
(1939) 08 MAD CK 0053
In the Madras High Court

Pandit Shiva Rao and Another

APPELLANT

Vs

D.A. Shanmughasundaraswami (Official Liquidator) and
Others

RESPONDENT

Date of Decision : 18-08-1939

Acts Referred:

Citation : AIR 1940 Mad 140 : (1940) ILR (Mad) 306 : (1939) 50 LW 844 :
(1940) 1 MLJ 922

Hon'ble Judges : Alfred Henry Lionel Leach, C.J.; Patanjali Sastri, J

Bench : Full Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The appellants appeal against an order refusing to recognise them as secured creditors of the Lakshmi Forest Company Limited, which is now under liquidation under an order for compulsory winding up. On the 3rd September, 1932 by a registered deed the appellants conveyed to the Company certain lands in the village of Shedimane, South Kanara District and assigned the benefit of a mortgage decree, which they had obtained in the Court of the Subordinate Judge of South Kanara. The consideration was Rs. 80,000 payable in instalments. The deed purported to charge both the immovable property and the mortgage-decree for the due payment of the balance of the consideration. It was also provided that the vendors should remit a sum of Rs. 10,000 if the Company should pay the balance falling due before the 1st April, 1933 With interest from the 30th June, 1932. The right to rank as secured creditors was challenged by the liquidator, and the appellants took out a Judge's Summons for a declaration that under the general law and also under the provisions of the deed they were secured creditors in respect of the monies remaining due to them under the deed. The deed had not been registered in accordance with the provisions of Section 109 of the Indian Companies Act, 1913, and was therefore clearly void against the liquidator and any creditor of the Company if put forward as embodying a charge. The appellants, however, claimed that they were entitled to rank as secured creditors by reason of the lien given to an unpaid vendor by Section 55(4) of the Transfer of Property Act. This

claim was disallowed by Gentle, J. The learned Judge held that they were not entitled to the statutory lien because the deed of conveyance contained a contract contrary to the provisions of Section 55(4) in that it created without any allocation a charge on both movable and immovable property and under the section the appellants could only claim a lien in respect of immovable property. The appellants challenge the decision of the learned Judge on three grounds. In the first place it is said that the mortgage decree is not movable property, but immovable property. Secondly it is said that the conveyance did not in law effect any charge. In the third place it is said that even if the decree be regarded as movable property the appellants are entitled to a lien as equity had extended the principle of the vendor's lien to movable property of this description.

2. Before the amendment of Section 17 of the Indian Registration Act there was a conflict of opinion whether a mortgage decree could be regarded as movable or immovable property. In *Gopal Narain v. Trimbak Sadashiv* I.L.R.(1876)1 Bom. 267 the Bombay High Court held that the assignment of a mortgage decree required registration. The Calcutta and the Allahabad High Courts expressed opinions to the contrary. See *Gous Mahommad v. Khawas Ali Khan* I.L.R.(1896) 23 Cal. 450, *Baij Nath Lohea v. Binoyendra Nath Palit* (1901) 6 C.W.N. 5, *Ram Ratan Chuckerbutty v. Jogesh Chandra Bhattacharya* 12 C.W.N. 625, *Abdul Majid v. Muhammad Faizullah* I.L.R.(1890) 13 All. 89, *Ahmad Khan v. Abdul Rahman Khan* I.L.R.(1904) 26 All. 603, *Mumtas Ahmad v. Sri Ram and Bhawani Singh* I.L.R.(1913) 35 All. 524. This controversy has been decided in favour of the Bombay view by the addition made to the provisions of Section 17 of the Indian Registration Act by Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, which came into force on 1st April, 1930. That Act added Clause (e) to Sub-section (1) of Section 17 of the Registration Act. The clause reads as follows:

Non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates 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.

3. The wording here follows that used in Clause (b).

4. It has been argued by Mr. Thyagarajan on behalf of the second respondent that the Court is not justified in regarding a mortgage decree as immovable property by reason of the addition of Clause (e) to the section. He says that there has been no amendment of the definition of immovable property to be found in Section 3(25) of the General Clauses Act and in Section 2(6) of the Indian Registration Act and the considerations which weighed with the Calcutta and the Allahabad High Courts still apply. As I have already indicated, I am unable to accept the argument. By virtue of the amendment of Section 17 of the Registration Act an assignment of a mortgage decree is placed in the same category as instruments falling within Clause (b), and admittedly such

instruments must be regarded as immovable property. When a final mortgage decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. The CPC contains a form for the drawing up of a final mortgage decree and unless the Legislature regarded the decree to be drawn up in accordance with such form as operating to declare the mortgagee's rights in the mortgaged property the amendment of the section would be idle. For the reasons indicated I hold that a mortgage decree must be regarded as immovable property.

5. I am also unable to share the opinion of the learned Judge that the conveyance of the 3rd September, 1932, created a charge, either as regards the lands or as regards the mortgage decree. Section 59 of the Transfer of Property Act requires a mortgage deed to be signed by the mortgagor, attested by at least two witnesses, and registered. Section 100 provides 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 simple mortgage shall, so far as may be, apply to such charge." In *Tenneti Viswanadham Vs. M.S. Menon, Official Liquidator of the Swarajya Printing and Publishing Company Limited and Another*, a bench of which I was a member held that the words "so far as may be" had not the effect of taking Section 59 out of the purview of Section 100. Unless given by statute a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge and attested by at least two witnesses. In the present case the company was not a party to the deed of conveyance and as it has not created a charge by another instrument there is in law no charge at all. The mere fact that the parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of the provisions of Sections 59 and 100 operate to create a charge in law. In these circumstances it cannot, in my opinion, be said that the parties had entered into a contract which deprived the appellants of the lien u/s 55(4) of the Transfer of Property Act.

6. The appellants' contention that equity has extended the principle of the vendor's lien to movable property of certain descriptions is based on the judgments in *Mycock v. Beatson* (1879) 13 Ch. D. 384, *Collins v. Collins* (1862) 31 Beav. 346 : 54 E.R. 1172, *In re Albert Life Assurance Co.: Ex parte Western Life Assurance Society* (1870) 11 Eq. 164, *Davies v. Thomas* (1900) 2 Ch. 462 and *In re Stucley: Stucley v. Kekewich* (1906) 1 Ch. 67, but holding, as I do, that a mortgage decree drawn up in the ordinary form, must now be regarded as immovable property and that the deed of the 3rd September, 1932, did not operate to deprive the appellants of their statutory lien u/s 55(4) of the Transfer of Property Act it is not necessary to consider whether this argument is well founded, and if well founded the principle could be applied in India having regard

to the provisions of the Sale of Goods Act.

7. The appeal succeeds on the first two points and consequently there will be a declaration in favour of the appellants that they are entitled to a charge on the property conveyed for the balance of the purchase money. The appellants are also entitled to their costs, which will be paid out of the assets of the company.

8. The Court has been informed that in other proceedings a creditor is claiming priority over the appellants, but this matter is not now before us and therefore cannot be inquired into. To avoid any misunderstanding I will, however, add that our decision is entirely without prejudice to any claim to priority.

Patanjali Sastri, J.

9. The main question argued in this appeal is whether a final decree for sale obtained in a suit brought to enforce a simple mortgage of immovable property is to be regarded as immovable property for the purposes of Chapter III of the Transfer of Property Act relating to sale of immovable property. The facts giving rise to the question have been fully set out in the judgment of my Lord the Chief Justice and it is unnecessary to recapitulate them here.

10. The Transfer of Property Act does not define the term "immovable property" except negatively by excluding standing timber, growing crops and grass. The General Clauses Act (X of 1897) contains a definition in Section 3(25) which is applicable to the Transfer of Property Act. There is also a definition in Section 2(6) of the Registration Act for the purposes of that Act. According to both these definitions so far as they are material to the present discussion, immovable property includes lands and benefits to arise out of land. We then have the definition of "mortgage" in Section 58 of the Transfer of Property Act as the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced, etc. This interest in the case of a simple mortgage consists of course in the right to bring the mortgaged property to sale for the realisation of the debt. A simple mortgage has thus a dual character. It is a debt with a right to be recouped from the sale proceeds of specific immovable property.

11. Now, it has been held in this Court, having regard to these definitions, that a debt secured by hypothecation of land is immovable property for the purposes of Sections 54, 55(2) and 123 of the Transfer of Property Act. See *The Official Receiver Vs. Lakshman Aiyar*, *Balagurumurthy Chetty Vs. Ramakrishna Chetty and Others*, and *Perumal Ammal v. Perumal Naick* (1920) 40 M.L.J. 25 : ILR 57 All. 314 and this position appears to have been accepted by their Lordships of the Privy Council in the recent decision in *Fanny Skinner v. Bank of Upper India, Ltd.* (1935) 69 M.L.J. 158 : L.R. 62 IndAp 115 : ILR 57 All. 314, where it was held that an assignment of a simple mortgage was of no effect as a transfer of the security by reason of non-registration. But the question in what category a final decree for sale obtained on a simple mortgage has to be placed has not been the subject of decision in this Court, though there are conflicting decisions

on the point in some of the other High Courts in India. Before referring to these decisions which are not however binding on this Court though, of course, they are entitled to great weight, it is desirable, in my opinion, to consider the question on principle. Prima facie, if a simple mortgage is to be treated as an interest in a land or as a benefit arising out of land and thus coming within the definition of immovable property, there seems to be no valid reason why a decree directing the enforcement of such mortgage should be regarded any the less as immovable property. Before the decree, the mortgagee had the right to bring the mortgaged property to sale through Court for the payment of his debt, or he could give up the security and sue for mere recovery of the debt. After the decree, however, he can no longer seek to recover the debt apart from realising the security and, unless the security proves insufficient on actual realisation, his only right, having regard to the provisions of the CPC in that behalf, is to bring, the mortgaged property to sale in execution of the decree. Thus, the decree does not in any way affect the mortgagee's interest in the mortgaged property which still remains in him in full force, and indeed his remedy is now confined to a realisation of that interest, the mortgage-debt being, to that extent, deprived of its dual character. It is thus clear that the decree only marks a stage in the process of realising the security and the only change effected by it in the position of the mortgagee is to effectuate the benefit arising to him out of the land, the subject of the mortgage, by bringing it one step - and that an important step - nearer realisation. It is therefore difficult to see on principle why a final decree for sale should be relegated to a different category of property from the mortgage itself on which it is based.

12. Turning now to the decided cases, we find that the High Courts at Bombay, Allahabad and Calcutta have had occasion to consider this point. The earliest case in Bombay is *Hari Govind Joshi v. Ramchandra Pandurang Joshi* (1872) 9 Bom. H.C.R. 64, where speaking of a Court sale of a mortgage decree, the learned Judges observed that what was purchased,

was not a mere paper on which the decree was written but the interest in immovable property which was recoverable under that decree and such interest must be regarded as immovable property within the meaning of Section 259 of the Civil Procedure Code.

13. In a later case in *Gopal Narayan v. Trimbak Sadashiv* I.L.R.(1876) 1 Bom. 267, the same view was taken and it was held that an assignment of a mortgage decree was compulsorily registrable. The Calcutta High Court in the earlier case *Koob Lall Chowdhry v. Nittyanand Singh* I.L.R.(1883) 9 Cal. 839, held that an unregistered deed of assignment of a mortgage decree was defective so far as it related to the mortgage lien on the property. In a later case, *Gous Mahomed v. Khawas Ali Khan* I.L.R.(1896) 23 Cal. 450, however, that Court adopted the view that Section 17(b) of the Registration Act does not apply to a deed of assignment of a mortgage decree as it could not be said to be immovable property within the definition contained in that Act. There is no reference to the earlier decision of

the same Court and the learned Judges do not refer to the definition of a mortgage in Section 58 of the Transfer of Property Act as involving the transfer of an interest in specific immovable property. In a still later decision reported in *Baij Nath Lohea v. Binoyendra Nath Palit* and Anr. 6 C.W.N. 5, the question arose whether a mortgage decree was immovable property for the purpose of Order 21, Rule 90 of the Civil Procedure Code, when a Court sale of such a decree was sought to be set aside under that provision. In this case, the definition of immovable property in the General Clauses Act was referred to and it was held that a mortgage decree did not come within that definition. Here again the earlier decision of the same Court in *Koob Lall Chowdhry v. Nittymanand Singh* (1883) 9 Cal. 839, was not referred to. In the Allahabad High Court the treatment of the subject followed more or less the same course. In the *Pearliest* case in *Musammat Bhawani Kuar v. Gulab Rai* (1877) 1 All. 348, the question arose whether the sale of a mortgage decree was a sale of movable property within the meaning of Section 252 of the CPC which provided that no irregularity in the sale of movable property under an execution shall vitiate the sale and it was held to be a sale of an interest in immovable property. In *Abdul Majid v. Muhammad Faizullah* I.L.R.(1890) 13 All. 89, however, the Court held that a deed of assignment of a mortgage decree did not come within the mischief of Section 49 of the Registration Act as it could not be regarded as immovable property. In the two later cases in *Ahmad Khan v. Abdul Rahman Khan* I.L.R.(1904) 26 All. 603 and *Mumtaz Ahmad v. Sri Ram* I.L.R.(13) 35 All. 524, the decision in *Abdul ad Faisullah* I.L.R.(1890)13 All. 89, was followed. In none of these cases was any reference made to the earlier decision of the same Court in *Musammat Bhawani Kuar v. Gulab Rai* (1877) ILR 1 All. 524.

14. In this state of the authorities, the Legislature added Clause (c) to Section 17(1) of the Registration Act by Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, thereby making compulsorily registrable instruments transferring or assigning any decree or order of Court when such decree or order purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property. It is clear to my mind that the object of this amendment was to affirm the Bombay view and supersede the Calcutta and Allahabad decisions referred to above holding the contrary. It is, however, urged that this newly added clause would not apply to mortgage decrees as the words, "purports or operates to create, declare, etc." must, in view of the Privy Council decision in *Bhageswari Charan Singh v. Jagarnath Kuari* (1931) 62 M.L.J. 296 : L.R. 59 I.A. 130 : ILR 11 Pat. 272 (P.C.), be construed to mean, "in itself purports or operates to create, declare etc.", whereas a mortgage decree merely declares a pre-existing right, that is, the mortgage right of the decree-holder. I think that this argument proceeds on a misapprehension of their Lordships' decision in the case referred to above. The distinction which their Lordships had in mind is the one between a mere recital of title as a fact and something which in itself creates a title. A reference to the passage from the judgment of West, J., in *Sakharam*

Krishnaji v. Madan Krishnaji I.L.R.(1904) 26 All. 603 (1881) 5 Bom. 232, which their Lordships quote with approval would make their meaning still more clear. The learned Judge there says:

There (that is, in Section 17) "declare" is placed along with "create, assign, limit or extinguish a right, title or interest" and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word "declare". It implies a declaration of will; not a mere statement of fact.

15. A mortgage decree does not merely recite the pre-existing mortgage right. By its own force it declares, even if it does not create, the decree-holder's right to have the property sold through the machinery of the Court for the realisation of his debt without any further impediment. It embodies the expression of the Court's will that a definite change of the legal relation of the mortgagor to the property should forthwith be brought about by the property being sold in satisfaction of the decree. It seems to me, therefore, idle to contend that a decree stands on the same footing as a document containing merely a recital of an existing right. In one sense, no doubt, a decree or order of Court does not ordinarily bring into existence any right which did not already vest in one of the parties litigant and to insist that it should do so in order to come within Clause (e) of Section 17 would be to render that provision almost nugatory.

16. The assignment of a mortgage decree thus falls within Section 17(1)(e), and must now be regarded as compulsorily registrable on the footing, clearly, that such a decree represents an interest in immovable property. It follows that much of the reasoning underlying the decisions of the Allahabad and Calcutta High Courts holding that a mortgage decree cannot be regarded as immovable property falls to the ground and I cannot, therefore, regard them useful precedents on the question now under consideration.

17. For the above reasons, I am of opinion that a final decree for sale on a simple mortgage must be regarded as immovable property for the purposes of Chapter III of the Transfer of Property Act.

18. On the other questions argued at the Bar, I agree in the conclusions of my Lord and have nothing material to add.