

Obla Sundarachariar and others - - - - - *Appellants*

*v.*

Narayana Ayyar and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 13TH JANUARY, 1931.

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*Present at the Hearing :*

LORD TOMLIN.

LORD MACMILLAN.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

SIR GEORGE LOWNDES.

[*Delivered by* LORD TOMLIN.]

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The suit out of which this appeal arises was instituted in 1921 in the Court of the Subordinate Judge at Madura by one Samoo Battar, a moneylender doing business in Palghat, Madras, and other places. He claimed in effect to enforce an equitable mortgage by deposit of title deeds to secure Rs. 60,000 and interest and to recover a personal judgment for the amount of the mortgage debt so far as the security should prove insufficient.

The defendants to the suit were the members of a joint family firm trading at Madura. The present appellants, who are assignees of the interest of the joint family firm in the property comprised in the title deeds in question, were brought into the suit as additional defendants.

On the 3rd November, 1923, the Subordinate Judge made the usual mortgage decree for the amount claimed and costs with a direction for sale in default of payment and with liberty for the plaintiff if the proceeds of sale of the property proved insufficient to apply for a supplemental decree against the family properties

of the members of the joint family firm and also against the members of the joint family firm personally.

The present appellants appealed to the High Court.

On the 26th October, 1928, the High Court dismissed the appeal with costs.

The appellants obtained special leave to appeal to His Majesty in Council. The respondents to the appeal are the legal representatives of the plaintiff who is dead.

The question raised by the appeal is whether there is any mortgage capable of legal proof having regard to the fact that there was a written memorandum relating to the matter which was not registered under the Registration Act XVI of 1908.

The facts are to be gathered from the documents and the evidence of witnesses called by the plaintiff. No evidence was adduced by the defendants.

The story is in substance as follows :—

The joint family firm owed the plaintiff Rs. 36,809. 0. 10. and wanted a further advance so as to make up a total debt of Rs. 60,000. Their manager, Krishnaswami Ayyar, entered into negotiations with the plaintiff through the plaintiff's son and eventually came to Madras to deal with the matter. Security was demanded. The deeds of two properties were offered but rejected as inadequate. Then the deeds of three additional properties were offered. The five properties were considered adequate security. The transaction was completed on the 14th March, 1921, between 4 p.m. and 6 p.m., in the house of the plaintiff's son. There were present the plaintiff, his son, the manager of the joint family firm, and one Doraisami.

Before the plaintiff arrived on the scene the manager had already handed the deeds to the plaintiff's son with two documents which he had written out and signed, namely: (1) A promissory note for Rs. 60,000 payable on demand with interest at 1 per cent. per mensem, and (2) a memorandum which consisted of a list of the title deeds, with the following introductory words :—

“Written to E. N. A. Samoo Battar by Krishnaswami Ayyar, of S. V. Ramasami Ayyar and Brothers.

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

Both documents were dated the 14th March, 1921.

The promissory note was signed by the manager but was not witnessed. It showed on its face that the Rs. 60,000 was made up of Rs. 36,809. 0. 10. amount already due and Rs. 23,190. 15. 2. “amount received in cash to-day.”

The memorandum was signed by the manager and witnessed by Doraisami.

Upon the arrival of the plaintiff his son showed him the deeds and the promissory note and the memorandum and was instructed by the plaintiff to examine the deeds to see whether they were in order.

When this examination had been completed and the deeds were found to be in order, the deeds, the promissory note, and the memorandum were put away by the plaintiff's son in a safe and a cheque for Rs. 23,115 together with cash to make up Rs. 23,190. 15. 2. was handed to the manager.

Under section 17 of the Registration Act, registration is required of (a) instruments of gift of immoveable property, and (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 in immoveable property.

By section 49 of the same Act it is provided that no documents required by section 17 to be registered shall (a) affect any immoveable property comprised therein; (b) confer any power to adopt; or (c) be received as evidence of any transaction affecting such property or conferring such power; unless it has been registered.

It is necessary also to bear in mind section 59 of the Transfer of Property Act which provides that 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, but that nothing in the section now being cited shall be deemed to render invalid mortgages made in the towns of Calcutta and Madras, and certain other towns therein mentioned by delivery to a creditor or his agent of documents of title to immoveable property with intent to create a security therein.

Now this transaction took place in Madras and did not therefore require a registered instrument under section 59 of the Transfer of Property Act.

The question which falls to be determined is whether the memorandum having regard to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff is an instrument which purports or operates 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.

If the memorandum is considered *in vacuo* its meaning is plain. It records particulars of documents which it states have been delivered as security in pursuance of an agreement reached in person.

It does not state what were the terms of the agreement or indicate the nature of the matter for which the deeds were deposited as security. So far as anything disclosed by the memorandum is concerned the security may have been for money lent or to be lent or for the performance of some obligation, the breach of which would sound in damages.

Considered in this light the memorandum, in their Lordships' judgment, merely records particulars of deeds the subject of a deposit. Is there then anything in the circumstances connected with the creation of the memorandum or in the way in which the parties dealt with it which permits or requires some other meaning or effect to be given to it?

The answer, in their Lordships' judgment, must be in the negative. Even if it was a condition of the advance that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit could not alter the nature and meaning of the document. 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. Upon this view of the matter apart from authority it would in their Lordships' opinion be impossible to hold that the document purported or operated to create or declare any right, title or interest in the property and required to be registered under section 17 of the Registration Act.

In this connection it may be observed that though an agreement embodied in a written document requiring registration under section 17 of the Registration Act and not so registered cannot be proved by the written document (*see* section 49 of the Registration Act) or by oral evidence (*see Shaw v. Foster*, L.R., 5 H.L. 321), yet where there is no written agreement there seems no reason why the intent to create a security by deposit of title deeds under the exception provided for in section 59 of the Transfer of Property Act should not be evidenced by written as well as by oral evidence.

It is, however, urged by the appellants that the present case is covered by the decision of their Lordships' Board in *Subramonian v. Lutchman* 50 I.A. 77, and that the appeal should succeed.

The memorandum in that case was held to embody the agreement between the parties and is in their Lordships' view different in that respect from the memorandum here under consideration.

Lord Carson, in delivering the judgment of the Board, quoted with approval a passage from the judgment of Couch C.J. in *Kedarnath Dutt v. Shamloll Khettry* 11 Ben. L.R. (O.C.J.) 405. That passage is in the following terms :---

"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 of 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."

Ultimately Lord Carson summed up the conclusion of the Board in these words :—

“Their Lordships have no doubt therefore 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.”

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 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.

Having regard to the view already expressed of the effect of the memorandum now under consideration, no comfort is to be found for the appellants in the case upon which they relied.

Their Lordships reach 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.

In their Lordships' opinion the appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.



OBLA SUNDARACHARIAR AND OTHERS .

vs.

NARAYANA AYYAR AND OTHERS.



DELIVERED BY LORD TOMLIN.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.  
1931.