

(1924) 12 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 133 of 1923

Kallappa Ramappa Deyannawar	Vs	APPELLANT
Balwant Daso Bettigeri		RESPONDENT

Date of Decision : 11-12-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 100

Citation : AIR 1925 Bom 343 : (1925) 27 BOMLR 434 : 87 Ind. Cas. 951

Hon'ble Judges : Norman Macleod, J;Crump, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Norman Macleod, Kt., C.J.—This suit was originally dismissed on the ground that it was not competent according to the provisions of Section 47 of the Civil Procedure Code. In second appeal to this Court Balwant v. Umnbai (1920) 23 Bom. L.R. 254 we held that that decision was wrong, and setting aside the proceedings of both the lower Courts remanded the case to the trial Court for decision on certain issues which this Court considered were the proper questions to be determined between the parties It is now suggested that there was another issue which ought to have been sent down for trial, namely, whether the plaintiffs' objection to the sale advertised by the Maralatdar should have been considered, and whether the fact that the objections were not considered was sufficient to invalidate the sale More than four years ago this Court passed that order, and now for the first time it has been suggested that that issue ought to have been remanded for trial. It is impossible now at this stage of the proceedings to consider that question. All the issues sent down by the High Court were found in favour of the plaintiffs, and consequently a decree was passed in their favour.

2. The important issue was the third issue: "whether the judgment-debtor was the ostensible owner of the suit lands with the consent, express or implied, of the decree-holder within the meaning of Section 41. of the Transfer of Property

Act." That would depend upon whether the charge created by the decree on the property in the possession of the judgment-debtor reduced his full ownership to a limited ownership. If his ownership was so reduced, then he could not be the ostensible owner so as to give a title to the transferee for value without notice. In *Maina v. Baohchim* I.L.R.(1906) All. 655 it was held "that, it being clear upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of Section 100 of the Transfer of Property Act, the charge could be enforced against the bona fide transferees for value without notice." The following passage appears in the judgment at p 559 :-

The Transfer of Property Act recognises in the clearest manner that Immovable property can lie made security for the payment of money by way of charge, just as it recognises the various kinds of mortgages. It equally recognises the right to enforce the mortgage or charge. It would appear that, the provisions as to registration contained in the Registration and Transfer of Property Acts apply to charges (when created by acts of parties) just as much as to mortgages, and if they do so apply I can see very little reason for drawing a distinction between mortgages on the one hand and charges (within the meaning of Section 100) on the other, more particularly as registration amounts to notice.

3. It follows that there can be no difference between a decree directing that certain property should be a charge for the plaintiff's maintenance as decreed in the suit, and a decree directing, as in this case, that certain property should be a charge for payment of the decretal amount.

4. Consequently the judgment-debtor in this case was in no better position than a mortgagor who retains for himself the equity of redemption, so that it would only be the equity of redemption that he could dispose of. The result must be that the plaintiff only got at the sale what was left to the judgment debtor, as he took the property subject to the charge created by the decree. The appeal must be allowed and the suit dismissed with costs throughout subject to any previous order thereon.

5. The plaintiff to pay costs of the present appellants throughout.