

Privy Council Appeal No. 70 of 1930.

V. Papiah Naidu - - - - - *Appellant*

v.

Naganatha Sethupathi and another - - - - - *Respondents*

FROM

THE COURT OF THE RESIDENT IN MYSORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH JUNE, 1931.

Present at the Hearing :

LORD BLANESBURGH.

LORD TOMLIN.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

This is an appeal from a judgment of the Court of the Resident in Mysore at Bangalore reversing a judgment of the District Judge of the Civil and Military Station of Bangalore, and decreeing the plaintiff's suit on a mortgage of immovable properties in Bangalore effected by deposit of title deeds in Madras. The question is whether such a mortgage is valid. The Civil and Military Station is an area within the territory of the Mysore State, as to which plenary jurisdiction has been transferred by treaty to the British Government, and is governed by the Indian (Foreign Jurisdiction) Order in Council of the 11th June, 1902, made under the Foreign Jurisdiction Act, 1890. Clause 4 empowers the Governor General of India in Council to make rules and orders for territories such as this :—

“(a) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise.”

A Notification of the Government of India of the 16th January, 1917, made under the aforesaid Order in Council and

in supersession of an earlier Notification, contains a lengthy schedule of British Indian enactments which are declared to apply to the Civil and Military Station of Bangalore "in so far as the same may be applicable thereto," and subject to any amendments for the time being in force in British India. References in such enactments to British India are to be read as referring to the Civil and Military Station. No. 37 is the Transfer of Property Act IV of 1882.

The Notification contains a further proviso to the effect that the enactments in question are to be applied *mutatis mutandis* to the Civil and Military Station :—

" Provided, first, that in the enactments as so applied except where the context or the modifications hereinafter referred to otherwise require, references to a Local Government, the Chief Commissioner, the Chief Controlling Revenue Authority or the Chief Revenue Authority shall be read as referring to the Resident in Mysore ; references to a Secretary to a Local Government as referring to the First Assistant to the Resident in Mysore ; references to a High Court as referring to the Court of the Resident in Mysore ; and references to British India or the territories subject to a Local Government as referring to the said Civil and Military Station of Bangalore :

" Provided, secondly, that the further modifications and restrictions set forth in the said schedule shall be made in the said enactments as so applied :

" Provided, thirdly, that for the purpose of facilitating the application of the said enactments, any Court in the said Civil and Military Station of Bangalore may construe the provisions thereof and any notifications, orders, rules, forms or bye-laws thereunder with such alterations, not affecting the substance, as may be necessary or proper to adapt the same to the matter before the Court :

As regards the Transfer of Property Act, 1882, the Schedule to the Notification contains the following further modification and restriction :—

SCHEDULE.

<i>Enactments and laws applied.</i>	<i>Further modifications and restrictions.</i>
37. The Transfer of Property Act, 1882 (IV of 1882).	In the definition of " registered " in Section 3 and in Section 52, the words " British India " shall be read as referring to British India and the Civil and Military Station of Bangalore.

While this Notification was in force, the first defendant, Yunus Hajee Oomer Sait, on the 2nd of February, 1923, borrowed Rs. 50,000 at Madras from the plaintiff, the Rajah of Ramnad, on a promissory note and at the same time deposited the title deeds of three of his properties in the Civil and Military Station of Bangalore as security. On the 15th March, 1923, the first defendant at Madras borrowed a further Rs. 20,000 from the plaintiff on the same security.

On the 3rd August, 1925, the plaintiff instituted in the Court of the District Judge of the Civil and Military Station of Bangalore the present suit, claiming the usual reliefs on the mortgage, which he alleged had been created in his favour by the deposit of title deeds in Madras.

On the 21st September, 1925, the first defendant filed a written statement admitting the claim, but praying for further time.

On the same day the present appellant, Papiah Naidu, who on the 7th June, 1924, had obtained a simple money decree against the first defendant in respect of a loan of Rs. 10,000 on the 17th December, 1923, and had subsequently attached, in execution of his decree, two of the properties which are the subject of the plaintiff's mortgage, applied to be made a party to the mortgage suit, to contest the validity of the mortgage, and was ordered to be impleaded as second defendant. He then filed a written statement denying that the first defendant by the deposit of title deeds in Madras had created an equitable mortgage of properties in the Civil and Military Station of Bangalore. The following issues were framed :—

- (1) Whether the transaction relied on by the plaintiff amounts in law to an equitable mortgage enforceable in this Court ?
- (2) To what relief is the plaintiff entitled ?

The District Judge, in his judgment, after correctly observing that such mortgages had been recognised without question in British India since the decision of this Board in *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 M.I.A. 307, though the area of their operation had been considerably narrowed by legislation, proceeded to hold that the saving-clause to Section 59 of the Transfer of Property Act, which exempts from the operation of that section mortgages effected by deposit of title deeds in Madras and the other places mentioned in the section, was not in force in the Civil and Military Station, as the Notification had only applied the Transfer of Property Act so far as applicable, and, in his opinion, the saving clause was inapplicable. He accordingly dismissed the suit.

The plaintiff thereupon preferred an appeal to the Court of the Resident in Mysore, who allowed the appeal and decreed the suit. In his judgment the Resident observed :—

“ It is true that that clause does allow of some discretion to the Court, but in my view the plain intention of the Notification was to apply to Bangalore the Act as a whole, and it would require very strong grounds to come to the conclusion that any clause or section not specially modified in the Notification was not to be applied.”

Holding that there were no such reasons, he allowed the appeal and decreed the suit.

From this decree the second defendant preferred the present appeal to His Majesty in Council.

Their Lordships agree with the Resident that there are no sufficient reasons for holding the last clause in Section 59 to be inapplicable to mortgages of immovable property situated in the Civil and Military Station. The Notification, it is true, only applies the Act to the Civil and Military Station “ in so far as the same may be applicable thereto,” but this provision, which

would appear to have been inserted *ex abundanti caritela* in a Notification applying a long list of enactments to meet the case of provisions which were clearly incapable of application having been applied without the necessary modifications, cannot be read as authorizing the Courts to treat as inapplicable provisions which can be applied merely on questionable grounds of legislative policy. These are matters for the consideration of the legislative authority, in this case the Governor General of India in Council, who, under the Order in Council, is authorized to apply to territories such as this enactments in force elsewhere "with or without modifications." Where no modification has been made, it is the duty of the Court to apply the provision if it can be applied, but, under the third proviso in the Notification, it may construe such provision "with such alterations, *not affecting the substance*, as may be necessary or proper to adapt the same to the matter before the Court." In their Lordships' opinion the saving clause in Section 59 clearly can be applied to the Civil and Military Station, and there are no grounds for treating it as inapplicable.

It has, however, been further contended before their Lordships that, assuming the whole of Section 59 to be applicable, it does not of itself validate the mortgages by deposit of title deeds therein referred to, but merely provides that nothing in the section is to be deemed to render them invalid.

Chapter IV, "Of mortgages of immovable property and charges," begins in Section 58 (a) by defining "mortgage" as a transfer of an interest in specific immovable property for the purposes specified in the section, but says nothing as to the form of transfer, and is wide enough to include a transfer by deposit of title deed :—

"58.—(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

"The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (*if any*) by which the transfer is effected is called a mortgage-deed."

Section 59 then proceeds to prescribe the mode in which mortgages are to be effected where the principal money secured is one hundred rupees or upwards, and where it is less than one hundred rupees, but excepts from the operation of the section mortgages such as the present mortgage, made by delivery of documents of title in the places specified with intent to create a security thereon :—

"59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

"Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

“ 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 to immovable property with intent to create a security thereon.”

It is contended for the appellant on the language of the saving clause that it does not validate the transfers, but throws on those who rely on them the onus of establishing their validity independently, and that in this case the plaintiff has failed to discharge that onus. As to this contention, it is to be observed in the first place that the Act itself does not contain any provision invalidating such transfers, and it is argued for the respondent that it proceeds upon the basis that they are valid and should be construed as recognising them.

In their Lordships' opinion, there is considerable force in this contention, for it would indeed be startling to find an Act which codifies the law of transfer of immovable property, throwing on those relying on transfers by deposit of title deeds the onus of going behind the Act and establishing in each case, independently of the Act, the validity of the transfer, even where the immovable property which is the subject of transfer is situated in one of the places specified in the section. Further, although, as observed by the District Judge, the saving clause in Section 59 was accepted very unwillingly by some of those who were in charge of the measure while it was passing through the Legislature—which may account for the guarded language in which it is expressed, and was at first confined to transfers effected in Calcutta, Madras, Bombay, Karachi and Rangoon—it has subsequently been extended by the Legislature in Act VI of 1904 to transfers in Moulmein, Bassein and Akyab, and in Act XI of 1915 to any other town which the Government of India may by Notification in the “Gazette of India” specify in this behalf, and has been applied by Notification to Mandalay and other places. These extensions would scarcely have been made or authorized by the Legislature if any doubt had been entertained as to the validity of these transfers.

For the purposes of the present case, however, their Lordships think it sufficient to say that, seeing that the Transfer of Property Act, which now codifies the law relating to the transfer of immovable property, both in the Civil and Military Station, where the lands are situated, and in Madras, where the contract was made, far from containing any general prohibition of mortgages by deposit of title deeds, expressly exempts them when made in the specified places from the formalities prescribed for the due execution of other mortgages, the onus is strongly upon the appellant to establish the invalidity of such mortgages, and he has failed to discharge it.

Authority for this proposition may be found in the decision of this Board in *Varden Seth Sam v. Luckpathy Royjee Lallah* (*supra*), already mentioned. That was the case of a deposit in the year 1851 of title deeds in Madras for the purpose of effecting

a lien on lands situated outside Madras and subject to the jurisdiction of the Company's Courts in the adjoining District of Chingleput. The deposit was made in Madras by a Hindoo in favour of an Armenian Christian. It was not shown that the parties, who were not of the same race and creed, contracted with reference to any particular law. There was, their Lordships observed, properly, no prescribed general law to which their decisions must conform, but the Company's Courts were required to proceed generally according to justice, equity and good conscience. In this state of things their Lordships observed: "It is not shown that any local law, any *lex loci rei sitæ*, exists forbidding the creation of a lien by the contract and deposit of deeds, which existed in this case: and by the general law of the place (Madras) where the contract was made, that is, the English law, the deposit of title deeds as a security would create a lien on lands." The Board accordingly reversed the decree of the Court of the Court of Sudder Dewany Adawlat, which had dismissed the plaintiff's suit to enforce the lien.

In their Lordships' opinion, the onus on the appellant in the present case is even stronger, because here there is in force a law of transfer of immovable property which, if it does not recognise such transfers, certainly does not prohibit them, and there is no evidence of any other prohibition. As the appellant has failed to discharge this onus, they are of opinion that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Account of the

In the Privy Council.

V. PAPIAH NAIDU

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NAGANATHA SETHUPATHI AND ANOTHER.

DELIVERED BY SIR JOHN WALLIS.

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