

(1981) 11 AP CK 0009

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 700 of 1980

T. Rama Seshagiri Rao and Another

APPELLANT

Vs

N. Kamalakumari

RESPONDENT

Date of Decision : 03-11-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 50

Succession Act, 1925 — Section 214

Transfer of Property Act, 1882 — Section 100

Citation : AIR 1982 AP 107 : (1982) 1 APLJ 94

Hon'ble Judges : Gangadhara Rao, J

Bench : Single Bench

Advocate : N.V. Suryanarayana Murthy, for the Appellant; G.S. Dwarakeswara Rao, for the Respondent

Judgement

1. Tadimalla Rattamma, obtained a decree against the petitioners for maintenance with a charge over their immovable properties for realisation of the amount decreed. She died after obtaining the decree. Before her death, she executed a will on 12th Sept., 1974 bequeathing the maintenance decree in favour of her daughter, Nidamarthi Kamala Kumari, the respondent. The respondent filed E. P. No. 55/1975 in the Court of the Subordinate Judge, Eluru, for execution of the decree. The petitioners--judgment --debtors took a preliminary objection that the execution petition was not maintainable without producing the succession certificate under S. 214(1)(b) of the Indian Succession Act, 1925. The learned Subordinate Judge held that the charge was in the nature of a simple mortgage and no succession certificate was necessary, for proceeding against the property in execution. In this connection he relied upon A. Ramaswami Vs. K. Venkamma, : and Ruprao V. Ram Rao AIR 1952 Nag 88. He also observed that the decree included costs of the suit and no succession certificate was necessary for execution of a decree for costs. He relied upon S. Rajyalakshmi Vs. S. Sitamahalakshmi, . In the result, he overruled the preliminary objection raised by the petitioners and held that the petition was

maintainable without producing the succession certificate.

2. In this revision it is submitted by learned counsel for the petitioner that charge created by a decree is not a charge within the meaning of S. 100 of the Transfer of Property Act and, therefore, it cannot be executed as if it is a mortgages decree. In this connection strong reliance was placed on the Full Bench Judgment of this Court in Sri Rajah Mommadevara Naganna Naidu Bahadur Jamindar Garu (died) and Others Vs. Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu and Others, . It was also submitted that a charge is different from a mortgage, and that the learned Judge erred in holding that the charge is in the nature of a simple mortgage and no succession certificate is necessary.

3. The question for my consideration is whether the respondent can execute the decree for maintenance with a charge, that was bequeathed to her by her mother under a will, without producing the succession certificate? Section 214 of the Indian Succession Act, to the extent it is relevant, reads as follows:---

"214 . Proof of representative title a condition precedent to recovery through the Courts if debts from debtors of deceased persons----

(1) No Court shall -----

(a) Pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed. upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming of-----

(I) and (ii) -----

(iii) a succession certificate granted under Part X and having the debt specified therein.

(2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes."

4. In view of this Section, no Court can execute a decree against the judgement - debtor for the payment of a debt due to a deceased decree--holder, which a person claims on succession, except on production of a succession certificate.

5. It is true that a Full Bench of this Court held in Sri Rajah Mommadevara Naganna Naidu Bahadur Jamindar Garu (died) and Others Vs. Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu and Others, that a charge created by operation of law within the meaning of S. 100 of the Transfer of Property Act. In that case, a maintenance decree charge was passed by a Court. S. 100 provides, that the provisions which apply to a simple mortgage shall, so far as may be, apply to a charge contemplated by that Section. O. 54, C. P. C. refers to suits relating to mortgages of immovable property. R. 15 of that order

relates to mortgages by the deposit of title-deeds and charges. It says that all the provisions contained in O. 34, C. P. C., which apply to a simple mortgage shall, as far as may be, apply to a charge within the meaning of S. 100 of the Transfer of Property Act, 1882. Therefore, O. 34, R. 15 C. P. C. applies to a charge within the meaning of S. 100 of the Transfer of Property Act. It does not apply to a charge that is not covered by S. 100 of the Transfer of Property Act.

6. It is also true that a charge is different from a mortgage. "A mortgage is a transfer of an interest in property, while a charge is merely a right to receive payment out of some specified property. The former is described a *jus in rem*, and the latter as only a *jus ad rem*. In the case of a simple mortgage, there is a personal liability, express or implied, but in the case of a charge, there is no such personal liability and the decree. if it seeks to charge the judgment- debtor personally, has to do so in addition to the charge". See *Janapareddy Latchan Naidu Vs. Janapareddy Sanyasamma*, .

7. But, that alone does not conclude the matter when we have to decide the question whether a succession certificate is necessary under S. 274 of the Indian Succession Act, in order to execute a decree for maintenance with a charge. In view of S. 214, a succession certificate is necessary for obtaining a decree for payment of a debt or for executing a decree for payment of a debt. If the decree is not for payment of a debt, then no succession certificate is necessary . So, the question is whether execution of a decree for maintenance with a charge is execution of a decree for payment of a debt? Obviously, when a person files a petition for execution of a maintenance decree with a charge , he is applying for enforcement of the charge by sale of the property in possession of the judgment-debtor. Thus, lit is not really an application for recovery of any debt but for the enforcement of the liability, as against the person, who had not paid the maintenance allowance, which liability he was bound to discharge. If so, there is no need for the legal representative of the deceased decree-holder to obtain a succession certificate.

8. The question may be viewed from another angle also. It is now well settled that, in order to execute a mortgage decree, no succession certificate is necessary, because a mortgage is not a debt within the meaning of S. 214 of the Indian Succession Act, and a suit to enforce a mortgage is not a suit for a debt. A suit to recover money due on a simple mortgage by sale for recovery of a debt, but it is a suit to enforce a charge on immovable property and no succession certificate need be obtained by the heirs of the mortgagee to recover the money. Similarly, an application for execution of a mortgage decree for realisation of the amounts by sale of the mortgaged property is not an application to obtain an order for payment of his debt. It is unnecessary to refer to all the decisions. Suffice, if I refer to *A. Ramaswami Vs. K. Venkamma*,

9. If a succession certificate is not necessary to execute a simple mortgage decree, the question is whether it is necessary to execute a maintenance decree with a charge. In my opinion, there is no difference in principle between both. If

so, no succession certificate will be necessary to execute a maintenance decree with a charge.

10. A charge can be created by act of parties or by operation of law, in which case, it will be a charge within the meaning of S. 100 of the Transfer of Property Act. It cannot be disputed that, in order to enforce such a charge, no succession certificate is necessary. If so, the mere fact that a charge is created by a decree of a Court cannot make any difference in principle. When a person is trying to execute a maintenance decree with a charge, he is really trying to recover a debt within the meaning of S. 214 of the Indian Succession Act. If so, in my opinion, there is no need for him to obtain a succession certificate. In this connection reference can be made to *Ruprao V. Ram Rao* (AIR 1952 Nag 88) (supra).

11. In the result I hold that there is no need for the respondent to obtain a succession certificate before executing the decree for maintenance with a charge.

12. It was also held by the lower Court that no succession certificate is necessary for execution of a decree for costs. It is true. That is on the ground that S. 214(1) (a) of the Indian Succession Act pre-supposes the existence of a debt before the suit is instituted. A decree for costs is not passed on the basis of any pre-existing debt, but is passed for the recovery of the costs incurred during the pendency of the suit. See, *Khadim Husain Khan and Others Vs. Abdur Rahman Khan*, ; *V.T.V. Ramanuja Swamy (Dead) and Others Vs. Ram Gnaneshwar*, and *S. Rajyalakshmi Vs. S. Sitamahalakshmi*, . But, in the present case, it is not a decree merely for costs.

13. In the result, I see no grounds to interfere with the order of the lower Court and I dismiss this revision, but in the circumstances of the case, without costs.

14. Revision dismissed.