as to their knowledge and belief as to the existence of the property at the date of the mortgage (although these issues were plainly raised in the pleadings of both the defendants), their Lordships decline to accept the suggestion that there was a mistake on the part of the mortgagee any more than that there was a mistake on the part of the mortgagor. The fact that neither the mortgagee nor the mortgagor gave evidence in support of the suggestion of a mistake has great weight with their Lordships. The defendants having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in Parcel 28 was property of strangers in which the mortgagor had not and never had any interest had proved all that was necessary to

throw upon the plaintiff the burden of showing that the entry of this parcel was not a fictitious entry. He might have done this by showing mistake or otherwise, but he did not do so, but abstained from giving any evidence whatever on the subject, although both he and Mani Mohan were available to give evidence, and were the persons who could establish the facts of the case. Taking all these matters into consideration, their Lordships can come to no other conclusion than that Parcel No. 28 was, to the knowledge of the parties to the deed, a fictitious entry probably designed to give to the deed the appearance of relating to property situated in Calcutta and therefore within the jurisdiction of the Sub-Registrar and the Calcutta High Court, so that registration could be obtained and actions brought in Calcutta.

11. It was strongly contended before their Lordships that a Subordinate Judge had found that it was a mistake, and that the High Court had accepted his finding so that the principle of Moulton two concurrent findings of fact would apply.

12. But their Lordships are of opinion that the principle of concurrent findings of fact does not apply to such a case as the present inasmuch as it is a case of no evidence, and according to the well-known principles of our law a decision that there is no evidence to support a finding is a decision of law. The issue is that the existing description of the parcels was inserted by mistake. A mistake means that parties intending to do one thing have by unintentional error done something else. There is no evidence whatever here that the error was unintentional or indeed that there was any error at all, and their Lordships are therefore free to set aside the finding without in any way departing from their practice regarding concurrent findings of fact.

13. It is perhaps necessary in this connection to point out that the document upon which the Subordinate Judge based his finding of mistake was not evidence between the parties nor relevant to the issue. In some other mortgage deed of later date and to other mortgagees Mani Mohan had apparently purported to mortgage the same property by the same description, and had been compelled by the mortgagees to consent to rectification. Such a fact was wholly irrelevant, and it is extraordinary that it should have been allowed to be proved at the trial.

14. It remains to consider the effect of their Lordships' finding. It may be looked at in two ways. In the first place the property, 25, Guru Das Street, purporting to be mortgaged, is a non-existing property, and therefore no portion of the property mortgaged is situated in Calcutta. The deed, therefore, could not be registered there, nor had the Court of ordinary original jurisdiction of Fort William in Bengal any jurisdiction to entertain the suit upon the mortgage bond, and its decree is of no validity. The plaintiff therefore has no title to maintain the suit and it must be dismissed.

15. But the point may be put in another way upon broader grounds. Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item. The same considerations apply to the question of jurisdiction of the High Court of Fort William in Bengal

in its ordinary original jurisdiction. No such fictitious item inserted to give a colorable appearance of the deed relating to property in Calcutta when in reality such is not the case could bring the deed within the limited jurisdiction of the Court. For the same reasons, therefore, as have been stated above, the plaintiff's case fails.

16. Their Lordships therefore will humbly advise His Majesty that this appeal should be dismissed with costs.