

Privy Council Appeal No. 92 of 1928.
Patna Appeal No. 54 of 1927.

Miss Dottie Karan and others - - - - - *Appellants*
v.
Rai Bahadur Lachmi Prasad Sinha and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 16TH DECEMBER, 1930.

Present at the Hearing :

LORD BLANESBURGH.
LORD MACMILLAN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal against a judgment and decree dated the 9th August, 1927, of the High Court of Judicature at Patna, setting aside a judgment and decree dated the 20th December, 1923, of the Court of the Subordinate Judge of Monghyr.

The suit was brought on the 12th September, 1922, by Lachmi Prasad Sinha and his co-plaintiffs, who are members of a Hindu joint family, against Christiana Benshaw and her daughter, Dottie Karan, claiming to recover Rs. 21,770-6-3 in respect of principal and interest alleged to be due on a mortgage dated the 4th of October, 1910, and to enforce the said mortgage by sale of the mortgaged property. The Subordinate Judge dismissed the plaintiffs' suit with costs.

The plaintiffs appealed to the High Court, which allowed the appeal and made a decree for sale of the mortgaged property in favour of the plaintiffs. Christiana Benshaw died while the appeal was pending in the High Court, and her husband, Samuel Benshaw and his daughter Mercia Benshaw, were added as legal representatives of the said Christiana Benshaw.

Dottie Karan, Mercia Benshaw and Samuel Benshaw have appealed against the decision of the High Court to His Majesty in Council.

Christiana Benshaw first married Rai Bahadur Duraj Karan, an Indian Christian. By him she had a daughter, Dottie Karan, who is the first appellant, and a son, David Karan, who died before this litigation began.

After the death of her first husband, Christiana married the above-mentioned Samuel Benshaw, by whom she had a daughter, the above-mentioned Mercia Benshaw. These two persons are the other appellants.

Rai Bahadur Dhiraj Karan died on the 13th of December, 1895, leaving him surviving his widow, Christiana, his son, David, and his daughter, Dottie.

The plaintiffs' case was that after her marriage to Samuel Benshaw, Christiana appointed him her agent, and gave him a general power of attorney, dated the 6th April, 1898, that on or about the 6th May, 1909, Christiana Benshaw borrowed Rs. 500 from Lachmi Prasad Sinha on a note of hand; that as she required a further advance she arranged with Lachmi Prasad Sinha through her husband and agent, Samuel Benshaw, that he should advance a further sum of Rs. 2,500, and that her first husband's share in Mahal Kamarpar should be mortgaged by her and her two children, David and Dottie Karan, as security for the two sums of Rs. 2,500 and Rs. 500, making a total of Rs. 3,000 and interest thereon.

It was alleged on behalf of the plaintiffs that on the 4th October, 1910, Christiana Benshaw, Dottie Karan and David Karan executed a mortgage deed in favour of Lachmi Prasad Sinha at Monghyr in the presence of attesting witnesses, and that at that time the sum of Rs. 2,500 was paid by him to Christiana Benshaw. It was alleged that the month of February had been inserted as the date at the end of the mortgage deed, and that at the time of execution the word "February" was crossed or blotted out, and the date the 4th October, 1910, was inserted.

This was done, it was alleged, with the consent of the executants and the alteration was initialled by Samuel Benshaw.

There is no doubt that a date in the mortgage has been crossed out, and it was alleged on behalf of the defendant-appellants that what was crossed out was not only the month February, but also the day of the month, viz., the 8th.

On the 5th October, 1910, the mortgage deed was registered at Monghyr by the Sub-Registrar on the admission of execution by Samuel Benshaw, who presented a special power of attorney dated the 9th February, 1910, purporting to have been executed by Christiana Karan (then Christiana Benshaw), Dottie Karan and David Karan before the Sub-Registrar of Allahabad on the 10th of February, 1910.

The defendants admitted their signatures to the mortgage deed, but they denied that they executed it at Monghyr on the 4th October, 1910, or that they received any consideration

money. They alleged that they were at Allahabad on the 4th of October, 1910, and they stated that they had not authorized Samuel Benschaw to admit execution of the mortgage, which was dated the 4th October, 1910, and that the only mortgage executed by them was dated the 8th February, 1910.

The defendants further contended that the attestation and registration of the mortgage were not according to law, and that, therefore, the deed was inoperative as a mortgage.

The Subordinate Judge held that the executants were at Allahabad on the 4th October, 1910: that they did not go to Monghyr on that date; that the deed was signed at Allahabad and attested subsequently at Monghyr, and consequently, it was not validly attested. He also held that Mr. Benschaw had no authority to admit the execution of the deed dated the 4th October, 1910, but only of a deed dated the 8th February, 1910; and that the deed was not validly registered. He further held that as the executants did not go to Monghyr it followed that they did not receive the consideration money. In the result he dismissed the plaintiffs' suit with costs.

On the plaintiffs' appeal, the High Court held that the mortgage was duly executed at Monghyr in the presence of attesting witnesses; that Samuel Benschaw had authority to admit execution of the mortgage deed on behalf of the executants before the Sub-Registrar; that in any case, as the executants had represented to Lachmi Prasad Sinha that Samuel Benschaw had such power and thereby induced Lachmi Prasad Sinha to act on that representation they could not now deny Benschaw's authority, and consequently, the deed was validly attested and registered. They also held that the executants received consideration money. They set aside the decree of the Subordinate Judge and ordered that a preliminary decree be drawn up for the amount due under the mortgage together with costs in both Courts in favour of the plaintiffs.

Against that decree of the High Court the defendants, Dottie Karan, Mercia Benschaw and Samuel Benschaw, have appealed to His Majesty in Council. As already stated, the two last mentioned defendants are parties to this appeal in their capacity of legal representatives of Christiana Benschaw.

Their Lordships do not find it necessary to give any decision upon the questions of fact involved in the above-mentioned contentions of the parties, as to which the evidence was conflicting, and in respect of which the Courts in India arrived at different conclusions, because, in their Lordships' opinion, this appeal can, and must, be decided upon the question relating to registration of the mortgage bond.

As to the last-mentioned point there is no dispute as to the material facts.

The special power of attorney executed by Christiana Benschaw, Dottie Karan and David Karan, under which Samuel

Benshaw purported to act when he admitted execution of the mortgage deed before the Registrar at Monghyr on the 5th October, 1910, is as follows :—

“ We are Mrs. Christiana Benshaw Nee (*sic*), Mrs. Christiana Karan, widow of late Rai Dhiraj Karan Bahadur, Miss Dottee Karan, daughter and Mr. David Karan, son of late Rai Dhiraj Karan Bahadur, residents of Mohalla Belan Bazar, Pargana, police station, sub-registry office and district Monghyr, at present residing at South Road, Allahabad, by nationality Christians, by occupation Zamindars.

“ We, the executants have executed a mortgage bond, dated 4th October, 1910, for Rs. 3,000 in favour of Babu Lachhmi Parshad Sinha, son of Babu Beni Ram, deceased, by caste Amast Kayasth, resident of Lachhmi Nagar Gogri, Pargana Pharkia, police station Gogri, district Monghyr, at present residing at Monghyr fort, by occupation a Zamindar, and have affixed our signatures thereon by our own pen. As it is necessary and requisite for us to present the said bond before the Registrar of district Monghyr, and to have it registered, we of our own accord and free will, have appointed Mr. Samuel Benshaw, husband of me Christiana Benshaw, by nationality a Christian, resident of Belan Bazar, Pargana Monghyr, police station Monghyr, district Monghyr, by occupation a Zamindar as our Mukhtar Khas (special agent) and we do declare that the said Mukhtar shall present the said bond containing our signatures before the Sub-Registrar of Monghyr, within the jurisdiction of the Hon'ble High Court in Calcutta, get the same registered on his own admission, on our behalf and affix his signature as our Mukhtar, to his admission, and effect exchange of equivalents after the deed is registered. These acts done by the said Mukhtar are and shall in every way be accepted and ratified by us as done by us as personally. Therefore, we have executed this special power of attorney so that it may be of use when required.

“ Dated the 9th February, 1910.

“ Christiana Karan now Christiana Benshaw.

“ Dottie Karan.

“ David Karan.

“ *Scribe.*—Muhammad Yasin, resident of Mahalla Belan Bazar Monghyr, at present residing at Allahabad.”

On the special power there is an endorsement by the Sub-Registrar of Allahabad to the effect that the said power of attorney was executed before him by the above-mentioned executants on the 10th February, 1910, and the said power bears the seal of the Sub-Registrar of Allahabad.

The said power also bears the name and seal of the District Sub-Registrar of Monghyr, and the date the 5th October, 1910.

It is to be noted that the date of the mortgage bond referred to in the special power of attorney is given as the 4th October, 1910.

Inasmuch as the special power of attorney was executed on the 10th February, 1910, and the executants state therein that they “ have executed a mortgage bond,” it is obvious that the date “ 4th October, 1910,” could not have been in the special power when it was executed.

Both the Courts in India have found that the date of the mortgage bond stated in the special power, when it was executed, was the 8th February, 1910, and that the said date, viz., the 8th February, 1910, had been altered to the 4th October, 1910.

The High Court further found that the alteration must have been made after the registration of the special power had been effected at Allahabad on the 10th February, 1910.

With this finding their Lordships agree. The High Court further held that the alteration must have been made at the instance of Samuel Benschaw, as the special power was in his possession. This may or may not be correct; it is, however, not material for the consideration of the present question, for their Lordships are satisfied that there is no ground for holding that the alteration was made with the consent or by the authority of the executants of the special power.

In the consideration of this question, therefore, it must be taken that the special power given on the 10th February, 1910, by the three executants to Samuel Benschaw, was in respect of a mortgage bond dated the 8th February, 1910, which the executants stated they had executed. The executants thereby gave Samuel Benschaw power to present the said bond before the Sub-Registrar of Monghyr.

The question is whether the registration of the mortgage bond dated the 4th October, 1910, which Samuel Benschaw purported to effect in pursuance of the above-mentioned special power was a good and valid registration.

For the consideration of this question it is necessary to refer to certain sections of the Transfer of Property Act, 1882 (Act IV of 1882), and of the Indian Registration Act (Act XVI of 1908).

Section 59 of the Transfer of Property Act, 1882, provides that:—

“ 59. Where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.”

This section applies to the mortgage in suit inasmuch as the principal money secured thereby was more than Rs. 100, and, therefore, the alleged mortgage could be effected only by a registered instrument.

By Section 3 of the said Act “ registered ” means registered in British India under the law for the time being in force regulating the registration of documents. The law regulating the registration of documents in force at the time when the mortgage was executed was the Indian Registration Act of 1908, which came into force on the 1st January, 1909 :—

Section 17 (1) (b) is as follows :

“ The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :—

(b) Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property.”

Section 32 is the next material section :—

“ 32. Except in the cases mentioned in Section 31 and Section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office :—

“(a) 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

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

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

Sub-clause (c) is applicable to the facts of this case, inasmuch as the alleged mortgage was presented for registration by Samuel Benschaw purporting to act under the above-mentioned special power.

Section 33 specifies the powers of attorney which shall alone be recognized, and sub-section (1) (a) is applicable to this case, and is as follows :—

“ 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 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.”

Section 34 provides for the time within which the persons or their representatives must appear before the Registrar for presentation, and sub-section (3) (c) provides that the registering officer shall thereupon in the case of any person appearing as a representative assign or agent satisfy himself of the right of such person so to appear.

In their Lordships' opinion it is clear that the registration of the mortgage of the 4th October, 1910, was not effected in accordance with the above-mentioned provisions of the Registration Act.

An examination of the special power of attorney ought to have shown the Registering Officer to whom Samuel Benschaw presented the mortgage, that the matter was not in order. The special power on the face of it bore the date 9th February, 1910, and the endorsement by the Allahabad registering officer showed that it was executed before him on the 10th February, 1910. This special power was being used by Samuel Benschaw as an authority to present a mortgage which the executants in the said power were made to say that they had executed on the 4th October, 1910, which disclosed an impossible state of affairs. Apart from this, however, it is clear, as already stated, that when the executants signed the special power of attorney the mortgage, which Samuel Benschaw was thereby empowered to present for registration, in fact, was dated the 8th February, 1910; that date was altered after the special power had been registered

on the 10th February, 1910, but without the consent or authority, of the executants.

In their Lordships' opinion the special power was no authority for Samuel Beshaw to present for registration any mortgage dated the 4th October, 1910, and inasmuch as the special power was the only authority produced to the Registering Officer, that officer had no jurisdiction to accept the said mortgage for registration.

It was, however, argued on behalf of the plaintiffs, that Section 87 of the Registration Act was material, and that by reason of the terms thereof the registration should not be deemed invalid.

Section 87 is as follows :—

“87. Nothing done in good faith pursuant to this Act or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure.”

Their Lordships are unable to accept this contention. The facts of this case do not show a defect of procedure ; but, on the contrary, they do disclose a want of jurisdiction in the Registering Officer.

It was then contended on behalf of the plaintiffs that the general power of attorney, dated the 6th April, 1898, and given by Christiana Beshaw to Samuel Beshaw was sufficient authority to enable him to present the mortgage in suit for registration. This contention is without any substance.

The power of attorney given by Christiana Beshaw alone was no authority to Samuel Beshaw to present a mortgage purporting to be given by Christiana Beshaw, her son and daughter.

Further, as far as their Lordships are aware, the general power of attorney was not produced to the Registering Officer or acted upon by him.

The High Court were of opinion that the evidence of the plaintiff Lachmi Prasad Sinha showed that the executants represented to him that Samuel Beshaw had a special power to register the mortgage bond for them, that he acted upon such representation, and that consequently it was not open to the defendants to challenge the validity of the registration. Even assuming the facts as found by the High Court, their Lordships are of opinion that they cannot constitute any estoppel in this case having regard to the fact that the express provisions of the Registration Act have not been complied with.

Their Lordships are of opinion that the mortgage bond in suit was not registered in accordance with the provisions of the Indian Registration Act : accordingly it was not a registered instrument, and no mortgage was effected thereby.

For these reasons and without expressing any opinion on the other issues raised in the case, their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment and decree of the High Court set aside, and the decree of the Subordinate Judge restored. The plaintiffs must pay the costs of the defendant-appellants in the High Court and of this appeal.

In the Privy Council.

MISS DOTTIE KARAN AND OTHERS

v.

RAI BAHADUR LACHMI PRASAD SINHA
AND OTHERS.

DELIVERED BY SIR LANCELOT SANDERSON.

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