

Sri Sri Sri Kishore Chandra Singh Deo

Vs

Babu Ganesh Prasad Bhagat and Others

Civil Appeals Nos. 1 and 2 of

(B.K. Mukherjea, Vivian Bose, Ghulam Hasan, T.L. Venkatarama Ayyar JJ)

09.03.1954

JUDGMENT

VENKATARAMA AYYAR J. -

These appeals arise out of a suit instituted by the respondents to enforce a mortgage deed, Exhibit A, dated 5th April, 1923, executed by the defendant in favour of one Radha Prasad Bhagat. The subject-matter of the mortgage is an estate called the Bodogodo Zemin situated in what was the District of Ganjam in the Province of Madras and now comprised in the State of Orissa, and governed by the provisions of the Madras Impartible Estates Act II of 1904. The mortgage is for Rs. 1,25,000 and the deed recites that a sum of Rs. 12,500 was advanced to the mortgagor on a promissory note executed on 30th March, 1923, that the balance of Rs. 1,12,500 was paid to him in cash, and that the entire amount was borrowed for meeting the expenses of the marriage of his second daughter with the eldest son of the Rajah of Talcher. The marriage, in fact, took place on 27th April, 1923. Though the deed recites that Rs. 1,12,500 was paid in cash, the case of the plaintiffs is that it was, in fact, paid on 14th April, 1923, on the authority of the defendant to his manager, one Mr. Henry Tapp, after the mortgage bond was registered, which was on 10th April, 1923. In 1926 and 1927 the defendant made several payments towards the mortgage, in all aggregating to Rs. 42,000. The mortgagee died on 18th November, 1933, and thereafter his legal representatives filed the suit, out of which these appeals arise, for recovery of the balance due under the mortgage by sale of the hypothecated property.

The defendant resisted the suit on several grounds. He pleaded that the mortgage was supported by consideration only to the extent of Rs. 25,000, and that it had become discharged by the payments made in 1926 and 1927. He also contended that the mortgage bond was not duly attested or validly registered, and that it was therefore void and unenforceable.

The Subordinate Judge of Berhampur who heard the suit held that no consideration passed for the promissory note for Rs. 12,500 dated 30th March, 1923, Exhibit J, and that it was really a salami; but that the balance of Rs. 1,12,500 was paid to Mr. Tapp under the authority of the defendant. He also held that the mortgage bond was duly attested and validly registered, and a decree was passed in accordance with these findings.

Both the parties took up the matter in appeal to the High Court of Patna. The plaintiffs filed A.S. No. 10 of 1937 claiming that Exhibit J was supported by consideration, and the defendant filed A.S. No. 11 of 1937 pleading that the alleged payment of Rs. 1,12,500 to Mr. Tapp was unauthorised, and that the mortgage bond was void, as it was neither duly attested nor properly registered. The High Court concurred with the Subordinate Judge in finding that Rs. 1,12,500 was paid to Mr. Tapp

under the authority of the defendant, and that the bond was duly attested and registered. But as regards the promissory note, Exhibit J, it held differing from the Subordinate Judge that it was also supported by consideration. Against this decision, the defendant appeals, and repeats all the contentions urged by him in the courts below.

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[The court held on a consideration of the evidence that the mortgage bond was supported by consideration and that it was duly attested.]

The last contention of the appellant was that the deed was not validly registered in accordance with the provisions of sections 32 and 33 of the Registration Act, and that it was therefore void. Section 32 enacts that,

"Except in the cases mentioned in sections 31, 88 and 89 every document to be registered under this Act..... shall be presented.....

(a) by some person executing or claiming under the same,..... or

(b) by the representative or assign of such person, or

(c) by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

Section 33, so far as is material for the present purpose, runs as follows :

33(1) "For the purposes of section 32, the following powers-of-attorney shall alone be recognized, namely :

(a) if the principal at the time of executing the power-of-attorney resides in any part of (the Provinces in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;...

Provided that the following persons shall not be required to attend at any registration office or court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this section, namely :-

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in court.

(2) In the case of every such person the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or court

aforesaid.

(3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination."

The substance of these provisions is that a document must be presented for registration either by a party to it or his legal representative or assign or by his agent holding a power-of-attorney executed and authenticated in accordance with section 33 of the Act.

In *Jambu Prasad v. Muhammad Aftar Ali Khan* (42 I.A. 22.), it was observed by the judicial Committee approving of the decision in *Ishri Prasad v. Baijnath* (I.L.R. 28 All. 707.) that,

"...the terms of sections 32 and 33 of Act III of 1877 are imperative, and that a presentation of a document for registration by an agent....., who has not been duly authorized in accordance with those sections, does not give to the Registering Officer the indispensable foundation of his authority to register the document."

Where, therefore, a document is presented for registration by a person other than a party to it or his legal representative or assign or by a person who is not an agent authorized in the manner prescribed in section 33, such presentation is wholly inoperative, and the registration of such a document is void. In the present case, Exhibit A was presentation for registration by Mr. Tapp as the agent of the defendant under a power-of-attorney executed by him, Exhibit B, and the question is whether that power satisfied the requirements of section 33. Exhibit B was executed by the defendant before the Registrar at the residence of the Chief of Hindol at Cuttack and was authenticated by him. It was argued for the appellant that the authentication was invalid on three grounds : (1) that the defendant was not residing at Cuttack at the time of the execution of Exhibit B, and consequently the Registrar at Cuttack had no jurisdiction to authenticate the deed under section 33(1)(a); (2) that Exhibit B was presented for registration by one Sundaram who described himself as the personal assistant of the defendant, but was, in fact, a person not authorised to present the document as required by section 32, and therefore the authentication of the power based on such presentation was void; and (3) that the authentication of the power under the proviso to section 33(1) at the residence of the defendant was bad, as he was, in fact not suffering from any bodily infirmity at that time, and that in consequence the registration of Exhibit A pursuant thereto was void.

With reference to the first contention that the defendant was not residing at Cuttack at the date of Exhibit B, and that consequently the Registrar of that place had no jurisdiction to register it under section 33(1)(a), the finding of the courts below is that the defendant had been residing at Cuttack for a week prior to the date of Exhibit B, and that was sufficient for the purpose of section 33(1)(a). In *Sharat Chandra Basu v. Bijay Chand Mahtab* (64 I.A. 77.) the Privy Council observed :

"The expression 'resides', as used in section 33, is not defined in the statute; but there is no reason for assuming that it contemplates only permanent residence and excludes temporary residence."

It must therefore be taken as settled that even temporary residence at a place is sufficient to clothe the Registrar of that place with jurisdiction under section 33(1)(a). It was argued for the appellant that his permanent place of residence was at Bodogodo, that he owned no house at Cuttack, that the house where Exhibit B was registered belonged to his brother-in-law, the Chief of Hindol, and that

he stayed there only for the purpose of registering the power, and that on these facts, it could not be held that there was residence even of a temporary character at Cuttack. The fact that the house did not belong to the appellant is not material for this purpose; because residence only connotes that a person eats, drinks and sleeps at that place, and not that he owns it. Whether the stay of the appellant at Cuttack was of a causal nature, or whether it amounted to residence must depend on all the circumstances proved, and is essentially a question of fact. The appellant described himself in Exhibit B as temporarily residing at Cuttack, and there is no reason why his words should not be accepted as indicating the true position. Then there is the endorsement of the Registrar on Exhibit B, and that runs as follows :

"Having visited and examined at his residence the principal Sri Sri Sri Kishore Chandra Singh Deo, son of Durga Mahtab Singh Deo, of at present Hindol House.. by profession Zamindar, who is personally known to me, I am satisfied that this power-of-attorney has been voluntarily executed by him and I accordingly authenticate it under section 33 of Act XVI of 1908."

In *Sharat Chandra Basu v. Bijay Chand Mahtab* (64 I.A. 77.) the endorsement on the power-of-attorney was as follows :

"Executed in my presence at the Hazaribagh Registration Office on August 8, 1916, by Sharat Chandra Basu, son of Nalinaksha Basu of Burdwan, at present of Hazaribagh in Hazaribagh, who is personally known to me and I accordingly authenticate it under section 33, Act XVI of 1908...."

In accepting this endorsement as evidence of residence, the Privy Council observed :

"It is true that he (the principal) ordinarily resided at Burdwan, but the endorsement of the Sub-Registrar on the document expressly states that he was living, at that time, at Hazaribagh. The endorsement also shows that he was personally known to the Sub-Registrar, and it is not likely that a mistake would be made about his place of residence."

The endorsement in the present case is even more positive, in that it refers expressly to the residence of the executant. It is also not correct to say that the defendant came to Cuttack only for the purpose of executing the power, Exhibit B. He came there to complete the negotiations for raising a loan from Radha Prasad, and the execution of the power was only one and not a major incident in the business for which he came to Cuttack. As already mentioned, he also borrowed a sum of Rs. 12,500 under Exhibit J on 30th March, 1923, while at Cuttack. It is also in evidence that the defendant's son was studying at Cuttack at that time, and was residing in the house of the Chief of Hindol. Under the circumstances there were ample materials to support the finding of the courts below that the appellant was residing at Cuttack at the time of Exhibit B, and that must be affirmed.

It was next contended that as Exhibit B was presented for registration by one Sundaram, who was neither a party to it nor an agent holding a power-of-attorney duly registered or authenticated, and as such presentation was void under section 32, the registration of Exhibit A under the authority contained in Exhibit B must also be held to be void. The answer to this contention is that section 32 would apply only if a power-of-attorney is presented for registration, and not when it is produced merely for authentication, in which case, the only requirements that have to be complied with are those set out in section 33. The endorsements in Exhibit B show that the Registrar examined the

principal at his residence and satisfied himself that he had executed it voluntarily. Then there was the authentication which was made expressly under section 33, and then the defendant signed in the presence of the Registrar. The defendant also admits in his evidence that the Registrar questioned him about the execution of the power, and then authenticated it, and that he thereafter signed before him. If the matter had stood there would have been no question but that Exhibit B was validly authenticated under section 33. But then, there is an earlier endorsement of Exhibit B that it was "presented for registration at 11 A.M. on the 5th Day of April, 1923, at the Sadar Sub-Registrar's Office, Cuttack, by P. Sundaram." The contention of the appellant based on this endorsement is that as Exhibit B was presented for registration, section 32 applied, and as Sundaram was not authorised to present it, it was inoperative. But the endorsement in question is clearly based on a misapprehension of the true position. Exhibit B was obviously produced before the Registrar along with the application for attendance at the residence for authentication and not for the purpose or registration. Rule 148 of the Bihar and Orissa Registration Manual provides both for registration and for authentication of a power-of-attorney, and prescribes separate endorsements for them. It also requires that they should be separately charged. Rule 157 provides that any person can present a document for authentication. Exhibit B was, in fact, not registered but only authenticated. It contains only an endorsement of authentication, and the charges collected were only for authentication. The endorsement therefore that Exhibit B was presented for registration is clearly a mistake, and must be ignored.

Moreover, even if there had been a presentation of Exhibit B for registration and that was unauthorised, that does not detract from the validity of the subsequent authentication before the Registrar, which was an independent act complete in itself and valid under section 33. In *Bharat Hindu v. Hamid Ali Khan* (47 I.A. 177.), a power-of-attorney executed by a mortgagor was presented for registration by his servant but actually the Registrar registered at the residence of the principal under section 33. In a suit to enforce the mortgage, the contention was raised that the registration of the mortgage deed was bad, as the power-of-attorney in pursuance of which it was registered was presented for registration by a person not authorised. In overruling this contention, the Privy Council observed that even though the presentation of the power for registration by the servant of the principal was bad, when it was subsequently registered at the residence of the executant in accordance with section 33 it should be deemed to have been presented by him to the Registrar, and that in that view the registration would be valid. On the same reasoning, Exhibit B should be deemed to have been presented for authentication by the defendant when the Registrar attended at his residence, and the requirements of section 33 were fully satisfied. This objection must, therefore, be rejected.

It was finally contended that the defendant was, in fact, not suffering from any bodily infirmity at the time of Exhibit B, that the authentication of the power by the Registrar at the residence under the proviso to section 33(1) was therefore bad, and that the registration of Exhibit A pursuant thereto was void; and reference was made to the evidence in the case that the defendant was not ill at the time. But there is the fact that the Registrar did, in fact, attend at the residence and authenticate the document, and that could have been only on the application of the defendant.

In his evidence the defendant stated :

"Perhaps an application was filed by me for private attendance of the Sub-Registrar at Cuttack. I do not remember what reasons were given for Sub-Registrar's private attendance."

No application has been produced in court, and it must be presumed in court, and it must be presumed that when the Registrar authenticated Exhibit B under Exhibit B under section 33 of the Act, he did so on an application setting out the proper ground, and that he satisfied himself that ground did exist. Whether he was right in his conclusion that the defendant was suffering from bodily infirmity is not a matter which can be gone into in a court of law. It is a matter exclusively within his jurisdiction, and any error which he might have committed would not affect his jurisdiction to register the document.

In *Ma Pwa May v., Chettiar Firm* ((1920) 56 I.A. 379.) Lord Atkin observed :

"In seeking to apply this section (section 87), it is important to distinguish between defects in the procedure of the Registrar and lack of jurisdiction. Where the Registrar has no jurisdiction to register, as where a person not entitled to do so presents for registration, or where there is lack of territorial jurisdiction, or where the presentation is out of time, the section is inoperative : see *Mujibunnissa v. Abdul Rahim* ((1901) 28 I.A. 15.). On the other hand, if the registrar having jurisdiction has made a mistake in the exercise of it, the section (section 33) takes effect."

A decision of the Registrar that an applicant was suffering from bodily infirmity for the purposes of section 33(1), proviso, clause (i), relates to a mere matter of procedure not affecting his jurisdiction, and even if erroneous, would not affect the validity of the registration. Moreover, there is the fact already mentioned that when the Registrar came to the residence for authenticating Exhibit B, the defendant signed it once again before him, and that would, in any case, be sufficient. There is no substance in this contention and it must be overruled.

In the result, the appeals fail and are dismissed. As for costs, it must be mentioned that the defendant died while the appeals were pending, and that it is his legal representatives who are prosecuting them. The property mortgaged is an estate governed by the Madras Impartible Estates Act II of 1904. The plaintiffs alleged in their plaint that the mortgage was binding on the estate under section 4 of the Act. Issue 6 was framed with reference to this allegation, and the finding of the trial court was that it was not binding on the state. But on appeal, the High Court held that the question could not be gone into in a suit laid against the mortgagor. It accordingly discharged the finding, and left the question open to be determined in other and appropriate proceedings. In view of this, we direct that the parties do bear their own costs in this court.

Appeals dismissed.

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