

(1992) 02 MAD CK 0057
In the Madras High Court
Case No : C.R.P. No 3087 of 1985

P.S. Chelladurai and another

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 21-02-1992

Acts Referred:

Stamp Act, 1899 — Section 30(a)(4)

Citation : (1992) 02 MAD CK 0057

Hon'ble Judges : Venkataswami, J

Bench : Single Bench

Advocate : V. Narayanaswami, for the Appellant; V. Venkatachalam for M/s. T. Raghavan and T.K. Seshadri, for the Respondent

Final Decision : Dismissed

Judgement

Venkataswami, J.—This Revision Petition is directed against an Order in R.E.P. No. 9 of 1983 in O.S. No. 171 of 1981, on the file of the Court of Subordinate Judge, Periyakulam dated 30.11.1984. The judgment debtors are the petitioners herein.

Brief facts of the case are the following:

The respondent filed the said suit O.S. No. 171 of 1981 for recovery of a sum of Rs. 53,276-86 P. The petitioners, along with one Periannan, executed a promissory note for Rs. 20,000/- on 9.10.1976. The first petitioner was having an overdraft account in the respondent Bank. That overdraft facility was enlarged, at his request, to a sum of Rs. 50,000/- on 9.10.1976. In the course of the operation of the bank account, a sum of Rs. 41,682-52 P. remained outstanding as due from the first petitioner and the second petitioner and the above mentioned Periannan acknowledged their liability in writing. It appears that one second-hand cinema projector hypothecated to the respondent Bank. The suit was decreed on 21.12.1981, directing the petitioners and the said Periannan to pay a sum of Rs. 53,276-86 P. with interest thereon at 20-53% per

annum from the date of plaint till date of decree and thereafter at 6% per annum till date of realisation. The respondent Bank was given liberty to sell the abovesaid hypothecated machinery in default of payment as per the decree. The respondent-Bank filed Execution petition obviously because the judgment debtors defaulted in making the payments.

2. The Execution Petition was resisted by the petitioners contending inter alia that the cinema projector must be treated as an immovable property, and as such, the decree already passed was unexecutable in the absence of preliminary decree, followed by a final decree.

3. The trial court, by the order under Revision, overruled the contentions raised by the petitioners and held that the cinema projector which was hypothecated to the respondent-Bank cannot be treated as an immovable property, and it was only a movable property and, therefore, the decree can be executed. In the course of the order the executing court, in passing, has made a reference that the petitioners had not challenged the preliminary decree passed and, therefore, they have no right to challenge the decree. Taking advantage of this passing reference, learned counsel for the petitioners attempted to argue that there should be a preliminary decree, and in the absence of a final decree nothing can be done.

4. I have perused the records, and I find that there was no preliminary decree. It was a simple suit for recovery of money and the decree was for realisation of money, and in default of payment, to proceed against the hypothecated machinery. Further, the only question that was raised before the executing court was, that the cinema projector must be treated as immovable property and, therefore, without preliminary and final decree, the Execution Petition cannot be proceeded with.

5. Learned counsel for the petitioners submitted that the cinema projector is permanently fastened to the earth and, as such, would fall within the category of immovable property. In support of that, he placed reliance on a Division Bench judgment of this Court in *State of Madras v. Govindaraja Chettiar* 1968 II M.L.J. 5 = 81 L. W. 570. He also placed reliance on another Division Bench judgment of this Court in *South Indian Bank Ltd. v. M/s. V.Krishna Chettiar & Brothers* 1975 II M.L.J. 431 = 89 L.W. 100.

6. As against this, learned counsel appearing for the respondent-Bank submitted that the cinema projector in question though fastened to the earth when in use, must be treated as movable, having regard to the purpose for which it was fastened to the car. In support of that, he placed reliance on a Full Bench judgment of this Court in *Board of Revenue, Chepauk, Madras Vs. K. Venkataswami Naidu*, . He also relied on another Division Bench judgment of this Court in *Perumal Naicker Vs. T. Ramaswami Kone and Another*, .

7. Now let me consider the rival submissions. The Full Bench judgment deals directly with the cinema projector belonging to touring cinema. The Full Bench in

that case, has held that the projector would fall within the category of movable only by observing that in the true nature of things, property of that nature cannot be immovable property. This Full Bench judgment was sought to be distinguished by the learned counsel for the petitioners by stating that the theatre in question is a permanent one. However learned counsel for the respondent-Bank pointed out that the theatre in question is also a touring cinema, and the Full Bench judgment directly applies to the facts of this case. From the records, it is not possible to find out whether the theatre in question is a permanent one or a touring cinema.

8. The next decision is *The State of Madras Vs. W.V.A. Govindaraja Chettiar*, . In that case, the Division Bench was considering whether pumping installation was not immovable property. The Division Bench, after distinguishing the Full Bench judgment above mentioned, observed as follows:-

We do not think that the Collector was correct in his view that the pumping installation could not have been acquired under the Act as it was not immovable property. Immovable property, both under the Transfer of Property Act and the General Clauses Act, would include anything imbedded in the earth or attached to what is so imbedded. The fact it is capable of being removed does not render it any the less immovable property when it is fastened to earth in the manner in which high-power motors and a pumping installation as a whole are imbedded. It may, however, be that the competent authority acting under the provisions of the Requisitioning and Acquisition of Immovable Property Act, proceeded to acquire only the land, buildings, trees, wells etc., for, both the agreement with regard to the compensation and the award passed by the enquiring officer only covered these items. That does not mean that there could not have been a separate agreement with regard to the purchase of the pumping installation.

The Division Bench further observed as follows:

A pumping installation necessarily involves a more permanent fixture to the earth, than a touring cinema does.

9. In *Perumal Naicker Vs. T. Ramaswami Kone and Another*, another Division Bench had occasion to consider whether the oil engine attached to the earth would be movable or immovable property. The Division Bench, after considering various earlier decisions including the Full Bench judgment, observed as follows:-

The question whether when a chattel is attached to the earth or a building, it is immovable property, is a mixed question of law and fact, and has to be decided in the light of particular facts in each case. Obvious cases may not call for tests. Where doubt arises, certain tests have been formulated in particular contexts, which, if literally applied, may not yield always a proper and correct result. While general tests pointed out by judicial decisions in the light of specific facts, may be borne in mind, eventually the decision on the question should depend upon how the Court, looking at the facts as a whole, feels on the matter.

Immovable property is defined at least in three Indian enactments, the General Clauses Act, the Registration Act and the Transfer of Property Act. The first two are not of much assistance, for, they merely say that immovable property includes things attached to the earth, or permanently fastened to anything attached to earth. They give no guidance as to what is meant by attached or permanently fastened, the third enactment, by S. 3 describes what is meant by attached to the earth to wit, (a) rooted in the earth, as in the case of trees and shrubs, (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Broadly speaking, the degree, manner, extent and strength of attachment of the chattel to the earth or building, are the main features to be regarded. All the three aspects in the description show that the attachment should be such as to partake of the character of the attachment of the trees or shrubs rooted to the earth or walls or buildings imbedded; in that sense, the further test is whether, such attachment is for the permanent beneficial enjoyment of the immovable property to which it is attached. Even here, although there may be an attachment to the earth, as contemplated by the first two aspects in the description of "attached", still if the attachment is a necessary requisite and that is the manner by which the movable property is or can be enjoyed or worked, it may be open to question whether because of its fixture, though permanently, in the qualified sense, it can ipso facto or ipso jure be regarded as immovable property

Board of Revenue, Chepauk, Madras Vs. K. Venkataswami Naidu, illustrates this. In that case which was under the Stamp Act, a lease of properties relating to a touring cinema (tent and machines), though collapsible and capable of being removed, but permanently fastened to the earth when in use, was held to be not chargeable to stamp duty under S. 30(a)(4) of Schedule 1A of that Act, as in the nature of things such properties could not be immovable property. The learned Chief Justice, who spoke for the court, further observed that the poles of the tent and machinery were imbedded in the earth only temporarily and not permanently. It may be seen that a touring cinema, which is located in a place, is not shifted from place to place but continues to function for fairly a long period. Permanence of the fixture, in the context is, therefore of a relative character.

For a chattel to become part of immovable property and to be regarded as such property, we should think it must become attached to the immovable property as permanently as a building or a tree is attached to the earth. If in the nature of things, the property is a movable property and for its beneficial use or enjoyment, it is necessary to imbed it or fix it on earth though permanently that is, when it is in use. It should not be regarded as immovable property for that reason. That, as we understand, is the ratio of Board of Revenue, Chepauk, Madras Vs. K. Venkataswami Naidu,) Sub-ramanian Finn v. Chidambaram Servai resembles the principles of Board of Revenue, Chepauk, Madras Vs. K. Venkataswami Naidu, Certain tenants installed an oil engine as part of a cinema in a certain leasehold land, with the object of utilising the machinery for their

profit. Wadsworth, J., held that a security bond pledging the oil engine could not be deemed to be a transaction relating to immovable property. The learned Judge approached the question in the following manner. -

If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property, If the attachment is made for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed.

We find ourselves in agreement with the second part of these observations, which is opposite to the instant case. In the case before us, the attachment of the oil engine to earth, though it is undoubtedly a fixture, is for the beneficial enjoyment of the engine itself and in order to use the engine, it has to be attached to the earth and the attachment lasts only as long as the engine is used. When it is not used, it can be detached and shifted to some other place. The attachment, in such a case, does not make the engine part of the land and as immovable property. *Mohammed Ibrahim Vs. Northern Circars Fibre Trading Co.*, was decided by a Division Bench of this Court under the provisions of the Registration Act, that was a case of machinery of a mill fixed to a cement platform and attached to iron pillars fixed in the ground. It was held that the movable property so attached should be regarded as immovable property. It seems to us that this case turned on the special facts and the nature of the fixture, including the intention derived from the physical features of the fixture, that the mill was to be a permanent attachment to the earth. A potter oil engine, as in this case, stands on a different footing and from the very nature of this type of machinery.

We do not think that any useful purpose would be served by a reference to English Cases, because they have proceeded on basis of fixtures to realities, under the English law. Different considerations have been applied by English Courts in deciding whether given things amounted to fixtures in the sense in which the term is understood in the law relating to real property. Nevertheless, reference may be made to two of those English cases. In *Leigh v. Taylor* (1902 A.C. 157), the House of Lords held that valuable tapestries affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them, were not fixtures and therefore, did not pass with the freehold to the remainderman. The House of Lords thought that the tapestries formed part of the personal estate of the tenant for life. The speech of Lord Halsbury shows that questions like this cannot always be answered, in the nature of things, with arithmetical accuracy, but certain discernible tests, as aids in deciding the question, are well established, as for instance, if something is made part of the house, it must necessarily go to the heir, because the house goes to the heir and it is part of the house. So, where something is attached in some form to the walls of a house, nevertheless, having regard to the nature of the thing itself, and the purpose of its being placed there, it is not intended to form part of the reality, but is only a mode of enjoyment of the thing while the person

is temporarily there, and is there for the purpose of his or her enjoyment. Though those observations were in the context of fixtures, and we are conscious that English law relating to fixtures cannot be bodily applied to conditions in this country the observations of Lord Halsbury certainly are of weight and point to the correct approach to question of this kind.

The House of Lords, again, had to consider in *Reynolds v. Ashby & Son* (1904) A.C. 466 whether machinery attached to freehold was a fixture. There the machines affixed to concrete bed in the floor of the factory of bolts and nuts, could have been removed without injury to the building of the beds. In this case too Lord Halsbury was one of the Law Lords who decided it, but with this difference, here the House considered that as the machines were part of a factory, which was the subject matter of a lease the attachment of the machines to the earth in that manner should be regarded as a fixture".

The last case cited at the Bar is *The South Indian Bank Ltd. Vs. V. Krishna Chettiar and Brother and Others*, Here again, the Division Bench considered whether the machinery attached to the earth in movable or immovable property. The Division Bench observed as follows: -

Mulla in his book on Transfer of Property Act, 1966 (Sixth Edition) quoted with approval a decision of the Calcutta High Court in *Janchand v. Kishore* (AIR 1960 Cal 301) and stated:

In the recent Calcutta case, it has been held, it is submitted, correctly, that the test is whether the annexation is with the object of the permanent beneficial enjoyment of the land or building: so machinery for metal-shaping and electroplating which was attached by bolts to special concrete bases and could not be easily moved, was held not to be a part of the structure housing it or the soil beneath it. The Court held that the machinery was not attached for the mere beneficial enjoyment of either the soil or the concrete; it was actually a case of the structure being built around the machinery to protect it....

Thus, therefore, the principles in the Calcutta decision, cited above, squarely applies to the facts of this case. The machineries are attached by bolts to special concrete bases or studs, or platforms and no one interested in saying so. would say that they are so attached to earth, so as to make it appear that such articles have been so imbedded for the permanent beneficial enjoyment of the mill premises itself. We accept the evidence of P.W. 2 in the absence of any contrary materials before us, to say that the imbedding is as urged by Mr. Venkatrama Iyer...

From the conduct of the borrowers and from the intrinsic value of the recitals in Exhibit A24 which is the hypothecation deed we are unable to resist the reasonable conclusion which flows from the surrounding circumstances and the facts of this case, that the parties intended that the machineries delineated in Exhibit A29 were to be understood and meant as movable property rather than as immovable property in the sense that they become imbedded to earth so

permanently as without it, the mill premises cannot be beneficially enjoyed.

(Paras 16, 19 and 21) (Paras 14, 16 and 18 in 89 L.W.100)

Bearing the principles laid down in the various cases cited above, I am of the view that except the observations in *The State of Madras Vs. W.V.A. Govindaraja Chettiar*, the other cases strongly support the contention of the learned counsel for the respondent-Bank. In fact, the Division Bench in AIR 1969 Mad 346, 81 L.W. 19 S.N. (supra) has observed that cinema projector in touring cinema and permanent cinema are the same for the purpose of treating them as immovable properties. For, the Division Bench has observed as follows: -

It maybe seen that a touring cinema, which is located in a place, is not shifted from place to place, but continues to function for fairly a long period. Performance of the fixture in the context, is, therefore, of a relevant character.

The above observation clearly supports the case of the respondent Bank. We have already noticed that the cinema projector, in the case on hand, was only hypothecated and the assumption that the projector must be treated as an immovable property and, therefore, the hypothecation must be equated to mortgage, is baseless. In the circumstances, the view taken by the Court below is correct, and does not call for any interference. The Civil Revision Petition is, therefore, dismissed. However, there will be no order as to costs.