(1933) 01 BOM CK 0029

Bombay High Court

Case No: None

Maneckchand Ramchand and Others		APPELLANT
	Vs	
Ganeshlal Goverdhan		RESPONDENT

Date of Decision: Jan. 27, 1933

Acts Referred:

- Dekkhan Agriculturists Relief Act, 1879 - Section 22
- Transfer of Property Act, 1882 - Section 100

Citation: 145 Ind. Cas. 582

Hon'ble Judges: Rangnekar, J; Broomfield, J

Bench: Division Bench

Judgement

Rangnekar, J.

The real question in this appeal is whether the judgment-creditor, who is the respondent here, is entitled to bring the properties of the judgment-debtors, the appellants, to sale. The question arises this way. The respondent brought a suit on a money claim against the appellants, who were traders, to recovery sum of Rs. 6,199. Pending the suit the parties arrived at a compromise, under which the respondent agreed to accept a sum of Rs. 5,000 payable by certain instalments. It was further agreed as follows:

The properties mentioned in the application, Ex. 6 in the suit, are to be security for the said sum of Rs. 5,000, they being considered as mortgaged. The said properties are to remain as security until payment of the moneys. In default of the payment of any one instalment by the defendants, plaintiff do recover the whole of the amount then due, by the sale of the properties mentioned in Ex. 6. Plaintiff has given remission to the defendants of the rest of the claim and the amount of the costs.

2. The compromise was submitted to the court and was recorded and in accordance therewith a decree under Order XXIII, Rule 3, was made. This decree was acted

upon, and the appellants paid the amount of the first instalment. On default of the payment of the second instalment the decree-holder instituted proceedings to carry out the decree, and it is out of these proceedings that the present appeal arises. The appellants contended that as they were agriculturists the property was not liable to be sold u/s 22, Dekkhan Agriculturists'' Relief Act. Their case was that there was no valid mortgage, as the compromise was not registered or attested, nor was the decree, as required by the Registration Act read with Sections 4, 58 and 59, Transfer of Property Act. The learned. First Class Subordinate Judge held in effect that the lands were specifically mortgaged to secure the repayment of the debt to which the decree related and that the case fell within the provisions of Section 22, Dekkhan Agriculturists'' Relief Act. He accordingly made an order for sale of the properties.

3. The learned Counsel for the appellants has raised the following points:----(1) Section 22, Dekkhan Agriculturists'' Relief Act, applies only to a case of specific mortgage and not to a charge. 5 Ind. Cas. 534 : A I R 1919 P O 84;46 I A 240: 4 O 485 : 37 M L J 525 : 17 A L J L. 117 : 24 O W N 177 : (1920) M W N 66 : 27 M L T 42 : 11 L W 201 : 31 O L J 298; 22 Bom, L R 488 The compromise and the decree were not registered nor attested as required by the Registration Act and the Transfer of Property Act. 22 M 508; 26 I A 101: 7 Sar. 516 : I Bom. L R 394 : 3 C W N 485 : 9 M L J 147 If it be held that the section is applicable to the case of a charge, the decree created a mortgage and not a charge. 26 B3 : 33 Bom. L R. 545 The property could not be brought to sale in any event in execution proceedings. This contention however, was not developed nor was pressed, and is, in my opinion, unsustainable on the authorities. (5) On a true and proper construction of Section 22, the case did not fall within the section, as the mortgage or the charge was not created before the decree but by the decree itself, and that the section, even if it be construed to include the case of a charge, would not apply, when the mortgage or the charge was created for the first time by the decree itself: It may be stated that this point, came up for discussion for the first time during the hearing. It was conceded by the learned Counsel for the appellants that if; on the construction of the decree it was held that the transaction was one of charge and not of mortgage, no question of want of registration or attestation would arise. That must be so, because the position in the case of a charge within the meaning of Section 100, Transfer of Property Act, as to the requirements of registration or attestation is different from that in the case of a mortgage under the same Act. Obviously Section 4 would then have nothing to do with the question, and the charge being incorporated in or created by the decree, it would be valid even if unregistered under proviso to Section 17, Registration Act. The points, then which survive are: (a) does the decree create a mortgage or a charge; (6) does Section 22 apply to the case of a "specific charge" and (c) does it apply when either the mortgage or the charge was not antecedent to the decree but was created by the decree itself? I will deal with these points in order. The learned First Class Subordinate Judge has, as I have stated, held in effect that the decree creates a charge. After discussing, the question as to

whether the word "mortgage" In Section 22 includes a charge or not, the learned Judge observes as follows:

Therefore if the clauses in the compromise be held to amount to only a charge, I hold that the plaintiff is entitled to the remedy by sale as claimed.

4. I agree with the Judge. I have read the decree in the vernacular, and in my judgment, the compromise as well as the decree in which the compromise was incorporated created a charge on the property of the judgment debtors and that the transaction did not amount to a mortgage within the meaning of the Transfer of Property Act. The material sentence is as follows: "ya rakames davyanteel milkatee gahan samajoon taran ahet." The word "taran" is ordinarily understood, as far as I know, to signify a charge rather than a mortgage. If for instance, the wording had been that the properties were to be considered as security for the sum and were given "taran gahan" the position might have been different. But on the language here the transaction falls short of a mortgage and the language shows that the properties were charged with the payment of the debt.

5. The next question is whether the term "mortgage" in Section 22 would include a "charge." The learned Judge held that it would, and I am inclined to agree with him. Speaking for myself, the question is not free from doubt. But on a careful consideration of the arguments I think the word "mortgage" in Section 22 is not used in the strict sense of a mortgage within the meaning of the Transfer of Property Act bet is used to describe not only what would technically be a mortgage, but also a charge, for the repayment of a debt on the property of the debtor. The Dekkhan Agriculturists'' Relief Act was enacted in 1879. The distinction between a "mortgage" and a "charge" as is now known to us was made for the first time by the Transfer of Property Act. This Act was en acted in 1882 and Section 58 defining a mortgage was extended to this Presidency in 1893. I have no doubt as observed in Girwar Singh v. Thakur Narain Singh (1), that in the old days these terms were used interchangeably. In this connection I may refer to two sections of the Act. Mr. Divatia referred to one of them and that Sections 70, in support of his argument. In that section both the words "mortgage" and "charge" are used. On the other hand, Section 56 seems to stew that tile weft "charge" used there would include a mortgage, and it is difficult to understand the omission of a mortgage from that section, except on the hypothesis that the terms were used interchangeably in the days when the Dekkhan Agriculturists'' Relief Act came to be placed on the statute book. The result of holding otherwise would be to deprive the agriculturist of the benefit of, say for instance, Section 11-A or Section 11 or Section 12, Dekkhan Agriclturists'' Relief Act, incases where he has created only a charge over his property to secure the payment of his debt. The next question is whether u/s 22 the mortgage or the charge must be antecedent to the decree. The relevant portion of the section is in these terms:

Immovable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order passed whether before or after this Act comes into force, unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates and the security still subsists.

6. The difficulty of a logical construction of the provisions Of the Dekkhan Agriculturists'' Relief Act is almost proverbial and, speaking for myself, I think, if the Legislature intended that Section 22 should apply only in cases where the lands were mortgaged or charged prior to the decree relating to the debt and that it should not apply where, a charge or a mortgage was created by the decree itself or the first time, the actual language used is somewhat unfortunate. But in view of the facts of this case it is not necessary - for me to express any opinion on the question raised. The learned Counsel for the respondent argues that even if the section is construed to refer only to the case of a mortgage or charge prior to the decree, there is no difficulty in his way as the charge was created before the decree under the compromise deed. Mr. Divatia contended that the compromise deed could not be looked at, as it is unregistered. Mow it seems to me that the answer to Mr. Divatia''s objection is found clearly in Hemanta Kumari Debi v. Midnapur Zemindari Go 5 Ind. Cas. 534 : A I R 1919 P O 84;46 I A 240: 4 O 485 : 37 M L J 525 : 17 A L J L. 117 : 24 O W N 177 : (1920) M W N 66 : 27 M L T 42 : 11 L W 201 : 31 O L J 298; 22 Bom, L R 488 In this case a decree was passed in accordance with a compromise arrived at between the parties to a suit. The petition setting out the terms of the compromise was recited in full in the decree One of the terms related to some lands which were not in the suit. In a subsequent suit to enforce the decree, their Lordships held that the agreement purported to create a contingent interest in the land, and required registration u/s 17 140 730. (b), but the agreement being incorporated in the decree it was not necessary to register it by reason of Section 17 140 730. (b). The next question considered by the Board was whether it fell within that sub-section and whether it was saved by reason of the proviso 6. Their Lordships were of opinion that it was. That is precisely the position here. Lord Buck-master on the point observed as follows (p. 246*):
This in fact is what the decree did in the present ease It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.

7. In support of this opinion Lord Buck-master referred to Pranal Annee v. Lakshmi Annee 22 M 508; 26 I A 101: 7 Sar. 516 : I Bom. L R 394 : 3 C W N 485 : 9 M L J 147 That was a suit for possession of certain land. It was compromised by two documents, one being a rajinama and the other an agreement of union. This latter related to lands in suit as well as certain lands outside the ambit of the suit. The rajinama was not registered nor mentioned to the court. Only the rajinama was produced and a decree made in accordance therewith. The effect of the agreement as to lands outside the suit was set out in the rajinama, lands outside the suit

mentioned in a schedule, but the decree did not refer to the same and no order was made in regard to those lands. The parties acted on the whole agreement for some years. Then a dispute took place resulting in a suit and the question was whether the rajinama could be given in evidence. The Privy Council held that so far as the rajinama related to the lands in the first suit, it was admissible but as the order made had not in fact referred to or mentioned the terms of the compromise, the rajinama being unregistered could not be received in evidence. But in expressing their opinion Lord Waston observed (p. 101).

If the parties, after agreeing to settle the suit of 1895 on the footing that they were each to takes half-share of the lands involved in that suit, and also a half-share of the lands now in dispute, and informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1985, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant that the respondents had agreed to transfer to her the moiety of land now in dispute.

8. A similar question arose in Balshet v. Dhondo 26 B3 : 33 Bom. L R. 545 and Candy, J., disposed of it in these words (p. 38*):

It is unnecessary for us to decide whether, as held by Mr. Knight, an agreement, creating a charge upon property which must have been in 1890 forth with reduced to writing before the Conciliator under'' Section 43, Dekkhan Agriculturists'' Relief Act, and then-forwarded by the Conciliator u/s 41 to the Subordinate Judge, and then ordered to be filed, taking effect from that day as a decree of the court, Would be invalid because it was unstamped, and because it had not been written by, or under the superintendence of, the Village Registrar u/s 56, Dekkhan Agriculturists'' Relief Act. As a fact, stamp duties on such documents were remitted by the Government of India in 1880.

9. Then his Lordship further observed:

And there is no question here of admitting in evidence or acting upon such document All that we are concerned with is the decretal order directing the sale of the land.

10. That, I think, is precisely the point in the case. It is difficult, speaking for'' myself, to see how the case would some u/s 49, Registration Act, It is not necessary for the respondent to go back to the compromise to show that the charge came into existence prior to the debt. There is no question here of admitting the compromise in evidence The decree itself would be judicial evidence of the fact. Nor is the respondent relying upon the compromise deed or seeking to use it for the purpose of affecting an interest in immovable property. All that he is doing now is to enforce the decree which he obtained against the appellants.

11. I think, therefore, even if the section fee construed to mean that the charge must precede the decree, the respondent is entitled to succeed as the decree shows that a charge was created before the passing the decree. But there is another object form in my opinion, to the point taken by Mr. Divatia. Under Rule 3, Order XXIII, when a compromise is presented to the court for being" recorded, the parties to the compromise have an opportunity of disputing the validity or the legality of the compromise. The court is bound to record a compromise if it is lawful. Any question which goes to the root of the matter as a question as to want of registration could have been raised by the appellants when this compromise was presented to the court for being recorded. That was not done. The appellants could have appealed against the order recording the compromise. In any case they could have appealed from the decree which was passed in accordance with the compromise. That was not done. On the other hand, they acted upon it by paying the first instalment and, in my opinion, it is too late for them to object to the legality of the compromise at this stage in execution proceedings and to have the matter re-opened. I think therefore, that the learned Subordinate Judge was right in holding that the appellants were precluded from raising the contention that the compromise was not lawful or valid. In this view I think the appeal must be dismissed with costs.
Broomfield, J.

12. This is an appeal from an order directing sale of the immovable property of an agriculturist in execution of a decree. The decree was based on a compromise and it ordered the defendant, who is the appellant now, to pay a certain sum of money and certain specific property was made security for the debt. The question. whether the property can be sold in execution depends on whether it can be held to have been specifically mortgaged for the repayment of the debt to which the decree relates within the meaning of Section 22, Dekkhan Agriculturists'' Relief Act. The learned Subordinate Judge, it appears, has not made up his mind as to whether it is a case of mortgage or a charge or as to whether the mortgage or charge, as the case may be, was created by the compromise or by the decree. But he was of opinion that in any case the land has been specifically mortgaged within the meaning of Section 22 and is therefore, liable to be sold. He has accordingly directed execution to proceed. We have to construe firstly the decree and secondly the provisions of Section 22, Dekkhan Agriculturists'' Relief Act. As to the construction of the decree, I propose only to say that I agree with my learned brother that the language used in the compromise which was incorporated in the decree "milkatee gahan samajoon taran ahet" not "gahan dile" may fairly be said to indicate that the intention of both the parties and of the court was not to create a mortgage but something less than a mortgage, that is to say, a charge according to the definition in the Transfer of Property Act. That being so, Mr. Thakor''s interesting argument directed to show that the decree required to be attested and registered need not be considered.

13. As to the construction of Section 22, the first question is whether the Dekkhan Agriculturists'' Relief Act intended to draw a distinction between a mortgage in the strict technical sense and a charge. In Section 70, no doubt, both words are used. But in Section 56 the word "charge" is apparently used in a sense where it would include a mortgage and it may be mentioned that the side-note to Section 22 itself uses the word "pledged" as equivalent to mortgaged. Before the Transfer of Property Act was passed no clear distinction was drawn between mortgages and charges, as was pointed out in Girwar Singh v. Narain Singh (1). On the argument addressed to us I am of opinion that the lower Court was right in holding that the words "specifically mortgaged" in Section 22 need not be construed in a technical sense and would apply to a specific charge such as we have in this case.

14. The next question I desire to deal with is whether Section 22 can be applied to a mortgage or charge which is created by the decree itself. For, as the compromise was not registered, I should myself find it difficult to hold that a valid charge was created before the terms of the compromise were incorporate ed in the decree. I think it must be admitted that if Section 22 was intended to apply to a charge created by a decree, the language cannot be regarded as being very clear or appropriate. But the language of this enactment is notoriously difficult to construe, and looking at the matter, as we must, from the point of view of the executing Court, I am not prepared to say that the property in question has not been specifically mortgaged for the payment of the debt to which the decree relates within the meaning of the section. I accordingly agree with my learned brother that the order of the lower Court is right and the appeal fails.