

Joseph Vs. Michael

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Court : Kerala

Decided On : Feb-14-2000

Reported in : AIR2000Ker240

Judge : M.R. Hariharan Nair, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58; [Registration Act, 1908](#) - Sections 17

Appeal No. : C.R.P. No. 1781 of 1998

Appellant : Joseph

Respondent : Michael

Advocate for Def. : Lloyd Joseph Vivera and; C.A. Chacko, Adv.

Advocate for Pet/Ap. : K.G. Balasubramanyan, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

M.R. Hariharan Nair, J.

1. The defendant is the revision petitioner. The dispute in the case is as to whether a memorandum of deposit of title deeds relied on by the plaintiff was compulsorily

registrable. Objections raised by the defendant regarding inadmissibility of the memorandum and the invalidity of the mortgage were overruled.

2. Reliance was placed by the learned counsel for the revision petitioner on the decision in *Hubert Peyoli v. Santhavilasath Kesavan Sivadasan*. (1998) 2 Ker LT 125 : (AIR 1998 Ker 344) in support of the contention that if the original transaction and the deposit are on the same date, the memorandum will require registration and that the impugned order is hence defective.

3. Section 17 of the Registration Act gives a list of documents which are compulsorily registrable. 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 come under Section 17(b) of the Act and they require registration. But, does a memorandum of deposit of title deeds create or declare any right or title over immovable property, attracting the sweep of the said section?

4. Mortgage by deposit of title deeds is created under Section 58(1) of the Transfer of Property Act. According to that Section such a mortgage comes into effect where a person in any of the notified towns delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon. Execution of any memorandum evidencing the deposit is not essential for creation of such a mortgage; but very often some writing is obtained in that regard in the form of a memorandum or letter so that it will be a record which would evidence the transaction. But then, the time and date when such writing is prepared assumes importance. If the parties execute such memorandum intending to reduce the transaction to writing and it is done contemporaneously it will require registration in so far as it declares the creation of the mortgage. However, the position would be different if the execution of the memorandum is not contemporaneous and it only confirms the fact of deposit ex-post facto. Surrounding circumstances can be looked into to see whether the execution was contemporaneous or whether it was done after the mortgage had come into effect with the deposit accompanied by the intention to create a mortgage. If the

memorandum as such does not evidence creation of the mortgage and only reveals what happened earlier it does not require registration. What is decisive of the question is the time factor and not the date. There is no bar in the execution of a memorandum evidencing the mortgage on the same day and the memorandum will not require registration provided it was executed after the deposit albeit on the same day. *Rachpal Maharaj v. Bhagwandas Daruka*, 1950 SCR 548 : (AIR 1950 SC 272) which is the leading decision on the point does not lay down anything to the contrary. Eventhough the memorandum involved therein was executed on the same day as the deposit of title deeds it was found valid without registration as the deposit had preceded the execution of memorandum. It was held that the memorandum only recorded a transaction already concluded.

5. *Sudarsan Trading Co. v. Sankar*, ILR (1979) 1 Ker 710, dealt with a case where the handing over of title deeds was accompanied by the execution of the memorandum. It was held that the memorandum required registration as the bargain was evidenced by the written agreement. (1960 Ker LT 442).

6. I have carefully perused the decision in *Hubert Peyoli's case*, (1998) 2 Ker LT 125 : (AIR 1998 Ker 344). None of decisions referred to therein lay down that a memorandum executed on the date of creation of mortgage requires registration. Even *Indersain's case*, (1961) 2 Mad LJ 328 : (AIR 1962 Mad 258) relied on by the learned Judge only provided that where there is no past transaction of actual deposit of title deeds before execution of the letter relied on and the letter is the only evidence of the mortgage and the only document by which the mortgage was created, the letter has to be registered. The stray sentence in paragraph 4 of *Hubert Peyoli's case*. (1998) 2 Ker LT 125 : (AIR 1998 Ker 344) that when memorandum was executed on the date of deposit or delivery of title deeds that needs registration has, therefore, to be understood as applicable to the facts and circumstances of that case and not as an inflexible rule of universal application irrespective of the time of deposit and time of execution of the mortgage.

7. Back to the present case. There is nothing to show that the memorandum was executed simultaneously or prior to the deposit/delivery of the title deed. That being the position, the contention that the memorandum required compulsory

registration has no substance. The impugned order does not suffer from any material defect, illegality or irregularity.

The revision petition is dismissed.

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