

to rebuild the cesspool, the Municipality ought to be content with the cover provided, so long as the protection placed over the opening of the cesspool does not in itself constitute a fresh danger. All that the Municipality have to see is that the covering is sufficiently strong and stable to make the passage of the public free from danger. I dismiss the application.

Application dismissed.

PRIVY COUNCIL.

BHARAT INDU (DEFENDANT) v. HAMID ALI KHAN (PLAINTIFF).

[On appeal from the High Court of Judicature at Allahabad].

Registration—Presentation of power of attorney for registration—Executant ill and unable to go to registration office—Registration Act (III of 1877), sections 32 and 33—Executant treated as presenter—Mortgage duly registered under power so presented and authenticated.

In a suit on a mortgage executed on the 30th of August, 1895, a question arose whether the mortgage had been duly registered. It appeared from an endorsement by the sub-registrar on the power of attorney under which it purported to be registered that it was brought to him on the 4th of November, 1895, "for registration and authentication" by a servant of the executant of the power who said "that the executant was ill and unable to come himself, and asked that the power of attorney might be registered on the spot." As that would have been illegal, the sub-registrar, on the 6th of November, went to the residence of the executant, and was satisfied that he was ill and unable without risk and serious inconvenience to attend at the registration office; and he read the contents of the power of attorney to the executant, who thereupon admitted the execution and completion of the power, and asked that after registration the document should be given to the person named as the attorney in it; and thereupon the sub-registrar registered it.

Held that the presentation by the servant on the 4th of November was inoperative and that the executant himself was the real presenter and was so treated by the sub-registrar on the 6th of November. *Jambu Prasad v. Muhammad Aftab Ali Khan* (1) distinguished.

The person named as attorney in the power presented on the 2nd of January, 1896, now sued upon the mortgage of which he had obtained registration under the power of attorney.

Held that the power was duly registered and authenticated in accordance with sections 32 and 33 of the Registration Act (III of 1877), and the subsequent registration of the mortgage under it by the attorney named in it was a valid registration.

*Present:—Lord BUCKMASTER, Lord PHILLIMORE and Sir JOHN EDGE.

(1) (1914) 1 L. R., 37 All., 49; L.R., 42 L.A., 22.

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APPEAL 128 of 1918 from a judgment and decree (5th March, 1915,) of the High Court at Allahabad, which reversed a judgment and decree (19th February, 1912,) of the Court of the Subordinate Judge of Bareilly.

On the 30th of August, 1895, one Muhammad Wilayat Ali Khan by a deed of that date, mortgaged certain immovable property to one Nazir Ali, and the latter on the 24th of January, 1900, assigned all his interest under the mortgage to the plaintiff (now the first respondent). The appellants (defendants 4, 5 and 6) were the legal representatives of one Babu Durga Prasad, who was the auction-purchaser of a portion of the mortgaged property at a sale in execution of a simple money decree against Wilayat Ali Khan.

On the 6th of August, 1910, the plaintiff respondent brought the suit out of which the present appeal arose against the defendants appellants and another defendant in the Court of the Subordinate Judge of Bareilly to enforce the mortgage of the 30th of August, 1895, by the sale of the mortgaged property.

The defendants denied the execution of the mortgage, and asserted that the registration of the mortgage and of the power of attorney under which it was presented for registration were invalid. They also asserted that there was no consideration for the mortgage, and that it was a fictitious transaction for the purpose of defrauding the creditors of the mortgagor.

The further facts and the questions of law raised will be found for the purposes of this report to be sufficiently stated in the judgment of the Judicial Committee.

The principal questions for decision in this appeal are (a) whether the mortgage deed was executed and registered according to law; (b) whether it was made for consideration; and (c) whether the plaintiff was entitled to enforce it.

The mortgage was presented for registration on the 2nd of January, 1896, by the person named in a power of attorney, dated the 1st of November, 1885, and was registered, but the validity of the power was disputed in the suit.

The Subordinate Judge, though he found on the evidence that the mortgage was duly executed and registered, came to the conclusion that there were circumstances in the case which

“induced suspicion” as to the *bona fides* of the mortgage bond, to prove which the onus was on the plaintiff who had not discharged that onus. He therefore dismissed the suit.

An appeal to the High Court was heard by TUDBALL and RAFIQ, JJ., who held that the mortgage in suit was genuine and made for consideration; that the evidence of Daud Ali and Nazir Hussain who swore to the execution and to the payment of Rs. 5,000 in their presence as consideration was reliable, and the reasons given by the Subordinate Judge for discrediting them could not be accepted; that it was not made out that the mortgagor Nazir Ali was a man of no means; and that the execution of the sale-deed “was not disputed.”

The High Court, therefore, allowed the appeal, reversed the decree of the Subordinate Judge and gave the plaintiff a decree on the mortgage.

On this appeal—

De Gruyther, K.C., and *B. Dube*, for the appellants, contended that the only presentation of the power of attorney was by Wazir Beg and that was invalid. Until the power of attorney had been duly authenticated under section 33 of the Registration Act III of 1877 the mortgage could not be duly presented for registration under section 32 of that Act—*Wilayat Ali Khan*, it was submitted, did not present the power of attorney for registration. Its not having been presented in accordance with law caused all the proceedings with regard to it to be without jurisdiction and therefore ineffectual. Reference was made to *Jambu Prasad v. Muhammad Aftab Ali Khan* (1). The mortgage, therefore, was not duly registered as was required by the Transfer of Property Act (IV of 1882), section 59, and was consequently inoperative. It was, therefore, not enforceable as a mortgage. The Subordinate Judge was, it was contended, right in finding that it was without consideration and was a fictitious transaction. Reference was made to *Bombay Cotton Manufacturing Company v. Motilal Shivalal* (2) as showing that weight should be given to findings of fact by the Trial Judge.

(1) (1914) I. L. R., 37 All., 49; L.R., 42 I. A., 22.

(2) (1915) I. L. R., 39 Bom., 386; L.R., 42 I. A., 110.

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Dunne, K. C., Kenworthy Brown and Palat for the first respondent, were not called on regarding the question of registration; but contended that on the facts the findings of the Subordinate Judge were on the evidence rightly reversed by the High Court.

1920, May 14th:—The judgment of their Lordships was delivered by Lord PHILLIMORE:—

The suit which gave occasion to the present appeal was brought by the plaintiff, now the first respondent, as assignee of a mortgage executed on the 30th of August, 1895, to one Wilayat Ali Khan in favour of one Nazir Ali for Rs. 5,000 and interest. The assignment was made by deed of sale, dated the 24th of January, 1900; and the suit was brought to recover the sum due upon the mortgage or to obtain the sale of the mortgaged property.

There were several defendants; but those with whom their Lordships are concerned are the present appellants, heirs of one Babu Durga Prasad who had lent money to Wilayat Ali Khan upon mortgage of other properties, and had brought them to sale, and as the proceeds were insufficient to realize the sum due upon his mortgage, had obtained a further personal decree for the balance, and had thereunder attached the properties which were subject to the mortgage to the plaintiffs in this suit. Ultimately these attached properties appear to have been brought to sale and then Durga Prasad or his heirs became the auction purchasers. The title of these heirs is, therefore, subsequent to that of the plaintiff and their defence rests upon their ability to displace the mortgage upon which the plaintiff relies.

Two objections are taken on their behalf to the plaintiff's title. One is that the mortgage upon which the plaintiff relies was never duly registered. On this point both the Subordinate Judge and High Court at Allahabad decided in favour of the plaintiff. The other point is that the mortgage in question was a sham transaction under which no money passed, executed by Wilayat Ali Khan to a nominal mortgagee in order that it might form a protection for that part of his estate against his other numerous creditors. Upon this point the learned Subordinate Judge decided in favour of the defendants and dismissed the suit;

but upon appeal the High Court thought otherwise and made a decree in favour of the plaintiff in the usual terms of a decree in a mortgage suit. Hence the present appeal.

Their Lordships will deal with the point as to registration first. By the Transfer of Property Act, section 59, where the principal to be secured exceeds Rs. 100, a "mortgage can be effected only by a registered instrument." The Indian Registration Act, then in force, Act III of 1877, is the Act governing the registration in this case. By section 32, except in certain cases not material to the present enquiry :—

"Every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned."

Now the mortgage in question was not presented by the mortgagee or the mortgagor, but by one Daud Ali described as general attorney of Wilayat Ali Khan, under a general power of attorney, dated the 1st and registered on the 4th of November, 1885. If, therefore, the registration is to be good it must be because Daud Ali was the agent of Wilayat Ali Khan, and was "duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned." Their Lordships have, therefore, to inquire, whether the power of attorney is sufficient within the meaning of this provision.

By section 33 :—

"For the purposes of section 32, the powers of attorney next hereinafter mentioned shall alone be recognized (that is to say) :—

"(a) 'If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar (within whose district or sub-district the principal resides . . .'

"Provided that the following persons shall not be required to attend any Registration Office or Court for the purpose of executing any such power of attorney as is mentioned in clauses (a) and (b) of this section :—

"Persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend. . . .'

"In every such case the Registrar or Sub-Registrar or Magistrate (as the case may be), if satisfied that the power of attorney has been voluntarily

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executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

"To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal . . . or issue a commission for his examination."

Now the power of attorney, under which Daud Ali purported to act, was certainly executed by Wilayat Ali Khan and is sufficiently large in its terms to authorize Daud Ali to procure the registration of the mortgage in question. But it appears from the endorsement made by the sub-registrar and must be taken to be the fact that it was brought to him on the 4th of November, 1885, "for registration and authentication by one Wazir Beg, a servant of Wilayat Ali Khan, who said that the executant was ill and that he (the servant) was going to deposit the commission fee and asked that the power of attorney might be registered on the spot." The sub-registrar could not legally do this, and accordingly on the 6th he personally went to the dwelling place of Wilayat Ali Khan, who, he was satisfied, was ill and unable without risk or serious inconvenience to attend at the registration office. He read out the contents of the power of attorney to Wilayat Ali Khan, who thereupon admitted the execution and completion of the power and asked that after registration the document might be given to Daud Ali. Thereupon the sub-registrar registered it. On these facts it is contended on behalf of the appellants that the power of attorney was not duly registered and therefore that Daud Ali had not the requisite authority to present the mortgage for registration, and that the mortgage has not been duly registered and is invalid.

The provisions of the Registration Act are very carefully designed to prevent forgeries and the procurement of conveyances or mortgages by fraud or undue influence, and though it may seem somewhat technical to insist upon exact compliance with the provisions of the Act, it is necessary so to do. Their Lordships have already given their sanction to the necessity of strict compliance with these forms in the case which was referred to at the Bar; *Jambu Prasad v. Muhammad Aftab Ali Khan* (1). In that case there were two mortgages presented at the registration office by two agents on behalf of the mortgagee, neither

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of whom held any authenticated power of attorney. Thereupon, the registrar in pursuance of his duty under section 34 inquired of the mortgagors who were there present at the same time whether they admitted the execution of the deeds, and they said that they did. Whereupon the registrar registered them. The presentation on behalf of the mortgagee being ineffective by reason of the defect in the powers of attorney, an attempt was made to support it on the theory that the mortgagors who attended and admitted the execution and received the mortgage money might be assumed to have presented the mortgages. But the High Court at Allahabad and their Lordships on appeal held otherwise. Their Lordships observed that it was obvious that the mortgagors had attended to admit that they had executed the deeds and not to present them for registration and that they did not present them for registration. Their Lordships said that the mortgagors could not be treated as presenting them for registration; they were no doubt assenting to the registration, but that would not be sufficient to give the registrar jurisdiction. They observed that one object of the Act was to make it difficult for persons to commit frauds by means of registration under the Act and that it is the duty of the Courts in India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presents a document for registration has not been duly authorized in the manner described in the Act to present it.

Their Lordships who are sitting on the present appeal have, therefore, to examine the evidence as to registration under the guidance of the decision just quoted.

Now it is said that the only presentation of the power of attorney was the presentation by the servant Wazir Beg, who had insufficient authority, and that the sub-registrar accepted this presentation, and thereupon proceeded with the other steps required by the Act which follow on the presentation, and that the presentation was bad and that nothing that followed upon it could make it good. The Courts in India did not take this view and their Lordships think that they acted rightly. It was probably an irregularity on the part of the sub-registrar to accept the document as presented by Wazir Beg, and to enter, as he

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ultimately did, the registration as made on the 4th of November, instead of the 6th. But if all that had happened had been that Wazir Beg had come as a messenger with the document in his hand from his master, and requested the attendance of the sub-registrar at his master's house, because his master was ill, and if the sub-registrar, instead of letting Wazir Beg carry the document back, had carried it himself, and on reaching Wilayat Ali Khan's house had said to him "Do you present this document? If so, do you admit its execution?" no objection could have been taken. Now it appears from the endorsement that the sub-registrar, when he reached the house, read the power of attorney through to Wilayat Ali Khan, who admitted the execution and completion of the instrument. The sub-registrar went there because Wilayat Ali Khan desired it to be registered; and he knew from the message by the servant and Wilayat Ali Khan knew that he knew that Wilayat Ali Khan desired it to be registered and that he had been sent for and had come for the purpose of completing the registration.

The case is not like the one already quoted, because in the present case it is the person who desired to present and purported to present who took the further step and admitted the execution.

It is to be further observed that under section 61, the document after registration is to be returned to the person who presented the same for registration or to such person as he shall nominate. If Wazir Beg had been the person presenting, the document should have been returned to him, but the sub-registrar records that Wilayat Ali Khan asked that after registration the document might be given to Daud Ali—that is he treated himself as the person who presented the document and who therefore had the power of saying to whom the document should be returned after registration.

The proper conclusion from these facts was that drawn in the Courts below. The presentation by Wazir Beg was inoperative but not injurious to the validity of any subsequent presentation. It remains that Wilayat Ali Khan was the real presenter, and was so treated by the sub-registrar.

A further point was taken that section 33 requires that the document shall be executed before as well as authenticated by the sub-registrar, and that this power of attorney certainly was not executed in his presence. But all this is covered by the proviso already quoted, under which, if the person is ill, what the sub-registrar is to do is to satisfy himself that the power of attorney has been voluntarily executed, for which purpose he may go to the sick man's house and examine him. This is what the sub-registrar did.

Upon the whole their Lordships are of opinion that this objection to the registration fails and that the appellants cannot succeed upon this ground.

There remains the question of substance upon which the Courts disagreed. It was urged on behalf of the appellants that the mortgage put in suit was a paper transaction, and that no money was really lent by Nazir Ali to Wilayat Ali Khan. The grounds for this contention are shortly as follows. That there is no documentary evidence outside the statement in the deed that any money passed upon the execution of the mortgage; that Daud Ali who deposed to the fact that it did pass, says that a receipt was executed, and that this receipt is not produced; that there is again no documentary evidence except the sale deed that Hamid Ali Khan, the plaintiff, paid anything upon the transfer when it was executed; that he was not called as a witness and produced no accounts; that he was the nephew of Wilayat Ali Khan; and that Wilayat Ali Khan, who died two years before the suit was instituted, was very heavily in debt, and might desire by this paper transaction to acquire a shield to protect his property from other creditors; that no interest appears to have been paid upon the mortgage; that it was put in suit very late; and that it is very doubtful whether Nazir Ali who was a servant or Nazir in a native State and had a very small salary, could have had Rs. 5,000 to lend.

To this it was replied that it might well be that Nazir Ali, though his salary was small, acquired money in other ways; that there was nothing in the non-payment of interest by the mortgagor, as he seems to have taken the same course with regard to other mortgages; that there was no delay in asserting

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the claim, the proper time to do so being when the auction purchasers claimed the property; that the case which the appellants were now making was not their original case, which was that either Wilayat Ali Khan had never executed the deed, and that it was a forgery, or that Daud Ali had registered it after he had been dismissed and his power of attorney had been withdrawn; that in fact the case had been rather launched as one of fraud upon Wilayat Ali Khan than of fraud by Wilayat Ali Khan; that there was no reason for disbelieving the oral testimony; and lastly, that whereas Wilayat Ali Khan had effected considerable mortgages and failed to pay interest upon them, it was a mistake to suppose that he was insolvent, or had not in fact a considerable balance of assets, so that he would not be very likely to encumber his estates by a fictitious mortgage for the purpose of a protection which he did not need.

This last point led to the High Court remitting the case to the Court of the Subordinate Judge with a view to having it ascertained what Wilayat Ali Khan's real means at the time were, and the result was that the Subordinate Judge found that there was a very handsome balance of assets over liabilities. After this further finding, the High Court reversed the decision of the Subordinate Judge and held that the mortgage was a real transaction.

It has been urged before their Lordships that the matter largely turns upon the credibility or otherwise of the plaintiff's witnesses, Daud Ali and Nazir Husain, who swore that the money passed, and that it is not right that the finding of the Subordinate Judge that these witnesses were to be disbelieved should be set aside by the High Court which did not see the witnesses; and in support of this contention reference was made to the decision of the Board in *Bombay Cotton Manufacturing Company v. Motilal Shivalal* (1). Their Lordships have no intention of trenching upon the salutary principle laid down in that case. But in the present case the High Court had an important piece of knowledge which was not in the possession of the Subordinate Judge who tried the case. He proceeded upon the view, which was to a certain extent true, that Wilayat Ali

(1) (1915) I. L. R., 39 Bom., 386; L. R., 42 I. A., 110.

Khan was "considerably involved." But he did not know that however this might be, there was still an ample surplus of assets; and this important fact, of which the High Court was in possession, but of which the Subordinate Judge was not aware, might well warrant a different conclusion from that which was arrived at in the Court of first instance.

Upon the whole, though the case is not free from difficulty, their Lordships are of opinion that the High Court was right, that the transaction was not fictitious and that the decree made in the High Court should stand. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

Appeal dismissed.

Solicitors for the appellants :— *Barrow Rogers and Nevill.*

Solicitor for respondent no. 1 :— *Douglas Grant.*

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

MUHAMMAD JUNAID (PLAINTIFF) v. AULIA BIBI¹ AND OTHERS
(DEFENDANTS).*

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April, 18.

Muhammadan law—Will—Bequests to heirs and to strangers—Civil Procedure Code (1908), order XXII, rule 4—Legal representative—Abatement of suit.

In giving effect to the will of a Muhammadan which contains bequests to heirs and also to strangers the principle to be followed is that the bequests to the heirs will be invalid unless in each case they are assented to by the other heirs; but the bequests to the strangers will be valid to the extent of one-third of the testator's property.

Held also that an application to bring upon the record as representative of a deceased defendant a person who is not in fact such representative will be of no avail to save the running of limitation in favour of the person who really is the legal representative.

THE facts of this case are fully stated in the judgment of the Court.

Dr. S. M. Sulaiman, for the appellant.

Mr. A. E. Ryves, Munshi Gokul Prasad, The Hon'ble Dr. Tej Bahadur Sapru, Munshi Damodar Das, Mr. N. P. Singh, Mr. Zahur Ahmad, Mr S. A. Haidar, Pandit Baldeo Ram

* First Appeal No. 928 of 1917, from a decree of Kunwar Sen, Subordinate Judge of Allahabad, dated the 28th of February, 1917.