
(1960) 02 KL CK 0020
In the High Court Of Kerala
Case No : A.S. No. 217 of 1955 (M)

Vridhachalam and Another	Vs	APPELLANT
Chaldean Syrian Bank Ltd. and Others		RESPONDENT

Date of Decision : 11-02-1960

Acts Referred:

Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 58(f), 59

Citation : (1960) KLJ 388

Hon'ble Judges : T.K. Joseph, J; M.S. Menon, J

Bench : Division Bench

Advocate : C.S. Vaidyasankar, S. Ramayya Naik, T.N. Subramonia Iyer and S. Subramonia Iyer, for the Appellant; C.H. Subramonia Iyer and T.S. Venkiteswara Iyer, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Menon, J.—Defendants 2 and 3 in O. S. No. 29 of 1950 of the Court of the Subordinate Judge of South Malabar at Palghat are the appellants before us. The second defendant is the son and the third defendant is the wife of the first defendant. The first and the fourth defendants are the sons of two brothers, Vridhachalam and Chockalingam respectively. The suit was by the first respondent--The Chaldean Syrian Bank Limited--for the recovery of a sum of Rs. 1,00,000/-, with future interest and costs, on the basis of a mortgage created by a deposit of title-deeds on 30--9--1946.

2. The genesis of the transaction as detailed in the plaint reads as follows :

(1) For the purposes of a joint trade carried on by defendants 1 and 4, who stand in the relationship of paternal cousins, for and on behalf of their respective families they applied for and obtained from the plaintiff-bank a cash credit to the extent of Rs. 1,50,000/-, and in connection with the said accommodation executed and delivered to the plaintiff-bank on 4th October 1945 a promissory note for the said amount of Rs. 1,50,000/- promising to pay the said amount on

demand with interest thereon at 6 per cent per annum with quarterly rests. As collateral security, they also executed and delivered to the plaintiff-bank on the same date an agreement hypothecating the goods of their business on the basis of an open loan system.

(2) In pursuance of the said cash credit accommodation, the said defendants were allowed to operate on the accounts and received advances of various amounts from 4--10--1945 as shown in the books of account of the plaintiff-bank.

(3) When the goods of the trade promised as security on the open loan system were found to be unavailable, the plaintiff-bank wanted the defendants 1 and 4 to furnish other sufficient security for the repayment of the amount due. In consequence, the defendants gave the plaintiff-bank on 30th September 1946 an equitable mortgage of the undermentioned properties by deposit at Coimbatore of their title-deeds which were then in their possession for all amounts due on that date and for amounts which may become due thereafter in respect of the said dealings. As one of such documents then deposited, namely, their family partition deed was only a plain paper copy, the original not being available with them, they promised to deposit authenticated copy also obtained from the registry and this was also deposited in due course and in accordance with law at Coimbatore.

3. There can be no doubt that the lower court is right when it finds that the documents were, as a matter of fact, handed over in Coimbatore, and that it was done with intent to create a security. P.W. 1 says, quite definitely, that the title-deeds were handed over at his house in Coimbatore, and that he "understood the transaction to be an equitable mortgage". P.W. 1 was at the time of his examination an advocate of 27 years' standing, and we see no reason to discard his testimony.

4. Ext. A10 is a letter written by the first defendant to the bank on 8--11--1946. It clearly recites the fact that a mortgage had been created, that the deposit of title-deeds was effected in Coimbatore, and that the transaction took place on 30--9--1946.

5. Section 58 (f) of the Transfer of Property Act, 1882, provides:

Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

It is common ground that the properties are in Palghat, and that Palghat is not a town notified u/s 58(f) of the Act. This will not, however, prevent the creation of a mortgage by a deposit of the title-deeds in Coimbatore, a town notified under the section. As pointed out by Mulla "the restriction to the towns named refers to

the place where the deeds are delivered, and not to the situation of the property mortgaged" (Transfer of Property Act, 4th Edition, Page 358).

6. Counsel for the appellants suggested that the evidence on record is insufficient to come to a conclusion that the documents of title were delivered "to a creditor or his agent" as contemplated by section 58 (f) of the Act. Such a contention does not appear to have been specifically taken in the pleadings or urged before the Court below.

7. It is true that the bank had no branch in Coimbatore on 30--9--1946. The evidence of P.W. 1, however, shows that the title-deeds "were handed over to the representative of the Chaldean Syrian Bank". He does not give the name or designation of the representative.

8. The evidence of P.W. 3, a clerk of the bank makes it clear that the person to whom the documents were handed over was one Pothan the then Secretary of the bank. He says:

1 was in Trichur till 6--10--46. Pothan was Secretary then. He died in Medam 1122. He brought the title-deeds covered by plaint equitable mortgage. All title-deeds are kept at Trichur H. O. 1 verified the title-deeds as per Ext. A1.

Ext. A6, the day book of the bank, contains an entry dated 2--10--1946 regarding the expenses incurred by the Secretary for a journey to Coimbatore and back.

9. In these circumstances we cannot but hold that a mortgage was, as a matter of fact, created in Coimbatore on 30--9--1946, by the delivery of title-deeds to an agent of the bank.

10. Ext. A1 mentioned by P.W. 3 is entitled a "memorandum" and gives the particulars of the document deposited. It is dated 30--9--1946, signed by the first and the fourth defendants, and attested by P.W. 1. According to the appellants this document itself creates the mortgage and is hence bad for lack of registration.

11. The principle governing the question is now well settled. The leading case on the subject is (1873)20 WR 160 (2) wherein Couch C. J. said:

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.

Lord Carson quoted this passage with approval in AIR 1923 50 (Privy Council)

and said that the question for determination is whether the document constitutes the bargain between the parties or whether it was merely the record of an already completed transaction. He summed up the conclusions 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.

12. In AIR 1931 36 (Privy Council) their Lordships referred to the passage extracted above and said :

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 S. 17, 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.

13. In AIR 1939 167 (Privy Council) Lord Macmillan dealt with the matter as follows:

Where, as here, the parties professing to create a mortgage by deposit of title-deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must under the statute be registered.

14. In *Rachpal Mahraj Vs. Bhagwandas Daruka and Others*, Patanjali Sastri J. said :

When the debtor deposits with the creditor the title-deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under S. 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration u/s 17, Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title-deeds and yet may not be registrable AIR 1931 36 (Privy Council) . Or, it may be

delivered at a later date and nevertheless be registrable AIR 1939 167 (Privy Council) . The crucial question is: Did the parties intend to reduce their bargain regarding the deposit of the title-deeds to the form of a document? If so the document requires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document, being merely evidential does not require registration.

and:

There are numerous decisions, some of them not easy to reconcile, where this question was considered with reference to the document concerned in the particular case. It is unnecessary to review them, as the two latest pronouncements of the Privy Council, to which reference has been made, aptly illustrate cases falling on either side of the line.

15. Ext. A1 reads as follows:

Memorandum that we (1) M.C. Ramalingam Pillai son of Chockalingam Pillai and (2) M.V. Kalyanasundaram Pillai son of Vridhachalam Pillai of Koppam amsom, Melemuri, Big Bazaar, Palghat, hereby acknowledge that we have this day deposited with the Chaldean Syrian Bank Ltd., Branch Palghat, "hereinafter called the Bank" as required by you the documents specified in the schedule hereto with intent to create an equitable mortgage upon all our estates and interests to which such documents relate including such improvements thereon for the purpose of securing the payment to the Bank on demand of all moneys now owing or which shall at any time hereafter be owing from us jointly and severally whether on balance of accounts, loans (open and otherwise) including interests with quarterly rests in connection with the above accounts. And we hereby further agree whenever requested by the Bank at our own cost to execute to the Bank a valid legal mortgage of such properties in such forms and with such power of sale and other provisions as the Bank may require for securing the repayment on demand of all moneys secured by this equitable mortgage. And we hereby also agree so long as any moneys remain owing to the Bank, to pay interest thereon to the Bank at rates contracted to be paid under the various accounts. And we hereby declare that the documents deposited are all that are in our possession or control and that the properties are not charged or encumbered in any way whatsoever.

In the light of the decision dealt with in paragraphs 12 to 15 it is impossible to say that Ext. A1 is anything more than a memorandum of a completed transaction. It follows that it is not hit by section 17 of the Indian Registration Act, 1908.

16. Our attention was drawn to the words "by this equitable mortgage" occurring in Ext. A1. So far as we can see the words "by this equitable mortgage" in the

context mean the equitable mortgage referred to in the document and do not in any way indicate the creation of a mortgage by the document itself. As pointed out by the Court below the words "obviously refer to the mortgage mentioned in the earlier part of the document, that is, the mortgage acknowledged to have been created by defendants 1 and 4 by deposit of title-deeds".

17. Counsel for the first respondent submitted that for the purposes of this appeal we may proceed on the assumption that the joint Hindu family with which we are concerned is not a trading family and that the shares of the second defendant and the sons of the fourth defendant--defendants 5 and 6--will not be affected unless the mortgage can be considered as one effected for the purposes of an antecedent debt. The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the son to discharge his father's debts which are not tainted with immorality. As pointed out by Mulla:

The father of a joint Hindu family may sell or mortgage the joint family property including the sons' interest therein to discharge a debt contracted by him for his own personal benefit, and such alienation binds the sons, provided--

(a) the debt was antecedent to the alienation, and

(b) it was not incurred for an immoral purpose."

(Hindu Law) 12th Edition, Page 453)

It is not contended that the debt concerned was incurred for an immoral purpose.

18. The only question, therefore, is whether the mortgage by deposit of title-deeds was for the purposes of an antecedent debt. In AIR 1924 P. C. 50 the Board said:

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

The meaning to be given to the word "independent" came up for consideration in Sheo Prasad Vs. Balwant Singh and Others . Sulaiman J. said:

I do not consider that the word "independent" used by their Lordships implies that there should be no connexion of any kind whatsoever between the two debts. It merely means that they should not be part of the same transaction, or the means of some device. Of course, when one debt is paid off by a subsequent debt, there must be in one sense a connexion between the two. I cannot, however, imagine that it was the absence of such connexion that was contemplated when the word "independent" was used. If such were the case, then almost the whole effect of the ruling would be destroyed, for no question of the discharge of an antecedent debt can arise unless that debt is connected with the subsequent debt in the sense of having been paid off by it. Of course where at the time when the first mortgage transaction is entered into, it is in contemplation that it will hereafter be converted into a second mortgage transaction, in order that it may operate as an antecedent debt, the position

would be quite different. But when the second mortgage transaction is not thought of at all at the time when the first mortgage transaction is entered into, the first must be considered to be independent of the second, even though at the time when the second mortgage is taken, the amount due on the first mortgage is set off. We have to see whether the first debt was independent of the second, and not whether the second is independent of the first. That is the only interpretation which I think the language employed by their Lordships can bear.

19. The reason for the insistence on an antecedent debt will be clear from the following passage in I. L. R. 31 All 176:

At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt, and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property.

In AIR 1939 Mad 450 Krishnaswami Ayyangar J. quoted the above passage and said:

In other words, the creditor will have one more hurdle to jump and the family will have a little more time to avert the threatened danger.

20. In order to constitute an antecedent debt, it is of course unnecessary that the prior and subsequent creditors should be different persons. It is equally unnecessary that the subsequent alienation should spell a "discharge" of the antecedent liability. AIR 1924 P. C. 50 was a case in which the mortgage in controversy discharged two older mortgages, and naturally the word "discharge" was employed in that judgment. The principle should be the same whether the subsequent transaction "discharged" the antecedent debt or not, so long as the transaction was necessitated by the existence of the antecedent liability.

21. Thekke Veetil Makkam Amma and Others Vs. Thekke Veetil Kunhi Kalappa Kurup and Others, --a case in which the original advances were made without the security of any immovable property as in this case--the following question was referred to a Full Bench for decision :

Whether money advanced to the father, in a joint Hindu family, in pursuance of an agreement to create a mortgage as and when required by the lender, will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower.

The Bench answered the question as follows :

Now what is the position in the present case? The Bank did advance moneys to respondents 2 and 3 and continued to lend moneys entirely without any security. For several years the Bank was satisfied with the undertaking given by respondents 2 and 3 not to alienate their properties. It is true that respondents 2

and 3 had undertaken to provide security when called upon to do so, but this does not alter the fact that moneys were advanced without security. When security was called for, there was a debt really in existence. In our opinion it cannot be said that there was here a breach of trust on the part of respondents 2 and 3 or that the Bank was a party to a colourable transaction. In other words it cannot be said that the debt was any part of the mortgage, or to use the words of Lord Dunedin in AIR 1924 PC 50, "part of the transaction impeached". In this country an agreement to mortgage creates no charge, and this is of importance in this connexion. For the reasons stated, we would answer the reference in this sense. If the agreement is merely to execute a mortgage, if and when called upon, and the money is lent on this understanding the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction within the meaning in AIR 1919 Mad 75, but the debt will constitute an antecedent debt within the meaning of Hindu Law. The agreement must be a genuine agreement and not a device for evading the law.

22. The question before us is very much simpler. There was no agreement at all to give any security at the time the loans were given.

23. Judged in the light of the decisions mentioned above, it is impossible to say that the mortgage created on 30--9--1946 was not for the purposes of an antecedent debt. Ext. A1 shows that the documents were delivered "for the purpose of securing the payment to the Bank on demand of all moneys now owing or which shall at any time hereafter be owing from us jointly and severally". There have been no advances subsequent to 30--9--1946 and the entire sum sought to be recovered in the suit had been advanced prior to that date.

24. Counsel for the appellants submitted that there has been a partition subsequent to 30-9-1946, by a decree as regards the properties in the Malabar area of the State and by a deed as regards the properties in the Cochin area of the State. Any partition thus effected cannot, however, affect the claims of the plaintiff. As stated by the Supreme Court in S.M. Jakati and Another Vs. S.M. Borkar and Others, : The liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make alienation comes to an end.

In view of what is stated above, this appeal should fail and must be dismissed with costs. We decide accordingly.