

(1908) 02 CAL CK 0035

In the Calcutta High Court

Case No : Appeal from Original Decree No. 264 of 1906

Gobinda Chandra Paul and Others

APPELLANT

Vs

Dwarka Nath Paul and others

RESPONDENT

Date of Decision : 10-02-1908

Acts Referred:

Citation : (1908) 02 CAL CK 0035

Final Decision : Dismissed

Judgement

Mitra, J.—The facts are not disputed. In 1898 the Plaintiffs Instituted a suit against the Defendants Nos. 1 to 4 for recovery of Rs. 36,882-2-5 due on bahikhata accounts. The Defendants pleaded non-liability. The parties, however, ultimately came to terms and the terms of the compromise were stated in a petition to the Court; one of the Defendants was a minor and the Court was necessarily asked to give permission to the compromise. On the 28th July 1898, the Court gave the permission sought for and a decree was made to the following effect, namely: "The Defendants do pay to the Plaintiffs the sum of Rs. 31,257-0-3 plea together with interest at 6 per cent per annum in installments of Ra. 500 per mensem but on default of payment of two installments, the whole amount with interest at the aforesaid rate will be realisable at once." According to the agreement of the parties as contained in the said petition of compromise, the decree further declared that " the immoveable properties specified therein shall be hypothecated for the realisation of the said money and that the Defendants shall not be able to create any encumbrance on the same." A part of the debt covered by the decree was realised by execution. For the recovery of the balance, i.e., Rs. 29,591-2-9 the Plaintiffs instituted the present suit under the provisions of the Transfer of Property Act and asked for sale of the properties specified in the schedule to the decree (made on the 28th July 1898) as hypothecated properties. They impleaded Defendant No. 5 in the suit by reason of his having taken possession of some of the hypothecated properties after their decree, and Defendants Nos. 6 to 11 as subsequent attaching creditors.

2. The present suit was contested by Defendants Nos. 1, 5, 6, 7, 8, 9, 10 and 11 on various pleas which were all overruled by the lower Court, and on the 17th April 1906, a decree was passed in favour of the Plaintiffs in accordance with their principal prayer in the plaint, under the provisions of the Transfer of Property Act, for sale of the hypothecated properties. The Defendants Nos. 1, 5, 6, 7, 8, 9, 10 and 11 have appealed from this decree.

3. The only contention raised before us is that the decree of the 28th July 1898 was void and of no effect in so far as it purported to create a lien on immoveable property. The following, in substance, are the arguments addressed to us by the learned vakil for the Appellants: (1) that no mortgage or hypothecation of immoveable property such as is alleged in this case could be effected without a duly registered instrument or contrary to the provisions of sec. 17 of the Indian Registration Act and sec. 59 of the Transfer of Property Act 3 C. W. N. 485 : s. c. L. R. 26 I. A. 101; I. L. R. 22 Mad. 508 (1899) that the decree of the 28th July 1898 was made in a suit for recovery of a simple money debt and the hypothecation of immoveable property for recovery of such debt was beyond the scope of that suit and that the said decree, so far as it provided for hypothecation, cannot be regarded as properly a part of it, and I. L. R. 28 All. 78(1905) that the distinction made in this case by the lower Court between a mortgage and a charge is without a difference.

4. The first argument overlooks the exception in cl. (i), sec 17 of the Indian Registration Act which excepts decrees and orders of Courts and awards from the rule as to the compulsory registration of documents. In *Bindsri Naik v. Ganga Saran Sahu* 2 C. W. N. 129 : s. c. L. R. 25. I. A. R; I. L. R. 20 All. 171 (1897), the Judicial Committee of the Privy Council declared that the provisions of sec. 17 of the Registration Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by Court when registration would be otherwise necessary. The same view was expressed by their Lordships in *Pranal Annee v. Lakshmi Annee* 3 C. W. N. 485 : s. c. L. R. 26 I. A. 101; I. L. R. 22 Mad. 508 (1899). The High Courts at Allahabad and Madras, respectively, followed this view in *Raghubans Mani Singh v. Mahabir Singh* I. L. R. 28 All. 78(1905) and in *Patha Muthammal v. Esup Rowther* I. L. R. 29 Mad. 365 (1906). This Court took the same view in *Gupta Narain Das v. Bejoya Sundari Debya* 2 C.L.J.388(1905) Sec. 59 of the Transfer of Property Act lays down a rule for the registration of mortgages as defined in sec 58 of the Act, and if, as we shall presently show, a charge as contemplated in sec. 100 of the Act is distinguishable from a mortgage, the absence of the formalities required by sec. 59 would not bar the relief which may be obtained under sec. 100. In this view of the decree so far as it related to hypothecation of immoveable property it could not be regarded as a mortgage, it might, under certain circumstances, be dealt with as an instrument creating a charge.

5. The learned vakil for the Appellants, however, laid great stress on the second head of his contention. He relied, mainly, on certain observations contained in

the decisions of this Court in the cases of *Birbhadra Rath v. Kalpataru Panda* 1 C. L. J. 388(1905) and *Gurdeo Singh v. Chandrikah Singh* 5 C. L. J. 611 (1907). The question whether any particular term of a petition of compromise incorporated in a decree made under the power given by sec. 375 of the Code of Civil Procedure, relates to the suit or is covered by its subject matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an Important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts. The cases cited before us, *Birbhadra Rath v. Kalpataru Panda* 1 C. L. J. 388 (1905) and *Gurdeo Singh v. Chandrikah Singh* 5 C. L. J. 611 (1907), turn on their own facts, and those facts are clearly distinguishable from the facts of the present case. We have care-fully examined the judgments in the cases relied on and are unable to apply them to the facts with which we are now dealing. On the other hand, in *Pranal Annee v. Lakshmi Annee* 3 C. W. N. 485 : s. c L. R. 26 I. A. 101; I. L. R. 22 Mad. 508 (1899) already cited, Lord Watson, in delivering the judgment of the Privy Council, said, with reference to property not covered by the decree but which was the subject of an agreement which led to a decree by consent of parties.--" If the parties after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit and also a half share of the lands now in dispute had informed the learned Judge that these were the terms of the compromise and had Invited him by reason of such compromise to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence available to the Appellant that the Respondents had agreed to transfer to her the moiety of land now in dispute : " [See in this connection, also *Raghubans Mani Singh v. Mahabir Singh* I. L. R. 28 All. 78 (1905)].

6. In *Jasimuddin Biswas v. Bhuban Jelini* I. L. R. 34 Cal. 456(1907), Brett and Sharfuddin, JJ., recognised the binding effect of the term in a decree which was the consideration for the relief granted in a suit as decreed on agreement of parties. The same view was taken in *Gupta Narain Das v. Bejoya Sundari Debya* 2 C. W. N. 663 (1897), *Purna Chandra Sarkar v. Nilmadhub Nandi* 5 C. W. N. 485 (1901). In the latter case, Ghose and Pratt, JJ., held that a decree passed on a compromise cannot be regarded as ultra vires simply because it goes beyond the subject-matter of the suit and contains other conditions and that if those other conditions are the considerations for the compromise of the subject-matter of the suit, they must be incorporated in the decree.

7. In the present case the hypothecation of immoveable property in the consent decree was the consideration for the time allowed for payment of the sum decreed by Installments, and which covered a period of over five years. It was an integral and necessary part of the adjustment of the claim in the suit, for without it there would have been no compromise. In our opinion, such a hypothecation

was properly inserted in the consent decree, and we cannot hold that the Court acted against the provisions of sec 375 of the Code in allowing its insertion.

8. Muthayya v. Venkata Rutnam (I. L. R. 25 Mad. 558 (1901)), cited before us by the learned vakil for the Appellants, does not militate against the view we take. In that case no decree was drawn up, the suit having been withdrawn and so the question now argued before us did not arise.

9. Thirdly, as regards the distinction between a mortgage and a charge, we observe that the Transfer of Property Act refers to mortgages which are defined in sec. 58 and to charges which are defined in sec. 100. The Act obviously contemplates a difference between mortgages and charges though no doubt the mode of granting relief and the nature of the relief that may be granted are similar because a decree for sale is the only relief that may be granted for the enforcement of a charge. A mortgage is a transfer of an interest in specific immoveable property, a charge only secures payment of money out of that property. Either may be created by act of parties but when " the transaction does not amount to a mortgage," and does not therefore operate as a transfer, it is a charge on immoveable property. A document which only gives a right to payment out of a particular property without transferring it has been held to create a charge; *Tancred v. Delagoa Bay and East Africa Railway Co.* 23 Q. B. D. 239 (1889), *Bur linsan v. Hall* 12 Q. B. D. 347 (1884).

10. The distinction between a mortgage and a charge is keenly appreciated by an English lawyer, though the inclusion of simple mortgages in the definitions given in sec 58 of the Transfer of Property Act has somewhat obliterated the distinction in India. The result has been a divergence of opinion between the High Courts; *Khemji Bhagvandas Gujar v. Rama* I. L. R. 10 Bom. 519 (1886), *Motiram v. Vital* I. L. R. 13 Bom. 90 at p. 97 (1888), *Rangasami v. Muttukumarappa* I. L. R. 10 Mad. 509 (1887), *Nabin Chand Naskar v. Raj Coomar Sarkar* 9 C. W. N. 1001 (1905) and *Pran Nath Sarkar v. Jadu Nath Shaha* 9 C. W. N. 697 : s. c. I. L. R. 82 Cal. 729 (1905) and *Kishan Lal v. Ganga Ram* I. L. R. 13 All. 28 (1890) A charge which owes its existence to the operation of law may be easily discovered, such as a rent charge. A charge created for payment of a legacy or annuity or maintenance money by a Will or trust-deed is not difficult to distinguish from a mortgage, but the difficulty that arises in cases of Hen created by other acts of parties especially for payment of debts, must be solved in each case from the terms and expressions used in the instruments creating them and the formalities actually observed in execution. If an instrument is expressly stated to be a mortgage, and gives the power of realisation of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realisation of money from a particular property, without reference to sale, it creates a charge; *Tancred v. Delagoa Bay* 23 Q.B. D. 289(1889).

11. The decree under construction in the present case has little resemblance in form to a simple mortgage, the hypothecation clause creates a lien and prohibits further encumbrances. The parties only intended that the immoveable properties mentioned in the schedule to the decree should be reserved in fact as security for payment of the money directed to be paid under the decree. We are, therefore, of opinion that the decree made by the lower Court is correct, and we accordingly dismiss this appeal with costs.