

BOMBAY HIGH COURT

The Indian Cotton Company Limited

Vs.

Huri Poonjoo

O.C.J. Suit No. 1404 of 1935

(Kania, J.)

11.02.1936

JUDGMENT

Kania, J.

1. Plaintiffs are merchants dealing in cotton and also act as pucca adatiyas. Defendants are members of a joint Hindu family and carry on business in the joint family firm name of Balkrishna Poonjoo Mali. Defendants Nos. 1 to 4 are the managers of the joint family. For several years before 1933 the defendants had employed the plaintiffs as their adatiyas in respect of their dealings in cotton in Bombay. The business was on the usual terms and interest was agreed to be paid at seven and a half per cent, per annum. Defendants consigned to the plaintiffs cotton bales for sale and against the same the plaintiffs advanced money from time to time. The market price of cotton went down and the plaintiffs demanded margin from the defendants. In September, 1931, fifty bales of the defendants were lying with the plaintiffs unsold.

2. On August 31, 1931, the defendants wrote to the plaintiffs a letter in which they offered to send promissory notes and debt bonds as margin. By their reply of September 10, 1931, the plaintiffs informed the defendants that they will not be accepted and further stated as follows :-

...Therefore you will please mortgage to us for ₹ 2500 some field owned by yourself and send the deed from the same place after getting (it) " Registered " in our name. Otherwise if there be any field which has been purchased in your name you will please send the sale-deed addressed to us simply by "registered" (post). Otherwise, if you have got with you any sale-deed in favor of another person then along with the said deed you will please send a letter written by him stating that he is giving us the said deed as taran (margin money) in connection with Bala Krishna Poonju's bales....

In reply, the defendants wrote a letter dated September 15 in which they stated :-

...Your letter was received yesterday. Accordingly, as required by you, a sale-deed has been sent to you. The particulars thereof are :-

* * * * *

The said sale-deed is deposited (with you) as security on account of my fifty bales of cotton which are lying with you. The said deed is in favor of Hari Poonju Mali. But we both of us are brothers and are joint. Moreover his letter of consent is also annexed hereto. You will therefore be pleased to accept the sale-deed and you will please not cause any inconvenience to Devrao Madhavrao on account of me....

The said sale-deed has been sent by registered post. You will please send a letter acknowledging receipt thereof....

Along with this letter was sent an undated letter signed by Hari Poonju Mali in which that party stated as follows :-

...But I am giving you by way of security a sale-deed for ₹ 6,000... passed in my favor against the loss arising on account of rates going down... I have deposited the said sale-deed by way of security with you....

The sale-deed mentioned in the above correspondence was sent by registered post and is produced by the plaintiffs. The bales remained unsold, and in 1933 the market having further gone down, the plaintiffs wrote six more letters calling upon the defendants " to send security " for the deficit. On February 2, 1934, Hari Poonju Mali wrote the following letter to the plaintiffs :

...The reason for writing (this) is as follows :-Field bearing survey No. 60 is allotted to the share of Balkrishna Poonju Mali. I have no dispute whatever regarding; the same. You will therefore accept the sale-deed sent herewith as a security.

Another sale-deed was sent along with that letter. On February 16, 1934, the plaintiffs sent a reply in which they stated as follows :-...You have sent 1 (one) sale-deed. It will suffice if you send similar (sale) deeds in respect of two more fields. Please therefore send a reply at once.

In reply the defendants sent an undated letter in which they inter alia stated as follows :-

...You say that you want a sale-deed for double the amount payable by us by way of security. But you have got my two sale-deeds of the value of at least 9000...rupees this day. Notwithstanding this I do not wish to go against your wish. Therefore I have this day sent to you again a sale-deed of the value of at least 4000 rupeesYou have got in all three sale-deeds of the value of ₹ 13,000...by way of security...

The plaintiffs in reply sent a letter on March 7, 1934, stating :-

...Your letter is received and the contents are noted. Similarly a sale-deed in respect of S. No. 214 (land) measuring A. 9-7G. sent therewith on account of taran (margin money) is received....

The plaintiffs thereafter sold the bales and claimed a deficit of ₹ 2,632-13-11 from the defendants by their letter of October 6, 1934. At the request of the plaintiffs the defendants also confirmed that they were indebted to the plaintiffs for ₹ 2,632-13-11.

3. The defendants at first contended that they were agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act and the Court had no jurisdiction to try the suit. The plaintiffs, thereupon, elected not to claim a personal decree against the defendants and proceeded with their suit only as a mortgage suit. The only point in dispute which therefore remained to be decided was whether there was a valid equitable mortgage created in favor of the plaintiffs by the defendants sending the title-deeds as mentioned above. On behalf of the defendants it is urged that, having regard to the wording of Section 58, Clause (f), of the Transfer of Property Act, it is necessary that the person making the deposit of title-deeds should be in Bombay and it is not permitted to send the title-deeds by post. The clause was inserted, in Section 58, by Act XX of 1929. Before that amendment, the relevant portion of Section 59 ran as follows :-

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 of Immovable property, with intent to create a security thereon.

Clause (f) of Section 58, at present, runs as follows :-

Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab... delivers to a creditor or his agent documents of title to Immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

The contention is obviously raised because of the comma after the word towns and because in the present clause the words " in any of the following towns " are put immediately after the word " person " and before the verb " delivers ", Relying on the terms of this clause it is urged that the word " person " must go with " towns " and therefore the person should be " in the towns " when the documents are delivered. It is urged that there is no hardship in interpreting the clause in this manner, because it has always been contemplated that this particular kind of mortgage could be created within the Presidency-towns and the towns mentioned in this clause, and nowhere else; for that purpose it is essential that the party delivering the title-deeds should be in Bombay. It is pointed out that the existence of the comma after the word " towns " clearly indicates that the towns mentioned in this clause do not go with the verb " delivers " but with the noun "

person ". In support of the contention that punctuation should be relied upon my attention has been drawn, to *Taylor v. Bleach*¹ and *Isap Ahmed v. Abhramji Ahmadji*²

4. In my opinion this contention of the defendants is incorrect. In considering the plain words of a section punctuation could not be relied upon. That was held so far back as 1887 in *Maharani of Burdwan v. Murtunjoy Singh*³ That decision was attempted to be explained away in *Taylor v. Bleach*, but that position was

¹(1914) 17 Bom. L.R. 56

³(1886) L.R. 14 IndAp 30

² I.L.R. (1917) Bom. 588 : 19 Bom. L.R. 579

not accepted in *Borgonha v. Borgonha*⁴, and has been definitely negated by the Privy Council in *Pugh v. Ashutosh Sen*⁵ I do not think the section has introduced any change in the law as to the rights of the parties. Under the old section it was necessary that the deposit should be made in Bombay and that could be done through an agent also. Under the present, provision also, in my opinion, it is not necessary that the debtor giving the security should be in Bombay personally. As I read the section it means that the person should deposit the title-deeds in Bombay to a creditor. I realise that it would have been perhaps better if the legislature had put the word " delivers " immediately after the word " person " in Clause (f), instead of putting. it after the various towns mentioned therein. Even taking the sequence as it is, I am unable to hold that the various towns cannot be read properly as going with "delivers" and must be read in connection with "person" only in the section. Under the circumstances the proper construction of the clause is that the debtor should deliver, in any of the towns mentioned in the clause, to a creditor or his agent, the documents of title to Immovable property with intent to create a security thereon. The question, therefore, must resolve itself into a question of fact, whether on the evidence it was established that the title-deeds were delivered in Bombay.

5. In this connection on behalf of the defendants it is urged that they were: not in Bombay and had sent the title-deeds, at the request of the plaintiffs, by post. In the present case therefore the plaintiffs had constituted the post office their agent, expressly or impliedly, for the purpose of receiving the title-deeds, from the defendants, and when the title-deeds were despatched by the defendants from their native place, with the required intention, the transaction was complete and the validity thereof is to be determined on that, footing. It is pointed out that under Section 58, Clause (f), it was not necessary to have an agreement preceding the mortgage by deposit of title-deeds. Even if the facts were considered from the point of view of an agreement, it is pointed out that having: regard to Section 7 of the Indian Contract Act, the plaintiffs had prescribed the manner in which the proposal was to be accepted, and the defendants having accepted it in that manner, the transaction was complete when the letters were posted. It is urged that if the plaintiffs had sent their representative and received the title-deeds at the defendants' native place the transaction would have been completed immediately the defendants handed over the title-deeds to the plaintiffs' representative. In the same way the post office, being the plaintiffs' agent for the purpose, the transaction was similarly completed when the title-deeds were posted. On behalf of the plaintiffs, on the other hand, it is urged, that there must be an agreement preceding the deposit of title-deeds and Sections 4 and 5 of the Indian Contract Act would apply. It is contended that in

whatever way the correspondence is looked at the transaction would not be complete, as against the defendants, till the documents were actually received by the plaintiffs at Bombay. It is pointed out that even if after the title-deeds were sent, if the defendants sent a telegram to the plaintiffs, before the title-deeds were received in Bombay, intimating that the title-deeds were not to be taken as security there would be no equitable mortgage. It is further pointed out that under the Indian Posts and Telegraph Act, VI of 1898, the defendants could have got back the documents after they had posted the same without the consent of the plaintiffs if they were so minded. It is, therefore, urged that the post office could not be considered the plaintiffs' agent in India.

⁴(1920) 22 BOM LR 361

⁵(1928) 31 Bom. L.R. 702

6. It, therefore, remains to be determined, on the evidence, whether the title-deeds were deposited in Bombay. While realizing that in some peculiar circumstances there may be no separate agreement to deposit the title-deeds, I think the agreement must ordinarily precede the actual transfer of interest in Immovable property, as denned by the term " mortgage " in the Transfer of Property Act. Section 58, Clause (f), requires that the deposit should be with the intention to create a security and that intention must be conveyed to the creditor and the title-deeds accepted by him on that footing. Therefore, there must be an offer to deposit the title-deeds with the necessary intention and acceptance of that offer theoretically, before the title-deeds actually pass from the possession of one to the other. It may be that in certain cases, the two acts being together, it may be difficult to exactly point out the moment the agreement took place, before the title-deeds were handed over, as the agreement may be completed By the act of handing over the title-deeds by one and receiving them by the other.

7. The defendants strongly rely on the decision in *Thorappa V. Umedmalji* for their contention that the delivery of the title-deeds was to a specially appointed agent and also that the post office was the agent of the plaintiffs for receiving the title-deeds. That decision was in respect of a hundi sent by post which was lost in transit. The hundi had been endorsed and it was contended that it was sent under the instructions of the other side by post. The material dispute between the parties was whether after the endorsement the hundi was delivered to the endorsee so as to pass the title in the hundi. Mulla J. held that to complete a transfer of the property in the hundi it must be established that there was an authority, express or implied, from the party conveyed to the sender, to send the hundi by post. If that was proved there would be delivery of the hundi to the authorised agent and the property passed. It was pointed out that under the regulations of the Indian Post Office a letter once posted cannot be reclaimed except under special circumstances. The decisions in *Ex parte Cole* : *In re Deveze*⁶, *Thairwal v. Great Northern Railway*⁷ and *Norman v. Ricketts*⁸ were relied upon to show that if there was an express or implied authority to send by post, the post office would be the agent of the addressee; if there was no such authority, the post office would be the "agent of the sender. Lord Hailsham's *Laws of England*, Volume II, p. 629, also supports that view. The decision in *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler*⁹ also supports the same contention, in respect of delivery of goods. It cannot be disputed that title-deeds of an Immovable property would fall under the

definition of " goods ", within the meaning of the Indian Contract Act. It remains, therefore, to be considered whether on the correspondence the plaintiffs had given authority, express or implied, to the defendants to send the title-deeds by post.

8. In my opinion, the correspondence indicates clearly that the plaintiffs asked the defendants to send the title-deeds by post. In the first letter written by them they suggested three alternatives, and although the post office is not mentioned expressly in respect of each of them, reading the letter as a whole, it is clear that the plaintiffs had intimated that the defendants should send the title-deeds by post. 'If so, that is sufficient to make the post office their agent to receive the title-deeds on their behalf. Reading the correspondence as a whole in 1931, it seems to me, therefore, that the plaintiffs having constituted the post office their authorized agent to receive the title-deeds and intimated

⁶(1923) 25 BOMBAY LR 604

⁸(1886) 3 T.L.R. 182

⁷[1910] 2 K.B. 509

⁹[1898] A.C. 200

the same to the defendants, as soon as the defendants sent the title-deeds accordingly, under Section 7 of the Indian Contract Act the transaction was complete. The plaintiffs' contention that the defendants could have cancelled the security before the documents were received in Bombay is incorrect because it assumes that the transaction remained incomplete when the title-deeds were posted. In respect of the subsequent title-deeds received in 1934 also the plaintiffs demanded the same and although in those letters there is no express reference to the post office, reading the correspondence as a whole, it seems clear that the suggestion was that the other title-deeds should also be sent by post. In fact they were so sent.

9. On behalf of the plaintiffs reliance was placed on the decision in *Jagjivandas v. Nagar Central Bank*¹⁰ That also was a case under the Negotiable Instruments Act. Kajiji J. held that from the mere fact that cheques were sent from time to time by post in the ordinary course of business, it could not be inferred that there was any implied request from the one party to the other to send cheques by ordinary post. In my opinion that decision does not help the plaintiffs. I recognise that the mere fact that the parties did correspond by post would not be sufficient to spell out an authority to send by post. As however in the present case an express request to send it by post was made and the first title-deed was so sent, the subsequent correspondence between the parties should be read along the same lines, and in the absence of any indication to the contrary, either in correspondence or in evidence, I think that the whole evidence justifies the conclusion of an implied authority given by the plaintiffs to send the subsequent title-deeds also by post. The plaintiffs hold these title-deeds as a result of this correspondence and therefore in my opinion the title-deeds were not deposited in Bombay within the meaning of Section 58, Clause (f), of the Transfer of Property Act, and there is no valid mortgage by deposit of title-deeds within the meaning of that clause.

10. The general contention about the effect of Section 18 of the Indian Posts and Telegraph Act, VI of 1898, and the rules stated to have been framed by the Governor General in Council need not be considered. It was contended that the observations in *Thorappa v. Umedmaljii*¹¹, were on a

wrong assumption that the old Act was in force. The report does not show that the Court was proceeding on the footing of the old Act and not Act VI of 1898 when that decision was given. The post office rules put before the Court, on the face of them, are only issued under the authority of the Post-Master General and the learned counsel for the plaintiffs did not draw my attention to its publication in the Government Gazette or to any statement indicating that they were made or published by the Governor General in Council under Section 18 of the Act. I had therefore no occasion to consider the exact effect of those rules on the facts of this case.

11. The suit will, therefore, be dismissed with costs.

Suit dismissed.

¹⁰(1925) 28 Bom. L.R. 226

¹¹(1923) 25 BOMBAY LR 604