

Deb Dutta Seal

Vs

Ramanlal Phumra and Others

Civil Appeal No. 1355 of 1966

(S.M. Sikri, G.K. Mitter, P. Jagmohan Reddy JJ)

06.11.1969

JUDGMENT

SIKRI, J. -

1. This appeal by certificate of fitness granted by the High Court under Article 133 of the Constitution is directed against its judgment and decree modifying the decree passed by the Trial Court. The Trial Court had decreed the suit and granted a preliminary decree against the appellant and another and had declared that the house at No. 35, Paddapukur Road, Bhowanipore, stood charged and/or mortgaged in favour of the plaintiffs (respondents before us) for the due payment of the sum of Rs. 99,182/3/6, and future interest was allowed at the contracted rate. The High Court modified the interest to 6 p. m. per annum till suit and the same rate till realisation. As the High Court had modified the decree it granted a certificate under Article 133 of the Constitution.

2. The only point raised by the learned counsel for the appellant is that the document Ex. 2, dated December 17, 1951, required registration and was inadmissible in evidence. The said letter reads as follows :

"Calcutta the 17th December, 1951 Girdhari Lal Phumra, Esqr., 56, Burtolla Street, Calcutta. Dear Sir, Re : 35, Pudde Pukur Road.##

I write to record that I delivered to and deposited with you this day at No. 56, Burtolla Street, Calcutta my title deeds relating to the premises No. 35, Pudde Pukur Road, Calcutta, solely belonging to me with intent to create security for my liability for the moneys payable under the three Hundies, dated this day for the sum of Rs. 80,000/- (Rupees Eighty thousand only) drawn by me in your favour and I have undertaken to execute a legal mortgage at my costs whenever called upon by you to do so. I further assure you that the said premises No. 35, Puddu Pukur Road, is free from all encumbrances and the same absolutely belongs to me.

Yours faithfully, Sd/- Deb Dutta Seal (DEB DUTTA SEAL) 17-12-51".##

3. The only evidence led as to the circumstances in which this letter was executed is that of P. W. 1, Raman Lal Phumra s/o Late Giridharilal Phumra. The defendant denied the execution of the Hundies referred to in the letter and the letter. It is necessary to extract the relevant evidence of P. W. 1. He says :

"I know the defendants 1 and 2. On 17-12-51 my father and myself lent Rs. 80,000 to

defendant No. 1 for the purpose of his business and then the defendant No. 1. executed 3 Hundis for Rs. 35,000, Rs. 35,000 and Rs. 10,000 respectively on that date. The body of the Hundis was typed. The defendant No. 1 executed all the three Hundis and the defendant No. 2 accepted the same in my presence. The Hundis are marked Exts. 1 and 1-B. Consideration for all Hundis was paid in my presence. On the same date, the defendant No. 1 gave his title deeds re : 35 Puddapukur Road after the execution of the Hundis as the security for the money. He gave the title deeds at our Gaddi at 86, Burtolla Street. He gave us this letter at the time of handing over the deeds. The defendant No. 1 signed the letter of the list of title deeds in my presence. Letter is marked Ext. 2. List of documents is marked Ext. 3."

In cross-examination he stated :

"On 17-12-51 the defendant came to us and requested for a loan of Rs. 80,000 on the ground that it was urgently needed for business..... My father read and approved of the title deeds and the defendant No. 1 made out the list. We know from before that 35, Pudda Pukur Road belonged to defendant No. 1..... I drafted the letters (Ex. 2) according to the draft usually made in such cases. The letter and title deeds were given together in the afternoon and the money was paid in the morning of the same day."

4. Both the Trial Court and the High Court have held that this letter did not require registration. It seems to us that on the evidence reproduced above what happened was this. In the morning the money was advanced and the Hundis executed. In the afternoon the defendant brought the title deeds with a view to create an equitable mortgage. He gave the title deeds to the father. The title deeds were approved and a list made by defendant No. 1 and at that moment the creation of equitable mortgage by deposit of title deeds was complete. The the letter, Ex. 2 was given. When the witness says in cross-examination that the letters and the title deeds were given together in the afternoon it does not mean that the title deeds had not already been given.

5. Ex. 2, dated December 17, 1951, on the face of it clearly does not create any mortgage. It records a past transaction and then the writer undertakes to execute a legal mortgage and further assures that the premises are free from all encumbrances, etc. The latter two provision cannot make the document registerable because they do not create or declare any interest in the premises.

6. The learned counsel for the appellant contends that we should read the words "delivered to and deposited" occurring in the first line of the letter as "I hereby deliver and deposit with you". But we are unable to see how we can change the wording of the document. He says that this letter reduces all the terms of the bargain to writing and, therefore, the letter itself constitutes the bargain and is registerable. He says it mentions the amount secured and the three Hundis executed and thus inferentially the interest on the Hundis under Section 80 of the Negotiable Instruments Act. The law on the point is quite clear and has been considered by this Court on at least three occasions. It is only necessary to mention the latest decision in *United Bank of India v. Lakharam Senaram and Co.* Where Ramaswami, J., reviewed the earlier decision bearing on the point.

7. The only question is whether the parties intended to create a charge by the execution of Ex. 2 or was it merely a record of the transaction which had already been concluded and under which rights and liabilities had already been created. It seems to us that the document did not intend to create a charge by its execution.

8. In The United Bank of India case (supra) one letter, Ex. 12, was considered not to have created a mortgage. The letter read :

"This is to place on record that I have this day deposited with you at your Head Office at Clive Street, Calcutta, the under noted documents of title relating to my properties, viz., Giridh Malho properties as described in the title deeds with intent to create an equitable mortgage upon all my rights, title and interest in the said properties to secure the repayment on demand of all moneys now owing or which shall at any time hereafter be owing from me or from M/s. Lakharam Sonaram and Co. either singly or jointly or otherwise to Bengal Central Bank Limited, whether on balance of account or by discount or otherwise in respect in any manner whatsoever and including interest with monthly rests commissions and other Banking charges and any law costs incurred in connection with the amount. I do hereby put on record that the properties mentioned below are free from all encumbrances."

Ramaswami, J., says this about the letter :

"As regards Ex. 12 also, it is not possible to accept the argument of the respondents that it created a charge for the reason that the language in Ex. 12 suggests that it recorded a transaction which had already been concluded and under which rights and liabilities had already been agreed upon. It is also significant that Ex. 12 is written not by Lekhram - the Karta of the joint family - but by Babulal Ram. It recites then he had deposited the title deeds with an intent to create an equitable mortgage 'upon all my rights, title and interest in the said properties'. The language of Ex. 12 is identical in material respects with the language of the document construed by this Court in 1950 SCR 548 (AIR 1950 SC 272) and is covered by the decision in that case."

9. It was said that if a transaction had already been entered into by the parties then Ex. 2 may not require registration, but if a transaction had not already been entered into it requires registration. Reliance was placed especially on Kedarnath Dutt v. Shamlal Khettry. The words in the memorandum in that case were :

"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with 'the plaintiff' as a collateral security by way of equitable mortgage, title-deeds of my property....."

The Court held that the memorandum did not require registration on the ground that this was "not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred. Earlier the Court had observed :

"When we consider what the memorandum is, we find it is not the contract for the mortgage, - not the agreement to give a mortgage for Rs. 1,200, but nothing than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given."

10. We are not concerned with the correct interpretation of that memorandum but if the decision lays down that even if a document on the face of it and properly interpreted in the light of the

circumstances does not disclose the creation of a mortgage, or in the words of the Privy Council in Hari Sankar Paul v. Kedar Nath Saha, even if the document itself is not an operative instrument and is merely evidential, it requires registration, the decision cannot be approved.

11. It seems to us that the document must contain all the essentials of the transaction and one essential is that the deeds must be deposited by virtue of the instrument or acknowledge an earlier deposit of title deeds and say further, as was said in the case of Hari Sanker Paul (supra) that the title deeds shall be held as security on the said mortgage.

12. Stress was also laid on the time element. Assuming that we are wrong in the interpretation that the deeds mentioned in the letter, after being shown to the father and approved, were handed back together, even then we are of the view that the document does not require registration because it is not an "operative instrument". It does not contain all the essentials of the transaction. What is registerable under the Indian Registration Act is a document and not a transaction.

13. In the result the appeal fails and is dismissed. There will be no order as to costs in this Court.

The dissenting Judgment of the Court was delivered by

MITTER, J. ❖

With regret, I am unable to concur in the judgment just now delivered. The only question canvassed in this appeal is, whether the respondents are entitled to have a mortgage decree in respect of premises No. 35, Pudda Pukur Road, Calcutta belonging to the appellant. The particulars of the mortgage as given in the plaint are :

#1. Date 17th December, 1951.2. Date of repayment 15th February, 1952.3. Sum secured Rs. 80,000/- with interest thereon at 8% p.a. and costs of realisation thereof.4. Nature of mortgage Equitable mortgage by deposit of title deeds.5. Subject-matter of mortgage Defendant No. 1's house at-premises No. 35, Puddapukur Road, Bhowanipore, District 24-Parganas.##

The two defendants in the suit were the appellant and one Deb Dutta Films Ltd. who was not a party to the mortgage. The facts about which there can be no dispute are as follows. A sum of Rs. 80,000/- had been advanced on three hundies to which the defendants were parties on December 17, 1951 repayable within 60 days after date without grace. The hundies were silent as to interest. The money was advanced at the creditor's place in the morning and in the afternoon Deb Dutta Seal, the appellant, went there with the title deeds of the above mentioned property which were examined by Giridharilal Phumra, the original plaintiff (now represented by the respondents). They were approved and two documents Exs. 2 and 3 were drawn up according to the drafts made by the first respondent Ramanlal Phumra, son of Giridharilal Phumra. They were signed by the appellant and the title deeds of the documents were made over to the creditors at the same time. Ex. 3 bore the super-scription :

"List of title deeds of premises No. 35 Pudda Pukur Road, Calcutta deposited by me this day with Giridharilal Phumra at his residence No. 35, Burtolla Street, Calcutta."

Below this was set down a list of various original conveyances and documents and certified copies of court records and municipal plans and rate bills. Ex. 2 was worded as follows :

Calcutta, the 17th December, 1951. Giridhari Lal Phumra Esq., 56, Burtolla Street, Calcutta. Dear

Sir, Re : 35, Pudde Pukur Road.##

I write to record that I delivered to an deposited with you this day at No. 56 Burtolla Street, Calcutta my title deeds relating to the premises No. 35, Puddu Pukur Road, Calcutta belonging to me with intent to create security for my liability for the moneys payable under the three hundies dated this day for the sum of Rs. 80,000/- drawn by me in your favour and I have undertaken to execute a legal mortgage at my cost whenever called upon by you to do so. I further assure you that the said premises No. 35, Pudda Pukur Road, is free from all encumbrances and the same absolutely belongs to me.

Sd./- Deb Dutta Seal. 17-12-1951."##

15. The only oral evidence adduced in this case which need be taken into consideration is that of Ramanlal Phumra, his father having died after the institution of the suit. In his examination-in-chief he said that the money had been advanced to the defendant No. 1 for the purpose of his business on December 17, 1961 and on the same day he gave his title deeds regarding 35, Pudda Pukur Road after the execution of the hundies as the security for the money. He also gave the letter Ex. 2 at the time of the handing over of the title deeds. His cross-examination makes it clear that money was advanced in the morning and the two letters and title deeds were given together in the afternoon after his father had looked into the deeds and approved of them. The letters were drafted by the witness.

16. The short question which arises is, whether the above document on the facts of the case required registration under Section 17 of the Registration Act, and whether if the document was inadmissible in evidence under Section 49 of the Registration Act, the plaintiff was entitled to a mortgage decree. Both the lower courts have held that the document did not require registration and it is the contention of counsel for the appellant that the said courts have gone wrong.

17. The cases on this point are legion but the principles of law have been stated over and over again in various decisions of the Judicial Committee of the Privy Council and of this Court, not to speak of the innumerable decisions of various High Courts. The principles of law are quite clear and were summarised as follows in *Pranjivandas Mehta v. Chan Ma Phee* :

"(1) Where titles of property are handed over with nothing said except that they are to be security, the law suppose that scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it and it alone, must determine what is the scope and extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster*, 'Although it is a well-established rule of equity that a deposit of a document of title, without more without writing, or with word of mouth will create in equity a charge upon the property referred to..... that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

18. The difficulty which has arisen in various cases had been mainly due to the form and text of the memorandum and the respective contentions of the parties based thereon and the surrounding circumstances. In the case of *Kedarnath Dutt v. Shamloll Khetty*, decided by the Calcutta High

Court about a hundred years back it was said by Couch, C.J. :

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, or their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within Section 17 of the Registration Act."

In that case the defendant had deposited certain title deeds with the plaintiff as security for the repayment of Rs. 1,200/- advanced to him at the time when the deposit was made. On the evening of the same day the defendant by way of further security gave to the plaintiff a promissory note for the amount of the loan endorsed therein the following memorandum :

"For the repayment of the loan of Rs. 1,200/- and the interest due thereon of the within note of hand, I hereby deposit with Baboo Shamloll Khetty, as a collateral security by way of equitable mortgage title deeds of my property etc."

The court held that the equitable mortgage was complete without the memorandum and the letter was not a writing which the parties had made as the evidence of their contract, but was only a writing which was evidence of the fact from which the contract was to be inferred.

In *Subramanian v. Lutchman*, the relevant portion of the memorandum was as follows :

"We hand you herewith title deeds relating to fifth class lot..... with building thereon belonging to Saleman Ahmad Seedat, also his promissory note for Rs. 63,000/- due to us, this please hold as security against advances made to us....."

There was evidence that the document was drafted and typed after the parties had come to an agreement and it was drawn up at the time they came together. Referring to the oral testimony of the plaintiff's agent that the arrangement to deposit the title deeds was made in the presence of the eldest son of E. Solomon who gave evidence to the above effect the Judicial Committee held that the evidence on the subject was conclusive that the memorandum constituted the bargain between the parties.

19. In *Obla Sundarachariar v. Narayana Ayyar*, there were two documents signed by the debtor, one was a promissory note for Rs. 60,000/- payable on demand and the other was a memorandum consisting of a list of the title deeds with the following introductory words :

"Written to E. N. A. Samoo Bhattar by Krishnaswami Ayyar of S. V. Ramaswami Ayyar and Brothers. As agreed upon in person, I have delivered to you the under-mentioned documents as security."

Both the documents were dated March 14, 1921. The evidence showed that the joint family of the debtors owed a sum of money exceeding Rs. 36,000/- and wanted further accommodation to make up the total of Rs. 60,000/-. Security was demanded and five properties were considered adequate. The transaction was completed on March 14, 1921 between 4 p.m. and 6 p.m. in the house of the plaintiff's son. Before the plaintiff arrived on the scene, the Manager of the joint family had already

handed the deeds to the plaintiff's son with two documents which he had written out and signed as mentioned above. The Judicial Committee held that the memorandum merely recorded particulars of the deeds, the subject of the deposit and there was nothing in the circumstances connected with the creation of the memorandum or in the way in which the parties dealt with it which permitted or required some other meaning or effect to be given to it. The Memorandum did not embody the terms of agreement between the parties.

20. In *Hari Sankar Paul v. Kedar Nath Saha*, there were two agreements between the parties. On July 24, 1924 a document was signed by one of the debtors setting out the terms and conditions of Rs. 25,000/- to be advanced to them. It also provided that Rs. 12,000/- should be paid on that day and the balance Rs. 13,000/- on or before 31st July, 1924. The advance of Rs. 12,000/- was to be made on the deposit of the documents of title relating to a named property and after the balance of Rs. 13,000/- was paid the mortgagors were to execute a memorandum evidencing the deposit and embodying the terms and conditions of the loan. The title deeds were formally handed over and the sum of Rs. 12,000/- paid out. Subsequently on 2nd August, 1924 the balance of Rs. 13,000/- was paid and the formality of handing the title deeds to the appellants' attorney was gone through once more and later on the same day another memorandum of agreement was executed. This document recite the advance of Rs. 12,000/- on 24th July, the deposit of documents of title and purported to declare that -

"In consideration of the two sums of Rs. 12,000/- and Rs. 13,000/- paid before the execution of the memorandum, the title deeds described in the second schedule 'which said deeds, evidences and writings have as hereinbefore stated prior to the execution of this agreement been delivered by the mortgagors to the mortgagees' said agent in the town of Calcutta with intent to create a security of the said hereditaments an premises, etc. shall be held by the mortgagees as such security as aforesaid for the payment by the mortgagors to the mortgagees at the time and in the manner hereinafter mentioned....."

21. It was held by the Judicial Committee that the statement that the title deeds had been previously delivered with intent to create as security did not alter the character of the memorandum itself in that it purported to create a mortgage over again in writing. It was observed :

"The memorandum does not merely evidence a transaction already completed : its language is operative. It is contractual in form, and it embodies an agreement that the title deeds in question are to be held as security for the advances made, and it speaks of the moneys 'hereby secured'."

22. In *Rachpal Mahraj v. Bhagwandas Daruka and Others*, Patanjali Sastri, J., said (at p. 511) :

"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 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."

In the last case the memorandum ran as follows :

"We write to put on record that to secure the repayment of the money already due to you from us on account 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 maybe found due and payable by us to you on account of the said transactions....."

This Court held that the parties did not intend by the memorandum to create the charge. The document purported only to record a transaction which had been concluded and under which the rights and liabilities had been orally agreed upon.

23. In *United Bank of India v. Lakharam & Co.*, where most of the decisions were reviewed the court negated the plea that the memorandum in that case required registration mainly on the ground that the same did not mention what was the principal amount borrowed or to be borrowed and it did not refer to the rate of interest for the loan.

24. In my view, the following propositions emerge from the above decisions :

- (a) The facts and circumstances attendant on the deposit of title deeds and the execution of the memorandum must be considered as a whole.
- (b) If the transaction of deposit of title deeds with intent to create a security be completed before the parties have a memorandum, registration of the document is not required unless as in *Hari Sankar Paul's case (supra)* the parties proceed to create a mortgage over again in writing.
- (c) The form and text of the memorandum although of paramount importance are not conclusive.
- (d) If the memorandum does not contain all the terms necessary to give it efficacy as a contract of mortgage no registration is necessary.
- (e) If the evidence shows that the memorandum was executed with the intention that it should be the repository of the bargain between the parties then the document alone can be looked into. In the absence of registration, the bargain cannot be proved.
- (f) The deposit of title deeds contemporaneously with the execution of the memorandum containing the terms of mortgage gives a strong indication of the document being considered as the bargain between the parties.

25. In this case but for the use of the past tense in the expression "I delivered to you and deposited with you" there is nothing in the memorandum which would suggest that it is not an operative document. All the terms of the bargain which the plaintiff sought to prove by oral evidence are contained in this document. It shows that the deposit was with intent to create a security for the liability for the moneys payable under the three hundies for the sum of Rs. 80,000/-. The principal amount is thus mentioned; the rate of interest is impliedly stated in the expression "my liability for the moneys payable under the hundies" which under the *Negotiable Instruments Act* was fixed at 6 per cent. and was the rate allowed by the courts below. It mentions the property given by way of

mortgage. It also impliedly fixes the date for repayment as co-terminous with "the liability under the hundies". This is borne out by the plain language which shows that the plaintiff understood the date of repayment to be 60 days from the date of execution of the hundies.

26. In my opinion the use of the past tense in the memorandum does not conclude the matter. One must consider the evidence relating to the deposit and the surrounding circumstances in which the deposit was made and the memorandum signed. There is nothing in the evidence of Ramanlal Phumra to suggest that the deposit was dissociated from the execution of the letter Ex. 2 in point of fact. As already noticed they were contemporaneous as admitted by Ramanlal Phumra. The letter was given when the title deeds were handed over. The use of the past tense in the opening sentence of the memorandum was either incorrect or untrue. It was untrue if the words "deposited and delivered" were used wilfully because a man cannot truthfully say that he "deposited and delivered" document at the moment of time when he was actually delivering or depositing them. More likely the use of the past tense was incorrect but unintentional because according to Ramanlal Phumra he was dictating the draft from a similar draft used in the past. However that may be it is clear that the creditors were not content with merely getting an admission from the appellant that the title deeds of the property had been lawfully deposited by the debtor with them. Exhibit 3 together with the oral testimony that the deposit was made with intent to create a security for the liability of the debtor would have been enough to prove the mortgage. If the creditor merely wanted the fact of deposit to be recorded in writing the letter Ex. 3 would have served his purpose. The execution of the hundies was sufficient to prove the extent of the loan. If the terms of the bargain were not meant to be recorded the execution of Ex. 2 was unmeaning and vain. The really necessity for the execution of Ex. 2 was in my opinion, to fix the appellant with the terms recorded therein. Though brief in words Ex. 2 contains all the terms of a valid mortgage by deposit of title deeds. That the execution of it was attended with some solemnity is evident from the declaration of the debtor that the property was free from all encumbrances and that he was willing to execute a regular mortgage whenever called upon. In my opinion, the document was not created merely to record the character of the deposit but to pin the executant down to the terms set for the therein. That Deb Datta Seal was a person for whom mere word of mouth had no sanctity is apparent from the written statement filed by him where he denied the plaintiff's claim in its entirety. Ordinarily when a deposit of title deeds is made with intent to create a security for any liability and thereafter a document is executed which records some but not all the terms which the nature of the transaction demands, there is scope for contending that the document is merely evidential and not operative but when the document contains all the terms and is executed contemporaneously with the deposit of title deeds, it and it alone can be considered in evidence and if the law of registration shuts the document out of consideration, unfortunate though the result may be, the law must take its course regardless of the hardship caused. In Kedarnath Dutt's case (supra) the use of the present tense regarding the deposit on the facts of the case was said not to make the document the contract between the parties. Besides one must always remember that the language of a document in English drafted by ordinary commercial people of India is not unoften tainted with faulty grammar and does not have the same precision as in the text of a Bacon or a Chalmers.

27. In the result, I would allow the appeal and hold that no mortgage decree can be passed but there being no defence to the claim of the plaintiff on the three hundies. I would allow a decree for the principal amount of Rs. 80,000/- with interest at 6 per cent. up to the date of decree and interest at the same rate thereafter.

28. In accordance with the opinion of the majority, this appeal is dismissed. There will be no order as to costs.

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