

(1999) 10 KL CK 0008
In the High Court Of Kerala
Case No : C.R.P. No. 2168 of 1998

Mohanachandran Pillai

APPELLANT

Vs

Ramachandran

RESPONDENT

Date of Decision : 11-10-1999

Acts Referred:

Registration Act, 1908 — Section 49, 49(c)

Citation : (2000) 1 CivCC 287

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : K.V. Sohan and Mr. K. Rajeev, for the Appellant; Mathews K. Philip, for the Respondent

Judgement

M.R. Hariharan Nair, J.—The petitioner is the plaintiff in O.S. 185 of 1994. The suit was filed alleging that for the purpose of starting hotel business the defendant borrowed a sum of Rs. 1,50,000/- on 16.4.1993 agreeing to repay the same with interest at the rate of 18% per annum and that the details of the agreement were reduced to writing in an agreement prepared on a stamp paper on the same day to which both parties affixed their signatures in the presence of witnesses. In addition to the prayer for recovery of the amount from the defendant there was also a prayer that in default of payment the plaintiff might be allowed to realise the amount by sale of the defendant's property. When the plaintiff went to the box to depose as PW 1 the question of marking the agreement in question arose. As per the impugned order that was decided. It was found that the document was compulsorily registered since it referred to a charge for the amount borrowed, and in view of S. 49(c) of the Registration Act the impact of non registration was that it could not be received in evidence of the transaction and that in the circumstances the document cannot be let in evidence. On the same date, the Court, also proceeded to pass a separate judgment, dismissing the suit based on the findings in the impugned order and finding that the suit was not maintainable.

2. According to the learned counsel for the revision petitioner the impugned order is unsustainable. It is pointed out that the document consists of two severable parts; one dealing with the personal liability of the defendant to pay the borrowed amount and the other with regard to the right of the lender to realise the amount charged on the property of the borrower. According to Mr. Sohan who argued that case of the revision petitioner if the latter part of the agreement was found to be unenforceable in view of the prohibition in S. 49 of the Indian Registration Act. the suit can still be proceeded with against the defendant as far as the personal liability is concerned. It was also argued by him that the fact that the court below passed a separate judgment dismissing the suit does not affect the relief prayed for in the revision and that once the impugned order is found to be unsustainable, the judgment also has to go and the matter has to be sent back. The relevant case laws was also cited by him.

3. I have heard the learned counsel for the respondent also.

4. The relevant portion of the agreement concerned may be quoted here.

(Matter in vernacular-Omitted. Ed.)

A more or less similar question arose for consideration in Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another, . That was also a case where a part of the document concerned required registration and the other part related to a personal liability to pay the amount. It was found that where one transaction creates an independent personal obligation to pay a certain sum of money and the other transaction merely strengthens the first transaction by adding a right to proceed against the charged property, the second transaction with regard to the charge being a severable transaction, can be validly ignored and the document to the extent it declares the personal obligation to pay is admissible in evidence, the transaction not being required to be compulsorily registered.

5. In Ouseph Varkey v. Subramonia Iyer (1984 KLJ 817) the question that arose was whether a document created a valid acknowledgement of the debt in which case alone the suit would be saved from limitation. The agreement relied on in that case was one of mortgage. The court found that if a transaction is distinct and divisible and one part of the transaction can be validly effected by an unregistered instrument and the other part require registration, the instrument may be used as evidence of the part which does not require registration. This is subject to the condition that the part which is not required to be registered must be collateral and not dependant on the part which requires registration.

6. Normally an agreement has to be considered as a whole. If severance can be effected without affecting or damaging the core of the transaction the document can be admitted in part. Severability which takes in the rule of separability, is a principle which can be applied if it does not affect the main aim and intention of the transaction and only if the objectionable part can be severed without affecting the validity of the remaining part.

7. Applying the aforesaid principles to the document in hand, what emerges are two different and severable obligations, the first evidencing a transaction of borrowal and creation of personal liability for repayment of the borrowed amount and the 2nd with regard to the creation of a charge therefore. In view of the bar under S. 49 of the Registration Act, what follows is that the former part of the agreement which creates personal liability of the defendant can be enforced through court whereas the latter portion becomes unenforceable. The court below was therefore wrong in declining to mark the relevant document and the impugned order is defective to that extent.

8. The other question that arises is whether the dismissal of the suit itself as per separate judgment revisability of the impugned Order. In this regard reliance was placed on the decision reported in *G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore*, . That was a case where pursuant to dismissal of an application for condonation of delay the High Court had dismissed an appeal finding that the appeal was barred by limitation. The question that arose was whether a later finding of the High Court on the aspect of limitation in the application for condonation of delay would be affected by the dismissal of the appeal by the High Court as per separate judgment. The Court found that the fact that the appeal itself was disposed of by a judgment would not bar the consideration of the correctness of order condoning the delay. It was held that this is an instance of dependent-orders" and if the order refusing to excuse the delay itself set aside in appeal the further exercise, made in the meanwhile by the Court, finally disposing of the appeal would be rendered, made in the meanwhile by the Court, finally disposing of the appeal would be rendered nugatory. In view of the aforesaid position of law, notwithstanding the fact that the judgment passed on 27.10.1997 has not been appealed against, the revision petitioner would be entitled to the relief of remand of the case once the impugned order is found to be defective and requiring further consideration. This is so because the only reason for dismissal of the suit was the finding entered in the impugned order that the suit document is inadmissible in evidence. Once that finding goes, definitely the suit has to be disposed of on the merits after answering all issues arising for consideration in the case.

9. When the question of admitting the relevant document is considered by the Court below, one more question may arise for consideration and that is whether the document can be treated as a Memorandum of Agreement for the purpose of the Kerala Stamp Act whether it will amount to a bond. It appears that the two categories attract stamp duty at different rates. This is an aspect which has not been considered in the impugned order and will have necessarily to be considered before calling upon the petitioner to pay the deficit stamp duty and penalty as a condition precedent for marking the document. In these circumstances the impugned order is set aside and the matter is remitted to the Court below with a direction to consider the nature of the document and to give an opportunity to the plaintiff to pay up the deficient duty. It is made clear that the plaintiff cannot be granted any charge as desired by him in the suit based on

the agreement which is dismissed herein. The suit shall proceed with regard to all other questions arising in the suit and shall be disposed of through a proper judgment in accordance with law. The parties are directed to appear in the court below on 30.11.1999.