(2000) 06 KL CK 0051

In the High Court Of Kerala

Case No : C.R.P. No. 1526 of 1999

Balakrishna Thantri APPELLANT

Vs

Industrial Crdit Dev. Syndicate RESPONDENT

Date of Decision : 29-06-2000

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 64, Order 38 Rule 5, Order 41 Rule 6, 145
Registration Act, 1908 — Section 17, 17(1)(b), 17(2)(vi), 49

Citation : (2000) 2 KLJ 268

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : L. Gopalakrishnan Potti, for the Appellant; S.R. Dayananda Prabhu, K.S. Rajesh and K.G. Gowrishankar Rai, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Hariharan Nair

1. The revision petitioner is the 5th respondent in an Execution Petition pending in the Sub Court, Kasaragod. The decree concerned was passed by the Civil Judge, Udippi in O.S. No. 105 of 1985 and subsequently transferred for execution to the former court. The petitioner purchased the property as per a document of 1985 and he claims to have improved the property. When the execution court notified the property for sale, the petitioner objected to the same after getting himself impleaded by filing necessary petition. The decree holder contended that the property had been given as security at the time when an attachment before judgment was sought against Defendants 2 to 4 and that as such the petitioner''s right if any, are only subject to the rights of the decree holder. The court upheld the decree holder''s contention and dismissed the petition filed under order 21 Rules 58 and 64 and Section 151 of the C.P.C. Maintainability of this revision is not challenged obviously because the property in question was neither the subject matter of the suit nor attached in the case. The question raised actually

comes under Sec. 47 of the CPC and the mere mention of O.21 R.58 in the petition does not alter the situation. The impugned order as such is not appealable and the revision has to be disposed of on the merits.

2. The thrust of the argument of the learned counsel for the petitioner was on the fact that the bond claimed by the decree holder allegedly executed on 29.9.85 is un-enforceable for want of registration. Reliance was placed on the decision in Purra Pentaiah Vs. Madam Pandya, in this regard. That was a case where the question of enforceability of an un-registered bond executed for the purpose of stay under order 41 Rule 5 C.P.C. was considered. It was found that Sec. 17(1) (b) of the Indian Registration Act makes it compulsory that any instrument, which 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 is to be registered, and Section 49 declares that a document required by Section. 17 to be registered, but not registered, shall not affect any immovable property comprised therein, nor shall it be received as evidence of any transaction affecting such property. The security bonds contemplated under order 41 Rule 5 of the C.P.C, are compulsorily registerable and merely because ''the court accepts the security bond and it becomes a part of the order of the court, it is not exempted from registration u/s 17(2) (vi) of the Registration Act.

3. Learned counsel for the respondents relies on the decision of this court in Thankamma v. Parameswaran Achari (1971 KLR 440) and Kathiru Kunju Bulkoose Begum v. Ebrahim Sait Khadeeja Bai (1975 KLT 693) in support of the contention that the legal principles mentioned above are not applicable to cases where bond is executed under order 38, Rules 5 and 6 where different criteria apply. It is pointed out that as far as the bond under order 41 Rule 5 is concerned; there is a form prescribed under Appendix G of the C.P.C. and that where such bond is executed, the provisions of the Registration Act would apply and that as far as bond under order 38 Rules 5 and 6 is concerned, there is no such form and what the court enforces is only an undertaking given before it in exercise of powers u/s 145 of the CPC. u/s 145(c)(2) of the C.P.C. where any person has furnished security or given a guarantee for the performance of any decree or any part thereof or for the fulfilment of any of the conditions imposed on any person under an order of the court or in any suit or in any proceedings consequent thereof such guarantee or security can be enforced by sale of such property.

4. In Thankamma v. Parameswaran Achari (1971 KLR 440) this court found that a bond under order 38 Rule 5 C.P.C. is not executed in favour of any person and that unlike Rule 41 Rule 6 of the C.P.C. there is no statutory declaration to create a mortgage. As far as bond under order 38 Rule 5 of the C.P.C, is concerned, there is no mortgage and Section 49 of the Registration Act is not attracted. It is only Section 17(2) (vi) of the Registration Act, that would apply in such a case. It was held that not merely for pragmatic considerations but also because a

security bond is sandwiched between two orders of Court and deriving force and vitality from the order of the court and forming an integral part of the judicial proceedings, it can be treated as part of the court''s order and for this reason it is not registerable and is therefore admissible and enforceable even if unregistered.

5. A Division Bench of this court has accepted the correctness of the said decision in Kathiru Kunju Bulkoose Begum v. Ebrahim Sait Khadeeja Bai (1975 KLT 693). It was found that the bond executed under order 38 Rules 5 and 6 is only in the nature of an undertaking given by the surety to the court that he would satisfy the decree and that a specific property offered by him may be proceeded against in case of default. It was held that such an undertaking does not amount to a mortgage under the T.P. Act. It is not executed with all the formalities required by the Act. The undertaking given to court also has no value unless the court accepts it.

6. A bond is only a step in the judicial procedure and becomes effectual only by the order of the court. In other words, it is the order of the court accepting the bond which makes it an operative document. An order accepting a security bond is not an order based on a compromise for the purpose of Sec. 17(2) (vi) of the Registration Act and therefore it would be saved by the general exception given to a decree or order. The decree holder is not entitled to proceed against the property mentioned in the bond straight away without an order of the court that the property charged might be sold unless the liability undertaken by the surety is discharged, within a time to be fixed by the court. In view of this legal position, the said Division Bench has also confirmed that a bond under 0.38 Rules 5 and 6 is not compulsorily registerable and that even an unregistered bond of this nature is enforceable by the court. In view of the above legal position the bond involved in the present case is enforceable though it was not registered. The right that the petitioner claims is only subject to the liabilities undertaken in the bond. In other words, the petitioner obtains right only subject to the right of the decree holder in E.P. No. 12 of 1990. The court below, having found correctly on proper evidence that the purchase by the petitioner was with knowledge that the property has been offered as security before, it was justified in dismissing the petition.

The revision is without merit. It is dismissed.

