

In Re: Jangilal

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Court : Allahabad

Decided On : Mar-20-1929

Reported in : 131Ind.Cas.675

Judge : Kendall ;Young and ;King, JJ.

Appellant : In Re: Jangilal

Judgement :

1. This is a reference made to the High Court by the Board of Revenue under Section 57 of the Indian Stamp Act, 1899, asking for a decision as to the duty chargeable on a security bond given under Order XLI, Rule 5 of the Code of Civil Procedure.

2. It appears that proceedings for the execution of a decree for the recovery of possession of immovable property were pending in the Court of the Subordinate Judge of Muttra. The judgment-debtor applied for stay of execution pending decision of an appeal to the High Court. The Subordinate Judge ordered the execution to be stayed under Order XLI, Rule 5, Sub-rule 2 upon the condition that the judgment-debtor should furnish security for the due performance of such decree or order as might ultimately be binding upon him. The judgment-debtor accordingly produced a surety who executed the instrument in question, hypothecating his property in favour of the Subordinate Judge of Muttra, for the benefit of the decree-holder, as security for any loss that the latter might sustain, up to a limit of Rs. 4,000 owing to any default of misconduct on the part of the

judgment-debtor.

3. The question is what stamp duty is chargeable on this instrument.

4. As the instrument is clearly a 'mortgage deed' as denned in Section 2, Clause (17) of the Indian Stamp Act, it must be chargeable either under Article 40 of the First Schedule as a 'mortgage-deed' or else under Article 57 as a 'mortgage-deed executed by a surety to secure the due performance of a contract.' No other Article has been suggested as possibly applicable.

5. The Board of Revenue are of opinion that Article 40 is applicable but three learned Judges of the Chief Court of Oudh have recently held that a similar security bond furnished under Order XLI, Rule 6 was chargeable under Article 57, Stamp Reference No. 2 of 1927 decided on the 8th December, 1927 [Lal Harihar Partab Bakhsh Singh v. Bisheshar Bakhsh Singh 107 Ind. Cas. 553 : 5 O.W.N. 15 : A.I.R. 1928 Oudh 143 : 3 Luck. 298]. So far as liability to stamp duty is concerned there seems to be no distinction between a bond under Order XLI, Rule 5 and a bond under p. XLI, Rule 6.

6. The instrument in question is no doubt a mortgage-deed executed by a surety and it was no doubt executed to discharge the liability of a third person in case of his default, but the question is whether it can be held to have been executed 'to secure the due performance of a contract' within the meaning of Article 57.

7. The 'contrast' mentioned in Article 57 obviously cannot mean the contract of the surety himself but must refer to the contract of some other person. The learned Judges of the Chief Court held (in the case mentioned above) that the instrument was executed to secure the due performance of a contract between the Court, which passed the order under Order XLI, Rule 6 and the decree-holder. On that view the contract, to secure the due performance of which the instrument was executed in the present case, was a contract between the Subordinate Judge of Muttra and the judgment-debtor. With due deference to the learned Judges of the Chief Court of Oudh we are unable to accept their view.

8. In the first place, we are unable to hold that there was any such agreement between the Subordinate Judge and the judgment-debtor as could amount to a contract. No agreement was expressed. The Subordinate Judge merely passed an order that execution be stayed upon security being furnished. The transaction purported to be an order, and not an agreement or contract. In the Oudh case *Wazir Hasan, J.*, admitted that 'there was no contract floating on the surface,' but held that 'there is always an implied contract in cases of this nature.' He considered that as the decree-holder requested the Court to deliver possession, and the Court agreed to deliver possession, provided that a decree-holder agreed to do certain things in certain events, and provided further that he furnished security for the due performance of the same, and as the decree-holder accepted the conditions and did what was required of him, therefore, there was an implied contract between the Court and the decree-holder.

9. It may be conceded that there was in substance, although not in form, an agreement in the present case between the Sub-ordinate Judge and the judgment debtor that execution should be stayed upon security being furnish/d but; in our opinion, the agreement does not amount to a contract. An agreement amounting to a contract must be entered into by the parties with the object of creating a contractual relation between themselves. In the present case we think it can safely be held that neither the Subordinate Judge nor the judgment-debtor contemplated that their negotiations should result in a contract between themselves. The object which the judgment-debtor had in view was to secure an order from the Court staying execution of the decree. The Court in the exercise of its discretion thought fit to grant the application for stay upon being satisfied that the interests of the decree-holder would be adequately safeguarded by the instrument of security. The parties certainly did not purport to enter into a contract with each other and, in our opinion, they never contemplated the creation of any contractual relation between themselves., Moreover, in our opinion, they did not in fact enter into any contract either express or implied.

10. It has been argued by the learned Government Advocate that there could be no contract between the Court and the judgment-debtor on the ground that contracts can only be entered into between two or more 'persons' and the Court is

not a juridical 'person' and cannot be sued and is, therefore, incapable of entering into a contract. He relies upon certain observations of their Lordships of the Privy Council in the case of *Raj Raghbar Singh v. Jai Indra Bahadur Singh* 55 Ind. Cas. 556 : 42 A. 158 at p. 167 : 22 O.C. 212: 6 O.L.J. 682 : 38 M.L.J. 302 : 18 A.L.J. 263 : 22 Bom. L.R. 521 : 13 L.W. 82 : 46 I.A. 228 (P.C.). This argument does not appeal to us. In the present case the Court passing the order was the Subordinate Judge of Muttra. There would be no doubt be obstacles to suing him upon the alleged contract but we see DO reason to suppose that the Subordinate Judge of Muttra would be incapable of entering into a contract on the ground that he is not a 'person'. If he is not a 'person' then we would observe, in passing that the instrument which forces the subject-matter of the present reference would be inoperative because it purports to hypothecate property in favour of the Subordinate Judge of Muttra. Property can only be transferred to a 'person' so if the Subordinate Judge of Muttra is not a person the instrument would be inoperative. We see nothing in the ruling referred to which lays down the proposition that a Subordinate Judge is not a 'person' since their Lordships of the Privy Council do not suggest that a security bond hypothecating property in favour of a specified officer of the Court would be invalid.

11. The main ground upon which we hold that the transaction between the Subordinate Judge and the judgment-debtor did not amount to a contract is that an agreement is not a contract unless it is enforceable by law. We presume that the word 'contract' in Article 57 is used in the sense of a contract as defined in Section 2 (h) of the Indian Contract Act, 1872. We think it is clear that the alleged agreement between the Subordinate Judge and the judgment-debtor would not be enforceable by law.

12. Supposing the Court passes an order for stay of execution, upon furnishing security under Order XLI, Rule 5 ex parte and supposing the judgment-debtor furnishing the security required. If the decree-holder subsequently appears and induces the Court to set aside its ex parte order, and to refuse stay of execution after hearing the decree-holder's objections, would it then be possible for the judgment-debtor to institute a suit against the Subordinate Judge claiming specific performance of the 'contract' entered into between the Subordinate Judge and

himself or claiming damages for breach of the said contract? In our opinion such a suggestion would be preposterous.

13. Then again it is open to a Court which has passed an order for stay of execution under Order XLI, Rule 5 to set aside or modify its own order by way of review. This is another indication that the Court is not bound by any contract since a contracting party cannot rescind or modify a contract at his own discretion and without the consent of the other contracting party.

14. Even assuming that there was a contract between the Subordinate Judge and the judgment debtor the question arises in what manner and against whom the judgment debtor could enforce the contract by law.

15. No suit would be maintainable for breach of contract against the Subordinate Judge personally. He would, be protected by the Judicial Officers' Protection Act, 1850, which enacts that no Judge shall be liable to be sued in any Civil Court for any act done, or ordered to be done, by him in the discharge of his Judicial duty. This Act probably does not contemplate the protection of a Judge from a suit for damages for breach of contract but the language of the Act appears to us sufficiently wide to grant protection even against a suit of that nature.

16. If the judgment debtor instituted his suit against the Secretary of State in Council on the ground that the Subordinate Judge contracted on behalf of the Secretary of State in Council, he would be met with the objection not merely that the Subordinate Judge did not purport to enter into any contract on behalf of the Secretary of State, but also with the objection that a Judge acting judicially has no authority to enter into a contract enforceable against the Secretary of State. The powers and duties conferred or imposed upon Civil Courts are set forth in great detail in the Code of Civil Procedure. We find no provision in that Code, or in any other Statute, empowering a Judge to enter into a contract with a litigant on behalf of the Secretary of State. The Courts are given statutory powers to pass decrees and orders and to perform certain acts but not to enter into contracts.

17. The Subordinate Judge on his part can no doubt enforce his order against the judgment-debtor as an order but he could not enforce performance against the

judgment-debtor in the manner prescribed by law for enforcing a contractual obligation.

18. We conclude, therefore, that the Subordinate Judge and the judgment-debtor did not in fact enter into any contract and did not purport to enter into any contract. Even if it be assumed that they entered into an implied agreement it was not such an agreement as would be enforceable by law and, therefore, it would not amount to a contract.

19. We hold that the instrument in question was not executed of secure the due performance of a contract and, therefore, Article 57 will not apply. It follows that duty will be chargeable under Article 40, which is the only other Article that could be applicable.

20. No rulings on the question at issue have been referred to us, other than the ruling of the Chief Court of Oudh mentioned above, but the learned Government Advocate has referred to the opinion of two learned Judges of the Bombay High Court, Mulla and Pratt, JJ., in their Commentary on the Indian Stamp Act (1924 Edition at page 376). They submit their opinion that mortgage-deeds executed by way of security under Order XLI, Rules 5, 6 and 10 of the Code of Civil Procedure, being by persons not parties to the suit would not be liable to Court-fee but would be liable to stamp duty under Article 40. This expression of opinion is of course (as has been observed in the Oudh ruling) in no sense authoritative, but as expressing the opinion of two learned Judges of a High Court it is entitled to some consideration; and it supports the view which we have taken.

21. Let a copy of this judgment be submitted to the Board of Revenue.