

In Re: Sital Prosad and ors.

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SooperKanoon Citation : sooperkanoon.com/866689

Court : Kolkata

Decided On : Dec-14-1916

Reported in : 41Ind.Cas.288

Judge : Lancelot Sanderson, C.J. and ;Asutosh Mookerjee, J.

Appellant : In Re: Sital Prosad and ors.;badrinaraIn Agarwalla

Respondent : ;brijnaraIn Roy and anr.

Judgement :

Lancelot Sanderson, C.J.

1. This is an appeal by Badrinarain Agarwalla, a creditor of the insolvents, from the judgment of Greaves, J., whereby he held that three mortgages, which the appellant alleged were void and inoperative, were valid mortgages.

2. An order for the sale of the mortgaged property had been obtained by the mortgagees under the provisions of the Presidency Towns Insolvency Act; the appellant succeeded in obtaining an order for stay of the sale from Chaudhuri, J., who directed that the matter of the mortgages should be investigated, i. e., for the purpose of ascertaining whether the three mortgages were valid mortgages.

3. The facts are set out in the judgment of Greaves, J:---'There wore four brothers, Raghubir, Raj Coomar Lall, Ram Smadar Lall and Sital Prosad who were members of a Mitakshara family, and they on 10th January 1907 executed a

power--of--attorney in favour of Raghubir. By the power these persons jointly nominated, constituted and appointed Raghubir their attorney for certain purposes named in the power, which include the power to execute mortgages on their behalf. Ram Sundar Lall died soon after the power-of-attorney was executed, and prior to the execution of the mortgage to which I will now refer. That mortgage is dated 21st Jan 1907, and it is executed by Raghubir and Raj Coomar Lall on their own behalf and by Raghubir as attorney for Sital Prosad. Subsequently, a second mortgage was executed of the same properties on 4th March 1908. This was executed by Raghubir on his own behalf and as attorney for Raj Coomar Lall and Sital Prosad. A third mortgage of the same properties was executed on 26th September 1908, and that was executed by Raghubir on his own behalf and as attorney for Sital Prosad. Raj Coomar Lall had died prior to the execution of this third mortgage leaving certain minor sons, and Raghubir also purports to execute the mortgage as guardian of these minor sons of Raj Coomar Lall.' The point relied upon by the appellant in his petition was as follows:--- 'Your petitioner is advised that the aforesaid power was void and inoperative inasmuch as Ram Sundar Lall, one of the executants of the said power-of-attorney, was dead at the time when the aforesaid mortgages were executed. Your petitioner is further advised that the mortgages executed under the aforesaid power were void and inoperative,' and the learned Judge states the point as follows:---The point I have now got to decide is, whether by virtue of the death of Ram Sundar Lall prior to the execution of the first of these mortgages, all the three mortgages are bad, because I do not think it can be really-disputed, in view of the authority of *Sudaburt Pershad Sahoo v. Foolbash Koer* (1) that as the parties are members of a joint Mitakshara family, the mortgage is to stand or fall by the validity or otherwise of the power-of-attorney at the time the first mortgage was executed.'

4. The learned Judge decided that the death of Ram Sundar Lall did not vitiate or bring to an end the power-of-attorney of 10th January 1907, and consequently the mortgages were valid. It was argued on behalf of the appellant that the power-of-attorney was intended to last only during the lifetime of the four brothers and in respect of their joint property, and consequently as soon as Ram Sundar Lall died, the power-of-attorney came to an end and as a further consequence all the three mortgages were totally invalid, inasmuch as each of the said mortgages had been

executed by Raghubir in pursuance of the powers contained in the power-of-attorney of the 10th January 1907, and that such mortgages were not even valid in respect of the shares of the individual brother or brothers who had executed the mortgages on his or their own behalf by reason of the decision of this Court in *Sudaburt Pershad Sahoo v. Foolbash Koer* (1).

5. The question whether the power-of-attorney came to end by reason of the death of Ram Sundar Lall, in my judgment, depends upon the construction which is to be put upon the terms of the power-of-attorney.

6. In coming to a conclusion as to the construction, it is necessary to consider the position of the parties to the power-of-attorney and the property which was thereby affected.

7. The brothers were members of a joint Hindu family under the Mitakshara Law and the property mortgaged was part of the joint and undivided estate. The three surviving brothers were engaged in a joint business and the money was borrowed for the purposes of the business, and regard must be paid to the well-known incidents of an undivided family living under the Mitakshara Law, one of which is that the undivided share of one of the brothers, if he died without male issue (as was the case with Ram Sundar Lall), would pass to the surviving members of the family.

8. Bearing these facts in mind and on a review of the terms of the power-of-attorney, I do not think the intention was that the power-of-attorney was to last only during the lifetime of the four brothers and in respect of their joint property. On the contrary, I think the intention was that the power-of-attorney should continue as long as the property retained the same character, viz., that of undivided property which it bore at the date of the power-of-attorney and in respect of the undivided shares of the four brothers or the survivors of them.

9. Section 201 of the Contract Act of 1872 was relied upon by the appellant, but in my judgment that Section would not apply to the above-mentioned circumstances of this case.

10. The English Law relating to a contract to serve as the agent of a firm of partners in the partnership business was referred to, in which case such a contract is impliedly subject to the continuance of the partnership and is, therefore, discharged by the death of one of the partners, which puts an end to the partnership.

11. I do not think that that principle is applicable to the circumstances of this case, having regard to the nature and incidents of a joint Hindu family living under the Mitakshara Law and the undivided estate thereof. For these reasons I agree with the learned Judge that the death of Ram Sunday Lall did not vitiate or bring to an end the power-of-attorney of 10th January 1907 and consequently the mortgages, by reason of his death, are not invalid.

12. A further point, however, was raised in the argument of the appeal which apparently was not argued before the learned Judge, viz., that inasmuch as Raj Kumar Lall had died prior to the execution of the third mortgage, leaving certain minor sons, then at all events the circumstances differed from those existing at the date of the power of-attorney to such an extent that it could not have been contemplated by the parties that it should continue after such a change.

13. In my judgment this argument ought not to prevail: the character of the property-remained unmodified, being joint and undivided estate, and it was vested in the two surviving brothers and the heirs of Raj Kumar Lall.

14. I assume for the purpose of this judgment that Raghubir was the duly appointed guardian of the minor sons of Raj Kumar Lall (which has not been disputed) and that the money was borrowed for the benefit of the joint business, and, under such circumstances, I think Raghubir would in such capacity be able to join in mortgaging the undivided estate for such a purpose, and inasmuch as the mortgage was also executed by Raghubir in his own behalf, and as attorney -for Sital Prasad, in my judgment the third mortgage was a good and valid mortgage of the joint and undivided properties comprised therein. For these reasons I think the appeal should be dismissed with costs.

Mookerjee, J.

15. The facts material for the determination of the question raised before us lie in a narrow compass and may be briefly stated. Sital Prosad, Raghubir Prosad, Raj Kumar Lal and Ram Sundar Lal were four brothers and constituted a joint family governed by the Mitakshara Law. On the 10th January 1907 three of them executed a power-of-attorney in favour of the fourth (Raghubir Prosad) and thereby authorised him to borrow money on their behalf and as security for the loan, to mortgage their lands. Shortly after this, Ram Sundar Lal died without issue. Thereafter, on the 21st June 1907, Raj Kumar Lal, Raghubir Prosad on his own behalf and Raghubir Prosad as attorney for Sital Prosad executed a mortgage of their joint properties to secure a loan of Rs. 25,000. On the 4th March 1908 a second mortgage was executed for a sum of Rs. 5,000 by Raghubir Prosad for himself and as attorney for Sital Prosad and Raj Kumar Lal. Raj Kumar Lal died in May 1908 and left three infant sons Gouri Sanker Prosad, Jaggannath Prosad and Kedarnath Prosad. On the 24th September 1908 a third mortgage for Rs. 6,000 was executed by Raghubir Prosad for himself, as attorney for Sital Prosad and as guardian for the infant sons of Raj Kumar Lal, On the 22nd November 1911 Sital Prosad, Raghubir Prosad, Gouri Sanker Prosad, Jagannath Prosad and Kedarnath Prosad were all adjudged insolvents on their own petition under the provisions of the Presidency Towns Insolvency Act, and their estate vested in the Official Assignee. On the 27th August 1914 the mortgagees applied to the Official Assignee that steps might be taken to satisfy their dues by the sale of the mortgaged premises. The matter was referred to the Court, and on the 5th January 1915, an order for sale was made under Rule 18 of the Second Schedule to the Presidency Towns Insolvency Act, On the 8th April 1915 the appellant Badri Narain Agarwalla, one of the creditors of the insolvents, applied to the Court to enquire into the validity of the alleged mortgages, His objection in substance was that the power-of-attorney became void and inoperative on the death of Ram Sundar Lal and that the mortgages executed on the strength of such power had no legal force whatever. Greaves, J., has overruled this contention and has directed that the properties be sold according to the original order for sale. On the present appeal, the propriety of this decision has been called in question. On behalf of the creditor appellant, it has been argued, on the authority of the decisions in *Gee v Lane* (2) *Raw v. Alderson* (3) and *Tasker v. Shepherd* (1861) 6

II. & N. 575 : 30 L. J. Ex. 207 : 4 L. T. 19 : 9 W. R. 476 : 123 R. R. 697 : 158 E. R. 237. that upon the death of Ram Sundar Lall, the power-of-attorney ceased to be operative not merely in so far as his interest in the estate was concerned but also in respect of the other executants, and, that, in any event, upon the death of Raj Kumar Lall, the power lost all its vitality. It will be observed that this contention is of a more comprehensive character than the limited ground which formed the basis of the petition of objection of the creditor dated the 8th April 1915.

16. There is no room for controversy that as argued by the appellant, under Section 201 of the Indian Contract Act; as under the Law of England [Binders v. Free (1829) 9 B. & C. 167 : 4 Man. & Ry. 282 : 7 L.J.K.B. (o. s.) 211 : 109 E. R. 63 : 32 R. R. 620. and Pool v. Pool (1889) 61 L. T. 401 : 58 L. J. P. 67. an agency is terminated by the death of the principal, and this view is supported by the decision of the Judicial Committee in Mujibun nissa v. Abdur Rahim (7) 23 A. 233 : 5 C. W. N. 177 : 28 I. A. 15 : 11 M. L. J. 58 : 3 Bom. L. R. 114 : 7 Kar. P. C. J. 829 (P. C.) This proposition, however, is of no real assistance to the appellant, for it merely shows that if Ram Sundar Lall had left heirs, they would not have been bound by acts done by the agent on the strength of the power-of-attorney after his death. Here, the conditions are different. On the death of Ram Sundar Lall, his interest in the estate vested by survivorship in his three brothers. Consequently, when Raghubir Prosad acted on the basis of the power-of attorney, he dealt with property which had vested in himself as also in Sital Prosad and Raj Kumar Lall; in essence, the death of Ram Sundar Lal did not in any way alter the constitution of the property but only enlarged the extent of the interest of the other members of the co-parcenary in their joint estate. The appellant is, consequently, constrained to maintain that the effect of the death of one of the executants of the power-of-attorney was to make the power void and inoperative in law. The contention has been broadly put forward that if A and B execute a power-of-attorney in favour of C, on the death of A, the power lapses in its entirety so as to make it impossible for C to bind thereafter by his act either B or the representatives of A. This proposition has been controverted by the mortgagees-respondents on the strength of the Rule enunciated in Bhagirath Samanta v. Prem Chand Pal (8) 16 Ind.Cas.852 : 17 C. L. J. 201. This decision, however, is not an authority directly in favour of the respondents, for it merely decides that where there are two joint

agents and one of them dies, upon his death the contract of agency terminates in so far as he is concerned but not as regards the surviving agent. The converse case of the death of one of two joint principals, which now requires consideration, did not arise in the case just mentioned, and must consequently be determined upon principle and upon the authorities.

17. It is plain to my mind that the cases of *Gee v. Lane* (2); *Raw v. Alderson* (3) and *Tasker v. Shepherd* (4) do not support the broad contention that where an agency has been created by two principals, the death of one of them terminates the agency not merely as regards himself but also as regards his joint principal. The first of these cases, *Gee v. Lane* (2) is an authority for the proposition that a joint warrant of attorney given to enter judgment against us' upon a joint and several bond does not authorise the entering up judgment against the survivor only. Lord Ellenborough, C. J., based his decision on the ground that an action to be brought 'against' must mean a joint action, and distinguished the decision in *Gladwin v. Scot* (1751) Barnes 53; 94 E. R. 802. where the warrant of attorney executed by the two was to enter judgment against me.' Similarly *Raw v. Alderson* (3) is an authority for the proposition that if two warrant an attorney to confess judgment against them and one dies, judgment cannot be entered up against the other. Reference was made to the decision in *Todd v. Dodd* (1781) 1 Wils. K. B. 312 : 95 E. R. 636 : Barnes 48 : 94 E. R. 800 : Sayer 5 : 96 B. E. 784. which has not been uniformly reported by the different reporters. Reliance was also placed upon *Fendall v. May* (1813) 2 M. & S. 76 : 105 E. R. 310 : 14 R. R. 593. where the Court of King's Bench held that there might be a material distinction between a case in which the alteration in the state of parties is only in the persons charging and another in which the alteration is in the persons to be charged; in other words, that when a warrant to confess judgment is given by two, the death of one revokes the authority of the attorney; but that when a warrant to confess judgment is given by two, the decease of one does not revoke the authority. It is not necessary for our present purpose to consider whether this distinction is or is not well founded, but it is plain upon an examination of the decisions mentioned that they do not enunciate a principle of universal application and only turn upon the ascertainment of the true intention of the parties to the power-of-attorney. This is made amply clear from *Tasker v. Shepherd* (4) where a question arose as to the effect of the

death of a member of a partnership which had appointed the plaintiff as their agent for a specified term. The Court held that the true question was - what did the parties contract should be done, and upon a consideration of the terms of the contract and the surrounding circumstances came to the conclusion that the contract had reference to a certain existing partnership business only. Baron Channel stated that after fully considering the contract and the probable intention of the parties to be collected from the various terms of the agreement, he came to the conclusion that the contract was intended to be for the period mentioned, subject to the condition that all the parties so long lived; the agreement of the parties had relation to the existing state of things which they presumed would continue for four years and in reference to which presumption alone they contracted *Friend v. Friend* (1897) 2 Ch. 421 : 66 L. J. Ch. 737 : 77 L. T. 50 : 46 W. R. 139; *Phillips v. Alhambra Palace Co.* (1901) 1 Q. B. 59 : 70 L. J. Q. B. 26 : 49 W. R. 223 : 83 L. T. 431 : 17 T. L. R. 40. Substantially the same view has been adopted in the Courts of the United States, where the question appears to have come up for consideration more frequently than either in this country or in the English Courts. It is there recognised that where authority is given to an agent by a partnership, the death of one of the partners, which operates as a dissolution of the partnership, also terminates the agent's authority, unless it is a power coupled with an interest. The same principle is held applicable where two principals jointly appoint an agent to take charge of some matter in which they are jointly interested and a severance of such interests afterwards occurs by the death of one of the joint principals *MacNaughton v. Moore* 1 Hay ward N. C. 189; *Easton v. Ellis* 1 Handy (Ohio.) 70; *Rowe v. Rand* (1887) 111 Ind. 206 : *Huffenth.* cases on Agency 126. Where, however, the principals are joint and several, and the power given to the agent is both joint and several, the death of one of the principals does not terminate his authority *Milson v. Stewart* (1861) 5 Clarke Pa. h. J. 450. The dividing line between the two classes of cases is well illustrated by the decisions in *Marlett v. Jackman* 3 Allen. (Mass.) 287. and *Martin v. Hunt* 1 Allen. (Mass) 418. see also *Long v. Thayer* 150 U.S. 520 : 37 Law. Ed. 1167; *Weaver v. Richards* 144 Mich 395 : 6 L. R. A. (n. s.) 855 : 108 NT. W. 382; *Grapel v. Hodges* 112 N. Y. 419. and *Graham v. Jackson* (1845) 6 Q. B. 811 : 14 L. J, Q. B. 129 : 9 Jur. 275 : 115 E. R. 306. We cannot consequently hold, as an inflexible Rule of

law, that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased but also as regards the surviving principal. We have, in each case, to determine the true intention of the parties to the contract from the terms thereof and from the surrounding circumstances. This view is in accord with the decision in *Budh Singh Dudhuria v. Denendra Nath Saneul* 11 C. L. K, 323. We must accordingly examine from this point of view the power-of-attorney in the case before us.

18. It is perfectly plain that the intention of the parties was to facilitate joint loans by the mortgage of the joint estate for their joint benefit. The terms used are as follows:---'To borrow money, if required, on our behalf from any person and execute a bond, if necessary, for that purpose, to sell or mortgage land belonging to us and receive the consideration money or the mortgage debt and to execute and sign the deed of sale or mortgage on our behalf, to appear on our behalf before the proper registering officer and present such deed of sale or mortgage for registration and admit the execution thereof and do all needful acts on our behalf for the registration of the said deed.' Clearly it would not be right to hold that the power-of-attorney came to an end by reason of the death of one or other of the principals, even though such joint action continued to be possible, in the event which happened. The death of Ram Sundar Lall without heirs, in no way, affected the constitution of the family or varied the incidents of the joint estate, though his interest vested by survivorship in his three brothers, with the consequence that the extent of their shares on a possible partition was enlarged. I feel no doubt whatever that in these circumstances, the death of Bam Sundar Lall did not affect the continued operation of the power-of-attorney. Consequently the validity of the first two mortgages cannot be impeached on any substantial ground. The question of the effect of the death of Raj Kumar Lall, however, seems at first sight to involve somewhat different considerations, as thereupon three new members (his three infant sons) were introduced into the family co parcenary. It is plain that they were not and could not be bound by the power-of-attorney. Indeed, in the third mortgage, Raghubir Prosad professed to hypothecate the interest of his infant nephews in the joint family estate, not by virtue of the authority vested in him under the power-of-attorney, but only as their guardian. We must for our present

purpose proceed on the assumption that he was in fact their lawful guardian and was competent to act on their behalf in the matter of this transaction, as the truth of the recital in this respect was not questioned in the Court below. The question thus arises, whether, upon the death of Raj Kumar Lall, it was competent to Sital Prosad to contend that the power of-attorney had come necessarily to an end, even though it was still possible to raise a joint loan for the benefit of the entire family, by means of a mortgage of the joint properties, executed by Raghubir Prosad, on his own behalf, in his character as agent and in his capacity as guardian of his infant nephews. In my judgment, the answer must be in the negative, if we bear in mind the paramount object of the power-of attorney; it is obviously reasonable to hold that so long as that object continued to be capable of realisation, the power also retained its vitality; to adopt the contrary view would plainly defeat the ends of justice. I hold accordingly that the validity of the third mortgage also cannot be successfully questioned. On these grounds I agree that the appeal must be dismissed with costs.