

Sir Hari Sankar Paul, Kt. and another - - - *Appellants*

v.

Kedar Nath Saha, since deceased, (now represented by
Srimati Jogemaya Dassa and others) and others - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN
BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 25TH APRIL, 1939

Present at the Hearing:

LORD MACMILLAN

LORD ROMER

SIR GEORGE RANKIN

[*Delivered by* LORD MACMILLAN]

The plaintiffs in this suit, now the appellants, seek to enforce a mortgage for the principal sum of Rs.25,000 with arrears of interest accrued. Their case is that the mortgage was effected by the delivery to them of the documents of title to certain immoveable property in Calcutta with intent to create a security thereon.

The general law in India under the Transfer of Property Act, 1882, is that a mortgage for a principal sum of Rs.100 or upwards can be effected only by a registered instrument duly signed and attested, but the validity of mortgages by deposit of title deeds in Calcutta and certain other places is expressly recognised and saved, doubtless because of the convenience of this form of security in commercial centres (see section 59 of the Act as it stood at the date of the transaction with which this case is concerned, and now, by amendment, section 58 (f)).

That the title deeds of the property were deposited by the respondents with the appellants is not disputed, but the appellants were not content to rely only on this deposit. They insisted on the execution by the respondents of a memorandum of agreement "evidencing the said deposit and embodying the terms and conditions of the loan." The appellants found upon this memorandum in their plaint and the respondents in their written statement aver that this memorandum constituted the bargain between them and the appellants and they maintain that, inasmuch as it was not registered as required by section 17 (1) (b) of the Indian Registration Act, 1908, it is inadmissible in evidence and

the mortgage is consequently unenforceable under section 49 of that Act. To this the appellants reply that the memorandum did not effect or constitute any transaction between the parties but merely recorded a transaction already completed; it therefore did not require registration, not being, in the words of the statute, a non-testamentary instrument purporting or operating "to create, declare, assign, limit or extinguish . . . any right, title or interest . . . to or in immoveable property."

There have been numerous cases, some of which have reached this Board, in which a mortgage, alleged to have been effected by the deposit of title deeds, has been accompanied by a written document and in which the question has arisen whether that document was of such a character as to require registration. The decision in each case has turned upon the nature of the document in question. It will be sufficient to refer to one or two of the most recent of these cases.

In *Obla Sundarachariar v. Narayanna Ayyar*, (1931) 58 I.A. 68, the title deeds of certain properties were handed over as security for a loan along with two written documents, viz., a promissory note for the total advance and a signed memorandum consisting of a list of the title deeds, prefaced with the names of the parties and these words:—

"As agreed upon in person I have delivered to you the undermentioned documents as security."

In the view of their Lordships as expressed by Lord Tomlin, the memorandum was a document which

"merely records particulars of deeds the subject of a deposit . . . it was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties."

Their Lordships accordingly reached

"the conclusion that the memorandum was not other than a written record of the particulars of deeds the subject of an agreement constituted in fact by the act of deposit and the payment of the money and that it neither purported nor operated to create or declare any right, title or interest in the property included in the deeds, with the result that it did not require registration."

With this case that of *Subramonian v. Lutchman*, (1922) 50 I.A. 77, may be contrasted. There, on the occasion of the deposit of the title deeds, a memorandum was signed and delivered to the lender or creditor which stated:—

"We hand you herewith title deeds relating to [certain specified property] . . . this please hold as security against advances made to us."

The memorandum in addition referred to a promissory note and a second mortgage over certain other property, both in favour of the borrowers, which they also handed over as security for the advances made to them, and the document concluded:—

"We promise not to deal with same till your amount due you is fully paid and satisfied."

Lord Carson, in delivering their Lordships' judgment, quoted passages from the cases of *Kedarnath Dutt v. Shamloll Khettry*, (1873) 11 Ben. L.R. (O.C.J.) 405, and *Pranjivandas Mehta v. Chan Ma Phee*, (1916) 43 I.A. 122, as laying down the law on the subject and stated the criterion to be:—

“ Did the document . . . constitute the bargain between the parties or was it merely the record of an already completed transaction?”

On the evidence and on the terms of the document their Lordships had no doubt

“ that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected.”

Commenting on this passage, Lord Tomlin, in the case above quoted, said on behalf of the Board:—

“ While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within section 17 of the Indian Registration Act unless it embodies all the particulars of the transactions of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section 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.”

With these considerations in mind their Lordships proceed to examine the facts of the present case. It appears that toward the end of 1923, three brothers, Kedar Nath Saha, Atindra Nath Saha and Jnanendra Nath Saha, who or their representatives, are the present respondents, arranged with the appellants for a loan of Rs.25,000, for which certain property in Calcutta owned by the borrowers was to be the security. The parties having reached agreement as to the terms of the loan, the transaction was carried out as follows. On 24th July, 1924, a meeting took place at the office of the attorneys for the appellants at which were present Hari Mohan Paul, one of the two appellants, on behalf of himself and his brother, the other appellant and Jnanendra Nath Saha, on behalf of himself and his two brothers. At this meeting a document was signed by Jnanendra Nath Saha setting out the terms and conditions of the advance. It provided that Rs.12,000 should be paid on that day and the balance of Rs.13,000 on or before 31st July, 1924, that the rate of interest was to be 9 per cent. per annum and that the period of the loan was to be one year from 1st August, 1924. It further provided that the advance of Rs.12,000 “ will be made on the deposit of the documents of title relating to the premises, No. 75, Beniatolla Street, abovementioned, and after the balance of Rs.13,000 shall be paid the mortgagors will execute in favour of the mortgagee a memorandum evidencing the said deposit and embodying the terms and conditions of the loan.”

Jnanendra having signed this document formally handed over the title deeds to the appellants' attorneys,

saying as he did so: "For the sum of Rs.12,000 which I have taken out of the loan of Rs.25,000 I am depositing these documents of title by way of security or mortgage." The sum of Rs.12,000 was thereupon paid over to Jnanendra, who signed a receipt on the memorandum for the sum of Rs.12,000 advanced "on the security and upon the terms and conditions hereinbefore mentioned."

Subsequently, on 2nd August, 1924, the balance of Rs.13,000 was paid to Jnanendra who repeated the formality of handing the title deeds to the appellants' attorneys, stating that "for the sum of Rs.12,000 which I have already received out of Rs.25,000 and for the sum of Rs.13,000 which I am receiving now these documents will be kept in security." Later on the same day Jnanendra executed the memorandum of agreement now in question.

This memorandum of 2nd August, 1924, is a formal and elaborate document. It designates the borrowers as the mortgagors and the lenders as the mortgagees and recites that the mortgagors are the owners of the property described in the first schedule, that the mortgagors had applied to the mortgagees to lend them Rs.25,000, and that the mortgagees had agreed to make this advance on the security of the documents of title specified in the second schedule. It further recites that the mortgagees had on 24th July, 1924, paid to the mortgagors Rs.12,000 and that as security for this sum the mortgagors had deposited with the mortgagees' agents the documents of title specified in the second schedule, and that the mortgagees prior to the execution of the memorandum had paid over the balance of Rs.13,000. The memorandum then proceeds to set out that it is thereby agreed and declared between the parties 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 agents in the town of Calcutta with intent to create a security on the said hereditaments and premises described in the said first schedule hereto such as is contemplated in the concluding proviso to section 59 of the Transfer of Property Act (such security having been created prior to the execution of this agreement by the delivery of the documents hereinbefore mentioned—would (*sc.* 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 and the costs (as between attorney and client) charges and expenses of and incidental to any proceeding which may be had for the protection of this security or for procuring or obtaining or attempting to obtain payment of the moneys hereby secured." There follows a series of heads dealing with the date of repayment, rate of interest, consequences of default, warranty of title and various other matters and the memorandum in conclusion confers on the

mortgagees a power of sale of the mortgaged property. A receipt for the total sum of Rs.25,000 is appended.

Such being the tenour of the memorandum of 2nd August, 1924, and such the circumstances attendant on its execution and delivery, the question is whether it required to be registered. Lord-Williams J., held that it did not, being satisfied that the "memorandum was nothing but a record of what had been agreed to orally on the 24th July," and was "not a document containing the bargain made between the parties." On appeal, Costello J., with whom Panckridge J. concurred, was of the contrary opinion, holding that "the writing was of such a character as calls for registration," for the reasons set out in a long and careful judgment.

Their Lordships find themselves in agreement with the Appellate Court. The leading feature of this case is that the appellants' advisers were evidently quite aware of the niceties of the law in the matter and deliberately endeavoured to effect a valid mortgage by delivery of title deeds and at the same time to accompany it with an effective written document which would nevertheless not require registration. The appellants, in their Lordships' opinion, have over-reached themselves and have failed to achieve their purpose.

In the first place, it is made clear by the earlier memorandum of 24th July, 1924, that the parties contemplated from the outset that a document should be executed "evidencing the said deposit and embodying the terms and conditions of the loan," and this earlier memorandum bears an acknowledgment of the receipt of the first instalment of the loan as having been advanced "on the security and upon the terms and conditions hereinbefore mentioned." When the memorandum of 2nd August, 1924, subsequently executed, is examined, it is found to contain all the essentials of the transaction. It states that it is *hereby* agreed and declared between and by the parties that in consideration of the sums advanced the title deeds of the property shall be held as a security on the said property and refers to any proceeding which may be had for the protection of *this security* or for procuring payment of the moneys *hereby secured*. It then sets out all the details of the transaction and specifically confers a power of sale on the mortgagees. It is true that in the parenthetical passage, quoted above, the title deeds are stated to have been previously delivered with intent to create a security, but that does not alter the character of the memorandum itself, which if the parenthetical passage be disregarded, is an instrument effective to create an interest in the property in favour of the mortgagees. Having purported to create a mortgage by delivery of title deeds the parties proceeded to create it over again in writing. 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.*" It not only contains all the terms on which the moneys were advanced but it expressly confers a power of sale. It is noteworthy that in the appellants' "concise statement" of their claim in the plaint they state that they sue for a decree "for realisation of the principal and arrears of interest due and payable under a memorandum of agreement dated 2nd August, 1924."

Their Lordships are of opinion that where, as here, the parties professing to create a mortgage by 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. The appeal accordingly fails.

Their Lordships will humbly advise His Majesty that the decree of the Appellate Court of 6th April, 1937, be affirmed and the appeal dismissed. The legal representatives of the respondent Kedar Nath Saha, who alone appeared, will have their costs of the appeal.



In the Privy Council

SIR HARI SANKAR PAUL, KT. AND
ANOTHER

v.

KEDAR NATH SAHA, SINCE DECEASED
(NOW REPRESENTED BY SRIMATI
JOGEMAYA DASSA AND OTHERS) AND
OTHERS

DELIVERED BY
LORD MACMILLAN

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