

Kerala High Court

C.P.Ashok Kumar vs Sub Registrar on 1 October, 2018

IN THE HIGH COURT OF KERALA AT ERNAKULAM  
PRESENT

(CR)

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY ,THE 01ST DAY OF OCTOBER 2018 / 9TH ASWINA, 1940

WP(C).No. 31900 of 2018

PETITIONER/S:

C.P.ASHOK KUMAR  
AGED 61 YEARS, S/O.A.P.ACHUTHAN NAIR,  
KANNATH VALAPPIL HOUSE  
(ANAND NIVAS), ARANGOTTUKARA PO,  
PIN 679532,  
THRISSUR DISTRICT, NEAR THIRUMITTACODE

BY ADVS.  
P. RADHAKRISHNAN  
SRI.MADHU RADHAKRISHNAN  
M.D. JOSEPH  
SRI.NELSON JOSEPH

RESPONDENT/S:

- 1 SUB REGISTRAR  
THRITHALA,  
OFFICE OF THE SUB REGISTRAR, THRITHALA 679534,  
PALAKKAD DISTRICT.
- 2 INSPECTOR GENERAL OF REGISTRATION  
DEPARTMENT OF REGISTRATION, VANCHIYOOR,  
THIRUVANANTHPAURAM-695035.

OTHER PRESENT:

SMT.A.C.VIDHYA, GOVT.PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON  
01.10.2018, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

W.P.(C)No.31900/2018

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(CR)

ALEXANDER THOMAS, J.

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W.P.(C)No.31900 of 2018  
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JUDGMENT

The petitioner is aggrieved by the stand of the 1st respondent in insisting that Ext.P1 notarized power of attorney executed by his brother in favour of the petitioner for effectuating sale of his brother's property should necessarily be authenticated by the Registrar or Sub-Registrar within whose district or sub district the principal resides as envisaged in clause (a) of Section 33(1) of the Registration Act, 1908. The petitioner is the brother of one C.P.Anand, who is now permanently residing at Mumbai. According to the averments in the Writ Petition (Civil), the petitioner's brother is suffering from serious ailments and he wants to alienate his landed property in Kerala for meeting his medical needs and that since he is unable to travel to Kerala for the said purpose, he has executed Ext.P1 power of attorney attested before an authorized Notary Public, whereby the petitioner has been appointed as his brother's power of attorney for execution of the sale deed for and on behalf of the petitioner's brother and for presenting the sale deed for registration before the competent registration officials in the State of Kerala. The petitioner being the power of attorney for and on behalf of his brother as per Ext.P1 had approached the 1st respondent Sub Registrar, Thrithala, with draft sale deed as well as with Ext.P1 power of attorney for taking further steps for the execution and registration of the sale deed. Thereupon, the 2nd respondent has now intimated the petitioner as per the impugned Ext.P2 letter dated 22.9.2018 that, since Ext.P1 has not been authenticated by the notified registration official concerned as envisaged in Section 33 (1)(a) of the Registration Act, the same cannot be utilized by the petitioner as a power of attorney for presentation of the sale deed on behalf of the principal in terms of Section 32. Further, it is also stated in the impugned Ext.P2 proceedings that the stamp duty payable for a power of attorney is Rs.600/-, in terms of the amended provision contained in Article 44 (c) of the Schedule to the Kerala Stamp Act, 1959 as per the amendment effected as per the Kerala Finance Act,2018 with effect from 1.04.2018. The impugned decision at Ext.P2 of the 1st respondent Sub Registrar, Thrithala reads as follows:

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1908 9 33( ) 9, 3 9), 9 3 3 , , 9 , 9 9 , V 3 3 9 32 39 \$ . ) Z 44( ) 9 3 9 600 ( 9 ) 3 ) .

2. The prayers in this Writ Petition (Civil) are as follows:

"a) issue a writ of certiorari calling for records leading to the issuance of Ext P2 order and quash the same;

b) issue a writ of mandamus directing the 1st respondent to accept Exhibit P1 and to direct the registration of the sale deed as and when presented by the Petitioner, executed and signed by him on behalf of his brother C.P. Anand, the executant,with regard to the property authorized by him in the Power of Attorney, Ext P-1."

3. Heard Sri.Madhu Radhakrishnan, the learned counsel appearing for the petitioner and Smt. A.C. Vidhya, the learned Government Pleader appearing for the respondents.

4. The matter in issue is no longer res integra and is covered against the respondents and in favour of the petitioner as per the dictum laid down by the Apex Court in the judgment in the case in Rajni

Tandon v. Dulal Ranjan Ghosh Dastidar and another reported in (2009) 14 SCC 782 = 2009(3) KLT 607 (SC). In that case, the plea was taken that the person, who claims to be the landlord did not have proper title to the property in as much as the sale deed in question in favour of the landlord was executed through his power of attorney concerned and that the said power of attorney was not authenticated by the Registrar of Sub Registrar concerned as envisaged in Clause (a) of Section 33 (1) of the Registration Act. Repelling the said contention, the Apex Court in the above said judgment in Rajni Tandon's case (supra) has held that where the sale deed is executed by the power of attorney and then presented by the power of attorney for registration, as envisaged in Clause (a) of Section 32 of the Registration Act, then the provisions contained in Section 33 of the Registration Act requiring authentication of the power of attorney by the Registration official will not apply in such a case.

5. The provisions contained in Section 33(1)(a) and Section 32 of the Registration Act reads as follows:

"33. Powers-of-attorney recognisable for purposes of Section 32.- (1) For the purposes of Section 32, the following powers-of-attorney shall alone be recognised, 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) xxx                      xxx                      xxx                      xxx  
(c) xxx                      xxx                      xxx                      xxx

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."

6. It is profitable to refer to the paragraphs 22 to 35 of the above said judgment of the Apex Court in Rajni Tandon's case (supra), which read as follows:

"22.Clause (a) of Section 32 specifies that a document can be presented for registration by;

(i)by the person executing the document;

(ii)any person claiming under the document presented for registration; and

(iii) in the case the said document is a copy of a decree or order, any person claiming under the decree or order.

Clauses (b) and (c) deal with cases where the document is presented not by any person mentioned in (I), (ii) and (iii) above but by their agent, representative or assign. This is so because the use of the words "such person" in clause 9b) and

(c) can be understood to mean only person as referred to in (i), (ii) and (iii)above.

23.It may also be mentioned herein that the scope of clauses (b) and (c) in Section 32 may to an extent overlap one another. However, we do not propose to deal with the same as it is not relevant for determination of the issue before us. It is suffice to say that insofar as clause

(c) of Section 32 is concerned the agents, representatives or assigns of the persons referred to in (I), (ii) and (iii) above can present the said document for registration only if they are duly authorised by the power of attorney executed and authenticated in the manner hereinafter mentioned.

24. The words "executed and authenticated in manner hereinafter mentioned" in Section 32(c) would mean the procedure specified in Section 33. This is clear from the opening words of Section 33 which reads "for the purposes of Section 32, the following power of attorney shall alone be recognised." Section 32 refers to documents presented for registration by a holder of "power of attorney" in clause (c) and it therefor follows that the procedure specified under Section 33 would be attracted where a document is presented by a person holding "powers of attorney" of the persons mentioned in clause (a) of Section 32.

25. The aforesaid position makes it explicitly clear that Section 32 of the Act requires the documents sought to be registered, to be presented, inter alia by the person executing it. In other words, the said expression requires presence of the actual person executing the document. The basic principle underlying this provision of the Act is to get before the Sub- Registrar the actual executant who, in fact, executes the document in question. In fact, the ratio of the decision in Ram Gopal [(2006) 9 SCC 591] has laid down a similar proposition on the conjoint reading of Section 32 and Section 33 of the Act and after referring to all the judgments noted hereinbefore. Same view has been expressed earlier by the Bombay High Court in Ratilal

Nathubhai v. Rasiklal Maganlal.

26. It is important to bear in mind that one of the categories of persons who are eligible to present documents before the registration office in terms of Section 32 of the Act is the "person executing" the document. The expression "persons executing" used in Section 32 of the Act, can only refer to the person who actually signs or marks the document in token of execution, whether for himself or on behalf of some other person. Thus "person executing" as used in Section 32(a) of the Act signifies the person actually executing the document and includes a principal who executes by means of an agent. Where a person holds a power of attorney which authorise him to execute a document as agent for someone else, and he executes a document under the terms of the power of attorney, he is, so far as the registration office is concerned, the actual executant of the document and is entitled under Section 32(a) to present it for registration and get it registered.

27. In view of the aforesaid legal position, we are of the considered view that the law laid down by the Andhra Pradesh High Court in D. Sardar Singh v. Seth Pissumal Harbhagwandas Bankers and the decision of the Calcutta High Court in Abdus Samad v. Majitan Bibi with regard to the interpretation of Section 32 and 33 of the Act is not the correct legal position.

28. In the facts of the present case, it is quite clear that Indra Kumar Halani, was given the full authority by Nandlal Tantia under the power of attorney to transfer the suit property and to execute the necessary document. It is an accepted position that the said document had been executed by Indra Kumar Halani in the name and on behalf of Nandlal Tantia thereof. Therefore, for the purpose of registration office under Section 32(a) of the Act Indra Kumar Halani is clearly the "person executing" the document. Therefore, it follows that the said sale deed which was executed and authenticated by Indra Kumar Halani could be presented for registration by him. We are of the considered view that Indra Kumar Halani acted in the aforesaid manner mandated under Section 32(a) of the Act.

29. The object of registration is designed to guard against fraud by obtaining a contemporaneous publication and an unimpeachable record of each document. The instant case is one where no allegation of fraud has been raised. In view thereof the duty cast on the registering officer under Section 32 of the Act was only to satisfy himself that the document was executed by the person by whom it purports to have been signed. The Registrar upon being so satisfied and upon being presented with a document to be registered had to proceed with the registration of the same.

30. The High Court held that since the power of attorney was not a registered document, Indra Kumar Halani, was not authorised to execute and present the sale deed before the Sub-Registrar for registration. It was, therefore, held by the High Court that no right and title had passed to the plaintiff on the basis of the aforesaid

sale deed.

31. The High Court also held that upon a conjoint reading of Section 32, Section 33(1)(a) and Section 34 of the Act, it was difficult to conclude that Indra Kumar Halani became the executant by himself on the basis of the power of attorney which was neither executed nor authenticated in the manner provided under Section 33(1)(a) of the Act so as to enable him to present the sale deed for registration in compliance with the provisions of Section 32 (a) of the Act.

32. We do not agree with the said findings of the High Court.

33. Where a deed is executed by an agent for a principal and the same agent signs, appears and presents the deed or admits execution before the registering officer, that is not a case of presentation under Section 32(c) of the Act. As mentioned earlier the provisions of Section 33 will come into play only in cases where presentation is in terms of Section 32(c) of the Act. In other words, only in cases where the person(s) signing the document cannot present the document before the registering officer and gives a power of attorney to another to present the document that the provisions of Section 33 get attracted. It is only in such a case, that the said power of attorney has to be necessarily executed and authenticated in the manner provided under Section 33(1)(a) of the Act.

34. In the instant case, Indra Kumar Halani executed the document on behalf of Shri N.L. Tantia under the terms of this power of attorney. He then presented it for registration at the registration office and it was registered. The plea taken by the respondents that in order to enable him to present the document it was necessary that he should hold a power of attorney authenticated before the Sub-Registrar under the provisions of Section 33 is thus not supported by the language of Section 32. The provisions of Section 33 therefore only apply where the person presenting a document is the general attorney of the person executing it, and not where it is presented for registration by the actual executant, even though he may have executed it as agent for someone else. In this case, the presentation is by the actual executant himself and is hence entitled under Section 32(a) to present it for registration and to get it registered.

35. Accordingly, we allow the present appeal and set aside the judgment and order passed by the High Court and restore the judgment and decree passed by the first appellate court whereby and whereunder a decree for eviction of the respondent-defendant was passed. No order as to the costs."

7. In the instant case, the sale deed is proposed to be executed on behalf of the vendor by the petitioner, who is authorised for such purpose by the power attorney constituted as per Ext.P1. Therefore, where the actual executant of the sale deed and the presenter is the power of attorney, then the provisions in Clause (a) of Section 32 will get attracted and therefore, the provision

contained in Clause (a) of Section 33 (1) of the Registration Act requiring the authentication of the said power of attorney before the Registrar/Sub Registrar concerned will not apply as held by the Apex Court in Rajni Tandon's case (supra). Therefore, the stand taken by the 1st respondent in Ext.P2 that Ext.P1 notarized power of attorney cannot be utilized for execution and presentation for registration of sale deed on behalf of the petitioner's brother as the same has not been authenticated by a notified Registrar or Sub Registrar in terms of Section 33(1) (a) is not tenable, so long as the executant and presenter of the sale deed on behalf of the petitioner's brother is the petitioner, who is the power of attorney constituted as per Ext.P1. So the impugned view taken by the 1st respondent SRO in the impugned Ext.P2 order is illegal and ultra vires. Hence, Ext.P2 order will stand set aside.

8. There is yet another important aspect of the matter about which no advertence has been made by the 1st respondent in Ext.P2. An amendment has been made to Section 17 whereby clause (g) of Section 17(1) has been introduced as per the Amendment Act 31 of 2013 with effect from 30.9.2013, whereby power of attorney creating any power or right of management, administration, development, transfer or any other transaction relating to immovable property for the value of Rs.100/ and upwards will require compulsory registration, except in the case of power of attorney 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. But in the instant case, the petitioner is the brother of the executant of Ext.P1 power of attorney and therefore, the mandate of compulsory registration as per clause (g) of Section 17(1) of the Registration Act will not apply as the power of attorney constituted as per Ext.P1 is the brother of the executant therein.

9. The last point to be decided is as to the correctness of the decision of the 1st respondent referred to in Ext.P2 that the applicable stamp duty payable for a power of attorney in the nature of Ext.P1 is Rs.600/- in view of the amended provisions contained in Article 44(c) of the Schedule to the Kerala Stamp Act, 1959 inserted as per the Kerala Finance Act, 2018 made effective from 1.4.2018. It will be profitable to refer to the various clauses envisaged in Article 44 of the Kerala Stamp Act as it stands after the amendment introduced from 1.4.2018 onwards, which reads as follows:

44. Power of attorney [as defined by Section 2(p), not being a proxy] -

(a) when executed for the sole purpose of [Fifty rupees] procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents:

(b) when authorising one person or more to [One hundred rupees] act in a single transaction other than the case mentioned in clause (a):

(c) when authorising not more than 5 [Six hundred rupees] persons to act jointly and severally in more than one transaction or generally:

(d) when authorising more than 5 but not [One thousand rupees] more than 10 persons to act jointly and severally in more than one transaction or generally :

(e) when given for consideration and [The same duty as a authorising the attorney to sell any conveyance (No. 21 or immovable property: 22 as the case may be) for the fair value of the land or for the amount of the consideration, whichever is higher].

(f) [When authorising a person other than his The same duty as a father, mother, wife, husband, son, conveyance (No. 21 or daughter, brother or sister to sell 22, as the case may immovable property or giving authority or be) for the fair value of power to a promoter or a developer, by land or for the amount whatsoever name called, to make of the consideration, constructions or develop, sell or transfer whichever is higher or (in any manner whatsoever) any the estimated cost as immovable property situated in Kerala. certified by a Chartered Engineer of proposed construction or development of such property, as the case may be.] 136(g) in any other case: 137[Six hundred rupees] Explanation.- For the purposes of this article, more persons than one when belonging to the same firm shall be deemed to be one person.

10. A reading of Ext.P1 power of attorney would disclose that the principal therein (the petitioner's brother)has authorized the petitioner as the power of attorney to enter into more than one transactions like sale/conveyance, partition, release etc. in respect to two distinct properties mentioned therein. The learned Government Pleader would point out that the applicable stamp duty is the one as prescribed in clause (c) of Article 44, which is Rs.600/-. Per contra, the learned counsel appearing for the petitioner would point out that the applicable stamp duty could be paid only in terms of clause (a) of Article 44. Clause (a) of Article 44 comes into play where it is for the execution of the power of attorney for the sole purpose of procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents. Clause (a) and (b) of Article 44 postulate that the power of attorney has been executed in relation to single transaction. In the instant case, the transactions envisaged by Ext.P1 partition deed is not only sale or conveyance but also multiple other transactions like partition, release etc. So obviously factual scenarios covered by clause (a) and (b) doe not arise in the instant case. Clause (c) of Article 44 comes into play where the power of attorney is one for authorizing not more than five persons to act jointly and severally in more than one transaction or then only, in which case the prescribed stamp duty is Rs.600/-. Obviously, more than one transaction is envisaged by Ext.P1 and therefore, the one of the limbs of clause (c) is satisfied. However, the learned counsel for the petitioner would point out that the applicability of clauses (c) and (d) would come into play only when the authorization is for not more than 5 persons or for more than 5 persons but not more than 10 persons etc., which obviously envisages that the authorization is at least for more than one person. That as in the instant case, the authorisation is only for a single person, clauses (c) and (d) will not apply. So the scenarios covered by clauses (c) and (d) will not come into play in the instant case. It is common ground that clauses (e) and (f)cannot be pressed into service. Therefore, obviously the residuary clause in clause (g) would come into play which is the scenarios in case of other than the one expressly envisaged in clauses (a) to (f). Whether a case is covered either by clause (c) or clause (g) of Article 44 the stamp duty is the same, which is Rs.600/-. So the ultimate conclusion arrived at by the 1st respondent Sub Registrar that the stamp duty is Rs.600/- cannot be faulted. Therefore, the applicable stamp duty payable in the instant case is Rs.600/-. Hence, it is for the petitioner to present Ext.P1 for payment of the correct stamp duty payable in this case. Formalities in this regard should be duly completed by the 1st respondent without any further delay on presentation of Ext.P1 for that purpose.



Thereafter, it is for the petitioner to execute the sale deed in respect of the property covered by Ext.P1 and then present the same for registration and the same shall be acted upon by the 1st respondent in the light of the legal position cited herein above.

With these observations and directions, the above writ petition (Civil) will stand finally disposed of.

sd/-

ALEXANDER THOMAS, JUDGE.

acd APPENDIX PETITIONER'S/S EXHIBITS:

EXHIBIT P1 TRUE COPY OF THE NOTARIZED POWER OF ATTORNEY.

EXHIBIT P2 TRUE COPY OF THE ORDER DATED 22/09/2018 ISSUED BY THE 1ST RESPONDENT.

TRUE COPY P.S. TO JUDGE.