M. L. Abdul Jabbar Sahib

Vs

M. V. Venkata Sastri & Sons and Others

Civil Appeal Nos. 272-274 of 1966

(S.M. Sikri, R.S. Bachawat, K.S. Hegde JJ)

04.02.1969

JUDGMENT

BACHAWAT, J. -

1. On February 23, 1953, the appellant instituted C.S. No. 56 of 1953 on the Original Side of the Madras High Court under the summary procedure of Order 7 of the Original Side Rules against Haji Ahmed Batcha claiming a decree for Rs. 40,556/1/2 and Rs. 8,327/12/9 said to be due under two promissory notes executed by Haji Ahmed Batcha. On March 9, 1953, Hajee Ahmed Batcha obtained leave to defend the suit on condition of his furnishing the security for a sum of Rs. 50,000/- to the satisfaction of the Registrar of the High Court. On March 26, 1953, Hajee Ahmed Batcha executed a security bond in favour of the Registrar of the Madras High Court charging several immovable properties for payment of Rs. 50,000/-. The condition of the bond was that if he paid to the appellant the amount of any decree that might be passed in the aforesaid suit the bond would be void and of no effect and that otherwise it would remain in full force. The bond was attested by B. Somnath Rao. It was also signed by K. S. Narayana Iyer, advocate, who explained the document to Hajee Ahmed Batcha and identified him. All the properties charged by the bond are outside the local limits of the ordinary original jurisdiction of the Madras High Court. The document was presented for registration on March 29, 1953 and was registered by D. W. Kittoo, the Sub-Registrar of Madras-Chingleput District. Before the Sub-Registrar, Hajee Ahmed Batcha admitted execution of the document and was identified by Sankaranarayan and Kaki Abdul Aziz. The identifying witnesses as also the Sub-Registrar signed the document. Hajee Ahmed Batcha died on February 14, 1954 and his legal representatives were substituted in his place in C.S. No. 56 of 1953. On March 19, 1954, Ramaswami, J., passed a decree for Rs. 49,891/13/- which interest and costs and directed payment of the decretal amount on or before April 20, 1954. While passing the decree, he observed :

> "It is stated that the defendant has executed a security bond in respect of their immovable properties when they obtained leave to defend and this will stand enured to the benefit of the decree-holder as a charge for the decree amount."

2. Clause 3 and 4 of the formal decree provided :

> "(3) that the security bond executed in respect of their immovable properties by defendants 2 to 4 in pursuance of the order, dated 9th March, 1953, in application No. 797 of 1953, shall stand enured to the benefit of the plaintiff as a charge for the amounts mentioned in Clause 1 supra;

(4) that in default of defendants 2 to 4 paying the amount mentioned in Clause 1 supra on or before the date mentioned in Clause 2 supra the plaintiff shall be at liberty to apply for the appointment of Commissioners for sale of the aforesaid properties."

3. The appellant filed an application for (a) making absolute the charge decree, dated March 31, 1954, and directing sale of the properties; and (b) appointment of Commissioners for selling them. On April 23, 1954, the Court allowed the application, appointed Commissioners for selling of the properties and directed that the relevant title deeds and security bond be handed over to the Commissioners. The Commissioners sold the properties on May 29 and 30, 1954. The sales were confirmed and the sale-proceeds were deposited in court on July 2, 1954.

4. All the three respondents are simple money creditors of Hajee Ahmed Batcha. The respondents Vankata Sastri and Sons, filed O.S. No. 13 of 1953, in the Sub-Court, Vellore and obtained a decree for Rs. 5,500/- on March 27, 1953. Respondent H. R. Gowramma instituted O.S. No. 14 of 1953, in the same Court and obtained a money decree on April 14, 1953. The two decree-holders filed applications for execution of their respective decrees. One Rama Sastri predecessors of respondents H. R. Chidambara Sastri and H. R. Gopal Krishna Sastri obtained a money decree against Hajee Ahmed Batcha in O.S. No. 364 of 1951/52, in the Court of the District Munsiff, Shimoga, got the decree transferred for execution through the Court of the District Munsiff, Vellore and filed an application for execution in that court. On June 7, 1954, the aforesaid respondents filed applications in the Madras High Court for (i) transfer of their execution petitions pending in the Vellore courts to the file of the High Court and (ii) an order of ratable distribution of the assets realized in execution of the decree passed in favour of the appellant in C.S. No. 56 of 1953. The appellant opposed the applications and contended that as the properties were charged for the payment of his decretal amount, the sale proceeds were not available for rateble distribution amongst simple money creditors. The respondents contended that the security bond was invalid as it was not attested by two witnesses and that the decree passed in C.S. No. 56 of 1953, did not create any charge. Balakrishna Ayyar, J., dismissed all the applications as also exemption petitions filed by the respondents. He held that the decree in C.S. No. 56 of 1953, did not create a charge on the properties. But following the decision in Veerappa Chettiar v. Sabramania (ILR 52 Mad 123), he held that the security bond was sufficiently attested by the Sub-Registrar and the identifying witnesses. The respondents filed appeals against the orders. On March 28, 1958, the Divisional Bench hearing the appeals referred to a Full Bench the following question :

"Whether the decision in Veerappa Chettiar v. Subramania Iyyar, (ILR 52 Mad 123), requires reconsideration."

The Full Bench held :

"In our opinion, such signatures of the registering officer and the identifying witnesses endorsed on a mortgage document can be treated as those of attesting witnesses as if (1) the signatories are those who have seen the execution or received as personal acknowledgment from the executant of his having executed the document, (2) they sign their names in the presence of the executant and (3) while so doing they had the aninus to attest. The mere presence of the signatures of the registering officer or the identifying witnesses on the registration endorsements would not by themselves be sufficient to satisfy the requirements of a valid attestation; but it would be competent for the parties to show by evidence that any or all of these persons did in fact intend to and did sign as attesting witness as well."

5. The Full Bench held that the decision in Veerappa Chettiar's case (supra) can be held to be correct to this limited extent only and not otherwise. At the final hearing of the appeals, the Divisional Bench held that (1) a charge by act of parties could be created only by a document registered and attested by two witnesses; (2) the security bond was not attested by two witnesses and was therefore invalid; (3) the decree in C.S. No. 56 of 1953, should be construed as containing nothing more than a recital of the fact of there having been a security bond in favour of the plaintiff; and the sale in execution of the decree must be regarded as a sale in execution of a money decree; and (4) the respondents were entitled to an order for rateble distribution. Accordingly, the Divisional Bench allowed the appeals, directed attachment of the sale-proceeds and declared that the respondents were entitled to rateble distribution along with the appellant. The present appeals have been filed after obtaining special leave from this court.

6. The following questions arise in these appeals : (1) Is the security bond attested by two witnesses; (2) if not, is it invalid ? (3) does the decree in C.S. No. 56 of 1953, direct sale of the properties for the discharge of a charge thereon, and (4) are the respondents entitled to rateble distribution of the assets held by court ? As to the first question, it is not the case of the appellant that K. S. Narayana Iyer is an attesting witness. The contention is that the Sub-Registrar D. W. Kittoo and the identifying, witnesses Sankaranarayana and Kaki Abdul Aziz attested the document. In our opinion, the High Court rightly rejected this contention.

7. Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words :

> "'Attested' in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has been the executant sign or affix his mark to the instrument, or has been seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attention shall be necessary."

It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are : (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

8. "In every case the Court must be satisfied that the names were written animo attestandi", see Jarman on Wills, 8th ed., p. 137. Evidence is admissible to show whether the witness had the intention to attest. "The attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the will, and evidence is admissible to show whether such was the intention or not," see Theobald on Wills, 12th ed., p. 129. In Girja Datt v. Gangotri (AIR 1955 SC 346, 351), the Court held that the two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the

sub-Registrar, were not attesting witnesses as their signatures were not put "animo attestandi". In Abinash Chandra Bidvanidhi Bhattacharya v. Dasarath Malo (ILR 56 Cal 598) it was held that a person who had put his name under the word "scribe" was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a "scribe". In Shiam Sunder Singh v. Jagannath Singh (54 MLJ 18), the Privy Council held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees.

9. The Indian Registration Act, 1908, lays down a detailed procedure for registration of documents. The registering officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to the identify of the executant, (Section 34(3)). He can register the document if he is satisfied about the identify of the person executing the document and if that person admits execution. (Section 35 (1)). The signatures of the executant and of every person examined with reference to the document are endorsed on the document (Section 58). The registering officer is required to affix the date and his signature to the endorsements (Section 59). Prima facie, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature.

10. The evidence does not show that the registering officer D. W. Kittoo put his signature on the document with the intention of attesting it. Nor is it proved that he signed the document in the presence of the executant. In these circumstances he cannot be regarded as an attesting witness, see Sunder Bahadur Singh v. Thakur Behari Singh (1939 (2) MLJ 762). Likewise the identifying witnesses Sankaranarayana and Kaki Abdul Aziz put their signatures on the document to authenticate the fact that they had identified the executant. It is not shown that they put their signatures for the purpose of attesting the document. They cannot, therefore, be regarded as attesting witnesses.

11. It is common case that B. Somnath Rao attested the document. It follows that the document was attested by one witness only.

12. As to the second question, the argument on behalf of the respondents is that Section 100 of the Transfer of Property Act attracts Section 59 and that a charge can be created only by a document signed, registered and attested by two witnesses in accordance with Section 59 where the principal money secured is Rs. 100 or upwards. The High Court accepted this contention following its earlier decisions in Viswanadhem v. Menon (ILR 1939 Mad 199) and Shiva Rao v. Shanmugasunderaswami (ILR 1940 Mad 306) and held that the security bond was invalid, as it was attested by one witness only. We are unable to agree with this opinion. Section 100 is in these terms :

> "Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.
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> Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the

hands of a person to whom such property has been transferred for consideration and without notice of the charge."

13. The first paragraph consists of two parts. The first part concerns the creation of a charge over immovable property. A charge may be made by act of parties or by operation of law. No restriction is put on the manner in which a charge can be made. Where such a charge has been created the second part comes into play. It provides that all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The second part does not address itself to the question of creation of a charge. It does not attract the provisions of Section 58 relating to the creation of a mortgage.

14. With regard to the applicability of the provisions relating to a simple mortgage, the second part of the first paragraph makes no distinction between a charge created by act of parties and a charge by operation of law. Now a charge by operation of law is not made by a signed, registered and attested instrument. Obviously, the second part has not the effect of attracting the provisions of Section 59 to such a charge. Likewise the Legislature could not have intended that the second part would attract the provisions of Section 59 to a charge created by act of parties. Had this been the intention of the Legislature the second part would have been differently worded.

15. If a charge can be made by a registered instrument only in accordance with Section 59, the subsequent transferee will always have notice of the charge in view of Section 3 under which registration of the instrument operates as such a notice. But the basic assumption of the doctrine of notice enunciated in the second paragraph is that there may be cases where the subsequent transferee may not have notice of the charge. The plain implication of this paragraph is that a charge can be made without any writing.

16. If a non-testamentary instrument creates a charge of the value of Rs. 100/- or upwards, the document must be registered under Section 17(1)(b) of the Indian Registration Act. But there is no provision of law which requires that an instrument creating the charge must be attested by witnesses.

17. Before Section 100 was amended by Act 20 of 1929, it was well settled that the section did not prescribe any particular mode of creating a charge. The amendment substituted the words "all the provisions hereinbefore contained which apply to simple mortgage shall, so far as may be, apply to such charge," for the words "all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the person having such charge". The object of the amendment was to make it clear that the rights and liabilities of the parties in case of a charge shall, so far as may be, the same as the rights and liabilities, of the parties to a simple mortgage. The amendment was not intended to prescribe any particular mode for the creation of a charge. We find that the Nagpur High Court came to a similar conclusion in Baburao v. Narayan. (ILR 1949 Nag 802, 819-822) It follows that the security bond was not required to be attested, by witnesses. It was duly registered and was valid and operative.

18. As to the third question, we find that the decree, dated March 19, 1954, declared that the security bond in respect of the immovable properties would enure for the benefit of the appellant as a charge for the decretal amount. This relief was granted on the oral prayer of the plaintiffs. We are unable to agree with the High Court that in view of the omission to amend the plaint by adding a prayer for enforcement of the charge, the decree should be construed as containing merely a recital

of the fact that a security bond had been executed. In our opinion, the decree on its true construction declared that the security bond created a charge over the properties in favour of the plaintiffs for payment of the decretal amount and gave them the liberty to apply for sale of the properties for the discharge of the incumbrance. Pursuant to the decree the properties were sold and the assets are now held by the Court. The omission to ask for amendment of the plaint was an irregularity, but that does not affect the construction of the decree.

19. It was suggested that the decree was invalid as the High Court had no territorial jurisdiction under Clause 18 of its Letters Patent to pass a decree for sale of properties outside the local limits of its ordinary original jurisdiction. For the purpose of these appeals, it is sufficient to say that the respondents cannot raise this question in the present proceedings. If the decree is invalid and the sale is illegal on this ground, the respondents cannot maintain their applications for rateble distribution of the assets. They can ask for division of the sale-proceeds only on the assumption that the properties were lawfully sold. It is, therefore, unnecessary to decide whether the objection as to the territorial jurisdiction of the High Court has been waived by the judgment-debtor and cannot now be agitated by him and persons claiming through him, having regard to the decision in Seth Hiralal Patni v. Sri Kali Nath ((1962) 2 SCR 747, 751-2), Bahrein Petroleum Co. Ltd. v. P. J. Pappu ((1966) 1 SCR 461, 462-3) and Zamindar of Ettyapuram v. Chidambaram Chetty. (ILR 43 Mad 675 (FB))

20. As to the 4th question we find the immovable properties have been sold in execution of a decree ordering sale for the discharge of the encumbrance thereon in favour of the appellant. Section 73(1) proviso (c), therefore, applies and the proceeds of sale after defraying the expenses of the sale must be applied in the first instance in discharging the amount due to the appellant. Only the balance left after discharging this amount can be distributed amongst the respondents. It follows that the High Court was in error in holding that the respondents were entitled to rateble distribution of the assets along with the appellant.

21. In the result, the appeals are allowed, the orders passed by the Divisional Bench of the Madras High Court are set aside and the orders passed by the learned single Judge are restored. There will be no order as to costs.

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