

(1967) 03 CAL CK 0028
In the Calcutta High Court
Case No : Company Petition No. 55 of 1967
In Re: K.K. Ray (Private) Ltd.

Date of Decision : 15-03-1967

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 3, 5
Civil Procedure Code, 1908 (CPC) — Section 139
Companies (Court) Rules, 1959 — Rule 6
Companies Act, 1956 — Section 439
Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 — Section 3
Evidence Act, 1872 — Section 82
Notaries Act, 1952 — Section 14, 15
Oaths Act, 1873 — Section 4

Citation : AIR 1967 Cal 636 : 71 CWN 430

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : R.K. Deb, as Amicus Curiae, Sankar Ghosh, for the Appellant;

Judgement

P.B. Mukharji, J.—This is an important point of procedure which requires to be settled by this Court. The point arises in this way.

2. This is an application for winding up intended to be presented in the Department of this Court by the Solicitors Messrs Orr, Dignam and Co., who are representing petitioners Franklin Square Agency Inc. an American Company.

3. This petition for winding up was signed by one Michael Michaelson, President and Principal Officer of Franklin Spare Agency Inc., and verified by two affidavits sworn before a Notary Public Elizabeth Levy of New York. U. S. A. authorised to administer oath by laws of the State of New York. U. S. A.

4. Such notarial act of Elizabeth Levy has also been certified by the County Clerk and Clerk of the Supreme Court, New York County, a court of record under its seal. This certificate has been annexed to the affidavits verifying the petition. This has been forwarded under the certificate of the Consulate General of India in New York for legalising the seal of the Clerk of the County of New York.

5. Now, the point of procedure arising for decision in these proceedings is whether such affidavits verifying the petition affirmed before a Notary Public of a foreign country can be accepted in this Court.

6. The office of this Court, where the application was intended to be presented, felt certain difficulties in admitting this petition for winding up and therefore administratively sought the direction from this Court. As the point raised is a point of considerable importance in matters relating to procedure, I adjourned the matter to Court and issued a notice giving an opportunity to Messrs. Orr, Dignam and Co., the Solicitors of the petitioners, to argue the matter fully so that this Court will be able to determine judicially the question and settle the practice. Mr. Sankar Ghosh, learned counsel for the petitioner, has ably argued the matter before me.

7. The difficulties which the Office felt may be briefly summarised as follows: In the first place, Rule 10 of Chapter 16 of the Original Side Rules of this Court appears to exclude the U. S. A. from its operation because the Rule runs as follows:

"Affidavits sworn in England before any Judge, Local Court, Magistrate or Notary Public or any official empowered to administer oaths and bearing their respective seals. If any, will be accepted as sufficient in this Court and in all Courts and Tribunals subordinate to this Court."

8. This Rule was brought into effect from June 26 1962 after the independence of India and after the proclamation of our Constitution. It is a relic of the past. It does not include affidavits sworn in the U S. A.

9. The second difficulty of the Office is Section 139 of the Code of Civil Procedure. In that section of the Code it is provided as follows:

"Section 139 -- In the case of any affidavit under this Code:

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the State Govt. has generally or specially empowered in this behalf, may administer the oath to the deponent."

10. As will be seen from those words of Section 139 C P C., the Notary Public is not a person competent to administer oath to a deponent under that section.

11. The third difficulty of the Office is Section 82 of the Evidence Act which expressly provides as follows:

"When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the

Court shall presume that such seal, stamp or signature is genuine and that the person signing it held, at the time when he signed it, the Judicial or Official character which he claims.

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland."

12. This is the law of presumption in evidence as to the documents admissible in England or Ireland without proof of seal or signature. This presumption being confined expressly to England or Ireland naturally cannot operate in favour of the U. S. A. This again is a relic of the past.

13. The fourth difficulty which the office felt was Section 4 of the Indian Oaths Act 1873 which inter alia provides that the authority to administer oaths and affirmations is vested in (a) all Courts and persons having by law or consent of parties authority to receive evidence, (b) the Commanding Officer of any Military, Naval or Air Force station occupied by troops in the service of the Government. This provision again does not include notarial attestation of a document or affirmation by a Notary Public of a foreign country.

14. Apart from these four difficulties the department draws attention to the decisions of A. N. Ray J. D/-17-8-1966 in Matter No. 107 of 1864 (Cal) and in the Matter of Chartered Accountants Act and in the Matter of Controller of Insurance, Simla v. B. Mukherjee and of B. C. Mitra J. D/- W-6-1956 in the Matter of Gaya Textiles (Private) Ltd. expressing the view that a Notary Public is not a person competent to administer oath to a deponent who is affirming an affidavit and, therefore, such an affidavit purporting to have been made before a Notary Public is not an affidavit according to the Company Rules and the Code of Civil Procedure. No doubt that is so; but that is for a Notary Public acting in India. These decisions, therefore, are not on the point which I have to decide. The observation made by the Special Bench in Matter No. 11 of 1982= (reported in) Jyoti Prokash Mitter Vs. H.K. Bose, Chief Justice of the High Court, Calcutta, , The Chief Justice of the High Court, Calcutta where the question of an affidavit sworn by an Under Secretary of the Ministry of Home Affairs, Government of India, before a Notary Public in Delhi was rejected, also does not touch the point under consideration before me. There can be no question that a Notary Public acting in India is not a person competent to administer Oath to a deponent affirming an affidavit. But here the point before me is very different. Here is a foreign notary of a foreign country, who by the laws of his own country U authorised by the law of the State of New York, U. S. A. to administer Oath in the Country where the affidavit is being sworn. The comity of Nations, *lex loci* relating to procedure and existence of foreign law proved and established, demand that such affidavits should be recognised by the Indian Courts. To deny recognition in such circumstances is to deny foreign litigants seeking redress and justice in Indian Courts.

15. The Notary Public is an institution of very ancient origin. It is an institution of

great utility and the Notary Public is an officer recognised by the whole commercial world. A certificate by a Notary Public, competent to administer an oath to persons making declarations or affidavits, is sufficient evidence of the execution of the instrument to which it refers. It is unnecessary to cite decisions on this point. Reference may, however, be made to such authorities as in *Re, Earl's Trust* (1858) 4 E& J 300, *Re Davis's Trusts* (1869) 8 Eq 98, *Taylor's Evidence*, 10th Edition. Section 6, p. 10, *Brooke v. Brooke* (1881) 17 Ch D 888.

16. It is common knowledge that the office of a Notary Public had its origin in the civil institutions of ancient Rome. Subsequently, the Notaries found their way in England and were regarded as originally officers of the civil and the canon law, and acted by imperial and Papal authority. The records of Edward the Confessor mention deeds attested by a Notary. In a deed by King John dated A. D. 1190 it was supposed to be written and attested by one Master. Philip, a notary, who was described as a Notary of the Pope. Many of the Notaries at that time were created by the counts palatine, who not only made the appointments themselves but also delegated their powers to English churchmen. Matters of a commercial nature gradually came to dominate the work of the Notary public, and there grew up a separation from their ecclesiastical origin.

17. It is also common knowledge that the functions of an English Notary are not defined by any statutory provision or rule. Generally speaking no person in England is entitled to practise as a Notary Public or do any notarial acts unless he has been duly sworn, admitted and enrolled in the Court of Faculties belonging to the Arch Bishop of Canterbury. A part of Indian legal history is that it was these persons before the year 1962 who practised as Notary Public in India. In the year 1962 the Indian Notaries Act came into operation to which I shall make a reference presently.

18. *Brooke's Treatise on the Office and Practice of a Notary of England*, 8th Ed. p. 19, points out:

"From a remote period English notaries have exercised the right to administer oaths and take affidavits. These affidavits are, for the most part, intended for use in the British dominions abroad and in foreign countries where notarial acts are recognised. They may also act as commissioners for oaths under commissions granted by colonial and foreign authorities."

English Courts, when required by statute or statutory rule, take judicial notice of the seal and signature of a Notary Public, for instance under the English Commissioners for Oaths Act, 1889 or old Rules of the Supreme Court, England, Order 38, Rule 6.

19. In *Brooke's Treatise* which is an authority on this subject and which I have just quoted this point is discussed at pp. 52-53. It is said there:

"Where, therefore, an affidavit, affirmation, declaration, etc. is sworn or taken before any of the persons mentioned in this rule no verification of the seal or

signature is necessary; but where it is sworn or taken in a country not under the dominion of His Majesty, before foreign notary, or before a person authorised by foreign law, the authority and the signature of the notary or other person must be verified. The verification required is a certificate annexed to the affidavit, or other document, certifying that the person before whom it was sworn or taken was duly authorised to administer oaths in the country in which it was sworn or taken, and such certificate must be signed by a British consul or vice-consul, or verified by the seal of the High Court or of a Local Court of Record of the said country."

20. Indeed the learned Editor of Brooke's Treatise, 8th Edition, at p. 182 goes on to observe further and more clearly on this point in the following terms:

"Powers of attorney executed by foreign companies should, in addition to an affidavit verifying execution, have attached to them an affidavit, made preferably by a notary public before a British consular Official, proving (1) that the company is duly constituted and registered in accordance with the local law of the foreign country; (2) that A, B and C, the signatories, are respectively directors and Secretary as the case may be, of the said company and (3) that the company is bound and engaged by the signatures of A, B and C, in accordance with the statutes or articles of association of the said company, and the local law."

Now all these formalities have been fully satisfied in the present case. Indeed in that authority just quoted above again at pp. 52-53 certain decisions are noted. Out of those decisions I shall select some as appropriate and relevant for the point under decision before this Court.

21. The leading case on this point is *Haggitt v. Iniff* reported in (1854) 5 De GM and G 910 corresponding to 43 ER 1124. The Lords Justices in the Court of Appeal in that case had to consider the following facts. An affidavit, sworn before Mr. Alien, a notary public in the State of New York in America was intended to be brought on the records of the English Court. The point there also was that Mr. Alien being a foreign notary public credit ought to be given to his official act which was certified by the British Counsel, New York under the official seal. The Clerk of the Records of the Court, however, doubted whether the jurat was sufficient in that case. There was an affidavit of the solicitor in that cause stating that he had applied to the American Counsel in England, who informed him that public notaries in the United States were authorised by law to administer oaths in any legal proceedings in that country. The Court of Appeal in that case admitted that affidavit and observed that the affidavit would have been sufficient before the passing of the new Act (15 and 16 Victoria, Chapter 86, Section 22), and that as there appeared to be nothing in that Act to exclude it. it ought in their Lordships' opinion to be placed on the file.

22. The other authority which clinches the matter is *Cooke v. Wilby* (1884) 26 Ch D 769. There in that case Chitty, J. a great authority on the point, had held that both before and after the Act 15 and 16 Vict. Ch. 86, affidavits sworn in foreign

part out of Her Majesty's dominions before a notary public might be filed, and that practice continued in force down to the time when the Rules of the Supreme Court, 1883, came into operation and that this practice was not abrogated by Order 38, Rule 6 and Order 72, Rule 2 of the Rules of 1883, and might be followed at any rate in cases where the practice under the Rules of 1888 would be very inconsistent.

23. As in the case before Chitty J. just mentioned and also in (1854) 5 De G. M. and G. 910 also quoted above, so here the person before whom the affidavit was sworn was a Notary Public and that by the laws of the State of New York a Notary Public can administer an oath.

24. Now if this was the English practice then surely if the English Courts could receive and recognise notarial acts of an American Notary then as a part of the practice and procedure of English Courts there is no difficulty, legal or otherwise, in accepting such affidavits in India and in the present case before me. Not only would that be a part of the English practice and procedure or of English Courts or Courts of England and Ireland as mentioned in some of the sections of Indian Statutes and Rules quoted above and especially of Section 82 of the Evidence Act but they would also come under the practice and procedure of this Court as Chitty J. observed in (1884) 25 Ch D 769 at p. 770, by quoting Order 72, Rule 2 of , the Rules of the Supreme Court of London which provided:

"Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force."

A similar provision can equally be invoked here in this Court under Rule 3, Chapter 14 of the Original Side Rules which provides expressly:

"Where no other provision is made by the Court or by the rules, the present procedure and practice shall remain in force."

26. A reference to the practice and procedure of this Court of this point will make it at once clear. Commenting on Chapter 15 Rule 5 of the Original Side Rules about affidavits in the Fourth Edition by E. C. Ormond of the Rules of the High Court published in 1948 at page 348, the following remarks are to be found:

"In addition to such affidavits, it has been the practice of the Calcutta High Court to admit affidavits sworn in the United Kingdom before persons who are Commissioners for Oaths duly appointed under the law of the United Kingdom, though in no sense Commissioners of the Calcutta High Court. Section 82 6f the Indian Evidence Act may be relied on in such cases, since under that section such an affidavit is "admissible for the same purpose for which it would be admissible in England or Ireland."

Section 82 of the Indian Evidence Act, however, does not apply to Scotland.....

While the position is thus not entirely satisfactory the practice of the Court continues to allow in any ordinary case any affidavit to be filed which purports to

have been sworn before a person purporting to be an English Commissioner for Oaths under English Law."

26. Not only, therefore, has this been the practice in this court but there is also no doubt that the English practice of English Courts is just the same and many decisions subsequent to the decisions quoted above confirm that view. It is unnecessary to discuss these later decisions, for instance, the decision in *Brittlebank v. Smith*. (1884) 50 LT 491.

27. In Simond's Edition of Halsbury's Laws of England, Volume 28 at page 116, Article 126 it is expressly provided: that every British ambassador, envoy, minister, secretary of embassy or legation in any foreign country and every person mentioned therein may do any notarial act which any notary public may do within the United Kingdom, and every oath, affidavit, and notarial act done by or before such person is as effectual as if done by or before any lawful authority in any part of the United Kingdom. In support of that proposition the Commissioners for Oaths Act, 1889 (62 and 53 Victoria Chapter 10 Section ft) has been quoted.

28. On the ground that as the Indian Oaths Act did not provide for notarial attestation or affirmation by a notary public of foreign country, and on the wrong assumption that the Indian consulate or embassy had no power to certify or do any notarial act this Court's office expressed its views that such an affidavit as the present should not be admitted in this Court. The view of the office is not correct.

29. The position is made abundantly clear by Section 3 of THE DIPLOMATIC AND CONSULAR OFFICER (Oath and Fees) Act, 1948 which this Court's office missed and which provides inter alia as follows:

(1) "Every diplomatic or consular officer may, in any foreign country or place where he is exercising his functions administer any oath and take any affidavit and also do any notarial act which any notary public may do within a State; and every oath, affidavit and, notarial act administered, sworn or done by or before any such person shall be effectual as if duly administered, sworn or done by or before, any lawful authority in a State.

(2) "Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any person authorised by this Act to administer an oath in testimony of any oath, affidavit or act, being administered, taken or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, of the official character of that person."

30. Now that being the express statute in India, there is no difficulty here. The Notarial Act of Elizabeth Levy has not only been certified under the seal of the County Clerk and Clerk of Supreme Court, New York, but has also been forwarded under the certificate of the Consulate General of India in New York for

legalisation of the seal of the Clerk of the County of New York. In that context of law and facts I see no difficulty whatever, legal or otherwise, in admitting this affidavit on the records of this Court I need hardly quote Rule 6 of the Company Rules, 1959 of this Court which says:

"Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any of the documents which is presented otherwise than in accordance with these rules or the practice and procedure of the Court."

As I have said above, admitting this affidavit on the records of this Court will be following the practice and procedure of this Court. That is how I understand the *cursus curiae* of this Court for many years.

31. Coming back now to the Notaries Act, 1952 it is necessary to observe that this was the first Act in India to regulate the profession of Notaries in India. In declaring the Objects and Reasons for this Act it was said:

"Under Section 138 of the Negotiable Instruments Act, 1881, the Government of India have the power to appoint notaries public, but only for the limited purpose of performing functions under that Act. By virtue of an ancient English Statute, the Master of Faculties in England used to appoint notaries public in India for performing all recognised notarial functions, but it is no longer appropriated that persons in this country who wish to function as notaries should derive their authority from an institution in the United Kingdom.

The object of the present Bill is to empower the Central and State Governments to appoint notaries, not only for the limited purposes of the Negotiable Instruments Act but generally for all recognised notarial purposes, and to regulate the profession of such notaries."

32. The Notary is now internationally known today in the modern world of commerce, industry and dealings between different nations and countries. Reciprocity between different countries is its essential basis. Without this reciprocity and mutual respect the whole system and rationale of notarial acts will break down, to the great detriment of commercial transactions throughout the world and their due administration by courts of law in different countries and will jeopardise international commerce, law merchant and administration of justice. It is precisely to provide facilities of receiving affidavits, documents, protests of bills of exchange and other commercial papers that this institution of Notary Public grew up to fulfil a very practical need. Unnecessary or illogical impediments should not be put on his way. No doubt that does not mean that law of the Courts should not ensure reasonable authenticity and dependability of notarial acts. When I find that this notarial act of Elizabeth Levy has been certified by the County Clerk and by the Clerk of the Supreme Court of New York, the Court of Record under its seal, and when I find that this Notary public is authorised to administer oath by the laws of the State of New York, U. S. A. and

further that there is the certificate of the Consulate General of India, an office recognised expressly by Section 3 of the Indian Diplomatic and Consular Officers (Oath and Fees) Act 1948 to administer oath and take affidavit, then the dependability and authenticity of such notarial act are in my judgment sufficiently ensured and cannot be doubted.

33. On this important and practical problem of reciprocity, the Court requested Mr. R. K, Deb as Amicus Curiae to appear as a senior Notary Public of this city to inform the Court about the Indian practise and experience in dealing with notarial acts and reciprocity between India and U. S. A. Mr. Deb has informed the Court that Indian notarial act is recognised and reciprocated in the U. S. A. and similarly the notarial acts of the U. S. A have been accepted and recognised in India in diverse matters and documents, specially when many industrial, commercial and business transactions are today entered between India and the U. S. A. Mr. Rashmohan Chatterjee of the instructing Solicitors. Messrs. Orr, Pignam and Co., of Mr. Shankar Ghosh also supported the practice and experience on the point of reciprocity between India and the U.S.A. regarding notarial acts Mr. Deb has told me that he himself in his professional capacity as a Notary Public in India has notarially noticed documents of U.S.A. and his notarial acts have been recognised in the U. S A. Similarly India has recognised notarial acts done by American Notaries. I am therefore satisfied that there is reciprocity with mutual recognition of notarial acts between India and the U. S. A.

34. On these authorities and for these reasons I have no doubt in my mind this petition signed by Michael Michaelson President and Principal Officer of the petitioner Co Franklin Square Agency Inc., and verified by two affidavits sworn before Elizabeth Levy, a Notary Public of U. S. A., should be duly admitted and received on the records of this Court.

35. I would, however, draw the pointed attention of the Central Government of India to Section 14 of the Notaries Act 1952. That is a section on the reciprocal recognition of the acts done by foreign notaries. It provides as follows:

"If the Central Government is satisfied that by the law or practice of any country or place outside India, the notarial acts done by Notaries within India are recognised for all or any limited purpose of that country or place, the Central Government may, by notification in the official gazette, declare that the notarial acts lawfully done by notaries within such country or place shall be recognised within India for all purposes or, as the case may be, for such limited purposes as may be specified in the notification."

36. It is time that the Central Government of India issued a Notification u/s 14 of the Notaries Act recognising the existing reciprocity of Notarial acts between India and U. S. A. in order that there may be no doubt or confusion in respect of the same and that individual cases need not come up to Courts for admission.

37. A copy of this judgment with the above observations shall be sent by the Registrar of this Court to the Ministry of Home affairs, Government of India for

taking necessary steps for issuing such Notification and making relevant Rules u/s 15 of the Notaries Act on this point.

38. There will, therefore be an order admitting the petition signed by Mr. Michael Michaelson, President and Principal Officer of Franklin Square Agency Inc., the petitioner, company, and verified by the two affidavits sworn before Elizabeth Levy, a Notary Public of the United States of America.