

(1984) 09 KL CK 0004
In the High Court Of Kerala
Case No : A.S. No. 276 of 1978

Ouseph Varkey and Another

APPELLANT

Vs

Subramonia Iyer

RESPONDENT

Date of Decision : 27-09-1984

Acts Referred:

Evidence Act, 1872 — Section 92

Registration Act, 1908 — Section 17, 17(1)(b), 17(2)(b)

Citation : (1984) KLJ 817

Hon'ble Judges : Varghese Kaluath, J;M. Fathima Beevi, J

Bench : Division Bench

Advocate : B.S. Krishnan and P.R. Raman, for the Appellant; P.K. Balasubramonian and S.V. Balakrishna Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Varghese Kalliath, J.—This is an appeal by the defendants in O.S. No. 41 of 1975 on the file of the Principal Sub Judge, Alleppey. Defendants' father executed a usufructory mortgage in favour of the plaintiff on 5-3-1113. The mortgage was in respect of the plaint schedule properties. The mortgagor took the properties on lease from the mortgagee. The mortgagor filed A.D.R.A. 5 of 1959 for discharging the mortgage debt under the provisions of the Kerala Agriculturists' Debt Relief Act (Act 31 of 1958). This petition was disposed of by an order dated 24-6-1960 evidenced in this case as Ext. A1. Ext. A1 was pursuant to a compromise petition marked as Ext. A2 in the case. The mortgagor agreed as per the compromise petition to pay to the mortgagee an amount of Rs. 23,000. A sum of Rs. 1,000/- was paid on the date of the execution of the compromise petition. The balance was agreed to be paid within three years with 5% interest. On 20-6-1960, an amount of Rs. 2,000/- was also paid to the plaintiff towards the amount due under the compromise. The defendants are the legal heirs of the original mortgagor. The balance amount was not paid to the mortgagee-plaintiff. Hence he instituted the suit for recovery of an amount of Rs. 35,270/- Several contentions were raised before the trial court including the contention that the

suit was barred by limitation. The court below rejected all the contentions and decreed the suit. Defendants filed this appeal against the decree and judgment of the court below.

2. Learned counsel for the appellants (defendants) Shri P. R. Raman raised two points and argued the points very ably. He contends that the suit is barred by limitation. He also submits that the compromise petition requires registration and it cannot be taken into evidence by this court. Counsel for the respondent, Shri P. K. Balasubramanyam, in his usual persuasive presentation of the case, contended that both the points raised by the appellants are untenable. He submitted that Ext. A2 compromise petition is a valid acknowledgement of the mortgage and the suit is within time. Alternatively, he contended that Ext. A2 can be acted upon without registration and that by Ext. A2 the period for filing the suit on the original mortgage has been extended and that the suit is within time. He submits that the second point raised by him is not on the basis that Ext. A2 is an acknowledgement under the Limitation Act. He submits that Ext. A2 compromise operates only as a contract by which the parties agreed to enforce the mortgage only after three years from the date of execution of Ext. A2.

3. The suit is filed on 28-2-1975. Ext. A2 compromise petition was on 29-2-1960. Suit is filed beyond 12 years, obviously the suit is barred by limitation. Counsel for the respondent rightly admits that the period of limitation for this suit is 12 years. Admitting that Ext. A2 (though not registered) can be used in evidence as an acknowledgement, counsel for the appellants vehemently contends that since the suit has not been filed within 12 years from the date of acknowledgement, the acknowledgement Ext. A2 is incapable of saving limitation.

4. Shri Balasubramanyam submitted that by virtue of two enactments, namely, the Kerala Agriculturists' Debt Relief Act (Act 31 of 1958) and the Kerala Agriculturists' Debt Relief Act (Act 11 of 1970), the plaintiff is entitled to an exclusion of three years period and so the total period that has to be reckoned for the purpose of limitation is not twelve years but fifteen years. The counsel submits that there was a bar in both the enactments for filing the suit and the bar in each enactment as far as the present suit was concerned, was for a period of 11/2 years and so the plaintiff got an additional period of three years for the institution of the suit.

5. We have to examine this contention. The counsel relied on a Full Bench decision of this court in Unni Asari v. Sasthavasari (1975 KLT 23 (F.B.)) in support of his contention. The Full Bench held that there is no specific ban imposed by the statute regarding the execution of the decree and that by necessary implication from the wording of sections 4(5) and 10, it is clear that the execution of the decree as such after 14-7-1958 is impossible. It was further held that this state of affairs will continue till such time as the judgment debtor in a given case had committed six consecutive defaults and that only when such an event occurs the whole decree will become executable. This Court observed that when the whole decree could not have been executed the principle that has

been applied in a number of decisions of this court is that the decree holder has no obligation to execute the decree in part and that he is entitled to wait till such time the whole decree becomes executable and the waiting period can be excluded for the purpose of limitation. Relying on the above dictum laid down by the Full Bench, the counsel for the respondent submits that he was under no obligation to file a suit for the recovery of the amounts and he was compelled to wait for a period, according to him, three years, by operation of the two enactments. He submits that he is entitled to get exclusion of that period for the purpose of limitation. The submission made by the counsel at the first blush may seem very attractive, but on a closer scrutiny of the provisions of the Acts and the decisions of this court would show that the submission is unsustainable. The exclusion of time by the operation of the provisions of the Debt Relief Enactments has absolutely no application in the matter of filing of a suit. This point has been made very clear by several decisions of this court. Section 3 of Act 31 of 1958 reads:

3. Bar of Applications--(1) No application for execution of a decree in respect of a debt shall be made against any agriculturist in any court before the expiry of six months from the commencement of this Act.

Explanation 1-- Where a debt is payable by an agriculturist, no application of the nature mentioned in this sub-section shall be made or continued either against the non-agriculturist or against the agriculturist before the expiry of the period mentioned in this sub-section.

Explanation II-- For the purpose of this Act, a decree shall be deemed to be a decree in respect of a debt notwithstanding that other reliefs are granted in such decree.

Explanation III-- Nothing in this section shall debar a decree-holder from enforcing reliefs other than in respect of a debt, where the decree contains independent reliefs.

Explanation IV-- Where the decree passed is a conditional decree, and the conditions imposed come within the definition of debt, breach of the condition shall not be deemed to have taken place so long as the judgment-debtor acts in accordance with the provisions of this Act.

(2) Where a creditor files a suit for recovery of a debt before the expiry of six months from the commencement of this Act or after the agriculturist has paid or deposited the sums and instalments specified in S. 4 and, during the period when he is so entitled to pay, the Court shall in decreeing the suit direct the plaintiff to bear his own costs and to pay the costs of the defendant who is an agriculturist, except in cases where the claim would have been barred by limitation had no such suit been filed or when a debt is jointly due from an agriculturist and non-agriculturist:

Provided that nothing contained in this sub-section shall be a bar to the Court

passing any order as to costs as between the plaintiff and other defendants who are not agriculturists.

This section does not bar institution of suits. To our mind this section expressly contemplates the institution of suits by creditors in time to save limitation, even though a period of six months from the date of its commencement has been allowed to agriculturist-debtors to pay the first instalment in discharge of the debt. The plaintiff cannot therefore claim any extension of the period of limitation for the institution of his suit taking shelter under the Kerala Agriculturists Debt Relief Act, 1958. This is our view. This view is supported by the decisions of this court in Ahammad Alias Kunhu v. Achutha Menon (1964 KLT 592) and Adhrumankutty v. Chovvara (1963 KLT 306). In 1964 KLT 592, a Division Bench of this Court held that "Section 3(2) of the Kerala Agriculturists' Debt Relief Act contemplates institution of suits on debts before they are barred by limitation". Section 20 of the Act extends the period of limitation only for applications for execution of decrees. The absence of any provision in the Act extending the period of limitation for any suit is significant. To hold that no suit could be instituted in view of the provisions of Act 31 of 1958 would be inconsistent with section 3(2) of the Act which seems to insist on suits being instituted within the period of limitation. Even the general absolute bar of six months from taking any proceedings to recover debts from agriculturists in Section 3(1) has been taken note of in Section 3(2) of the Act, which provides for the institution of suit which would become time barred, before the expiry of six months. The Act provides that such a suit has to be decreed if there is no other bar for passing a decree directing the plaintiff to bear his own cost to the defendant, who is an agriculturist, except in cases the suit would have been barred by limitation had no such a suit been filed or where a debt is jointly due from an agriculturist and a non-agriculturist. There is no doubt on this point. Act 31 of 1958 is of no assistance to the plaintiff for getting an extended period. If the plaintiff is not entitled to get an extended period under Act 31 of 1958, he has to fail on this point, even if we find that he is entitled to get an extended period of time under Act 11 of 1970. The plaintiff himself admits that he is entitled to an extended period of 11/2 years only under Act 11 of 1970. We have examined this contention also and we are of the opinion that the plaintiff is not entitled to get any extended period of limitation under Act 11 of 1970. There is a similar provision in Act 11 of 1970. Section 3(2) of Act 11 of 1970 reads:

3.* * *

* * *

(2) Where a creditor institutes a suit for the recovery of a debt after the agriculturist has paid or deposited the sums and instalments specified in section 4, and during the period when he is so entitled to pay, the court shall in decreeing the suit direct the plaintiff to bear his own costs and to pay the costs of the defendant who is agriculturist, except in cases where the claim would have been barred by limitation had no such suit been instituted or where a debt is

jointly due from an agriculturist and a non-agriculturist.

In view of this provision, we think the same principle in regard to Act 31 of 1958 applies in the case of Act 11 of 1970. The plaintiff is not entitled to any exclusion of time. The contention of the respondent in this appeal that he has got an extended period of three years is unsustainable and is rejected. The result that emerges from rejecting the contention that the plaintiff is not entitled to an extended period of 3 years is that even if we agree that Ext. A1 can be used as an acknowledgement the suit is not within time.

6. The counsel for the respondent now submits that he can maintain the suit on the basis of Ext. A2 compromise itself not as an acknowledgement of liability under the mortgage. According to him, Ext. A2 compromise affirms a pre-existing debt and evidences an agreement for payment of that debt 3 years after the date of Ext. A2. He submits that all the incidents of that pre-existing debt is kept alive with the modification that the creditor can realise the debt only after 3 years from the date of the execution of the document Ext. A2. He expands his argument and submits that if such a view is taken, the suit is within time, since by the operation of Ext. A2, though not as an acknowledgement, the period for recovery of the original mortgage is extended by 15 years from the date of Ext. A2. Counsel for the appellants submits that if Ext. A2 postulates a modification of the terms of the original mortgage in any respect, it requires registration and since it has not been registered, it could not be used for any purpose other than for the collateral purpose of an acknowledgement of the previous debt. We have already seen that even if Ext. A1 is considered to be an acknowledgement, it is of no assistance to the plaintiff.

7. Counsel for the appellants relied on the decisions reported in Kashinath Bhaskar Datar Vs. Bhaskar Vishweshwar Karve, and Kesava Bhagavathar Vs. Vardayya Bhagavathar and Others, to substantiate his contention that a fresh agreement which affects the mortgage requires registration. Counsel for the respondents submits that Kashinath Bhaskar's case has no application in this case. There is a vital distinction between a mere recital of an already existing fact and something which in itself creates a title to a debt. Section 17 of the Indian Registration Act provides thus:

17(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871. or the Indian Registration Act, 1877, or this Act came or comes into force, namely:--

(a).

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

The relevant clauses in Exts. A2 are extracted hereunder:

8. Counsel for the appellants relying on some observations made in *Bihari Lall Lahoty Vs. Harendra Nath Sharma and Others*, drew our attention to the fact that there is no special case pleaded in the plaint explaining the obvious bar of limitation. Further he submits that in fact the plaintiff has relied on Ext. A2 and calculated the interest at the rate of 5% as provided in Ext. A2. According to the appellants, the plaintiff is now pleading a fresh case for which he has not made any foundation in the plaint.

9. There is a clear statement in Ext. A2 that the plaintiff is entitled to recover Rs. 23,000/- with a charge on the properties. If this document is considered to be a mere affirmation of a pre-existing debt, the plaintiff can say that it requires no registration, if the document is taken as an independent deed, it really creates rights affecting the property by clamping a charge on the property. If read along with the original mortgage, it certainly modifies the period for the release of the mortgage. The plaintiff is prevented from enforcing the mortgage for a period of 3 years from the date of Ext. A2, thereby the period fixed in the mortgage has been extended. In fact the plaintiff is very much relying on this extension of period for extricating the suit from the morbid grip of limitation. Further an additional clause has been engrafted in so far as interest at 5% per annum has been provided. In *Kashinath Bhaskar Datar Vs. Bhaskar Vishweshwar Karve, , Fazl Ali and Bose*, JJ observed:

one part of the "interest" which a mortgagee has in mortgaged property is the right to receive interest at a certain rate when the document provides for interest. If that rate is varied, whether to his advantage or otherwise, in our judgment, his "interest" in the property is affected. If the subsequent agreement substitutes a higher rate, than to the extent of the difference it "creates" a fresh "interest" which was not there before. If the rate is lowered, then his original "interest" is limited.

10. A question of little difficulty may arise when we want to determine whether a fresh bond or agreement affects an existing mortgage. What is the test that has to be applied. It may appear in the case of a fresh bond that the bond only affirms the existing rights and liabilities of the mortgagor and mortgagee. There may be a shadow of difference in the case of a bond which extinguishes or modifies the terms of an original mortgage and a bond merely affirming the existing rights and liabilities of the original mortgage. We think a simple measure is this--ascertain (determine) whether the mortgagee can in view of the subsequent bond or agreement enforce the terms and conditions of the earlier bond. If he is prevented or barred, then it is clean and clear that the subsequent undertaking has effected a modification and if that has the effect of limiting or

extinguishing the mortgagee's interest, it is at once hit by Section 17(1)(b) of the Indian Registration Act. If we apply this simple test, in the face of the agreement Ext. A2, the mortgagee is prevented from enforcing the original terms of the mortgage. The agreement prevents him from enforcing his mortgage for 3 years from the date of Ext. A2. We are of opinion that an agreement by which the period of redemption or enforcement of a mortgage fixed by the mortgage deed is either enhanced or reduced requires registration. (See *Sadar-ud-din v. Chajju* (1909) 31 All. 13; *Deo Narain v. Bhola Singh* (1930 28 All. L.J. 1163). Similarly, an agreement which reduces the rate of interest on a mortgage or which sets out the mode in which the rents and profits of land are to be dealt with at variance with the stipulations contained in a deed of usufructuary mortgage require registration. Where the rate of interest is varied by the agreement whether to the advantage or disadvantage of the mortgagee, then the interest in the property is affected and consequently the document requires registration u/s 17(1)(b). The agreement A2 creates a liability on the part of the debtor to pay interest which in effect is a new liability as far as the original mortgage is concerned.

11. Counsel for the respondent relying on the decision reported in *Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another*, submits that even if the agreement contains certain provisions which require registration, without affecting the body and main purpose of the agreement, the part that is required to be registered can be severed and the document could be used. In *Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another*, , it was observed:

Thus 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 using a severable transaction can be validly ignored" and the award to the extent it declares the personal obligation to pay is admissible in evidence, the transaction not being required to be compulsorily registered.

The counsel submits that that part which provides for interest can be severed and the document can be used even without registration. Here also the plaintiff has got another difficulty that there is a charge created by the document Ext. A2.

12. If applying the principles of separability, this part also is. severed, the plaintiff has to fall back on the charge in the original mortgage. If he wants to enforce the charge created on the property by the original mortgage as stated earlier, it is not enforceable in this suit since it is barred by limitation. The charge in the original mortgage can be enforced only if the suit is filed within a period of 12 years from the date of the original mortgage or at least 12 years from the date of Ext. A2 treating it as an acknowledgement. As stated earlier, the suit has been filed only after 15 years from the date of Ext. A2. It cannot be doubted that Ext. A2 creates a charge on the property. It is very clearly stated in Ext. A2 thus:

13. We also agree 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 requires registration, the instrument may be used as evidence of the part which does not require registration. We are of opinion that the part which is not required to be registered must be collateral and not dependent upon the part which requires registration. In a Madras Case (Sambayya v. Gangayya (1890) 13 Mad. 308) Muttusami Ayyar, J. said:

The test therefore is whether the transaction evidenced by the particular instrument is single and indivisible, or whether it really evidences, two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immovable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have an independent existence, and be in no way contingent or conditional on the breach of some obligation relating to immovable property created by the same instrument, for the contingency or the condition and the obligation would then be parts of one indivisible transaction.

Normally an agreement has to be considered as a whole. Of course, severance can be effected without affecting or damaging the core of the transaction. Severability which takes in the rule of separability is a principle which can be applied only 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,

14. In view of the very clear language used in the agreement, we are compelled to hold that the parties who executed the document Ext. A2 intended to create and to limit certain rights of the mortgagee in respect of the mortgaged property and that is the modification aimed and intended by the document. Even if it is found that the clause relating to payment of interest can be severed applying the principle stated in *Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another*, , the difficulty is not yet over. There is the further difficulty in the matter of the grant of the extended time of three years for the enforcement of the mortgage. As stated earlier, grant of extension of time is also a modification of the original terms in the mortgage limiting the rights of the mortgagee and so requires registration.

15. Counsel for the respondent also relied on the following decisions:

Sasi Bushan Das Vs. Ram Chandra Das and Others, ; *Aijaz Hussain v. Maqbul Hussain* (AIR 1925 Lah 307); AIR 1947 117 (Privy Council); *Garuda Satyanarayana Vs. Grandhi Venkatachalapathi Rao and Another*, and *Jani Jayantilal v. Lakha Hula* (AIR 1954 Sourashtra 22).

In *Sasi Bushan Das Vs. Ram Chandra Das and Others*, , the question was one u/s 92 of the Evidence Act. The court held:

When a mortgage bond is silent as to how the money due on it is to be paid, and the mortgagee executed a document which merely provides that the mortgagor is to pay the amount then found due in certain instalments spread over a certain number of years with a proviso that in default of any instalment, the entire amount under the mortgage bond would become due, the document only shows an arrangement between the parties and does not alter or vary the terms of the mortgage bond and that it is admissible in evidence without registration.

This decision may not be of much help to the plaintiff since the facts are totally different from the facts of this case.

16. In AIR 1925 Lah 307, the court observed where one of the terms of a compromise refers to immovable properties of one of the parties, but no new rights are either created or declared by the compromise but the reference was confined to mentioning of a pre-existing state of things with regard to which there was no dispute, even though the deed may be unregistered, still it is admissible. There is no dispute that when a document only states and affirms pre-existing rights and liabilities, it does not require registration.

17. In AIR 1947 147 (Privy Council) , their Lordships, Lord Thankerton, Lord Uthwatt and Sir Madhavan Nair only observed that an award on mortgage declaring amount due and merely stating that on default property might be sold, does not require registration. Their Lordships only said that the provisions in the award merely stated as an existing fact the general consequences which by law were attached to non-payment of the secured debt. It had no operative effect in creating any interest in immovable property and so held that Section 17(2) (b) of the Registration Act had no application and that the award did not require registration. Obviously this decision has no application to the present case. The counsel next relied on the observations in AIR 1968 AP 131 to the effect that section 17 of the Registration Act being a disabling provision must receive a strict construction and that if there is any doubt on the matter, the benefit of such doubt must obviously be given to the person who wants the court to receive the document in evidence. Of course, this is a principle which has to be borne in mind in interpreting Section 17 of the Registration Act, In AIR 1954 Sou 22, Shah C.J. followed the decision reported in AIR 1947 117 (Privy Council) and held that there is a vital distinction between a mere recital of a fact and something which in itself creates a title. There cannot be any dispute about this principle. We find that if the plaintiff wants to use Ext. A2 in evidence to establish his claim in the suit and to save limitation, it requires registration. So in the absence of registration, Ext. A2 shall not be received in evidence to establish the claim in the suit. We have already found that Ext. A2 is of no help to the plaintiff as an acknowledgement to save limitation. Since the suit is barred by limitation, the decree passed by the court below has to be vacated. We do so. In the circumstances, we allow the appeal dismiss the suit and direct parties to bear their respective costs.