

(1956) 02 MAD CK 0006

In the Madras High Court

Case No : Second Appeal No. 2569 of 1952

Mathamangalath Ananthanarayana Subramania Iyer's eldest son, Sivaramakrishna Iyer APPELLANT

Vs

Abdul Khader's children Kanhukkarathiyute Mammu and Others RESPONDENT

Date of Decision : 16-02-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
Transfer of Property Act, 1882 — Section 52

Citation : AIR 1957 Mad 214

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Single Bench

Advocate : V.P. Gopala Nambiar, for the Appellant; A. Atchuthan Nambiar, for the Respondent

Final Decision : Dismissed

Judgement

Krishnaswami Nayudu, J.—This appeal arises out of a suit for possession, the plaintiff's father having purchased the suit properties in a

Court sale under Ex. A-1 dated 24th June 1943. The properties were brought to sale in execution of the decree in O. S. No. 44 of 1095 M.E. of

the Travancore State. That suit was a suit for maintenance by a junior member of a Marumakathayam tarwad for maintenance against the members

of the kovilagam. It was filed in the District Court, Kottayam in the Travancore State. The decree was for arrears of maintenance and the future

maintenance, the amount awarded to the plaintiff-decrce-holder in that suit and the future maintenance was declared a charge on the tarwad

properties. It is common ground that the tarwad properties were not specified in the decree. The Kovilagam owned properties both in the

Travancore State and in British India in North Malabar. The plaintiff in O. S. No. 44 of 1095 had the decree in the Travancore Court transmitted

to the District Court of North Malabar and filed a petition for enforcement of the charge in execution by sale of the properties of the tarwad

situated in the district of North Malabar. Sale was ordered and in pursuance of that sale, the plaintiff had become the purchaser. Symbolical

possession was granted to him and the present suit is to recover actual possession.

The main defences to the action were that the charge created on the tarwad properties by the Travancore Court did not relate to the properties

outside the Travancore State, and, in any event, such a decree is void and unenforceable, as no decree could be passed in respect of Immovable

properties situated in a foreign State. The decree having been passed in 1920, corresponding to 1095 M.E., the Travancore State was not part of

the Indian Union. The question, therefore, Would be whether such a decree could be upheld as creating any rights in the decree-holder for

enforcement of the charge on properties outside the Travancore State.

2. The trial Court rejected the contention of the defendants and granted a decree for possession. In appeal the learned District Judge held that the

decree did not really create a charge over the properties in British India, and secondly, it could not, in law, affect properties in British India. With

both these findings I am in entire agreement.

3. From the decree, Ex. A-4, it is seen that the amount awarded to the plaintiff is declared a charge on the tarwad properties. There was nothing to

show that the plaintiff sought to ask for a charge against the properties of the tarwad situated outside the Travancore State since there was no

description or particulars of the tarwad properties shown in the decree. Presumably, therefore, the plaintiff in that suit could have asked for a

charge on the tarwad properties situated within the jurisdiction of the Travancore Courts.

In the absence of any specific reference creating a charge over properties outside the State and in British India, there is no reason to assume that a

charge is created in respect of properties of the tarwad wherever they may be situated, notwithstanding that they are outside the jurisdiction of the

Travancore State. This will be sufficient to dispose of the appeal.

4. But Mr. Nambiar, however, contended that even the other finding of the learned District Judge that the decree of the Travancore State creating

a charge over the properties in British India could not, in law, affect such properties is not correct. For this he relied upon certain passages in

Halsbury which he considered supported his contention. The passages referred are in 6 Halsbury's Laws of England, Hailsham's Edn. At page

220 (paragraph 269) it is stated:

Where, however, it is only necessary to determine the question of title incidentally, an action relating to rights in respect of a foreign Immovable

will lie in England. Thus, where a fund is in court representing the proceeds of sale of foreign immovables, and it is necessary to decide who is

entitled to it, an action will lie; and where there "is a contract relating only indirectly to foreign immovables, such as a covenant to pay rent or an

agreement to contribute part of the cost of works to be undertaken on the land, the court has jurisdiction, and where, according to the local law,

there is an obligation ex contractu or ex quasi contractu not to commit waste, the court will entertain an action to recover damages in respect of

such waste if committed.

The English courts have jurisdiction to order an account of rents and profits between tenants in common of a foreign immovable.

Again at page 224, with reference to mortgaged and immovables, it is stated in paragraph 274;

Where a mortgage, whether legal or equitable of foreign immovables has been validly made according to English law, an English court will com-

pel the mortgagor to pay off the mortgage debt out of the proceeds of sale of the land, although the mortgage does not comply with the *lex loci rei*

sited or a mortgage of the particular kind in question is unknown to the local law.

But a mortgage will not be enforced against an assignee of the immovable, even where he takes with notice of the incumbrances, unless he is bound

either by express obligation or by the local law itself to satisfy the claims of the incumbrancer.

The Courts have jurisdiction to decree foreclosure of an English mortgage on foreign land, this being treated as an extinction of the right to redeem,

and may make the usual decree in a redemption action in respect of foreign immovables, and where a redemption decree has been made in this

country an injunction will be granted against a mortgagee who brings a foreclosure action in the local courts, and vice versa.

Again, at page 227 (paragraph 277) this is what is stated:

The English Courts have Jurisdiction to order an account of the rents and profits of a foreign Immovable against any person liable to account-in

respect thereof, and in a suitable case a receiver will be appointed.

In Halsbury's at page 225 (paragraph 275) the author says:

The English Courts have jurisdiction to order the specific performance of any contract relating to foreign Immovable which the *lex loci rei sitae*

allows to be carried into effect.

The general principles relating to exercise of jurisdiction in respect of foreign immovables is stated by Halsbury in paragraph 270 thus:

The English courts have power to exercise a jurisdiction in *personam*, in respect of foreign immovables against persons locally within their

jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title be not

directly involved. But such an equity must be of a personal nature, i.e., there must be either a fiduciary relationship or privity of some other kind

between the parties. For the courts will not exercise their jurisdiction in order to enforce English principles of equity against third persons who have

acquired a good title by the local law nor (in the absence of a privity between the parties) to impose on a foreign Immovable a burden, other than

the local law requires it to bear.

5. From the principles so laid down, the basis for the exercise of jurisdiction in respect of foreign immovables, will be that if the action is in

personam, though it may relate to Immovable properties situated in a foreign territory, such rights can be declared and enforced by courts, though

they may relate to foreign immovables, the action or relief granted being based on a contract or trust where the obedience of the decree will

depend upon the compliance of it by the person and not of the property. The passages relied on by the learned counsel makes this position clear,

that all the actions which have been held to be maintainable in respect of foreign immovables are on something which the owner of the immovables,

though they may be situated in a foreign country, is under a personal obligation to comply as and by way of directing him to collect the rents and

profits of foreign immovables and pay them into court which passed the decree; but there can be no decree creating a right or interest in

Immovable properties situated in a foreign State as by creating a charge or by passing a decree in a mortgage if the effect of it would be to

proceed against the immovables and sell them in execution as has been done in the present case. Jurisdiction therefore in respect of foreign

immovables does not extend so as to enable courts to declare a charge over Immovable property situated in a foreign State since the effect of it

would be that by enforcement of such decree the Immovable properties would be required to be sold. No court, therefore, has jurisdiction in

respect of foreign immovables to grant either a decree charging the properties or recognising a mortgage and passing a decree on the mortgage. In

the judgment in App. No. 745 of 1954 (Mad) (A) Mack J. and myself have dealt elaborately with the question as to the rights of a court in respect

of foreign immovables. The view, therefore, taken by the lower appellate court that such a decree is not legal and could not, therefore, be enforced

and any sale in pursuance of the decree cannot confer any right or title on the plaintiff in respect of the suit properties is correct.

6. It is also urged relying on the decision in T. Sundaram Pillai Vs. Kandaswami Pillai, , that though the property in respect of which a charge is

purported to have been created by the Travancore court has been subsequently dealt by members of the family by way of gift and sale, such a

transaction did not affect the charge created under the decree as it is affected by lis pendens, especially in view of Ex. B. 1 which is a gift of the

property in pursuance of which defendants 1 to 3 claim the properties under a later assignment Ex. B. 3 of 1941. The gift deed Ex. B. 1, therefore

is urged to be affected by lis pendens but as observed by the learned District Judge, Section 52 of the Transfer of Property Act expressly limits the

operation of the doctrine of lis pendens to suits in respect of Immovable properties situated within British India and not in territories outside British

India. The principle of lis pendens is not applicable to the facts of the present case.

7. On all these grounds I should consider that the learned District Judge has come to the correct conclusion.

8. The second appeal fails and is dismissed with costs of respondents 1 to 3. No leave.