

(1994) 12 KL CK 0030

In the High Court Of Kerala

Case No : C.R.P. No's. 1321 of 1992 and 12 of 1993

Yusuf Kunju Thajudeen

APPELLANT

Vs

Padmanabhary Narayanaru and Others

RESPONDENT

Date of Decision : 22-12-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72, Order 21 Rule 72A, Order 21 Rule 90, Order 34 Rule 11, Order 34 Rule 15
Transfer of Property Act, 1882 — Section 100, 2, 55(6)

Citation : (1994) 12 KL CK 0030

Hon'ble Judges : B.M. Thulasidas, J

Bench : Single Bench

Advocate : P. Sukumaran Nair and B. Radhakrishnan, for the Appellant; M. Balagovindan, for the Respondent

Final Decision : Allowed

Judgement

B.M. Thulasidas, J.—These were heard together. The judgment in C.M.A. No. 41 of 1988 of the District Court, Thiruvananthapuram is under challenge in C.R.P. No. 1321 of 1992 and the order on E.A. No. 202 of 1992 in O.S. No. 42 of 1983 of the Sub Court, Attingal is under challenge in the other revision.

2. The common Petitioner filed O.S. 42 of 1985 of the Sub Court, Attingal, for specific performance of an agreement to sell, of the year 1975. The prayer was not granted. But the suit was decreed for an amount of Rs. 12,000 with interest at the rate of 12 per cent from 1980 onwards, charged on the property. In execution of the decree 60 cents of paddy fields in Sy. No. 3769 of Navaikulam Village was sold in court auction and was purchased by the Petitioner/decreed holder as per order passed on E.A. No. 153 of 1990 filed under Order XXI Rule 72 Code of Civil Procedure. The Respondent/judgment debtor filed E.A. No. 206 of 1992 under Order XXI Rule 90 to set aside the sale stating inter alia that the sale was invalid the sale proclamation was defective that there was no proper notice and that the property had been sold for a meagre amount by reason of

the fraud played by the Petitioner. The application was opposed by the Petitioner and the execution court by order dated 31st January 1991 dismissed the application which was reversed by the Appellate court by judgment in the above appeal, holding that the sale was irregular and illegal for non-compliance of Order XXI Rule 72A. Code of Civil Procedure. The execution court was accordingly directed to reopen E.A. No. 153 of 1990 filed by the Petitioner for permission to bid and set off and "pass appropriate orders fixing a reserve price and conduct the sale again in accordance with law".

3. E.A. No. 202 of 1992 was filed by the Respondent in C.R.P. No. 12 of 1993 under Order XXXIX Rules 1 and 2 and Section 94 CPC for an order of injunction to restrain the Petitioner from trespassing into the property, claimed to be in the possession of the Respondent and from harvesting the crops there from. In the said proceedings, Exts. A-1 to A-6 were marked and by the impugned order reliefs were granted as prayed for.

4. I heard counsel for the parties.

5. The Petitioner had been permitted to realise the pre-paid sale price and interest and that was allowed to be realised by sale of the property agreed to be sold. The distinction between mortgage and charge is well known. As observed by Da, J. in *Raja Sri Shiva Prasad v. Beni Madhab* (1992) 1 Pat. 387 that:

The broad distinction between a mortgage and a charge is this that whereas a charge only gives right to payment of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property. A mortgage is a *jus in rem*, a charge a *jus and rem* and the practical distinction is that a mortgage is good against subsequent transferees and a charge is only good against subsequent transferees with notice.

In every mortgage there is a charge, but every charge is not a mortgage.

6. A charge can be created either by act of parties or by operation of law. In the decision reported in *Venkatachala Pillai v. Rajagopal Naidu* (1945) M.W.N. 654, it was no doubt held, that:

The words "operation of law" occurring in Section 100 of the Transfer of Property Act, included a charge brought into being by a decree of a competent court.

But then in *V.S.V. Thankavelu Mudaliar v. G. Thirumalaswami* AIR 1956 Mad. 67 this view was not followed and it was held that Section 100 of the T.P. Act did not take within its scope a charge created by a decree of court, which, as held in *Sri Rajah Mommadevara Naganna Naidu Bahadur Jamindar Garu (died) and Others Vs. Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu and Others*, , may be regarded as a judicial lien.

7. In *H.C. Mukerji v. Radha Mohan* AIR 1959 All. 539, where:

One of the clauses in a compromise decree in a suit for arrears of rent provided

that the judgment-debtor shall not remove or dispose of in any manner any of his stock-in-trade until the entire decretal amount was paid up and in the event of any attempt of the judgment-debtor to remove or dispose of any of the stock-in-trade the decree-holder would be entitled to take out immediate execution for the entire decretal amount due

it was held:

that the clause fell short of actually creating a charge on the stock-in-trade of the judgment-debtor. There was a general prohibition about alienation of the stock-in-trade which was not expressly made liable for the payment of the decretal amount. The clause read as a whole meant that so long as the stock-in-trade remained in the premises, the debtor would be allowed to pay the decretal amount in installments as agreed by the parties but if he made any attempt to remove the same the concession would be withdrawn. Hence the decree-holder could not be a second creditor within the meaning of Section 2.

In *Jata Bhusan Chatterjee Vs. Sm. Krishna Bhamini Debi and Another*, , it was held:

A charge created by decree would be one by operation of law u/s 100 of the Transfer of Property Act only where the decree merely embodies a charge which exists in law apart from the decree itself.

The Punjab High Court in *Seth Radhe Lal Vs. Ladli Parshad*, , held:

A charge created by a decree does not come within the scope of Section 100 as it is neither a charge created by the act of the parties or a charge created by operation of law.

The learned Judge has followed the decisions reported in AIR 1940 163 (Nagpur) A Full Bench of the Andhra Pradesh High Court in *Sri Rajah Mommadevara Naganna Naidu Bahadur Jamindar Garu (died) and Others Vs. Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu and Others*, , after considering precedents of the various High Courts, held:

Section 100 is restricted in its operation to two categories of charges, namely those created by act of parties and those created by operation of law. Charges created by decrees of courts are not included. Such charges are not charges created by operation of law.

I am in respectful agreement with the decisions above mentioned. In my view, in respect of charge created for the first time by a decree, Section 100 of the Transfer of Property Act has no application.

8. This was not a case where decree was passed in favour of the Petitioner in recognition of any right available to him u/s 55(6)(b) of the T.P. Act. It was again not a charge created by a decree passed in pursuance of agreement or by act of parties, but a charge created by the court by its decree. Therefore Section 100 of the T.P. Act would not apply.

9. It was rightly observed by the court below that the suit was not on a mortgage; but then it observed "that the amount decreed was a first charge over the property as pre-paid purchase price". Under Order XXXIV, Rule 15 (ORDER XXXIV, Rule 11) the provisions in Order XXXIV regarding Mortgage "suit" must apply to enforce charges also. The provisions in Rule 72A of Order XXI must apply to processes in execution of a decree for enforcement of a charge, as the charge-holder is in the position of a mortgagee. It was found that there was non-compliance of the provisions of the above rule and therefore the sale was held to be irregular and illegal. Reliance was placed upon the decision in P. Rami Reddy Vs. P. Sundara Rama Reddy and Others, to find that permission granted which was not in conformity with the provisions in Rule 72A is illegal. I am afraid the court below was wrong in its assumptions. This was not a case where Order XXXIV, Rule 15 (Order XXXIV, Rule 11) had any relevance. The application the Petitioner had made under Rule 72 of Order XXI as was necessary had been allowed by the execution court, after notice to the judgment-debtor, who, it was submitted did not raise any objection. There is nothing to show that permission was granted by the court in a perfunctory or casual manner. Indeed, even assuming the Petitioner bid at the sale without permission having been validly, given, the sale held would not thereby become illegal unless it had been shown that there was fraud played by the decree-holder and that the property was sold for a grossly inadequate price, or otherwise the interest of the judgment-debtor was seriously affected. It was held in Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal Dangarwala and others,

under Order 21, Rule 90 it is not sufficient for the Appellant to contend that there was an illegality or irregularity in the conduct of the sale; he must also prove by adducing sufficient facts that some substantial injury has been caused to the Petitioner as a result of the order under Order 21, Rule 72 having been passed without such notice.

As the executing court observed, the judgment-debtors did not substantiate their contentions against the court-sale and the manner in which it was held. It was also observed that they had not sustained substantial injury or loss. These are findings of facts, which are not shown to be perverse and therefore do not deserve to be interfered with. In my view, the impugned judgment in C.M.A. No. 43 of 1991 is unsustainable and it is set aside. In consequence the order of the execution court shall stand restored.

In view of what is stated above, I am unable to sustain the order passed on E.A. No. 202 of 1992 challenged in the other revision. The court below was not right to grant injunction against the Petitioner. There was irregular and illegal exercise of jurisdiction. The order is unsustainable and is set aside.

The C.R.Ps. are allowed as above.