
(1985) 03 KAR CK 0043
In the Karnataka High Court
Case No : First Appeal No. 83 of 1974

Syndicate Bank, Bangalore

APPELLANT

Vs

I.K. Amitha and Others

RESPONDENT

Date of Decision : 25-03-1985

Acts Referred:

Contract Act, 1872 — Section 226

Citation : AIR 1985 Kar 213 : (1985) ILR (Kar) 1900 : (1985) 2 KarLJ 145

Hon'ble Judges : M.P. Chandrakantaraj Urs, J;K. Jagannatha Shetty, J

Bench : Division Bench

Advocate : K. Rama Kamath, for the Appellant; R. Mallikarjun, for N. Santhosh Hegde, V. Krishna Murthy, S.V. Tarakaram and K.G.C. Prabhu, for the Respondent

Judgement

Chandrakantaraj URS, J.—This appeal by Syndicate Bank, Bangalore, is directed against the judgment and decree of the Prl. Civil Judge, Bangalore City (as it then was) made in O.S. No. 150 of 1968 on his life.

2. The appellant Bank was the plaintiff in the suit. Suit was for a decree against the respondents in the sum of Rs. 1,15,210/- and for sale of the mortgaged suit schedule property of the defendants in the event of the defendants not depositing the amount decreed within the time specified. The suit came to be decreed only as against defendant 1, but it came to be dismissed as against defendants-2 to 9. Defendant-1 has been directed to pay the decretal amount within 3 months from the date of the decree failing which only the share of defendant-1 in the suit schedule mortgaged property is directed to be brought to sale to realise the amount. Aggrieved by the said judgment and decree in regard to failure to get a decree against all the defendants, the plaintiff Bank has preferred this appeal.

3. Originally the appeal was filed only making defendants 2 to 9 as respondents. Subsequently defendant I made an application to implead himself in this proceeding and he was permitted to implead himself as respondent 9 in this proceeding.

4. In this appeal we will refer to the parties by the ranks they held in the Court below.

5. The brief facts leading to the suit are as follows: -

It was averred by the plaintiff Bank that defendants 1 to 9 wrote a letter dt. Mar. 25, 1964 by which they asked for a Bank guarantee in a sum of Rs. 50,000/- to be given to the Government Soap Factory on behalf of the 1st defendant for the performance of his obligations under the terms of an Agency Agreement entered into by him with the Government Soap Factory in regard to sale of the products of the Soap Factory within the area allotted to the first defendant in the agency agreement. In order to secure the repayment of the liability arising thereunder defendants 2 to 9 authorised the first defendant by the powers of attorney given by them to execute all the loan papers such as on Demand Promissory Note, Deposit of Title Deeds. pertaining to the properties belonging to all the defendants jointly with intent to create an equitable mortgage in favour of the plaintiff Bank and to do all necessary things for and on their behalf also. Pursuant to that defendant 1 deposited the title deeds described in Schedule "A" to the plaint with the plaintiff Bank and secured the Bank guarantee. Defendant 1 also offered the title deeds creating mortgage for utilising the loan facility of discounting bills to a limit of Rs. 1,50,000/- and in that behalf a continuity letter dated Feb. 11, 1965 was also given. The Bank guarantee was enforced against the plaintiff Bank whereupon the Bank was required to pay a sum of Rs. 43,592-46 on March 8, 1967. In the result the on Demand Promissory Note which had already been executed for Rs. 50,000/- was converted into an operative negotiable instrument with effect from the date of such payment and became enforceable against all defendants jointly and severally. In all 14 documentary bills discounted between Dec. 26, 1966 and Jan. 4, 1967 for an aggregate sum of Rs. 54,108.34 remained unrealised in spite of repeated reminders to the parties concerned. In that circumstance, a total sum of Rs. 1,15,210/- was liable to be paid on the security of the mortgaged property by the defendants and as the defendants failed to pay the same the plaintiff filed the suit for recovery of the same.

6. Defendant-1 resisted the suit claim on the basis that there was no enforcement of the Bank guarantee and there was no payment by the plaintiff in that behalf. He also disputed his liability to pay any amount to the Bank on the second loan discounting bills on the ground that the Bank statements- were inaccurate, that the discounting bills, in fact, have been realised by the plaintiff and as such there was no liability to pay. However, in his written statement he asserted that the property offered as security was worth more than Rs. 2,00,000/and if it was found that he was liable to pay any amount to the Bank he may be granted reasonable instalments to pay the same.

7. As against this defence of the first defendant, defendants 2 to 9, who it is needless to state are all brothers and sisters of defendant 1, set up a totally different defence in their common written statement filed, though signed and

verified by defendant-2 only. They denied knowledge of the letter requesting for Bank guarantee. They denied knowledge of the loan taken by defendant - 1 for discounting the bills. They also denied their liability to pay any to the Bank. They contended that they had authorised defendant 1 only to borrow money in order to discharge the liabilities of their deceased father, who had managed the business in New Tharagupet when he was alive; that they had not authorised defendant 1 to contract any loan for his individual business or agency of the Soap Factory products. They further contended that any borrowings made by defendant -1 was entirely in his individual capacity for his business and not for discharging any of their obligations and therefore there was no liability attached to them to discharge the loan contracted by defendant-1 for, his individual business. They further denied knowledge of the business of the first defendant. They also denied that they received any demand from the Bank in respect of the unrealised bills which it had discounted. In other respects, many other averments made in the plaint were also denied by the defendants. Though the written statement filed by - these defendants is lengthy, it is only repetitive and in substance their defence was no more than what has been narrated above.

8. The Bank even filed a reply, which was no more than the reiteration of the plaint allegations.

On the above pleadings, the trial Court framed as many as 9 issues. Issue No. 1 was whether the plaintiff due to enforcement of bank guarantee paid Rs. 43,592-46 on 8-3-1967 and therefore defendants were liable under the pronote converted as operative negotiable instrument. Issue No. 2 was in respect of liability by defendant -1 for the loan incurred on account of discounting of bills in the sum of Rs. 54,108-43. Issue No. 5 related to whether the first defendant had not acted in terms of powers of attorney given to him as alleged by defendants 2 to 9. Issue No. 6 was more or less the same. Similarly Issue No. 7 related to the suit pronote. But what is really important for us is issue No. 8, viz., whether or not a mortgage by deposit of title deeds was created in respect of the suit schedule property on March 28, 1964. We need not concern ourselves with the other issues framed.

9. Plaintiff examined one witness and got marked as many as 24 documents in support of its case. On behalf of defendants, 3 witnesses were examined and no documents were specifically marked for them.

10. In the light of the defence taken by defendants 2 to 9 the Court below while accepting the proof offered by the Bank of the encashment of the bank guarantee held only defendant- 1 liable to repay the loan arising out of the encashed bank guarantee as well as the loan obligation arising out of the discounting of the bills for his agency business.

Accepting the oral evidence of defendant 2, who was examined as D.W.3, the Court came to the conclusion that defendants 2 to 9 were not liable to repay the loan as defendant 1 had raised the loan for his personal business and the

intention of giving power to the first defendant as per Exs. P. 2 to P. 5 was authorising him to mortgage their ancestral property for the benefit of the family i.e., for repayments of the dues of their late father and not for doing the individual business of defendant -1.

11. Mr. Rama Kamath, learned Counsel for the plaintiff Bank, has contended that the Court below totally misdirected itself in coming to the conclusion that defendants 2 to 9 had no intention to authorise defendant - 1 to borrow and create mortgage in respect of any business other than that of their late father or liabilities arising there from. In fact, the thrust of his argument was that the clauses authorising defendant 1 to create mortgage in respect of their father's business as evidenced by the recitals in Exs. P. 2,3,4 and 5 was unambiguous and unequivocal in so far as the conferment of power to create a mortgage of the specific property and therefore the trial court ought not to have examined the question of intention.

12. In order to appreciate this argument it would be useful to extract the reasoning as found in para 13 of the judgment of the trial Judge:

Since there is no evidence of the plaintiff Bank to gather the intention of the executants of Exs. P. 2 to 5 1 have to rely on the evidence of DW3 who is defendant 2 in this case. As stated earlier, his version is that he himself and other defendants had to execute P2 to P5 in favour of DI since there was some family debt to be discharged by him. He had to execute the same since he was in service at the time of the death of their father and since he was likely to go abroad in that connection. It is not his case that they executed the same in order to bind all of them even for all the personal business of DI. It is not known why I should not accept this evidence of DW3".

From the above it is evident that the trial Judge was wholly persuaded by the evidence of DW3 i.e., defendant 2 as to the intention of giving power of attorney to defendant-1.

13. Like any other document a power of attorney may also need judicial interpretation on the facts and circumstances of each case. Normally the donor of power will either give restricted qualified power in favour of the agent or he may give absolute and general power. One has to look at the manner in which the power is given to the agent by the principal and that purpose for which, it is given "in order to ascertain the extent of power.

14. Our attention has been drawn to the decision of the Privy Council in the case of Bank of Bengal v. Ramanathan Chetty AIR 1915 PC 121. In that case it was said that:

"Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the Whole instrument the authority in question is to be found within the four comers of the instrument either in express terms or by

necessary implication. Where under a power of attorney the agent had express authority to borrow on behalf of the principal for purposes of lending money to others"

15. Similarly Bowstead on Agency - 12th Edn. - in Art. 35 at page 52 has pointed out the rules of construction applicable to the construction of powers of attorney, Therein Rr. 1 and 2 state:

(1) The operative part of the deed is controlled by the recitals where there is ambiguity.

(2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.

16. Rule 1 referred to above will come into operation only when there is ambiguity. If there is no ambiguity in the conferment of power then the first principle extracted above need not be applied or referred to.

17. On the facts of the present case the second principle extracted above may have some bearing. In the light of the well recognised principle of interpretation as well as the ruling of the Privy Council referred to earlier we may now turn to examine the manner in which the power has been transmitted to Defendant 1 by Defendants 2 to 9.

18. It is useful to see what Exhibits P2, P3, P4 and P5 are, Exhibit P2 is entitled general power of attorney and is a document executed by Shaila Mahadev (defendant-4). Exhibit P3 is also entitled general power of attorney and is executed by Parvathi (defendant 7). Similarly, Exhibit P4 is executed by defendant-2 and is also entitled general power of attorney. Exhibit P5 is also entitled general power of attorney and is executed by the other defendants jointly. It will be useful to extract the relevant recitals from Exhibits P4 and P5. In Exhibit P4 in so far as the power to borrow money from Bank and create a mortgage is concerned, it is denoted in the following terms

"..... I further appoint him and authorise him to borrow money by mortgaging or on the security of any property that stands in the name of or "belonging to my late father K. N. Iyanna Setty, inclusive of my right and interest in the said property"

In Exhibit P5 the donors of power have used the following language:

".....
..... We further appoint him to sell any property or to mortgage any property or to give any property as security to any Court or Bank or to any concern, that stands in the name of our father and to recover from the purchaser or purchasers the sale amount and to execute sale deeds, mortgage deeds, On Demand Pronote"

From the language employed it is clear that the power conferred is absolutely

unqualified where it relates to borrowing or taking a loan or creating a mortgage. The restrictive aspect can only be read in regard to the property which is to be secured and not for the purpose for which it is secured. In the absence of any limitation imposed on the agent for the purpose of creating a mortgage, it must be held that the power conferred is absolute and general and such power cannot be read as restrained or restricted power.

19. Mr. K. G. C. Prabhu, learned counsel for defendants 3 to 9 contended that the paras extracted above must be read with reference to the preamble of the power of attorney and if so read, the restriction would be obvious as it was intended only to settle the estate of the deceased father and not intended for contracting loans or securing the property in question for creating additional charge on the estate of their father. The difficulty for us to accept that argument is that if the right of management alone was intended, then nothing prevented the donors of power to restrict specifically the power to prevent the acts that would encumber the property of their late father. In the absence of such express prohibition, by resorting to interpretation in a particular manner the documents in question, we cannot come to the conclusion that the powers conferred on defendant-1 by Exhibits P 2, P 3, P 4 and P 5 were such that they were not intended.

20. We must not fail to notice that a power of attorney is a document of convenience. It is a document which aids all kinds of transactions to be carried out by the agent in the absence of the principal. S. 226 of the Contract Act and S. 2 of the Powers of Attorney Act make it abundantly clear that the principal is liable for all the actions of his agent. Most people respect the power of attorney acting in good faith and on the plain language of the power conferred. If the construction suggested by the learned counsel for defendants 3 to 9 is accepted, then more often than not it would enable the principal to escape his liabilities and obligations for the acts of his agent.

21. He further brought to our notice a decision of the Privy Council in the case of Dwarkanath Singh v. Keshri Mall AIR 1927 P. C. 11. Actually the ruling of the Privy Council in that decision goes contrary to the interests of defendants 3 to 9. In that case what was held was the expression "in respect of any mauza or share of land owned and possessed by us", the executants, did confer power to execute the mortgage for debts for which the joint family of the three brothers would be liable when the executants of the power were only two of the brothers in favour of the third brother.

22. As already noticed by us, the second principle enunciated by Bowstead on Agency for interpretation clearly indicates that once general power to mortgage was conferred, the words following, though general in nature must be read down to limit the meaning only to the extent of subserving the purpose of general power conferred by the earlier provision and not to enlarge it. Even if it is so read, in the instant case on hand, we are convinced that defendants 2 to 9 had conferred the power on defendant-1 to execute or create a mortgage in respect of the property of their father at Bangalore without restricting that power to any

specified purpose. Defendants 2 to 9 having admitted execution of power under the relevant power of attorney in question cannot now be allowed to escape their liability in respect of acts done under that power. The learned trial Judge in our opinion was in error in applying the theory of intention and that too solely relying upon the self-serving testimony of defendant-2 who is- the elder of the two brothers in the family.

23. No other evidence is led on behalf of defendants to prove their intention that the power was given only for the purpose of management of the joint family properties and for no other purpose. Therefore, we must necessarily differ from the conclusion reached by the learned trial Judge and set aside his findings in regard to the nature and extent of authority conferred on defendant -1 by the powers of attorney in question.

24. Shri Prabhu next contended that defendants 2 to 9 in any event could not be held liable, as the trial Judge had come to the conclusion that there was no equitable mortgage created at all. It is true that in para 18 of the Judgment, the learned trial Judge has observed that there was no equitable mortgage created by defendants 2 to 9. But that conclusion was based on the reasoning that there was no power to create a mortgage conferred on defendant - 1 by Exhibits P 2, P 3, P 4 and P 5. Since we have come to the conclusion that Exhibits P 2, P 3, P 4 and P 5 did confer power on defendant -1 to create the mortgage in question, then it must necessarily follow that the mortgage created or held to have been so created, by defendant-1 would be binding on defendants 2 to 9.

25. It may be noted that the finding recorded against defendant -1 has not been challenged by him either in this appeal or by any separate appeal. In the result, the finding recorded by the learned trial Judge as to the non-liability of defendants 2 to 9 must necessarily be set aside. The decree will accordingly be modified to read "that the suit be decreed as against all the defendants" and the defendants are directed to deposit the decretal amount of Rs. 1,15,210/- together with current interest at 6 per cent per annum from date of suit till date of realisation within six months from today. On such failure, it will be open to the plaintiff to move for drawing up of final decree to bring for sale suit Schedule-B property.

26. All the defendants are liable to pay costs both in this Court as well as in the Court below.

27. Appeal allowed.