

S. Noordeen

Vs

V. S. Thiru Venkita Reddiar and others

Civil Appeal No. 779 of 1978

Civil Appeal No. 3450 of 1996

(K. Ramaswamy, B. L. Hansaria JJ)

07.02.1996

JUDGMENT

1. This appeal by special leave arises from the order of the learned single Judge of the Kerala High Court made on June 24, 1977 in CRP No. 3375/76 (reported in AIR 1978 Kerala 11). The facts are fairly not in dispute. O. S. No. 95/53 was filed in the Court of the Subordinate Judge at Quilon by Palai Central Bank Ltd. to recover the amounts due from D. J. Gonzago, the second respondent. Certain properties appended to the Schedule to the plaint and also items 1 to 7 of the petition were attached before judgment under Order 38, Rule 6, Civil Procedure Code, 1908 (for short the 'Code'). On April 3, 1954, a compromise decree was made empowering the decree holder to have the schedule properties including item Nos. 1 to 7 of the additional properties mentioned above. In the meanwhile, the bank went into liquidation. The liquidator brought those properties to sale. With permission of the Court those properties were purchased by the decree-holder in execution on June 26, 1969 and the sale was confirmed. On April 25, 1974, these properties, the subject matter in this case, were sold by the liquidator to the first respondent - Thiru Venkita Reddiar.

2. The appellant S. Noordeen, plaintiff in O. S. No. 38/60 on the file of the Court of the Subordinate Judge, Quilon filed a suit against D. J. Gonzago for recovery of the money claim. On March 28, 1961, the money decree was passed. The properties covered under items 1 to 7 of the petition were sold in execution of the decree in O. S. No. 95/53 after due attachment on January 13, 1969. The sale was confirmed on September 13, 1974. The appellant, therefore, filed E. A. No. 57/75 to declare that the sale of properties in execution of the decree in O. S. 95/53 at items 1 to 7 of the compromise decree was not valid and it does not bind him. That was upheld by the executing Court and the District Court in CMA. Thus the respondent came to file CRP in the High Court. The High Court has held that though items 1 to 7 were not part of the schedule mentioned properties, they became subject matter of the proceedings in O. S. No. 95/53 in which compromise decree, ultimately passed on 3-4-1954, properties were under attachment from 1953. Therefore, they became part of the suit properties. Consequently, they are not required to be compulsorily registered. The decree thereby is not liable to be annulled. The appellant does not get any valid right to the properties since they have already been sold.

3. Shri Sudhakaran, learned counsel for the appellant contended that in view of the fact that items 1 to 7 of the compromise decree dated 3-4-54 were not the subject matter of O. S. No. 95/53 for recovery of the debt due from Gonzago, the decree was required to be registered under Section 17 (1) of the Registration Act, 1908 (for short, the 'Act') which was not done. Therefore, the right, title and interest of the judgment-debtor Gonzago was not divested. The appellant having purchased the

property and having got the properties registered in the Court sale, he got better title. The view of the High Court, therefore, was wrong in law. We find no force in the contention.

4. It is necessary to clear the factual position which is not fairly in dispute. There was attachment before judgment in O. S. No. 95/53 subsisting till June 26, 1969, the date on which the property items were sold in execution and the liquidator had become the purchaser from the Court sale. The sale thereof was confirmed. The entire sale consists of items of the Schedule and items 1 to 7 mentioned in the petition in addition to the Schedule. It is seen that there was a compromise between the Bank and the judgment-debtor. Pursuant thereto, the decree was passed on April 3, 1954 comprising of all the properties.

5. The question, therefore, emerges : whether the decree passed under the compromise would attract exception engrafted in Clause (vi) of sub-section (2) of Section 17 or the main part in Clause (vi) of subsection (2) of Section 17 of the Act? The attachment before the judgment is an encumbrance preventing the owner of the property to create encumbrance, sale or create charge thereon. Attachment before judgment does not create any right, title or interest, but it disables the judgment-debtor to create any encumbrances on the property. Ultimately, when decree is passed, the property forms part of the decree so as to enable the decree-holder to proceed with against the property to realise the decree-debt. The question is : whether the properties which are not part of the schedule mentioned in the suit will nonetheless be the part of the decree? It is not mandatory that the property should be specifically mentioned; it is so only in a mortgage suit under relevant clauses of Order 34 of the Code. The decree holder is entitled to proceed against those items mentioned in the petition. The decree would be executed as provided in other mode of the decree. In other words, attached properties are also liable to be sold as integral part of the decree. The properties, though do not form part of the Schedule, would also become part of the decree.

6. It is seen that in addition to the schedules, by way of separate application, items 1 to 7 had also been attached under Order 38, Rule 6 of the Code. In the compromise, the judgment-debtor agreed that these properties would be proceeded with in execution of the decree. Thus, the properties mentioned in the Schedule as well as the properties mentioned separately as items 1 to 7 became integral part of the decree.

7. The question is : whether proceedings under Order 38, Rule 6 of the Code is part of the civil proceedings? It is seen that when an application under Order 38, Rule 1 is made for attachment before judgment, as envisaged in Clauses (i), (ii), (iii) and (iv), if the defendant furnishes security, then the need to make an attachment of the properties does not arise. On his failure to do so, Rule 6 gives power to the Court to attach the properties before judgment where no cause is shown or security is not furnished. Then mode of attachment has been provided in Rule 7. It says that "(s)ave otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree," Rule 8 provides adjudication of a claim to property attached before judgment. The procedure has been provided for attachment under Order 21, Rule 38 and adjudication under Order 21, Rule 58.

7A. Section 141 of the Code provides that "(t)he procedure provided therein in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction". The Explanation amplifies the doubt that the expression "proceedings" includes proceedings under Order 9, but does not include any proceeding under Article 226 of the Constitution". It would thus be clear that the proceedings envisaged for adjudication under Order 38, Rule 8 read with Order 21, Rule 58, is a civil proceeding. When attachment of the properties has

been made before the judgment, they become part of the civil proceedings in the suit. Thereby they become part of the decree.

8. The question is : whether such a decree is compulsorily registrable? This Court in *Bhoop Singh v. Ram Singh Major*, (1995) 5 SCC 709 : AIR 1996 SC 196, has considered the question whether a compromise decree is compulsorily registrable. In that case, there was no pre-existing right to the properties between the parties, but a right was sought to be created for the first time under the compromise. The High Court had taken the view that it was not compulsorily registrable instrument under Section 17 of the Act. This Court considered elaborately the circumstances in the Clause (vi) of sub-section (2) of Section 17 would come into play and stated in paragraph 18 thus :-

"The legal position qua Clause (vi), on the basis of the aforesaid discussion, be summarised as below :-

(1) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse situation, it would require registration.

(2) If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs. 100 or upwards in favour of any party to the suit the decree or order would require registration.

(3) If the decree were not to attract any of the clauses of sub-section (1) of Section 17, as was the position in the aforesaid Privy Council and this Court's cases, it is apparent that the decree would not require registration.

(4) If the decree were not to embody the terms of compromise, as was the position in Lahore case, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed of because of the compromise in question.

(5) If the property dealt with by the decree be not the "subject-matter of the suit or proceeding", Clause (vi) of sub-section (2) would not operate, because of the amendment of this clause by Act 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted, even if it were to encompass property not litigated."

9. It would be seen that if the decree were not to embody the terms of the compromise, as was the position in other cases, the benefits in terms of the compromise cannot be derived even if a suit were to be disposed of because of the compromise in question. If the property dealt with by the decree is not "subject-matter of the suit or proceeding, then Clause (vi) of sub-section (2) would not operate because of the amendment of this clause by Act 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted even if it were to encompass property not litigated.

10. Section 17 (1) of the Act provides that the document shall be registered if the property in which they relate is an instrument or 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 rupee and upwards, to or in immovable property, Sub-section (2) gives exception. It says that :

"Nothing in Clauses (b) and (c) of sub-section (1) applies to -

x x x x x x

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding."

11. Here we are concerned with the question whether items 1 to 7 properties brought to sale in execution of decree in O. S. No. 95/53 are a part of decree or order of the Court, relating to the subject-matter of the suit or proceeding. We have already held that items 1 to 7 of the properties mentioned in the separate application, which was the subject matter of the attachment before the judgment, have become part of the decree and also the order of the Court in the proceedings under Order 38, Rule 6 of C. P. C. Therefore, the decree, though passed on compromise, formed part of the decree and order of the Court in Court proceedings. The immovable properties whose sale is impugned are not properties other than the subject matter of the suit or proceedings. Therefore, the view of the High Court is correct in law.

12. It is seen, as referred to by the learned single Judge, the Madras High Court and the Patna High Court had taken the same view in *Ramdass v. Jagannath Prasad*, AIR 1960 Patna 179, *M. P. Reddiar v. A. Ammal*, AIR 1971 Madras 182, *Govindaswami v. Rasu*, AIR 1935 Madras 232 and *C. M. Pillai v. H. S. S. S. S. Kadhiri Thaikal*, AIR 1974 Madras 199. Contra views were taken in *Chhotibai Daulatram v. Mansukhlal Jasraj*, AIR 1941 Bombay / and *Ganeshlal v. Ramgopal*, AIR 1955 Raj 17. In *Chhotibai's* case (Bombay High Court), it was a case of simple money decree and the properties were not attached before judgment, but they were sold in execution of the decree on compromise. The sale was sought to be impugned on the ground that they were not registered. Therefore, they were held to be compulsorily registrable, by operation of Section 17 (1) of the Act. Section 17 (2) (vi) was not attracted. The learned Judge had proceeded with on the premises that this exception would apply to other proceedings under special laws but not to the civil proceedings. The view taken by the Bombay High Court is not correct in law. The Rajasthan High Court had merely followed the view of the Bombay High Court without any further reasons. Accordingly, we hold the view of the Bombay High Court as well as that of the Rajasthan High Court are not correct in law.

13. The appeal is accordingly dismissed. No costs. Appeal dismissed.