

BOMBAY HIGH COURT

Chhotibai Daulatram Marwadi

Vs

Mansukhlal Jasraj

(John Beaumont, Kt., C.J. Wassoodew, J.)

26.07.1940

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal from a decision in execution of the First Class Subordinate Judge of Ahmednagar, and it raises an interesting question under the Indian Registration Act. The suit in which this darkhast arises is an ordinary money suit, and on July 7, 1932, there was a compromise decree. The decree notices that the plaintiff's claim was for Rs. 11,000 odd and interest, and states that the plaintiff's claim is admitted by the defendants, and that it is agreed that this suit and some other suit, of which we have no particulars, were to be settled. The plaintiff was to purchase lands mentioned in Clause 6, and he was also to accept a sum of Rs. 7,500 as the amount due in respect of his claim. Then; in Clause 3 there is a provision that defendant No. 2 was to give possession of the lands referred to in Clause 6 as therein mentioned, and then appears a statement that under Civil Procedure Code, Order XXXIX, Rule 1, certain properties, against which an injunction had been issued, should continue subject to the injunction until defendant No. 2 executed the sale-deed. Then, in Clause 4 it is provided that a decree for Rs. 7,500 should be passed against defendant No. 2, and then occur the words that " defendant No. 2 do pay the said sum of Rs. 7,500 by five instalments." Then there is a provision that on failure to pay any three instalments the plaintiff should recover the whole of the amount then remaining due by sale through Court of the mortgaged properties mentioned in Clause 5, and it was stated that defendant No. 2 had in accordance with this compromise mortgaged to the plaintiff the properties belonging to her mentioned in Clause 5 for the said sum of Rs. 7,500, and then comes a statement that " defendant No. 2 is not personally liable for the said debt."

2. This darkast was filed on March 28, 1936, and it asks for sale of the property referred to in Clause 5 and mortgaged by the decree.

3. The first point taken by the appellant is that the decree required registration under Section 17

of the Indian Registration Act, and that, not having been registered, it cannot create any mortgage interest in the plaintiff, nor is the Court at liberty to look at it as creating a charge on the immovable property, that being the effect of Section 49 of the Act. Under Section 17 of the Indian Registration Act all non-testamentary instruments which operate to create, declare, assign, limit or extinguish any right, title or interest, of the value of one hundred rupees and upwards, to or in immovable property require registration. But by Sub-Section (2) certain exceptions are introduced, and Clause (vi) is in these terms:-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. So that, if a decree or order is made on a compromise which comprises immovable property other than that which is the subject-matter of the suit or proceeding, the decree requires registration. Prima facie this case clearly falls within Clause (vi), because; the decree in a purely money suit creates or purports to create a charge on immovable property.

4. However, Mr. Kane for the respondent has taken a point which is supported by two cases to which he has referred. The point which he takes is this: that the immovable property over which the compromise decree purported to create a charge had been the subject-matter of the order for attachment before judgment which is mentioned in the decree (and I will assume that to be so, though the record does not establish it); that the application for attachment before judgment was a proceeding, that an order made on that proceeding had, as its subject-matter, the land in question, and that such order did not require registration; and that as the compromise decree extends the attachment, the effect is to make the land attached the subject-matter of the suit.

5. In support of his argument Mr. Kane has referred us to the case of *Govinda-swami v. Rasu*¹ which was a decision of a single Judge. In that case the suit was for a money decree, and an application had been made for attachment before judgment of certain immovable property, and that application was to be heard with the decree. An order was made at the hearing "Petition is dismissed," which I should have thought effectively disposed of the application. But the learned Judge says that "the use of the word 'dismissed' conveys no more than that the petition was disposed of by the decree made in the suit," which seems a strange interpretation to place upon the word. However, the reasoning of the learned Judge undoubtedly is that an interlocutory application for attachment before judgment is a proceeding, that an order made on that proceeding in the compromise decree has the effect of making the land attached the subject-matter of the suit, and so saves the decree from the necessity of registration. It seems to me, with great respect to the learned Judge, that there are several answers to that reasoning. In the first place, although, no doubt, the expression "proceedings" does, in some contexts, include interlocutory proceedings, still, when you get a reference to a decree or order to be made in a suit or proceeding, the natural meaning of "proceeding" is an independent originating proceeding,

which may be contrasted with a suit, a proceeding that is under some special Act. In my opinion in Clause (vi) of Sub-Section (2) of Section 17 the word 'proceeding' is used in that sense, and the fact that land is attached before judgment does not make it the subject-matter of the suit. A further difficulty appears to me to be that it is not correct to say that land is the subject-matter of an order for attachment before judgment. An order for attachment is merely an injunction restraining the defendant from disposing of certain land, which operates in personam and not in rem, and which does not create any right or interest in the land. If I may say so with great respect to the learned Judge, it seems to me fantastic to say that in any circumstances immoveable property can be regarded as the subject-matter of a suit merely for a money decree. In my opinion, the case of *Govindaswami v. Rasu* was wrongly decided, and the question then arises whether we ought to follow it upon the principle of stare decisis. I realise that authorities which may affect title to immoveable property ought not to be lightly disturbed; but this decision seems to me to be contrary to the plain words of an Act of Parliament. It was decided less than five years ago, and, so far as we have been able to ascertain, it has not been cited or referred to in any decision of any other High Court except in a decision of this High Court in *Krishna v. Madhav*. That was a decision of a single Judge, and the learned Judge merely applied the reasoning of the case of *Govindaswami v. Rasu* to the facts in his case without considering whether the decision was right or wrong. As I have said, I think the Madras decision was wrong, and under the plain words of the Indian Registration Act this compromise decree, which involved land not the subject-matter of the suit, required registration.

6. In the Court below the learned Judge assumed that the decree required registration, and apparently the two cases, I have mentioned, were not brought to his notice. But he held that, although the decree could not be enforced as a mortgage decree, the property in question could be attached in execution of the decree, regarded as a money decree. Mr. Rao for the appellant contends that that cannot be done because of the provisions in Clause 4 of the decree that defendant No. 2 is not personally liable for the said debt. If I were to construe Clause 4 as a whole without reference to the Indian Registration Act, I should say that the meaning of it is that, although defendant No. 2 is expressly ordered to pay the debt by the instalments mentioned, still, on default the monies are only to be recovered by sale of the mortgaged property, and not by any other process, against the defendant or her property. But, dealing with the clause as a whole in that sense, it is perfectly plain that this property is not exempted from execution. If, on the other hand, one is to read the clause omitting all reference to the mortgage upon this property, as one is required to do by Section 49 of the Indian Registration Act, one gets this: an order on defendant No. 2 to pay a sum of money coupled with a provision that she is not personally liable for the debt. The two things are really inconsistent, and, construing the clause without reference to the mortgage, I think that it means that defendant No. 2 must pay, but there is to be no personal

liability, in the sense of liability to attachment of her person. That is the meaning I should be disposed to give to the clause, if I have to omit all reference to the mortgaged property. But which-ever way one reads the clause, it seems to me clear that it does not exempt this particular property from attachment. In my view, therefore, the judgment of the lower Court was right, and the appeal must be dismissed with costs.

Wassoodew J.

7. I agree.

Cases Referred.

1(1934) I.L.R. 58 Mad. 781