

(1958) 10 KL CK 0010

In the High Court Of Kerala

Case No : A.S. No's. 349, 403 and 411 of 1955-E

George

APPELLANT

Vs

South Indian Bank Ltd. and Another

RESPONDENT

Date of Decision : 09-10-1958

Acts Referred:

Contract Act, 1872 — Section 70

Transfer of Property Act, 1882 — Section 58, 72, 8

Citation : AIR 1959 Ker 294

Hon'ble Judges : T.K. Joseph, J;G. Kumara Pillai, J

Bench : Division Bench

Advocate : C.K. Sivasankara Panicker, C.A. Ouseph, in A.S. No. 403 of 1955 and C.S. Venkiteswara Iyer, in A.S. No. 411 of 1955, for the Appellant; C.A. Ouseph, in A.S. Nos. 349 and 411 of 1955, C.S. Venkiteswara Iyer, (for No. 1) in A.S. No. 403 of 1955, C.S. Padmanabha Iyer, (for No. 2) and K. Rama Iyer, (for No. 6), for the Respondent

Judgement

1. These appeals arise from the decree in a suit for recovery of money. Defendants 2 to 5 are the sons of the 1st defendant and the 6th defendant is the second defendant's wife. Defendants 1 to 6 executed an overdraft agreement Ext. A dated 24-10-1947 to the plaintiff Bank for Rs. 1,25,000/-. They also executed a promissory note Ext. B on the same day as collateral security for the loan. An equitable mortgage of the immovable properties described in Schedule A appended to the plaint was also made in favour of the plaintiff, by deposit of title deeds, Ext. D-2 being the memorandum.

Items Nos. 9 to 11 in Schedule 8 are described in Schedule B. These belong to defendants 2 and 6. Sometime after the commencement of the transaction, defendants 1 to 6 requested the plaintiff to release the charge over these items on receipt of Rs. 15,400/-. They offered to furnish additional security for releasing these items and the properties in the Schedule C were given as additional security. On 7-11-1947 the plaintiff accepted this proposal and sent a reply Ext. H.

Amounts were borrowed by defendants 1 to 6 for the purchase of some buses of which the 4 buses described in Schedule D were given as security for the sum of Rs. 25,000/- out of the sum advanced by the plaintiff. There was a prior charge on the buses in favour of the 7th defendant and he had sued in O. S. No. 199 of 1123 of the District Court of Anjikaimal. The plaintiff therefore claimed a subsequent charge on the buses. There was a further claim for recovery of a sum of Rs. 335-10-0 alleged to have been paid by the plaintiff when the properties in Schedule A were brought to sale for recovery of arrears of Income Tax due from defendants 1 to 6.

According to the plaintiff, though the original rate of interest was only 7 1/2 per cent, per annum it was raised later to 8 1/2 per cent, from 31-3-1949 and the defendants were liable to pay interest at that rate. Defendants 7 to 11 were impleaded as persons having some interest in the properties. The 6th defendant died after the institution of the suit and her legal representatives were impleaded as additional defendants 12 to 19. The 7th defendant was sought to be adjudged insolvent during the pendency of the suit and defendants 20 and 21 are the interim receivers appointed in the insolvency proceedings.

The plaintiffs suit is for recovery of a sum of Rs. 1,27,167-8-11 from defendants 1 to 6 and the properties in Schedules A to D. Defendants 1 to 11 contested the suit and their contentions so far as the same are necessary for the decision of these appeals alone need be stated. The 1st defendant contended that the properties described as Item No. 8(a) in Schedule A were not liable for the plaintiff claim, as title deeds relating to the same were not deposited along with other deeds of title. He further contended that the improvements on the properties as well as the buildings thereon could not be made liable for the plaintiff claim.

Defendants 2 and 6 filed the joint written statement contending that they were liable to pay only a sum of Rs. 15,400/- under Ext. H, that besides the properties in Schedule B, the second defendant was entitled to 1/4th of items 1 to 6 in Schedule A and the building bearing municipal No. 8/367 (old No. 8/356) in item 1 in Schedule A, as those properties belonged to his deceased mother and as the building referred to above was constructed by him. According to these defendants share of the 2nd defendant in items 2 and 6 was also to be exonerated under Ext. H when payment of Rs. 15,400/- was made and since, a sum of Rs. 17,500/- had been deposited in the suit the plaintiff was not entitled to a decree charged on the 2nd defendant's interest in those items.

The 10th defendant contended that the building in items 2 and 3 of Schedule C was constructed by the 3rd defendant, that he had purchased the same from the 3rd defendant, on 8-12-1124 and that the building was not liable for the plaintiff claim. It was also stated that there was an already existing equitable mortgage in favour of the Indo-Mercantile Bank over this building when the mortgage in favour of the plaintiff was created. According to the 10th defendant, the title deed in respect of the building was not deposited with the plaintiff and the plaintiff was therefore not entitled to a charge on the same.

It is unnecessary to refer to the other contentions raised by the contesting defendants. The trial court held that the plaintiff was not entitled to claim interest at the enhanced rate, that the claim for Rs. 335-10-0 was not sustainable and that survey Nos. 27/3 and 4 and 2108/2 were not liable for the plaintiff claim. Disallowing these claims, a decree was passed allowing the plaintiffs to recover a sum of Rs. 1,18,397-14-9 and interest thereon from 1st April 1949. The decree also directed that the houses in items 1 to 8(a) Schedule A were to be sold last. The 10th defendant has preferred A. S. No. 349/55 from this decree while the plaintiff and the second defendant have filed A. S. Nos. 403 and 411 of 1955 respectively.

2. A. S. No. 411 may be considered first. The 2nd defendant has raised two points in this appeal viz: (i) that his share in items 1 and 6 in Schedule A and the building bearing No. 8/367 should also have been exonerated from liability as the amount under Ext. H was paid and (ii) that in any view of the case, his interest in item No. 1 the building should be sold last. The position contended for by the appellant is that what was negotiated for, and agreed to under Ext. H was the release of the interest of defendants 2 and 6 in all the properties in the plaintiff Schedule and not merely those described in Schedule B.

Ext. H does not lend itself to this construction. What is stated in Ext. H is that title deeds in the names of defendants 2 and 10 have also been handed over to the plaintiff, that defendants 1 to 6 have requested the plaintiff to exonerate the properties standing in the names of defendants 2 and 6 and that such properties would be released on receipt of Rs. 15,400/-. The title deeds standing in the names of defendants 2 and 6 are those relating to the properties in Schedule B. If the interest of the 2nd defendant in items 1 and 6 in Schedule A was also intended to be released, that fact could and should have been specifically stated in Ext. H.

That was not done and the plain construction of Ext. H does not lead to the conclusion that the 2nd defendant's undivided share in items 1 and 6 in Schedule A which originally belonged to his mother was also intended to be released on receipt of the aforesaid sum. However, taking into consideration the fact that the vendee of defendants 2 and 6 has deposited a sum of Rs. 17,500/- towards the plaintiff claim, a direction can be given that the interest of the 2nd defendant in item 1 of Schedule A and the building bearing No. 8/367 should be sold last. The plaintiff respondent has no serious objection to this course. Subject to this direction, A. S. No. 411 must be dismissed.

3. A. S. No. 349 by the 10th defendant raises only one point viz., whether the building in items 2 and 3 of Schedule C should be exonerated from liability. According to the appellant this building was put up by his father-in-law the 3rd defendant who sold the same to him in July 1949 under Ext. I. It was urged that though the title deed of items 2, and 3 in Schedule C was deposited with the plaintiff, the title deed of the building was not so deposited and that the plaintiff could not therefore claim a charge on the same.

It was not stated that there was separate title deed for the building. The validity of the mortgage so far as items 2 and 3 of Schedule C is concerned is not disputed. It cannot also be disputed that the building is a thing attached to the earth. u/s 8 of the Transfer of Property Act, unless a different intention is expressed or necessarily implied, a transfer of land passed to the transferee all the interest the transferor is capable of passing in the land, as well as things attached to the earth.

A house being imbedded in the earth is Immovable property and when land is transferred, buildings erected upon it pass by necessary implication to the transferee. We are therefore unable to accept the argument that the plaintiff is not entitled to a charge on the building in items 2 and 3 of Schedule C. However, a direction can Be given for sale of this building after the sale of all except the interest of the 2nd defendant in item 1 of Schedule A which we have directed should be sold last. Subject to this direction, the appeal must fail.

4. The only appeal which remains is A. S. No. 403 of 55 by the plaintiff. The 1st point raised by the plaintiff-appellant is that the learned Judge ought to have allowed a charge on survey Nos. 27/3 and 4 and 2108/2 in item 8 (a) of Schedule A. The charge claimed was refused on the ground that patta of these properties alone had been handed over to the plaintiff along with title deeds of other properties and that this was insufficient to create a charge. The 1st defendant who raised this contention in a vague form had no case that there was any document of title other than the patta in respect of these properties.

It was not shown in evidence either that there was any such document of title other than the patta. In these circumstances the court below was not justified in refusing a charge on these properties.

5. Another point raised is that the direction in the decree that the buildings in the various items should be sold last is unsustainable. This direction is not merely unjustified but is also practically unworkable, as it means that the plaintiff should sell the, sites attached to the building but not the building, unless the decree amount is not realised by the sale of the sites. This direction in the decree has to be set aside.

6. The last point raised is that the plaintiff should have been allowed to recover the sum of Rs. 335-10-0 deposited by the plaintiff when the properties were brought to sale for recovery of Income Tax due from defendants 2 to 6. u/s 72 of the Transfer of Property Act a mortgagee may spend such money as is necessary for the preservation of the mortgaged property from destruction, forfeiture or sale. Mulla in his commentary on the Transfer of Property Act has pointed out that the word "sale" is ejusdem generis with "destruction" or "forfeiture" and that it must be a sale which threatens to extinguish the security,

It has been held that the sale of the equity of redemption would not be within the section and that the mortgagee could not recover the amount paid to stay a sale, subsequent to the mortgage, in execution of money decree, or sale for

recovery of cesses for which the mortgage right could not be sold. Even if the properties had been sold for recovery of Income Tax dues, the plaintiffs security would not have been impaired in any manner. The plaintiff is therefore not entitled to claim a charge in respect of this sum. It was also urged by the plaintiff that at least a personal decree against defendants 1 to 6 should have been given for this sum. Reliance is placed on section 70 of the Indian Contract Act in support of this argument. Section 70 reads as follows:--

"Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered." Mulla in commenting on this section observes:--

"The word 'lawfully' in this section is not mere surplusage. It must be considered in each individual case whether the person who made the payment had any lawful interest in making it if not, the payment cannot be said to have been made lawfully.

7. The payment made by the plaintiff is of a gratuitous nature and the plaintiff is not therefore entitled to a personal decree against defendants 1 to 6. This claim was therefore rightly disallowed by the court below. No other point arises in this appeal.

8. In the result, A. S. No. 403 of 1955 is allowed to this extent viz., that the plaintiff is allowed to recover the amount decreed, by sale of survey Nos. 27/3 and 4 and 2108/2 also. The general direction in the lower court's decree that the buildings in the properties will be sold last is set aside. A. S. No. 403 is dismissed in other respects. A. S. No. 411/55 is dismissed subject to the direction that the 2nd defendant's share in item 1 of Schedule A and the building bearing No. 8/367 will be sold last.

9. A. S. No. 349/55 is also dismissed subject to the direction that the building in items 2 and 3 of Schedule C will be sold after the sale of all the plaintiff items except the 2nd defendant's share in item 1 in Schedule A and the building No. 8/367. The plaintiff is allowed to bring all the properties to sale and the same will be sold subject to the directions made above.

10. In the circumstances of the case, the parties are directed to bear their costs in this court.