

SUPREME COURT OF INDIA

Rachpal Mahraj

Vs.

Bhagwandas Daruka & Ors.

C.A.No.LXVII of 1949

(H.J.Kania,CJI., M.Patanjali Sastri, S.R.Dass,JJ.,)

05.05.1950.

JUDGMENT

Patanjali Sastri,J.,

1. This appeal arises out of a suit brought by the respondents against the appellant and other members of his joint family to enforce a mortgage alleged to have been created by the appellant by deposit of title deeds on the 23rd October, 1936, at Calcutta.

2. The short point for determination in the appeal is whether the memorandum signed and delivered by the appellant on 23rd October, 1936, and relied upon by the respondents as evidencing the creation of the mortgage was compulsorily registrable under section 17 of the Indian Registration Act, 1908, and, not having been registered, was inadmissible in evidence to prove the mortgage. The Subordinate Judge of Darbhanga who tried the suit, and the High Court at Patna on appeal, held that the document did not require registration and was admissible in evidence, and accordingly decreed the suit.

3. The question turns on the proper construction of the memorandum and the circumstances under which it was delivered to the respondents. According to the evidence of the respondents' witnesses which has been accepted by the Courts below, the accounts relating to the appellants' dealings were examined on the 23rd October, 1936, and a large sum was found due to the respondents who demanded payment. The appellant thereupon brought and gave documents, being title deeds relating to immovable properties belonging to his family, for the purpose of being held as security for the amounts then due and to become due on further dealings. A draft of the memorandum was thereafter prepared which the appellant took with him to be shown to his lawyer and he returned in the afternoon, and signed and delivered it to the respondents. All this took place in Calcutta. The memorandum is in the form of a letter addressed to the respondents' firm and is in the following terms :

"We write to put on record that to secure the repayment of the money already due to you from us on accounts of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such

transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7 Sambhu Mallick Lane, relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions...."

4. A mortgage by deposit of title deeds is a form of mortgage recognised by section 58(f) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) by a person "delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon." That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable, as in *Obla Sundarachariar v. Narayana Ayyar* [58 I.A. 68] Or, it may be delivered at a later dated and nevertheless be registrable, as in *Hari Sankar Paul v. Kedar Nath Saha* [66 I.A. 184]. The crucial question is : Did the parties intend to reduce their bargain regarding the deposit of the title deeds to the form of a document ? If so, the document requires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document, being merely evidential does not require registration.

5. There are numerous decisions, some of them not easy to reconcile, where this question was considered with reference to the document concerned in the particular case. It is unnecessary to review them, as the two latest pronouncements of the Privy Council, to which reference has been made, aptly illustrate cases falling on either side of the line. In *Obla Sundarachariar v. Narayana Ayyar* [58 I.A. 68] a signed memorandum was delivered to the mortgagee along with the title deeds of certain properties deposited as security. The memorandum stated "As agreed upon in person, I have delivered to you the under-mentioned documents as security," and listed the title deeds deposited. It was held that the memorandum was no more than a mere record of the particulars of the deeds and did not require registration. The criterion applied was : "No such memorandum can be within the section (section 17 of the Registration Act) unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the

parties." In *Hari Sankar Paul v. Kedar Nath Saha* [66 I.A. 184] the title deeds were deposited accompanied by a memorandum when part of the advance arranged for was made. Some days later when the balance was advanced, another memorandum was delivered superseding the earlier one, and this was a formal document stating the essential terms of the transaction "hereby agreed" and referred to the moneys "hereby secured". It also conferred an express power to sale on the mortgagee. Lord Macmillan, after reviewing the earlier decisions of the Board, held that the document required registration, observing, "where, as here, the parties, professing to create a mortgage by a deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction, and is itself an operative instrument and not merely evidential, such a document must, under the statute, be registered."

6. Turning now to the memorandum before us, it is clear, on the face of it, that the parties did not intend thereby to create the charge. The document purports only to record a transaction which had been concluded and under which the rights and liabilities had been orally agreed upon. No doubt it was taken by the respondents to show that the title deeds of the appellant's properties were deposited with them as security for the moneys advanced by them, and to obviate a possible plea that the deeds were left with them for other purposes, as indeed was contended by the appellant in his written statement, taking advantage of the non-registration of the memorandum in question. But that is far from intending to reduce the bargain to writing and make the document the basis of the rights and liabilities of the parties. In agreement with the High Court, we are of opinion, that the memorandum delivered by the appellant along with the title deeds deposited with the respondents did not require registration and was properly admitted in evidence to prove the creation of the charge. The appeal fails and is dismissed with costs.

7. Appeal dismissed.