

RAJASTHAN HIGH COURT

Ganeshlal

Vs.

Ramgopal

First Appeal No. 7 of 1953
(Wanchoo, C.J. and Dave, J.)

13.07.1954

JUDGMENT

Wanchoo, C.J.

1. This is an appeal by Ganeshlal judgment-debtor in an execution proceeding, and has arisen in the following circumstances.

2. A suit was brought by Ramgopal, now deceased, and his sons Bhanwarlal and Gordhan against Ganeshlal, and two others, for a sum of Rs.46,593/10/9. There was prayer for attachment before judgment of the immovable property of Ganeshlal, and an interim injunction was issued to Ganeshlal forbidding him from alienating his share in a certain house. Before this interim injunction was confirmed, the parties compromised the suit, and a decree for Rs.32,000/- was passed against the three defendants including Ganeshlal. The decree, among other terms, provided for payment by five installments of the entire decretal amount. It was also provided that in case of default of even one installment, the decree-holders would be entitled to realize the entire decretal amount with interest. There was also a provision creating a charge on the share of Ganeshlal in a house in the city of Udaipur.

3. The first installment was due on 31-7-1952, but nothing was paid. In view of this default, the decree-holders applied for execution on 2-9-1952, and prayed for sale of the immovable property of Ganeshlal and other judgment-debtors. Ganeshlal appeared and objected to the execution application on 7-2-1953. In the meantime, he had paid certain amounts to the decree-holders after the execution application had been filed.

The main contentions of Ganeshlal were these:

1. As the decree created a charge on the immovable property of Ganeshlal, it required registration, and as it was not registered, it could not be executed at all.

2. In the alternative, if the charge was validly created by the decree, the decree-holder could only enforce the charge by means of a suit, and not by an execution application.
3. The execution application was not according to law, and was, therefore, liable to be dismissed on that ground.
4. As the judgment-debtors had paid something more than the first installment sometime after the execution application had been filed, the court should not proceed to enforce the penal clause and execute the entire decree at once.
4. The executing court decided all these points against the judgment-debtors. Hence this appeal.
5. The most important question is whether the decree required to be registered, inasmuch as it created a charge on the share of Ganeshlal in the house situate in the city of Udaipur. In this connection reference was made to Section 17 of Registration Act which requires all 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, to be registered. There is, however, an exception to the in the same section. It says that the above provision does not apply to 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.
6. The question, which arises at once, is whether this decree can be said to be exempt from registration in view of Section 17(2)(vi), Registration Act. The contention on behalf of the appellants is that that exception does not apply as the property, which was the subject-matter of the charge, was not the subject-matter of the suit, and the charge had been created by a compromise.
7. We are of opinion that this contention of the appellant is well-founded. Section 17(2)(vi) exempts decrees or orders of courts from being registered; but where a decree or order is based on a compromise and comprises immovable property other than that which is the subject-matter of the suit or proceeding, such decree or order has to be registered if covered by Section 17(1). Authorities on this point are practically all one way except for a decision of Madras High Court.
8. In - '*Ataat Husain v. Mustaq Ali*', AIR 1937 Allahabad 282, it was held that where a Suit was for a simple money claim, and the decree passed on compromise transferred from the defendant to the plaintiff rights in the Zamindari belonging to him

of the value of more than Rs.100, the decree was compulsorily registrable, and the effect of the non-registration was that it could not effectively transfer any interest in the property comprised in it.

9. In - '*Chhotibai Daulatram v. Mansukhlal Jasraj*', AIR 1941 Bombay 1 the Bombay High Court held that in a money suit a compromise decree creating a mortgage of immovable property attached before judgment in plaintiff's favour required registration. The Madras view that where property had been attached before judgment and that very property was later charged under the compromise and decree following it, such decree did not require registration was dissented from in this case.

10. In - '*Mani Sahoo v. Lokanath Misra*', AIR 1950 Orissa 140 the Orissa High Court preferred the view of the Bombay High Court in AIR 1941 Bombay 1 to the view taken by the Madras High Court - '*Govindaswami Mudaliar v. Rasu Mudaliar*', AIR 1935 Madras 232.

11. The case on the other side is AIR 1935 Madras 232. In that case also the suit was for money, and there was attachment before judgment of certain immovable property. When the suit and the application for attachment before judgment came up for hearing, there was a compromise, and the compromise created a charge over the property which had been attached before judgment. The question arose whether a decree creating a charge in these circumstances was compulsorily registrable when the property had been attached before judgment in a proceeding in the suit.

12. As we have already mentioned, this view was dissented from in - '*Chhotibai Daulatram Marwadi*'s case, and the reasons given in that case for coming to a contrary conclusion appear to us, if we may say so with respect, to be sound. We may also point out that the word 'proceeding' appearing in Section 17(2)(vi), Registration Act cannot refer to a proceeding within a suit, but to an original proceeding. The reason for this is that the opening part of Section 17(2)(vi) mentions a decree or order, while the last part mentions the words 'suit' or 'proceeding'. The word 'proceeding' had to be used because generally speaking a decree is passed in a suit, and an order concludes a proceeding.

Further, it seems to us that it would be stretching the language of the provision too far to say that the property attached before judgment in a money suit can ever be the subject-matter of the suit. Where therefore there is a decree passed in a suit all that we have to see is whether the property, which is made the subject-matter of the charge in the compromise, was the subject-matter of the suit. If it is not, then a decree creating a charge by compromise has to be registered and cannot be exempted under Section 17(2)(vi).

13. In the present case, the suit was for money only, though there was an attachment before judgment. The decree was also for money though it created a charge based on a compromise. In these circumstances, the property charged cannot be said to be the subject-matter of the suit, and therefore the compromise, in so far as it created a charge on the property, required registration.

14. This does not dispose of the matter entirely. Even though the decree required registration, if the charge which it created was to be valid, it does not follow that the decree thereby became inexecutable. All that would happen under Section 49, Registration Act for want of registration would be that the decree would be valueless for purposes of creating a charge on the property. But it would, in our opinion, clearly remain an executable decree in the manner provided by the Civil Procedure Code. We are supported in this view by the observations of Beaumont, C.J., in - Chhotibai Daulatram Marwadi's case,

15. Our attention was drawn to the remarks of Niamatullah, J., in - 'Ataat Husain's case, where he held that the decree not being registered could not be executed. These words, however, must be read in the context of the application for execution. In that case, the compromise and the decree following thereon provided for transfer of certain plots from the defendant to the plaintiff. It was held that the decree in that case required registration as these plots were not the subject-matter of the suit which was purely for money.

In the execution application in that case, it was prayed that these plots, which had been allotted to the plaintiff, be given to him. In those circumstances, it was held that as the decree could not affect the plots, the execution application was not maintainable. As such the learned Judge could not be said to have held that execution of the money decree could not have been taken out in the manner provided in the Civil Procedure Code. We are, therefore, of opinion that though it is not open to the decree-holder to take action on the charge created in this decree, he can execute it as a simple money decree for Rs.32,000/-, and this is what he has also done. The execution application, therefore, cannot be thrown out on this ground.

16. In view of our decision on the first point, the second point does not arise. Inasmuch as there is no question of enforcing a charge in this case through an execution application, we need not express any opinion on this point.

17. Then it is urged that there was non-compliance with O.21, Rules 11 and 13, inasmuch as the description of the immovable property and the judgment-debtors' share or interest in it had not been specified in the execution application as required in these rules. The facts in the present case are that along with the execution application,

another application was presented the same time. In this application the description of the immovable property to be attached and the share of the judgment-debtor appellant was mentioned.

Learned counsel for the appellant urges that this was a separate application and should be completely divorced from the execution application, and if it is done, the execution application will be found wanting in material particulars required by the mandatory provisions of O.21, Rules 11 and 13 Civil Procedure Code. We are not prepared, however, to take this very technical view of the defect pointed out by learned counsel. The fact remains that the court considered the two applications together, and treated the second application as an appendix to the execution application and attached the property mentioned in the second application soon after the execution application had been filed. It was open to the Court under Order 21 Rule 17 to have the defect remedied; but as the court treated the two applications as merely part and parcel of the same application, it did not follow that procedure. In the circumstances, we are of opinion that the second application was rightly treated as an appendix to the execution application, and there is no defect of the nature contended for by learned counsel for the appellant. The application, therefore, cannot fail on this technical ground.

18. The last point, that is urged, is that the amount of the first installment was paid to the decree-holder after the execution application had been filed, and therefore the court need not have enforced the penal clause. It is enough to point out however that the first installment was not paid by the date fixed for it, namely the 31st July, 1952. It was not even paid up to the date of the execution application. The payment was made after the execution application had been filed, and that also by two or three installments to make up the entire amount of the first installment. Under these circumstances, the trial court was right in holding that the execution could be taken out of the entire decretal amount, and that there was no waiver by the decree-holders. We do not see why we should relieve the judgment-debtors of the penalty incurred by them particularly when we have not upheld the charge created by the decree and there is thus no security for the amount decreed in favor of the decree-holder.

19. We are, therefore, of opinion that the appeal fails, though we have not agreed with the decision of the District Judge on one point. In view of the circumstances, we think that the decree-holders should get their costs of the appeal, and we award costs to them.

Appeal dismissed.

