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Elizabeth Korah Vs Bhavani Amma and others

S.A. No. 377 of 1963

Court: High Court Of Kerala

Date of Decision: July 7, 1967

Acts Referred:
Registration Act, 1908 â€" Section 17, 17(1)(e), 49

Citation: (1967) KLJ 914

Hon'ble Judges: V. Balakrishna Eradi, J

Bench: Single Bench

Advocate: Mathew Muricken and A.S. Narayanan Asan, for the Appellant; C.K. Sivasankara Panicker, D.N. Potti, N. Govindan Nair and T.A. Narayanan Nair for 1st Respondent and T.P. Mathai, K.J. Chacko and K.M. Emmanuel for 3rd Respondent, for the Respondent

Final Decision: Dismissed

Judgement

V. Balakrishna Eradi, J.
The appellant herein instituted the suit out of which this Second Appeal arises, for a declaration that the

proceedings taken by her jointly along with the first defendant for recognition of an alleged assignment of the decree obtained by the appellant in

O.S. 42/60 of the District Court, Kottayam against the third defendant, were the result of fraud and forgery and that the order passed by the

executing court recognizing the said assignment of the decree was not binding on the appellant-plaintiff. She accordingly prayed for setting aside the

said order and also for a permanent injunction restraining the first defendant and her advocate, the second defendant, from withdrawing from court

certain amounts which were lying in deposit to the credit of the aforesaid decree. It was also contended as a ground for invalidating the assignment

that the decree was one creating a charge over immovable properties exceeding Rs. 100/- in value and that no assignment of the said decree could

be validly made except under a document duly registered under the Indian Registration Act. Reliance was placed in support of this proposition on

Sections 17(1)(e) and Section 49 of the Indian Registration Act. The trial court found against the plaintiff on the merits of all her allegations of fact

relating to the alleged practice of forgery and fraud and held that the assignment was not vitiated by any such invalidating circumstances. It

however, upheld the contention of the plaintiff that the assignment was bad for want of registration u/s 17(1)(e) of the Indian Registration Act and

that therefore, the first defendant had not validly acquired any rights whatever over the decree by virtue of the purported assignment. In this view,

the trial court granted the plaintiff the declaration and injunction as prayed for by her. An objection raised by the defendant that the suit based on

allegations of fraud was barred by limitation having been brought beyond the period of 3 years from the date of the order recognizing the

assignment was rejected by the trial court. The first defendant filed an appeal against the aforesaid decision of the trial court. The plaintiff filed a

memorandum of cross-objections objecting to the trial court''s finding that the assignment was not vitiated by fraud, forgery etc. The learned

Additional District Judge confirmed the finding of the trial court that the plaintiff''s case of forgery and fraud was not true and that there were no

such circumstances vitiating the assignment of the decree in favor of the first defendant. On the question relating to want of registration, the lower

appellate court took the view that u/s 49 of the Indian Registration Act the assignment would be inadmissible for want of registration only to the

extent to which it purported to deal with rights in immovable property and that even without a registered instrument there can be a valid

conveyance of the portion of the decree entitling the plaintiff to recover personally from the defendants the amount decreed. In other words, in the

view of the learned District Judge, while the assignment would not operate to convey any rights to the first defendant to enforce the charge

declared by the decree it would be perfectly valid and effective in so far as it related to that portion of the decree providing for the recovery of the

suit amount from the judgment-debtors personally. In this view, the lower appellate court held that the plaintiff was not entitled to the declaration or

injunction prayed for by her and dismissed the suit.

2. The learned counsel for the appellant strenuously urged that the view taken by the lower appellate court regarding the effect of Section 17(1)(e)

and section 49 of the Indian Registration Act is incorrect and untenable. It is contended that since the decree admittedly declares and creates a

charge on immovable property exceeding Rs. 100/- in value, no rights over such decree can be validly transferred except under an instrument in

writing duly registered. In support of this contention reliance was placed on the decisions reported in Raychand Jivaji Vs. Basappa Virappa

Bellary, ; Bank of Calcutta Ltd. Vs. Dhirendra Nath Roy and Others, and Narayana Kaimal v. Kumara Pillai (I.L.R. 1955 T.C. 77.) On a

reference to these decisions however, it is seen that they were all cases of mortgage decrees where the mortgagee-decree-holder had in the first

instance, necessarily to proceed only against the mortgaged property and it was only after exhausting his remedy by sale of the property that

recourse could be had to personal execution against the judgment-debtor. In such cases it cannot be doubted that no rights can be validly

conveyed in the decree except by a registered instrument because the assignee should first be entitled to proceed against the immovable property

in enforcement of the mortgage. Thus, these are cases where the personal decree did not co-exist as enforceable simultaneously along with the

portion of the decree entitling the decree-holder to proceed against the property. This distinction is pointed out by the learned Judges of the

Bombay High Court in Raychand Jivaji Vs. Basappa Virappa Bellary, where it is observed that the position would only be different if the terms of

the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy

but in addition to it. In the case before the Bombay High Court it was held that the right to proceed against the judgment-debtor personally was not

independent of the charge but arose only, if at all, after the right to proceed against the charged property had been exercised and exhausted.

3. The same is the position in regard to the decisions in Bank of Calcutta Ltd. Vs. Dhirendra Nath Roy and Others, and Narayana Kaimal v.

Kumara Pillai (I.L.R. 1955 T.C. 77), the former being a case where a preliminary mortgage decree passed under Order 34 C.P.C. was purported

to be assigned without a registered instrument and, the latter a case of assignment of a decree in enforcement of a chitty hypothecation bond which

did not contain a clause for personal recovery. These decisions, therefore, will not help the appellant unless the present case is one where the

portions of the decree providing for realization of the amount from the defendants personally and for recovery by sale of the immovable properties

are not severable. The decree in O.S. 42/50 which was the subject-matter of assignment, has not been produced or marked in this case but

counsel appearing on both sides agree that its terms have been correctly set out in Ex. P-I which is the execution petition by which the court was

moved for recognition of the assignment and for permitting the assignee-first defendant to execute the decree. From Ex. P-I it is seen that the

decree entitled the decree-holder to recover the amount personally from the judgment-debtors and that the further provision declaring a charge for

the said amount over certain immovable properties belonging to a judgment-debtor was only in addition to the personal remedy. This is not a

decree passed in terms of Order 34 C.P.C. and under the terms of the decree as gatherable from Ex. P-I the decree-holder was entitled to

proceed personally against the judgment-debtors without having in the first instance, to exhaust his remedies against the properties charged. The

right to proceed against the judgment debtor personally is quite independent of the charge declared on the immovable properties and the two

portions of the decree are clearly severable.

4. It is now well-established that if a document which purports to create or declare etc. rights in immovable property exceeding Rs. 100/- in value,

deals also with other subjects not falling within the purview of Section 17 of the Indian Registration Act, while, u/s 49 of the Act, the document

cannot be received in evidence of any transaction affecting such immovable property it is not inadmissible for the purpose of proving how the other

subjects have been dealt with by it. The bar to the admissibility is only limited to the extent to which the document pertains to rights in immovable

property. Applying these principles to the present case, the assignment of the decree would be valid and operative even without a registered

document in so far as it relates to that portion of the decree conferring the right to proceed against the judgment debtors personally for recovery of

the decree amount, while it would not certainly be valid to convey any rights over that portion of the decree creating a charge over immovable

property and entitling the decree-holder to enforce such charge. That this is the correct position in law has been laid down by a Division Bench of

the Madras High Court consisting of Rajamannar C.J. & Umamaheswaram J. in O.S.A. 162 of 1952-1954 M.W.N. - Short notes page 27 Since

the judgment in that case was not fully reported a certified copy thereof was produced before the lower appellate court and it is available among

the records sent up to this court. The learned Chief Justice has observed in the above case as follows

As to the objection based on the fact that the deed of assignment was not registered, learned counsel for the appellant submitted that the decree

specifically provided for enforcement of the liability of the 1st defendant, both personally and by the enforcement of the charge and the omission to

register the deed could only affect his right to the benefit of the charge declared by the decree, but would not affect his right to execute the decree

personally. We agree with him, and Mr. Narasimha Ayyar, learned counsel for the respondent, has not been able to controvert this position.

Indeed, it follows from the language of Section 49 of the Registration Act. We, therefore, hold that the deed of assignment, in so far as it purported

to transfer the right to execute the decree personally against the first defendant does not require registration and therefore could be the basis of an

application by the appellant to be brought on record as the assignee-decree-holder for a part of the decree amount.

I am in respectful agreement with the view so expressed by the learned Chief Justice and applying the aforesaid principle to the present case, it has

to be held that the District Judge was quite correct in holding that the assignment in favor of the first defendant was valid so far as it related to the

right to execute the decree personally against the judgment-debtor even though there was no registered instrument evidencing the assignment.

5. In this view, it becomes unnecessary for me to consider the point raised by the respondent in her memorandum of Cross Objections that the

suit, based as it is on allegations of fraud, was barred by limitation having been brought beyond the period of 3 years from the date of the executing

court''s order recognizing the assignment and I express no opinion on the merits of this contention. The Second Appeal fails and is accordingly

dismissed with costs. No leave.