
(1958) 12 RAJ CK 0002
In the Rajasthan High Court
Case No : Second Appeal No. 298 of 1954

Ilahi Bux

APPELLANT

Vs

Jamila Bai

RESPONDENT

Date of Decision : 22-12-1958

Acts Referred:

Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 100, 4

Citation : AIR 1959 Raj 143 : (1959) RLW 209

Hon'ble Judges : D.S. Dave, J

Bench : Single Bench

Advocate : Sagar Mal Mehta, for the Appellant;

Final Decision : Dismissed

Judgement

D.S. Dave, J.—This is a second appeal by the defendant against the judgment and decree of the learned District Judge, Kotah, dated the 31st August, 1.954.

2. The facts giving rise to it are that plaintiff Mst. Jamila Bai filed a suit in the court of the Munsif Ramganj Mandi on 27-3-1952 for possession of an immovable property on the basis of title. The description of the property in dispute is given in detail in the plaint and need not be repeated here. The defendant did not contest the plaintiff's title to the property. His objection was that the property in dispute was mortgaged with Seth Motilal Kastoorbhand, that the said mortgage was redeemed by the plaintiff, but at the time of redemption the defendant had paid a sum of Rs. 215/- to the mortgagees at the direction of the plaintiff, that the disputed 2 bhandars were therefore kept in possession of the defendant and he had a charge over this property. Thus, he expressed his willingness to part with the property on payment of Rs. 215/-together with interest thereon. The trial court framed an issue and called upon the defendant to prove if he had advanced Rs. 215/- and if there was a charge on the disputed property in his favour.

3. After recording evidence of both the parties, the trial court decided the said issue in favour of the defendant and dismissed the suit on 16-2-54. Aggrieved by that decree, the plaintiff filed an appeal in the court of the learned District Judge, Kotah. The learned District Judge held that the defendant was not able to produce any documentary evidence to show the payment of Rs. 215/-. He considered the oral evidence produced by the defendant as worthless and threw it out.

Thus, according to the first appellate court the. payment of Rs. 215/- by the defendant was not proved. It was further observed by the learned Judge that no valid charge could be created in favour of the defendant, because there was no registered document in his favour. For these reasons, he allowed the appeal and decreed the suit in the plaintiff's favour for possession of the disputed property. It is against this decree dated the 31st August, 1954, that the present appeal has been filed.

4. Learned counsel for the appellant has urged that the first appellate court has committed an error in holding that a valid charge could not be created without a registered instrument. It is next urged that the first appellate Court has ignored certain oral evidence produced by his client.

5. Regarding the first point, learned counsel has referred to AIR 1943 338 (Oudh) In that case it was held that a charge is not an interest in the property within the meaning of Section 13 of the Oudh Estates Act. It would suffice to say that this case is of little help to the appellant, because the question for determination in the present appeal is, whether a charge of an amount more than Rs. 100/- over an immovable property must be effected by a registered instrument or not.

Learned counsel in this connection referred to Kuppuswamy and Another Vs. Rasappa Chettiar and Others, In that case it was held that there was no express provision of law that a charge could be created only by a document and therefore according to learned Judges a valid charge could also-be created orally. At the same time, it was held that if a charge is created by a document, such a document must be registered if the charge is for a sum in excess of Rs. 100/-.

It may be pointed out that in a subsequent case of the same court in Tenneti Viswanadham Vs. M.S. Menon, Official Liquidator of the Swarajya Printing and Publishing Company Limited and Another, the above decision was explained and distinguished by saying that the learned Judges in that matter were considering a case which was instituted before the amendment of the Transfer of Property Act in 1929. It was observed that "by the amendment all the provisions of the Trans-| fer of Property Act which precede Section 100 have been made applicable "so far as may be" to a charge.

Therefore, unless the words "so far as may be" operate to sever Section 59 from Section 100, registration of a charge is necessary. We do not consider that these words have the effect of taking Section 59 out of the purview of Section 100.

Section 100 applies all the provisions of the Act with regard to a simple mortgage to a charge, unless a particular provision is incompatible with a charge.

Registration is surely not incompatible, Section 17, Registration Act requires a charge for Rs. 100/- or upwards to be registered, and by virtue of Section 4, T. P. Act, Section 59 has now to be read as being supplemental to Section 17, Registration Act". This view was followed in Pandit Shiva Rao and Another Vs. D.A. Shanmughasundaraswami (Official Liquidator) and Others, I respectfully agree with the above observation. Section 100 of the Transfer of Property Act clearly lays down that

"where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

This would mean that the provisions of Section 59 of the same Act would also apply to a charge. Section 59 provides that

"Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses." Where a charge is created instead of mortgage, the word "charge" has to be read wherever the word "mortgage" appears in this section. When this section is so read, it would be quite clear that if the principal money secured by the charge is Rs. 100/- or more, the charge can be effected only by a registered instrument signed by the debtor and attested by at least 2 witnesses. In the present case no such document has been produced by the appellant. A valid charge of Rs. 215/-, therefore, could not be orally created in his favour. Under these circumstances, the first appellate court was not incorrect in dismissing his objection and decreeing the plaintiff's Suit.

6. The second point was not pressed by learned counsel.

7. The appeal is therefore dismissed. No order as to costs.