

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

WEDNESDAY, THE 18TH DAY OF JULY 2018 / 27TH ASHADHA, 1940

WP(C).No. 23710 of 2018

PETITIONER:

CHERRYL ANN JOY,
AGED 27 YEARS, D/O.JOY ANTONY,
RESIDING AT 15054 SW, 34 STREET, DAVIE FL-33331,
USA, PASSPORT NO.5133998989, REPRESENTED BY
POWER OF ATTORNEY HOLDER, JOSEPH ANTONY, AGED 63,
S/O.ANTONY, RESIDING AT NELLIYEKKUNNEL HOUSE,
NEDUMKANDAM P.O., KALKOONTHAL VILLAGE,
IDUKKI DISTRICT - 685 553.

BY ADVS.SMT.V.H.JASMINE
SRI.JESWIN P.VARGHESE

@neeharam

RESPONDENT :

THE SUB REGISTRAR,
SUB REGISTRAR OFFICE, UDUMBANCHOLA,
IDUKKI DISTRICT - 685 554.

BY GOVERNMENT PLEADER SMT.A.C.VIDHYA

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 18-07-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

- EXHIBIT P1: TRUE COPY OF THE TITLE DEED REGISTERED AS
DOCUMENT NO.2413/2015 OF S.R.O. UDUMBANCHOLA.
- EXHIBIT P2: TRUE COPY OF THE POWER OF ATTORNEY DATED
30/04/2018 EXECUTED BY PETITIONER IN FAVOUR OF
HER POWER OF ATTORNEY HOLDER JOSEPH ANTONY.
- EXHIBIT P3: TRUE COPY OF THE SALE DEED DATED 15/06/2018 EXECUTED BY
THE PETITIONER THROUGH HER POWER OF ATTORNEY
HOLDER OF PETITIONER.
- EXHIBIT P4: TRUE COPY OF THE LETTER DATED 16/06/2018 SENT BY
RESPONDENT TO THE POWER OF ATTORNEY HOLDER
OF PETITIONER.

TRUE COPY

P.A. TO JUDGE

(CR)

ALEXANDER THOMAS, J.

W.P.(C)No.23710 of 2018

Dated this the 18th day of July, 2018

JUDGMENT

It is stated that the petitioner is permanently settled in the United States of America along with her parents and sister and that she has no immediate family members who are now residing in India and the closest relative is her father's brother in whose favour she has executed Ext.P2 power of attorney dated 30.4.2018 authorising him to enter into transaction for sale of her property situated in Kerala. It is the case of the petitioner that she has executed Ext.P3 sale deed dated 15.6.2018 through her duly constituted power of attorney holder, who is her father's brother, on the strength of Ext.P2 Power of Attorney dated 30.4.2018 executed duly before the Vice Consul of the Indian Consulate in the United States of America.

2. It is further stated that Ext.P3 sale deed was presented by the petitioner's power of attorney for registration before the respondent-Sub Registrar, S.R.O., Udumbanchola, Idukki District. The respondent-S.R.O. has refused to register Ext.P3 sale deed as per the impugned Ext.P4 rejection memo dated 16.6.2018 on the ground that Ext.P2 power of attorney dated 30.4.2018 is not a registered document

as required in Section 17(1)(g) of the Registration Act, 1908 (Central Act 16 of 1908). It is this order at Ext.P4 that is under challenge in this writ petition. The impugned Ext.P4 order reads as follows:-

"വിഷയം - ആധാരം രജിസ്റ്റർ ചെയ്യുന്നത് -ഒബ്ജക്ഷൻ നൽകുന്നത്- സംബന്ധിച്ച് സൂചന- 1. താങ്കൾ ഈയാഫീസിൽ രജിസ്റ്റർ ചെയ്യുന്നതിനായി ഹാജരാക്കിയ ആധാരം.

2.കൗൺസലേറ്റ് ജനറൽ ഓഫ് ഇന്ത്യ അറ്റലാന്റ് താർലോക്ക് ബഥാൻ വൈസ് കൗൺസലർ എന്നയാളാൽ സാക്ഷ്യപ്പെടുത്തിയ എംബസി അറ്റസ്സഡ് പവർ.

3. 13/09/2013 തീയതിയിലെ 20137/Leg.A2/ 2009/Law നമ്പർ കേരള ഗസറ്റ് വിജ്ഞാപനം.

മേൽ സൂചന (1) പ്രകാരം താങ്കൾ ഈ ഓഫീസിൽ രജിസ്റ്റർ ചെയ്യുന്നതിനു സമർപ്പിച്ച ആധാരത്തോടൊപ്പം ഹാജരാക്കിയിട്ടുള്ള അമേരിക്കൻ എംബസി സാക്ഷ്യപ്പെടുത്തിയ സർവ്വമുക്ത്യാർ രജിസ്റ്ററേഷൻ ആക്റ്റ് 17(1) (ജി) വകുപ്പ് പ്രകാരം നിർബന്ധമായും രജിസ്റ്റർ ചെയ്യേണ്ട ആധാരങ്ങളിൽ ഉൾപ്പെട്ടു വരുന്നു. സൂചന (3) പ്രകാരം ആധാരം എഴുതി ഒപ്പിട്ട് നൽകുന്നതിന് രജിസ്റ്റർ ചെയ്യാത്ത മുക്ത്യാർ പ്രകാരം താങ്കൾക്ക് അധികാരം ഉള്ളതായി കാണുന്നില്ലത്തതിനാൽ ആധാരം രജിസ്റ്റർ ചെയ്തു നൽകുവാൻ സാധിക്കുകയില്ല എന്നു അറിയിക്കുന്നു."

3. The petitioner would contend that the above said stand taken by the respondent S.R.O. as reflected in the impugned Ext.P4

rejection memo dated 16.6.2018 by placing reliance on Section 17(1)(g) of the Registration Act, 1908 is misplaced and is without taking into consideration the vital and crucial provision contained in Section 33(1)(c) of the Registration Act, 1908. The petitioner would contend that Section 33(1)(c) of the Registration Act, 1908 mandates that for the purpose of Section 32 (which deals with persons to present documents for registration), a power of attorney executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, Indian Consul or Vice Consul or representative of the Central Government alone shall be recognized if the principal at the time aforesaid does not reside in India. In the light of these aspects that the petitioner has filed this instant writ petition (civil) on 13.7.2018 with the following prayers:-

“i) Call for the records leading to Exhibit-P4 letter issued by the respondent and quash the same by issuing a writ of certiorari or other appropriate writ or order;

ii) Issue a writ of mandamus or any other appropriate writ, order or direction, directing the respondent to register Exhibit-P3 Sale Deed dated 15.6.2018 at Sub Registrar Office, Udumbanchola;

And

iii) Grant such other and further reliefs as this Hon'ble Court deems fit and proper in the circumstances of this case.”

4. Heard Smt.V.H.Jasmine, learned counsel appearing for the petitioner and Smt.A.C.Vidhya, learned Government Pleader appearing for the respondent-Sub Registrar.

5. Before dealing with the rival contentions, it will be pertinent to refer to some of the relevant provisions in the Registration Act, 1908 and the Kerala Stamp Act, 1959.

6. Section 17(1) of the Registration Act, 1908 as it stands now, provides as follows:-

“17. Documents of which registration is compulsory.-*(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No.XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-*

(a) instruments of gift of immovable property;

(b) other 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;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates 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;

(f) Instruments purporting or operating to effect a contract for the sale of immovable property of the

value of one hundred rupees and upwards;

(g)Power of attorney creating any power or right of management, administration, development, transfer or any other transaction relating to immovable property of the value of one hundred rupees and upwards other than those executed in favour of father, mother, wife, husband, son, adopted son, daughter, adopted daughter, brother, sister, son-in-law or daughter-in-law of the executant.

Provided that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.”

7. It may be noted that clauses (f) and (g) of Section 17(1) have been inserted as per the State Amendment Act, 31 of 2013 with effect from 13.9.2013 and the bill in that regard as passed by the Kerala Legislative Assembly had received the assent from the President of India on 28th August, 2013 and the amended provision was thereafter notified in Gazette of Kerala dated 13.9.2013. These aspects are discernible from the Gazette of Kerala extraordinary Volume-II published on 13.9.2013, as per Notification No.20137/Leg.A2/2009/Law dated 13.9.2013.

8. Section 33(1) of the Registration Act provides as follows:-

“33. Power-of-attorney recognizable for purposes of section 32.-*(1) For the purposes of section 32, the following powers-of-attorney shall alone be recognized, namely:*

(a) if the principal at the time of executing the power-of-attorney resides in any part of [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;

(b) if the principal at the time aforesaid [resides in any part of India in which this Act is not in force], a power-of-attorney executed before and authenticated by any Magistrate;

(c) if the principal at the time aforesaid does not reside in [India], a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, '[Indian] Consul or Vice-Consul, or representative of the Central Government.

Provided that the following persons shall not be required to attend at 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, namely:-

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in Court.

9. Section 32 of the Registration Act stipulates as follows:-

“32. Persons to present documents for registration.-*Except in the cases mentioned in [sections 31, 88 and 89], every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration-office,-*

(a) 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

(b) by the representative or assign of such a person, or

(c) by the agent of such a person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned.”

10. Section 26 of the Registration Act provides as follows:-

“26. Documents executed out of India.-When a document purporting to have been executed by all or any of the parties out of [India] is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the registering officer, if satisfied-

(a) that the instrument was so executed, and

(b) that it has been presented for registration within four months after its arrival in [India], may, on payment of the proper registration-fee accept such document for registration.”

11. Section 18 of the Kerala Stamp Act, 1959 stipulates as follows:-

“18. Instruments executed out of India.- (1) Every instrument chargeable with duty executed only out of India may be stamped within three months after it has been first received in the State of Kerala.

(2) Where any such instrument cannot, with reference to the description of stamp prescribed therefor, be duly stamped by a private person, it may be taken within the said period of three months to the Collector who shall stamp the same, in such manner as the Government may by rules prescribe, with a stamp of such value as the person so taking such instrument may require and pay for.”

12. The main contention urged by Smt.V.H.Jasmine, learned counsel appearing for the writ petitioner is that the provision contained in Section 33(1) (c) which deals with power of attorney recognizable for the purpose of Section 32, is a special provision, which permits the authorised power of attorney to execute the sale deed, if the power of attorney has been duly executed in the manner prescribed therein, that is it is authenticated by the officials mentioned therein including the

Consul, Vice Consul or representative of the Central Government in the Indian Embassy abroad in a case where the principal, does not reside within India at the relevant time. Whereas the provision now engrafted as per the State Amendment and as contained in Section 17(1)(g), is a general provision in the matter of aspects dealing with power of attorney and that therefore going by the well known Canons of interpretation of Statutes, the special provision governing the field will override the general provision. That therefore in a case where the executant is residing abroad, then he or she is able to execute a power of attorney before and authenticated by Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice Consul or representative of the Central Government in the Foreign Country concerned and if such power of attorney has been so duly constituted fulfilling strict requirements of Section 33(1)(c), then such a power of attorney is duly recognized as competent to present the document for registration as envisaged in Section 32. That only in those cases other than those covered by Section 33(1), that the rigour of the provision contained Section 17(1)(g) can be pressed into service.

13. Per contra Smt.A.C.Vidhya, learned Government Pleader appearing for the respondent would submit that the above said contention advanced by the petitioner is untenable. It is contended by

the learned Government Pleader that the provision contemplated in Section 33 which deals with power of attorney recognizable for the purposes of Section 32, is the provision which deals with general scenario of power of attorney recognizable for the purpose of presentation of document under Section 32. Such powers of attorney could be for various purposes. But where such power of attorney is for one of the specific purposes conceived in clause (g) of 17(1), that is, the said power of attorney intends to create any power or right of management, administration, development, transfer or any other transaction relating to immovable property of the value of Rs.100/- and upwards, other than those executed in favour of father, mother, wife, husband, son, adopted son, daughter, adopted daughter, brother, sister, son-in-law or daughter-in-law of the executant, then the provision contained in Section 33(1) cannot be pressed into service. That such a special provision conceived in Section 17(1)(g), would cover only those specific and special cases of power of attorney within the parameters mentioned in clause (g) of Section 17(1). Therefore it is contended that the special provision contemplated in Section 17(1)(g) would override the general provision contemplated for recognizable power of attorney in Section 33(1). That only in cases where the power of attorney is other than those mentioned in Section 17(1)(g), could one claim the benefit of

the clauses conceived in Section 33(1). In this context the learned Government Pleader would also take the attention of this Court to the judgment of the Apex Court in the case of **State of Rajasthan and others v. Basant Nahata [(2005) 12 SCC 77]** wherein the Apex Court has referred to similar provisions inserted by the Amendment to the Registration Act made by the State of Rajasthan as per clauses (f) and (g) of Section 17(1) thereto which mandated that registration of agreement to sale and irrevocable power of attorney relating to transfer of immovable property in any way, should be made compulsorily registrable. In the judgment in the case of **State of Rajasthan and others v. Basant Nahata [(2005) 12 SCC 77]**, the Apex Court has noted the similar amendment made in the Registration Act by the State of Rajasthan wherein Section 17(1)(f) & (g) were inserted whereby registration of agreement for sale and irrevocable power of attorney relating to transfer of immovable property was made compulsorily registrable and has noted in para.53 thereof that registration of power of attorney except in cases falling under Section 17(1)(g) or 17(1)(h) is not compulsorily registrable. It will be profitable to refer to para.53 of the above said decision of the Apex Court in **State of Rajasthan and others v. Basant Nahata [(2005) 12 SCC 77]** which reads as follows:-

“53. We have noticed hereinbefore that the State of Rajasthan inserted Sections 17(1)(f) and (g) in the Act making the registration of agreement to sale and irrevocable power of attorney relating to transfer of immovable property in any way a compulsorily registrable document. The State went further to amend Article 23 of the Second Schedule of the Stamp Act, 1899 making an agreement to sale of immovable property and irrevocable power of attorney or any other instrument executed in the course of conveyance, etc with possession to be deemed to be a conveyance and stamp duty is chargeable thereon accordingly. According to the State, despite such enactments sales were being made by seller on the basis of a power of attorney with a right to sell the property and such powers of attorney were being executed for an unspecified period. A transaction between two persons capable of entering into a contract which does not contravene any statute would be valid in law. The State of Rajasthan does not make such transactions illegal. The Contract Act or the Powers-of-Attorney Act have not been amended. Execution of a power of attorney per se, therefore, is not illegal. Registration of power of attorney except in cases falling under Section 17(1)(g) or 17(1)(h) is not compulsorily registrable. Sections 32 and 33 of the Registration Act also do not bar any such registration.”

14. This Court is of the view that the above said contention advanced on behalf of the petitioner is not tenable and that the contention made by the learned Government Pleader on behalf of the respondent, merits acceptance. A mere perusal of the above said provisions more particularly those contained in Sections 32, 33 and Section 17(1) of the Registration Act will make it clear that the scenario covered by Section 33(1)(c) deals with the situation of all types of powers of attorney which have been executed by an executant who is not

residing in India, in the manner stipulated therein. Clause (c) of Section 33(1) does not make any distinction as to the purpose for which the power of attorney conceived therein is executed. Whereas the specific provision contained in clause (g) of Section 17(1) deals only with those specific types of powers of attorney which create power or right of management, administration, development, transfer or any other transaction relating to immovable property of the value of Rs.100/- and upwards other than those executed in favour of the exempted categories therein. In the light of these aspects this Court is inclined to hold that the specific scenario covered by clause (g) of Section 17(1), deals with special cases of the powers of attorney as envisaged therein. Hence the said specific provision contained in Section 17(1)(g) would have overriding effect over the one covered by Section 33(1)(c). In that regard it is also to be noted that so long as the power of attorney conceived in Section 33(1)(c) is not one which is creating power, right of management, administration, development, transfer or any other transaction relating to immovable property of the value of Rs.100/- and above, other than those exempted categories mentioned therein, the executant can take the benefit of Section 33(1)(c) if such a power of attorney has been duly executed and authenticated in the manner stipulated in Section 33(1)(c) which would confer competence to the

power of attorney to present the documents for registration under Section 32. In the instant case, the relationship between the petitioner and her power of attorney as per Ext.P2 will not come within the exempted categories of relationships mentioned in Section 17(1)(g) as the latter is the former's father's brother. So the petitioner will have to comply with the requirement of registration of her power of attorney deed as per Section 17(1)(g) and she cannot claim the benefit of Section 33(1)(c). In the light of these aspects, it is only to be held that the stand taken by the respondent-S.R.O. in the impugned Ext.P4 letter is lawful and tenable and is not liable to be interdicted. So the respondent-S.R.O. can act upon Ext.P2 power of attorney only if it is registered in terms of the provisions contained in the Registration Act.

15. However this is not the end of the road of the petitioner. The petitioner is an unmarried lady who is now permanently settled in the U.S.A. and all the members of her family, viz., her father, mother and sister are all permanently settled in the U.S.A. and it is averred that the only close relative who is available to transact her business is her father's brother, in whose favour she has executed Ext.P2 power of attorney dated 30.4.2018 before the Vice Consul of the Indian Embassy in the U.S.A.

16. Section 26 of the Registration Act deals with the cases of

documents executed out of India and it is stipulated therein that when a document purported to have been executed by all or any of the parties out of India is not presented for registration till after the expiration of the time prescribed in that behalf, the Registering Officer may if satisfied that the instrument so executed and that has been presented for registration within four months after its arrival in India, may, on payment of proper registration fee accept such document for registration. Sec.23 deals with the time for presenting documents. Therefore if Ext.P2 power of attorney is got registered in the manner stipulated in Section 23 r/2 Section 26, then the power of attorney concerned will get the competence to present the petitioner's sale deed for execution in view of Section 32(a) or (b) of the Registration Act. Where there is any lack of stamping or improper stamping, that situation is also taken care of by the legislature, by engrafting Section 18 of the Kerala Stamp Act, 1959.

17. Smt.V.H.Jasmine, learned counsel appearing for the writ petitioner would submit on the basis of the instructions of her party that steps will be immediately taken by the power of attorney holder of the petitioner to present Ext.P2 power of attorney dated 30.4.2018 for registration before the respondent-S.R.O. as contemplated in Section 26 of the Registration Act.

18. Of course as stated herein above, for presenting Ext.P-3

sale deed through the power-of-attorney holder, it is mandatory that Ext.P-2 power-of-attorney deed is duly registered. Sec.26 of the Registration Act Specifically deals with the situations in respect of documents executed out of India and it stipulates that when a document purporting to have been executed by all or any of the parties out of India is not presented for registration till after the expiration of the time prescribed in that behalf, the registering authority if satisfied (a) that the instrument was so executed, and (b) that it has been presented for registration within 4 months after its arrival in India, may, on payment of the proper registration fee, accept such document for registration. Sec.23 deals with time for presenting documents, which stipulates that subject to the provisions contained in Secs. 24, 25 and 26, no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution and provided that a copy of a decree or order may be presented within four months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final. Since Ext.P-2 power-of-attorney deed satisfies the technical requirements of clause (c) of Sec.33(1), inasmuch as it was duly executed before and authenticated by the Indian Consul of of the Indian Embassy abroad, the power-of-attorney holder is

competent to present Ext.P-2 power-of- attorney deed for registration as he should be treated as competent, going by the prescriptions in clause (a) or (b) of Sec. 32. If position is held to be otherwise, then it will amount to compelling the executants like the petitioner herein, who is living abroad, to come over to India only for the purpose of presenting Ext.P-2 power-of-attorney deed for registration, which would totally whittle down and obliterate the beneficial provision contained in Sec. 33(1) (c). If it is insisted that an executant of the P/A deed, which satisfies the strict requirements of Sec.33(1)(c), will have to personally present such P/A deed for registration in India, then it will make the beneficial provision in Sec.33(1)(c) a mere teasing illusion or mirage. Any interpretation of these provisions has to be made by the court so as to make it in consonance with the “*reasonableness*” concept inbuilt in Arts. 14 and 300A of the Constitution of India. Therefore, it is only to be held that the power-of-attorney holder of the petitioner appointed as per Ext.P-2 P/A. deed is competent to present the said power-of-attorney deed for registration.

19. Accordingly, it is ordered that in case the petitioner's power of attorney presents Ext.P2 P/A deed for registration before the respondent-S.R.O., then the said official will register such document, if it is otherwise in order. It is further ordered that after securing

registration of Ext.P2 P/A deed, it is for the petitioner's power of attorney to present Ext.P-3 sale deed for registration before the respondent-S.R.O. upon which, the said Officer will register the said document, if it is otherwise in order.

With these observations and directions this Writ Petition (Civil) will stand finally disposed of.

Sd/-
ALEXANDER THOMAS, JUDGE

///True Copy///

P.S. to Judge

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