

(1941) 09 BOM CK 0017

Bombay High Court

Case No: Second Appeal No. 319 of 1940

Krishnaji Kondo Sahasrabudhe

APPELLANT

Vs

Narayan Anant Phansalkar

RESPONDENT

Date of Decision: Sept. 18, 1941

Acts Referred:

- Registration Act, 1908 - Section 17(2)(vi)

Citation: (1942) 44 BOMLR 158

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

Bench: Division Bench

Final Decision: Allowed

Judgement

Wassoodew, J.

This is a second appeal from a decree of the Assistant Judge of Satara. The only question involved in this appeal is whether the charge created by a registered compromise decree dated January 15, 1935, between defendant No. 1 Narayan and defendant No. 2 Dattatraya on certain house property is subject to the prior charge on the same property created by an unregistered decree on an award dated June 28, 1932, between the plaintiff and the said Dattatraya.

2. The dispute has arisen in this way. The second respondent Dattatraya owed a certain sum of money to the plaintiff Krishnaji and his cousin, and upon a dispute arising as to the extent of the liability of the said Dattatraya it was referred to arbitration and an award decree was passed thereupon on June 28, 1932. By that award decree a charge was created on a house bearing No. 208A situated at Karad. This is the clause in that decree relating to the charge:-

A charge in respect of the whole amount claimed in the suit is created on both the properties (including the house property). The defendant should not create any charge on the said properties.

3. While proceedings in execution of that decree were pending under darkhast No. 1182 of 1934, defendant No. 1 Narayan on January 11, 1935, instituted a suit against the said Dattatraya to recover a sum of money due to him. Narayan applied for attachment before judgment, and four days later, that is, on January 15, 1935, Narayan and Dattatraya came to terms and a consent decree for Rs. 428 with interest and costs was passed in that suit. That decree also created a charge on the house which had already been charged by the award decree dated June 28, 1932. The decree between Narayan and Dattatraya was then registered. In the proceedings in execution of the award decree an objection was raised by the judgment-debtor Dattatraya to its execution on the ground that the award not being registered the decree was a nullity: He was unsuccessful in the executing Court, and that Court's order was confirmed by the High Court in appeal on April 7, 1937. Pending those proceedings in the High Court Narayan, the holder of the compromise decree, filed a darkhast for sale of the property charged by his decree in satisfaction of his decretal dues. The plaintiff Krishnaji intervened and asked the Court to sell the property subject to the charge created by the prior decree under the award in his favour. As the Court refused to accede to that prayer, Krishnaji filed this suit on January 8, 1937, for a declaration that the charge created by the subsequent decree was subject to the charge created by the prior decree. The trial Court granted the plaintiff the necessary declaration. But the learned Assistant Judge in appeal took a contrary view holding that the charge created by the award decree was not valid because ab initio the award was ineffectual, and that in view of the authority in [Chimanlal Girdhar Ghanchi Vs. Dahyabhai Nathubhai Ghanchi](#), it was clear that no valid charge in favour of Krishnaji was created by the decree. Against that decision the plaintiff has filed this appeal.

4. Mr. Kane for the appellant has argued that the learned Assistant Judge has misinterpreted and misread the case of Chimanlal v. Dahyabhai, and that although the award would require registration, the decree passed thereupon, which has not been set aside in a proper proceeding, creates a valid charge which must take effect against the subsequent charge created by the compromise decree. In short, the argument is that the subsequent incumbrance or charge is subject to the prior charge. It is also urged that as the subsequent charge was created pending the execution of the award decree, it is subject to the rule of *lis pendens*.

5. There can be no doubt that u/s 17, Sub-section (2), Clause(b), of the Indian Registration Act, 1908, an award, which purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, to or in Immovable property, is compulsorily registrable. Although at one time awards were excepted from the operation of Section 17(2) of the Indian Registration Act under Sub-section (2), Clause (vi), of that section, by the amending Act passed in 1929 they were excluded from the excepting clause. That being so, it was held in Chimanlal v. Dahyabhai that it was not competent to a Court to file an award which was compulsorily registrable and had not been registered

and make it a decree of the Court in contravention of the provisions of Section 49 of the Indian Registration Act. There is nothing in the judgment of that case to support the view that where a decree is passed upon an unregistered award, and it has not been set aside or challenged in a proper proceeding, it is a nullity and of no effect. Here the charge is expressly created by the award decree. The law, as it stands, does not require every decree to be registered. According to the provisions of Section 17, Sub-section (2), Clause (vi), of the Indian Registration Act, a decree passed upon an award is no exception to that rule. If such a decree were based upon an award which is unregistered and therefore inadmissible in evidence, it can be impeached in a proper proceeding, such as an appeal, review or revision. At any rate a stranger to the proceedings cannot challenge its validity or underrate its effect on the ground that the decree was founded upon an award which ought not to have been admitted in evidence [see *Arvi Co-operative Credit Society, Limited v. Dhondiram Navalchand* (1939) 42 Bom. L.R. 486 and the observations in [Gurpadappa Dodappa Hasibi Vs. Karveerappa Kulkarni](#), .

6. But it is urged by Mr. Bakhale for the respondent that the decree on the award itself required registration because an award is on the same footing as compromise, and a decree expressed to be made on a compromise and comprising Immovable property other than that which is the subject-matter of the suit or proceeding is under the provisions of Section 17(2)(vi) of the Indian Registration Act compulsorily registrable. In support of his argument that the word "compromise" in Section 17(2)(vi) is synonymous with the term "award", we were referred to the full bench case of [Chanbasappa Gurushantappa Hiremath Vs. Baslingayya Gokurnaya Hiremath](#), . There the question referred to the full bench was as follows:-

Where in a suit parties have referred their differences to arbitration without an order of the Court and an award is made, can a decree in terms of the award be passed by the Court under Order XXIII, Rule 3, or otherwise?

7. It is true that in the judgment delivered by the learned Chief Justice it was observed that the word "compromise" may include a reference to arbitration having regard to the derivation of the term and the primary meaning of the word compromise appearing in certain dictionaries to which reference was made. But the full bench was not considering the provisions of Section 17(2)(vi) of the Indian Registration Act. That clause was amended by Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, the effect of which was that the award was no longer excepted from registration. Similarly consent decrees and orders comprising Immovable property other than the subject-matter of the suit in which they were passed were no longer excepted from registration. The legislature has used the term "compromise" in a technical sense. The obvious object of the legislature by the amendment was, as pointed out by Sir Dinshah Mulla in his treatise on the Indian Registration Act, (4th Ed. p. 91), to supersede the Privy Council decision in 24 CWN 177 (Privy Council) : where it was held, that consent decrees did

not require registration under the old law even if they comprised Immovable property other than that which was the subject matter of the suit. In view of that amendment it would not be improper to assume that the legislature had in view the essential distinction between an award and a compromise. While an award is not in any sense an adjustment by agreement, a compromise is, and the decree passed upon such agreement would, if it falls within the provisions of Section 17(2)(vi) of the Indian Registration Act, be compulsorily registrable. When it is remembered that decrees and orders of a Court are not as a rule compulsorily registrable, and the only exception affects a decree made on a compromise and comprises Immovable property other than that which is the subject-matter of the suit or proceeding, the effect of the exception should be limited strictly to the express words used in the excepting Clause (vi) of Sub-section (2) of Section 17. In the view I take it would not be proper to give a more extended application to the decision of the full bench than what was actually decided. The decree upon an award, passed in favour of the plaintiff on June 28, 1932, is certainly not a decree expressly made on a compromise nor could it be said that it comprises Immovable property other than that which is the subject-matter of the suit or proceeding. The decree in fact was expressly made on an award and in view of the application to file it which was numbered as a suit, the second condition to make a compromise decree compulsorily registrable is not satisfied.

8. It is said that the respondents should not be prejudiced for the omission of the judgment-debtor Dattatraya to take proper proceedings to set aside the decree in time, and that consequently effect should be given to the later charge created by the registered decree, and not to the prior charge. That argument in the view we take is not reasonable and cannot therefore be accepted. It is unnecessary to refer to the provisions of Section 50 of the Indian Registration Act to which reference was made in the course of argument in the Courts below. That section provides for priority between documents, one of which is registered and the other is not. It can have no application to a valid charge created by a decree which though unregistered must have a prior operation being prior in time. Consequently we think the lower appellate Court was wrong in regarding the charge created by the decree in the plaintiff's favour as of no effect. We therefore allow this appeal, set aside the decree of the lower appellate Court and restore that of the trial Court with costs throughout.