
(1944) 11 BOM CK 0019
In the Bombay High Court

Govind Ram

APPELLANT

Vs

Madan Gopal

RESPONDENT

Date of Decision : 22-11-1944

Acts Referred:

Registration Act, 1908 — Section 17(2)(i)
Trusts Act, 1882 — Section 5

Citation : (1945) 47 BOMLR 612

Hon'ble Judges : Russell, J;Madhavan Nair, J;Goddard, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Russell, J.—The point for decision on this appeal from the High Court at Allahabad is short, but not free from difficulty. The relevant facts which gave rise to it must first be stated.

2. One Seth Kashi Nath obtained a decree (in a Suit No. 42 of 1930) against the present respondents Nos. 2, 3 and 6, and one Lala Sagarmal. Lala Sagarmal is dead, and his sons, the present respondents Nos. 4 and 5, were substituted for him on the record in the present suit. Respondent No. 6 has been declared insolvent and the Official Receiver, Algiers, has also been brought on the record in the present suit. For convenience the original defendants to suit No. 42 of 1930 or those representing their interests from time to time will all be included in the words the debtors.

3. Seth Kashi Nath having obtained his decree applied to attach certain immovable property as being the property of the debtors and liable to be sold in execution of the decree. He was met by an objection filed on behalf of the present appellants claiming the property as trustees under a deed of May 25, 1929. The objection was allowed. Thereupon Seth Kashi Nath commenced the suit in which this appeal arises, claiming a declaration that the property was liable to be attached and sold in satisfaction of his decree. To that suit he joined the present appellants as co-defendants with the debtors. By his plaint he

alleged that the said deed was a collusive and fraudulent document. He also alleged that it had not been registered. By their written statement the appellants alleged that there was no necessity for the deed being registered, and that the plaintiff's allegation as to want of registration had no effect.

4. The deed in question was a composition deed by which the debtors conveyed assigned and transferred to the appellants (therein called the trustees)(1) the lands, hereditaments and premises described in the 1st Schedule thereto, (2) the shares and other personal properties the particulars whereof were contained in the 2nd Schedule thereto, and (3) all other the property of the debtors and each of them except the property described in the 3rd Schedule thereto, upon trust for sale and conversion, the proceeds to be divided among the "creditors" (as therein defined) of the debtors as therein provided, and the surplus (if any) to be paid to the debtors. The deed contains powers and provisions commonly found in a composition deed which creates a trust of property for the benefit of creditors.

5. The point at issue can now be stated?it is whether by reason of Section 17 of the Registration Act, 1908, the deed of May 25, 1929 (hereinafter called the said deed), was exempt from any requirement to be registered, notwithstanding that Section 5 of the Trusts Act, 1882, enacts that no trust in relation to immovable property is valid unless registered.

6. The trial Judge decreed the suit, holding that the said deed was a collusive document, and was not binding on Seth Kashi Nath. The appellants appealed to the High Court. Pending the hearing of the appeal Seth Kashi Nath died. His son (the present respondent No. 1) was substituted for his father on the record.

7. The High Court held that the said deed, not having been registered in accordance with Section 5 of the Trusts Act, 1882, was invalid. The appellants however had applied to be allowed to amend their written statement, and to plead that the defect due to non-registration had been cured by the registration of a document dated June 6, 1929, and the High Court made an order on September 26, 1935, (1) setting aside the decree of the Court below, and ,(2) remanding the case to that Court to dispose of it after hearing argument and any relevant evidence as to the effect of the registered document of June 6, 1929. The case was then heard before the Civil Judge, who held that the registered deed did not cure the defect. He accordingly, by decree dated December 14, 1936, declared that the immovable properties in suit and specified in the plaint were liable to be sold in satisfaction of the decree in the suit No. 42 of 1930. The appeal by the present appellants from this decree was dismissed by decree of the High Court of (November 9, 1938. It is from this decree that the present appeal has: been brought.

8. It is convenient at this stage to state that no point now arises in regard to the alleged curative effect of the document of June 6, 1929. The argument was not pressed before the Board by counsel for the appellants, and very properly, for in their Lordships' opinion there is nothing in it.

9. Their Lordships now proceed to consider in detail the relevant enactments. The Registration Act, 1908, is an Act consolidating the law contained in previous Acts and repealing those Acts. Its most important section in connection with the present appeal is Section 17, the relevant provisions of which run thus :

17. (i) 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 :

(a)...

(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 one hundred rupees and upwards, to or in Immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d).. ..

(2) Nothing in clauses (b) and (c) of sub-section (I.) applies to (i) any composition deed ; or....

It will be observed that there is not, in terms, any direct provision enacting that no composition deed need be registered, or that no composition deed may be registered. There is in terms only a provision that nothing in Clauses (b) and (c) of Sub-section (I) applies to any composition deed. These words are, their Lordships think, open to two constructions, viz. : they might be construed as meaning (A) that all composition deeds are exempt from any requirement to be registered, or they might be construed as meaning (B) that all composition deeds are exempt from the requirement to be registered imposed by that Act ; in other words, that a composition deed is not required to be registered because it purports or operates to do any of the things enumerated in (b) or because it acknowledges the receipt or payment of a consideration on account of the matters enumerated in (c). Construction A would, in the case of composition deeds declaring trusts of immovable property, clash with Section 5 of the Trusts Act, 1882 ; construction B would not.

10. Section 5 of the Trusts Act is in the following terms :

5. No trust in relation to Immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

11. Their Lordships prefer the construction which involves no clash with Section 5 of the Trusts Act, 1882, and they are strengthened in this view by the following considerations. When the Trusts Act, 1882, came into force, the Registration Act then in existence was the Act of 1877 which contained (in Section 17) similar provisions to those in Section 17 of the present Act. Notwithstanding the fact that composition deeds very commonly involve the declaration of a trust of immovable property, it was deemed necessary or advisable to enact that no trust in relation to immovable property should be valid unless registered. Registration thus was made essential to the validity of every such trust notwithstanding the existence of the old Section 17. Nor can the subsequent enactment of the Registration Act, 1908, be said to have affected the position as it existed under the Trusts Act, 1882, for the Act of 1908 is a Consolidation Act and contains a section (Section 93) which provides :

(1) The enactments mentioned in the schedule are repealed to the extent specified in the fourth column thereof.

(2) Nothing herein contained shall be deemed to affect any provision of any enactment in force in any part of British India and not hereby expressly repealed

12. The late Sir Dinshah Mulla in his work which deals with the Registration Act, 1908 (2nd Edn., p. 309), remarks in reference to this section : "The principal enactments referred to are the Transfer of Property Act, Sections 54 and 59, abolishing optional registration in the case of sales and mortgages, the Bengal Tenancy Act, and other enactments containing special provisions relating to the registration of certain documents."

13. It was urged on behalf of the appellants that by virtue of the definition clause in the Trusts Act, 1882, the word "registered," in Section 5, meant registered under the registration law for the time being in force, and that since the Registration Act now in force did exempt composition deeds from registration, the requirement of registration in Section 5 of the Trusts Act, 1882, could not apply to the deed in question. This contention is based on construction A, which their Lordships have rejected ; but in any event their Lordships think that the words in the definition clause refer only to the method and procedure of effecting the registration which is required by Section 5.

14. A further argument was adduced on behalf of the appellants to the following effect. The Transfer of Property Act by Sections 54, 59 and 107 required the registration of certain documents of sale, mortgage, and lease, respectively, which by reason of the small value involved would not have required to be registered under the Registration Act, 1908. Section 4 provided that those sections were to be read as supplemental to the Registration Act. The question arose whether Section 4 operated to apply to documents which were covered by Sections 54, 59 and 107, but which had not been registered, the sanctions which a. 49 of the Registration Act, 1908, applied to documents which were covered by

that Act but which had not been registered. As a result of two full bench decisions, *Rama Sahu v. Gowro Ratho* I.L.R (1920) Mad. 55. and *Sohan Lal v. Mohan Lal* I.L.R (1928) All. 986. which decided that Section 4 had not that operation, Section 49 of the Registration Act was amended so as to make unregistered documents which should have been registered under the Transfer of Property Act subject to the sanctions enacted in Section 17 of the Registration Act. It was pointed out that no similar amendment had been made in regard to the documents required to be registered by Section 5 of the Trusts Act. From this it was argued that composition deeds were not required to be registered even though trusts of immovable property were declared thereby, for if this were not so, one would have expected (so ran the argument) that the necessary amendment would have been made. Their Lordships however do not consider the cases are really similar. The sections of the Transfer of Property Act added to the number of documents which had to be registered, documents of the same kind as those included in the Registration Act but excluded from its operation only by reason of their smaller value. It was a matter of course that non-registration of them should entail the same sanctions as those prescribed by Section 17 of the Registration Act in the case of similar unregistered documents of a higher value. When it was decided by the full bench decisions in Madras and Allahabad that Section 4 of the Transfer of Property Act had not brought about the result,. the necessary amending legislation was passed. The position in regard to Section 5 of the Trusts Act was entirely different. It dealt with the registration of documents of a class which were not included in the classes of documents required to be registered by the Registration Act, although it is a class wide enough to include some forms of the documents referred to in Section 17(2)(i) of the Registration Act. Section 5 of the Trusts Act provides its own sanction for non-registration, viz invalidity.

15. Counsel for the appellants relied also on two decisions in the High Court of Bombay which decided the exact point in favour of the appellants' contention. The first decision was pronounced in 1904 in the case of *Malukckand v. Manilal* I.L.R (1904) Bom. 364 : 6 Bom. L.R. 296. the second was pronounced in the case of *Chandrashnkar v. Bai Magan* I.L.R (1914) Bom. 576: 16 Bom. L.R. 236. The Court in the latter case merely followed the decision in the former one. The reasons given for the judgment in the first case appear to their Lordships unconvincing and in some respects manifestly incorrect. The judgment is based upon the view indicated more than once, that the real ownership of the property conveyed by a debtor to the trustees of a composition deed remains in the debtor, and that the element of a trust in a composition deed is a mere accident and not of the essence of the matter. The true position would appear to be quite otherwise. The debtor ceases to have any interest in the property conveyed to the trustee; he is only interested in the surplus proceeds, if any result. The trust, so far from being a mere accident, is the essential machinery for producing the means of paying off the creditors. The reasoning upon which the decision is based is erroneous, and for the reasons already indicated their Lordships are of

opinion that the Court ought to have reached the opposite conclusion.

16. It was however urged that decisions of such long standing should not be departed from. No doubt an appellate tribunal does not lightly interfere with decisions of long standing, especially in cases where their reversal might jeopardise existing titles acquired on the faith of their correctness. Their Lordships, however, while assenting to this view in general, feel that this danger does not exist to any serious degree in the case of composition deeds. Composition deeds work themselves out and come to an end ; and the cases in which any one could be in a position to claim the immovable property comprised in an unregistered composition deed adversely to the debtor and. the trustees can only be of a very rare occurrence. In these circumstances their Lordships feel justified in overruling these decisions, the reasons for which they consider to be obviously wrong.

17. Their Lordships agree with the judgment of the High Court in the present case and with the construction of Sub-section (2)(i) of Section 17 of the Registration Act stated by them in the following passage :

It is true that Clause (2) of Section 17...distinctly provides that nothing in Clause (b) and it is only under Clause (b) that the document might require registration applies to any composition deed; but this does not mean that if a document requires registration under any other enactment, the exemption contained in Clause (2) would prevail against that other enactment. What the Registration Act provides is that a composition deed so far as it purports or operates to create declare assign limit or extinguish...any right title or interest...of the value of Rs. 100 and upwards to or in immovable property will not require registration; but it does not say that any composition deed if it purports to do or operates to do anything else-will not require registration either.

18. For the reasons indicated in this judgment their Lordships are of opinion, and they will humbly advise His Majesty, that this appeal should be dismissed. The appellants will pay the costs of the appeal to respondent No. 1, who alone appeared-