

Privy Council Appeal No. 129 of 1918.

Allahabad Appeal No. 26 of 1915.

Bharat Indu and others - - - - - *Appellants*

v.

Hakim Mohammad Hamid Ali Khan and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 14TH MAY, 1920.

Present at the Hearing:

LORD BUCKMASTER.

LORD PHILLIMORE.

SIR JOHN EDGE.

[*Delivered by* LORD PHILLIMORE.]

The suit which gave occasion to the present appeal was brought by the plaintiff, now the first respondent, as assignee of a mortgage executed on the 30th August, 1895. to one Wilayat Ali Khan in favour of one Nazir Ali for Rs. 5,000 and interest. The assignment was made by deed of sale dated 24th January, 1900; and the suit was brought to recover the sum due upon the mortgage or to obtain the sale of the mortgaged property.

There were several defendants; but those with whom their Lordships are concerned are the present appellants, heirs of one Babu Durga Prasad who had lent money to Wilayat Ali Khan upon mortgage of other properties, and had brought them to sale, and as the proceeds were insufficient to realise the sum due upon his mortgage, had obtained a further personal decree for the balance, and had thereunder attached the properties which were subject to the mortgage to the plaintiffs in this suit. Ultimately these attached properties appear to have been brought to sale and then Durga Prasad or his heirs became the auction purchasers.

The title of these heirs is therefore subsequent to that of the plaintiff and their defence rests upon their ability to displace the mortgage upon which the plaintiff relies.

Two objections are taken on their behalf to the plaintiff's title. One is that the mortgage upon which the plaintiff relies was never duly registered. On this point both the Subordinate Judge and the High Court at Allahabad decided in favour of the plaintiff. The other point is that the mortgage in question was a sham transaction under which no money passed, executed by Wilayat Ali Khan to a nominal mortgagee in order that it might form a protection for that part of his estate against his other numerous creditors. Upon this point the learned Subordinate Judge decided in favour of the defendants and dismissed the suit; but upon appeal the High Court thought otherwise and made a decree in favour of the plaintiff in the usual terms of a decree in a mortgage suit. Hence the present appeal.

Their Lordships will deal with the point as to registration first. By the Transfer of Property Act, Section 59, where the principal to be secured exceeds Rs. 100, a "mortgage can be effected only by a registered instrument." The Indian Registration Act, then in force, Act III of 1877 is the Act governing the registration in this case. By Section 32, except in certain cases not material to the present enquiry:—

"Every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned."

Now the mortgage in question was not presented by the mortgagee or the mortgagor, but by one Daud Ali described as general attorney of Wilayat Ali Khan, under a general power of attorney, dated the 1st and registered on the 4th November, 1885. If therefore the registration is to be good it must be because Daud Ali was the agent of Wilayat Ali Khan, and was "duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned." Their Lordships have therefore to enquire whether the power of attorney is sufficient within the meaning of this provision.

By Section 33:—

"For the purposes of Section 32, the powers of attorney next hereinafter mentioned shall alone be recognised (that is to say):—

"(a) If the Principal at the time of executing the power of attorney resides in any part of British India 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 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:—

"Persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend. . ."

“ In every such case 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.

“ 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 issue a commission for his examination.”

Now the power of attorney, under which Daud Ali purported to act, was certainly executed by Wilayat Ali Khan and is sufficiently large in its terms to authorise Daud Ali to procure the registration of the mortgage in question. But it appears from the endorsement made by the sub-registrar and must be taken to be the fact that it was brought to him on the 4th November, 1885, “ for registration and authentication by one Wazir Beg, a servant of Wilayat Ali Khan, who said that the executant was ill and that he (the servant) was going to deposit the commission fee and asked that the power of attorney might be registered on the spot.” The sub-registrar could not legally do this, and accordingly on the 6th he personally went to the dwelling place of Wilayat Ali Khan, who he was satisfied was ill and unable without risk or serious inconvenience to attend at the registration office. He read out the contents of the power of attorney to Wilayat Ali Khan, who thereupon admitted the execution and completion of the power and asked that after registration the document might be given to Daud Ali. Thereupon the sub-registrar registered it. On these facts it is contended on behalf of the appellants that the power of attorney was not duly registered and therefore that Daud Ali had not the requisite authority to present the mortgage for registration, and that the mortgage has not been duly registered and is invalid.

The provisions of the Registration Act are very carefully designed to prevent forgeries and the procurement of conveyances or mortgages by fraud or undue influence, and though it may seem somewhat technical to insist upon exact compliance with the provisions of the Act, it is necessary so to do. Their Lordships have already given their sanction to the necessity of strict compliance with these forms in the case which was referred to at the Bar, *Jambu Parshad v. Muhammad Aftab Ali Khan* (42 I.A. 22). In that case there were two mortgages presented at the registration office by two agents on behalf of the mortgagee, neither of whom held any authenticated power of attorney. Thereupon the registrar in pursuance of his duty under Section 34 enquired of the mortgagors who were there present at the same time whether they admitted the execution of the deeds, and they said that they did. Whereupon the registrar registered them. The presentation on behalf of the mortgagee being ineffective by reason of the defect in the powers of attorney, an attempt was made to support it on the theory that the mortgagors who attended and admitted the execution and received the mortgage money might be assumed to have presented the mortgages. But the High

Court at Allahabad and their Lordships on appeal held otherwise. Their Lordships observed that it was obvious that the mortgagors had attended to admit that they had executed the deeds and not to present them for registration and that they did not present them for registration. Their Lordships said that the mortgagors could not be treated as presenting them for registration ; they were no doubt assenting to the registration but that would not be sufficient to give the registrar jurisdiction. They observed that one object of the Act was to make it difficult for persons to commit frauds by means of registration under the Act and that it is the duty of the Courts in India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presents a document for registration has not been duly authorised in the manner described in the Act to present it.

Their Lordships who are sitting on the present appeal have therefore to examine the evidence as to registration under the guidance of the decision just quoted.

Now it is said that the only presentation of the power of attorney was the presentation by the servant Wazir Beg, who had insufficient authority and that the sub-registrar accepted this presentation, and thereupon proceeded with the other steps required by the Act which follow on the presentation, and that the presentation was bad and that nothing that followed upon it could make it good. The Courts in India did not take this view and their Lordships think that they acted rightly. It was probably an irregularity on the part of the sub-registrar to accept the document as presented by Wazir Beg, and to enter, as he ultimately did, the registration as made on the 4th November instead of the 6th. But if all that had happened had been that Wazir Beg had come as a messenger with the document in his hand from his master, and requested the attendance of the sub-registrar at his master's house, because his master was ill, and if the sub-registrar instead of letting Wazir Beg carry the document back, had carried it himself, and on reaching Wilayat Ali Khan's house had said to him " Do you present this document ? If so, do you admit its execution ? " no objection could have been taken. Now it appears from the endorsement that the sub-registrar when he reached the house, read the power of attorney through to Wilayat Ali Khan, who admitted the execution and completion of the instrument. The sub-registrar went there because Wilayat Ali Khan desired it to be registered ; and he knew from the message by the servant and Wilayat Ali Khan knew that he knew that Wilayat Ali Khan desired it to be registered and that he had been sent for and had come for the purpose of completing the registration. '

The case is not like the one already quoted, because in the present case it is the person who desired to present and purported to present who took the further step and admitted the execution.

It is to be further observed that under Section 61, the document after registration is to be returned to the person who presented the same for registration or to such person as he shall

nominate. If Wazir Beg had been the person presenting, the document should have been returned to him, but the sub-registrar records that Wilayat Ali Khan asked that after registration the document might be given to Daud Ali—that is he treated himself as the person who presented the document and who therefore had the power of saying to whom the document should be returned after registration.

The proper conclusion from these facts was that drawn in the Courts below. The presentation by Wazir Beg was inoperative but not injurious to the validity of any subsequent presentation. It remains that Wilayat Ali Khan was the real presenter, and was so treated by the sub-registrar.

A further point was taken that Section 33 requires that the document shall be executed before as well as authenticated by the sub-registrar, and that this power of attorney certainly was not executed in his presence. But all this is covered by the proviso already quoted, under which, if the person is ill, what the sub-registrar is to do is to satisfy himself that the power of attorney has been voluntarily executed, for which purpose he may go to the sick man's house and examine him. This is what the sub-registrar did.

Upon the whole their Lordships are of opinion that this objection to the registration fails and that the appellants cannot succeed upon this ground.

There remains the question of substance upon which the Courts disagreed. It was urged on behalf of the appellants that the mortgage put in suit was a paper transaction; and that no money was really lent by Nazir Ali to Wilayat Ali Khan. The grounds for this contention are shortly as follows. That there is no documentary evidence outside the statement in the deed that any money passed upon the execution of the mortgage; that Daud Ali who deposed to the fact that it did pass, says that a receipt was executed, and that this receipt is not produced; that there is again no documentary evidence except the sale deed that Hamid Ali Khan, the plaintiff, paid anything upon the transfer when it was executed; that he was not called as a witness and produced no accounts; that he was the nephew of Wilayat Ali Khan; and that Wilayat Ali Khan, who died two years before the suit was instituted, was very heavily in debt, and might desire by this paper transaction to acquire a shield to protect his property from other creditors; that no interest appears to have been paid upon the mortgage; that it was put in suit very late; and that it is very doubtful whether Nazir Ali who was a servant or Nazir in a native State and had a very small salary, could have had Rs. 5,000 to lend.

To this it was replied that it might well be that Nazir Ali, though his salary was small, acquired money in other ways; that there was nothing in the non-payment of interest by the mortgagor, as he seems to have taken the same course with regard to other mortgages; that there was no delay in asserting the claim, the proper time to do so being when the auction purchasers

claimed the property ; that the case which the appellants were now making was not their original case, which was that either Wilayat Ali Khan had never executed the deed, and that it was a forgery, or that Daud Ali had registered it after he had been dismissed and his power of attorney had been withdrawn ; that in fact the case had been rather launched as one of fraud upon Wilayat Ali Khan than of fraud by Wilayat Ali Khan ; that there was no reason for disbelieving the oral testimony ; and lastly, that whereas Wilayat Ali Khan had effected considerable mortgages and failed to pay interest upon them, it was a mistake to suppose that he was insolvent, or had not in fact a considerable balance of assets, so that he would not be very likely to encumber his estates by a fictitious mortgage for the purpose of a protection which he did not need.

This last point led to the High Court remitting the case to the Court of the Subordinate Judge with a view to having it ascertained what Wilayat Ali Khan's real means at the time were, and the result was that the Subordinate Judge found that there was a very handsome balance of assets over liabilities. After this further finding, the High Court reversed the decision of the Subordinate Judge and held that the mortgage was a real transaction.

It has been urged before their Lordships that the matter largely turns upon the credibility or otherwise of the plaintiff's witnesses, Daud Ali and Nazir Hussain, who swore that the money passed, and that it is not right that the finding of the Subordinate Judge that these witnesses were to be disbelieved should be set aside by the High Court which did not see the witnesses ; and in support of this contention reference was made to the decision of the Board in *Bombay Cotton Manufacturing Company, Limited v. Motilal Shivalal* (42 I.A., 110). Their Lordships have no intention of entrenching upon the salutary principle laid down in that case. But in the present case the High Court had an important piece of knowledge which was not in the possession of the Subordinate Judge who tried the case. He proceeded upon the view, which was to a certain extent true, that Wilayat Ali Khan was "considerably involved," but he did not know that however this might be, there was still an ample surplus of assets ; and this important fact, of which the High Court was in possession, but of which the Subordinate Judge was not aware, might well warrant a different conclusion from that which was arrived at in the Court of first instance.

Upon the whole, though the case is not free from difficulty, their Lordships are of opinion that the High Court was right, that the transaction was not fictitious and that the decree made in the High Court should stand. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

BHARAT INDU AND OTHERS

2.

HAKIM MOHAMMAD HAMID ALI KHAN AND
OTHERS.

DELIVERED BY LORD PHILLIMORE.