
(1943) 08 BOM CK 0005
In the Bombay High Court
Case No : Second Appeal No. 659 of 1940

Abdullakhan Daryakhan Mhadik

APPELLANT

Vs

Purshottam Damodar Sura

RESPONDENT

Date of Decision : 03-08-1943

Acts Referred:

Limitation Act, 1908 — Article 91
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1944 Bom 267 : (1944) 46 BOMLR 613

Hon'ble Judges : Lokur, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Lokur, J.—This appeal arises out of a suit filed u/s 53 of the Transfer of Property Act for a declaration that the sale-deed passed by defendant No. 1 in favour of his son, defendant No. 2, on October 19, 1929, was passed with intent to defeat or delay the creditors of defendant No. 1 and was, therefore, not binding on the plaintiff and other creditors.

2. The main defence was that the sale was bona fide and for valuable consideration and not intended to defeat or delay the creditors of defendant No. 1, and that the plaintiff's suit was time-barred under Article 91 of the first schedule to the Indian Limitation Act, 1908.

3. Both the Courts below held that the sale-deed in dispute was passed by defendant No. 1 with intent to defeat or delay his creditors and was, therefore, not binding on them, and that the plaintiff's claim was in time. The plaintiff was, therefore, given a declaration that he and the other creditors of defendant No. 1 were not bound by the sale-deed in suit and that the property comprised in the sale-deed was liable to be attached and sold for the satisfaction of the decree obtained by the plaintiff in Suit No. 259 of 1929.

4. Defendant No. 2 is the son of defendant No. 1 and went to South Africa in

1920 to earn his living. Defendant No. 1 was indebted and defendant No. 2, who was prospering in South Africa, used to send him moneys from time to time. The plaintiff, one of the creditors of defendant No. 1, filed Suit No. 259 of 1929 against defendant No. 1 on October 21, 1929, to recover Rs. 2,399 due to him in respect of various transactions. On October 19, 1929, two days before the institution of the suit, defendant No. 1 passed a sale-deed in favour of his son, defendant No. 2, for Rs. 25,000, purporting to convey to him all his property consisting of lands and a house. He got it registered on the very day on which the plaintiff's suit was filed. Apparently the plaintiff, who was living in the neighbourhood, seems to have come to know about the sale-deed and joined defendant No. 1's sons as co-defendants in the suit. The defendants being Mahomedans, defendant No. 1 alone was liable for his debts. But evidently the plaintiff wanted to have a decree against his sons also in order that the property which defendant No. 1 had sold to defendant No. 2 might still be liable for the satisfaction of his decree sought to be obtained against them. But ultimately his suit was dismissed as against defendant No. 1's sons, and even as against defendant No. 1 he got a decree only for Rs. 1,001, on June 30, 1931. Both the parties appealed against the decree, but it was confirmed on June 9, 1933. The plaintiff then presented a darkhast to recover the decretal amount by attachment and sale of defendant No. 1's moveable property, but the darkhast proved infructuous. He presented a second darkhast in 1934 for attachment and sale of the crops standing on the land sold by defendant No. 1 to his son. The crops were duly attached and sold in spite of the objection put forward on behalf of defendant No. 2. Rupees 36 were realised by the sale and paid to the plaintiff towards the satisfaction of his decree. The plaintiff then presented a third darkhast for the recovery of his decretal amount by attachment and sale of the land itself, and when defendant No. 2's attorney objected to the attachment of the land, the executing Court passed an order on October 26, 1936, that the plaintiff should get a declaration that the sale-deed passed by defendant No. 1 to defendant No. 2 in respect of the land sought to be attached was not binding on him. In pursuance of that order the plaintiff filed the present suit.

5. The concurrent finding of the Courts below that the sale by defendant No. 1 to defendant No. 2 is fraudulent and was intended to defeat and delay the creditors of defendant No. 1 is binding in second appeal. But Mr. Coyajee contends that the finding is based on inferences drawn from proved circumstances, and if the inference is not justified, it is open to this Court to consider whether the transaction is proved to be fraudulent and intended to defeat and delay the creditors of defendant No. 1. The lower appellate Court has found that defendant No. 1 was in debts, that defendant No. 2 used to send him amounts from time to time, that those sums amounted to Rs. 6,000 up to 1929 and that they were utilised by defendant No. 1 towards the payment of his debts. But it has held that the amounts were not advanced by defendant No. 2 as loans to his father and that there was no agreement for repayment of those amounts to him. It has, therefore, come to the conclusion that the sale of all his property by defendant

No. 1 was really without any consideration, and in view of the fact that it was passed only two days before the plaintiff filed this suit and that even after the suit defendant No. 1 himself continued to reside in the house and defendant No. 2 continued to send him amounts as before, it has held that the sale was fraudulent. Mr. Coyajee points out that u/s 25(2) of the Indian Contract Act, 1872, a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, is a valid agreement, and, although defendant No. 2 may have voluntarily sent amounts to his father, the latter might promise to repay the amount, and a sale-deed in repayment of such amount must be deemed to have been for good consideration and that the sale-deed cannot be regarded as void for want of consideration and is binding on defendant No. 1. But that is not the question which is to be decided in this case. A good deal of the correspondence between defendant No. 1 and defendant No. 2 has been produced and it shows that defendant No. 2 did not send the money by way of loan to his father but he wanted to help him out of his indebtedness through his affection or as a duty towards his father. Defendant No. 1 was, therefore, not under any obligation to return the money to his son. The correspondence shows that he was receiving money from 1922 and till 1929 he never thought of compensating his son, but suddenly on the eve of the plaintiff's suit he conveyed to him not only all his lands but even the house in which he was living without having any regard to his other sons. He knew that his son in South Africa was prospering well and was not in need of any property and it is not likely that he would deprive his other sons of their share in order to benefit his rich son. The intention obviously was to screen his property from the plaintiff who was about to file a suit against him. The plaintiff says that he was constantly asking him to repay his dues, and when the lower appellate Court has stated that the amounts advanced by defendant No. 2 to defendant No. 1 were not loans, all it wanted to say was that defendant No. 2 could not be treated as one of the creditors of defendant No. 1, so that the sale of property for the satisfaction of one of the creditors in preference to others cannot be regarded as fraudulent. It was open to defendant No. 1 to prefer one creditor to another and pay his dues to any creditor by the sale of his property. But as defendant No. 1 had not taken any loans from defendant No. 2, the latter cannot be deemed to be his creditor. There is, therefore, no doubt that the sale-deed was brought about with the sole intention of defeating or delaying the plaintiff's claim.

6. On the point of limitation both the Courts have held that the suit is governed by Article 120 of the first schedule to the Indian Limitation Act. On the strength of the ruling in Radika Mohan Gope v. Hari Bashi Saha (1933) C. W. N. 1141 Mr. Coyajee contends that the appropriate article for such a suit is Article 91 and not Article 120. Article 91 provides a period of three years for a suit to cancel or set aside an instrument not otherwise provided for, and the period of limitation begins to run when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. This suit is brought by the plaintiff u/s 53 of the Transfer of Property Act, 1882, on his own behalf as well as on

behalf of all the creditors of defendant No. 1 for a declaration that they are not bound by the sale-deed in suit. The plaintiff does not and cannot seek to have the sale-deed cancelled or set aside. Even on the allegations of the plaintiff the sale-deed is not absolutely void and will be binding on the executant defendant No. 1. The plaintiff, who is not a party to the deed, merely wants to have a declaration that he and the other creditors of defendant No. 1 are not bound by it. There seems to be no ruling of this Court exactly in point, but in dealing with Article 95 which governs suits to set aside a decree obtained by fraud or for other relief on the ground of fraud a division bench of this Court, (of which I was a member), in *Saburdas Mahasukkram v. Gopalji Nandas* (1942) 45 Bom. L.R. 526 has held that the fraud contemplated by that article is fraud practised upon a party to the decree or a party to the transaction in which the fraud was committed. A stranger to a decree who is intended to be defrauded by it cannot sue to have it set aside, but he can have it declared that his interest cannot be affected by such a collusive decree. A suit for such a declaration does not, therefore, come within the purview of Article 95 but is governed by Article 120. This reasoning applies equally to Article 91.

7. In *Parkash Narain v. Raja Birendra Bikram Singh* ILR (1931) Luck. 131 ILR (1930) 12 Lah. 262 *Lal Singh v. Jai Chand and Guntur Narasimham and Another Vs. Nyapati Narayan Rao Garu*, , Article 120 and not Article 91 was held to be applicable to a suit filed by a creditor u/s 53 of the Transfer of Property Act. It is contended that such a suit is virtually a suit to set aside a sale-deed on the ground of fraud and, therefore, ought to be governed by Article 91 which in terms is intended to apply to it. The short reply to this is to be found in *Pachamuthu v. Chinappan* ILR (1887) Mad. 213 where it is observed (p. 215):

No doubt a declaration that defendant No. 5 (the transferee) has no title to the plaint land would be to that extent equivalent to setting aside that mortgage. But such declaration would still leave the deed to operate as between the parties thereto, and therefore would not amount to cancelling or setting aside that deed. Moreover the plaintiff has no title or interest to set aside the deed as between the parties thereto.

8. The only case where Article 91 was held to apply is *Radhika Mohan Gope v. Hari Bashi Saha* (supra) relied upon by Mr. Coyajee. But there the suit was not filed by a creditor, but by an auction-purchaser who by purchasing the right, title and interest of the judgment-debtor had stepped into his shoes and was, therefore, the representative of a party to the transaction sought to be avoided. Mr. Justice Mukerji who decided that case had this distinction present before his mind and he said (p. 1143) :

Article 91 " can possibly have no application where the deed which the plaintiff challenges is one which was not executed by him or by one under whom he claims, and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But there is no doubt that it does apply to a case in which it is not possible for the plaintiff to get any relief until the instrument is set aside. In

other words, if the instrument is binding upon the plaintiff, then even though the plaint may have been made to look as much like a suit for recovery of lands as possible, the plaintiff in order to get any such relief must have the instrument cancelled or at any rate have a declaration of its invalidity as against him.

9. Thus, the auction-purchaser being the representative of a party to the deed itself, he had to get it set aside before getting any other relief ancillary to it. This case is, therefore, not inconsistent with the view expressed in the cases cited above that a suit by a creditor u/s 53 of the Transfer of Property Act for a declaration that a transfer by his debtor is intended to defeat or delay him and his other creditors and is, therefore, not binding on them, is governed by Article 120 and not by Article 91, and I respectfully agree with that view.

10. The next point for consideration is the date from which the period of limitation begins to run. Article 120 itself says in general terms that it commences " when the right to sue accrues." In *Sola v. Koklan* (1930) L.R. 57 IndAp 325 their Lordships of the Privy Council observed at p. 331 that there can be no " right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted. Mr. Coyajee argues with evident plausibility that even according to this view the right to sue accrued to the plaintiff, if not when the sale-deed was executed by defendant No. 1, at least when its execution came to the plaintiff's knowledge and he became aware of the circumstances from which he could infer fraud on the part of defendant No. 1. Both the Courts below have held that the plaintiff came to know of the sale-deed within a week of its execution, since he applied on October 28, 1929, to have the sons of defendant No. 1 added as parties to his suit. If so, this suit filed on April 13, 1937, is clearly out of time. But why should he rush to the Court as soon as he comes to know that a fraudulent sale-deed is executed by his debtor ? He was not yet sure that he would get a decree against him. In fact, though he had sued for Rs. 2,000 and odd he got a decree for Rs. 1,001 only and even that decree was challenged in appeal. When it was confirmed he had no reason to suppose that he could not recover his dues except by the sale of the property that had been fraudulently transferred by defendant No. 1 to his son. He first sought to recover his decretal dues out of the moveables of defendant No. 1, Failing in that attempt, he sought to recover them out of the crops standing on the land sold by him to defendant No. 2. He succeeded and was able to recover Rs. 36. Then he tried to have the land itself attached and sold and met with defendant No. 2's obstruction. The Court then asked him to get a declaration that the land was liable to be sold in execution of his decree. Even assuming that the right to sue accrued to the plaintiff when he obtained his decree against defendant No. 1 on June 30, 1931, this suit filed within six years thereafter is well within time.

11. In each of the cases cited above, the decision went on its own facts. In *Parkash Narain v. Raja Birendra Bikram Singh* and *Lal Singh v. Jai Chand* there

was no difficulty as it was held that the plaintiff was not proved to have known of the fraudulent transfer more than six years before the suit. In *Narasimham v. Narayan Rao* (supra) there was a difference of opinion. Venkatasubba Rao J. held that a suit u/s 53 of the Transfer of Property Act to contest an alienation by a debtor was governed by Article 120 of the Indian Limitation Act, but the starting point of limitation was the date on which the plaintiff decided to exercise his option of avoiding the transfer, while Madhavan Nair J., while agreeing with him that such a suit was governed by Article 120, was of opinion that the starting point for limitation was not the date on which the creditor exercised the option to avoid the transfer nor the date of transfer, but it was the date on which the circumstances entitling the creditor to have the transfer avoided first became known to him. With respect, I find the reasons given by the former more convincing. Referring to the suggestion that the date of knowledge of the fraudulent transfer was the starting point of limitation he says (p. 68):

... it matters little to a creditor that his debtor has alienated some of the properties. Why should a creditor be driven to embark on litigation, merely because it has come to his knowledge that his debtor has entered into a transaction not above board ? The property still remaining as I have said, may suffice or they may hope that the debtor may in time rally, and no creditor can be expected to have before him a balance sheet disclosing actually the debtor's affairs.

12. Section 53 of the Transfer of Property Act gives the creditor an option to avoid his debtor's fraudulent transfer and that option may be exercised when it is found necessary to do so. In differing from this view Madhavan Nair J. says (p. 70):

The result of holding that the starting point for limitation is the exercise of option by the creditor is that the creditor, in that case, would be entitled to wait any number of years he pleases before bringing the suit, which would mean that in effect, there would be no period of limitation at all for a suit u/s 53 of the Transfer of Property Act.

13. But there is no reason to be scared away by such a contingency. To cite a similar instance from the Indian Limitation Act, under Article 60, the period of limitation for a suit to recover money deposited under an agreement that it shall be payable on demand is three years from the date when the demand is made, and in such a case the making of the demand depends entirely on the volition of the plaintiff and he can prolong the period of limitation indefinitely by not making any demand. The exercising of the option is analogous in this respect to the making of the demand and it may be exercised at any time when it is thought necessary. Instead of filing the suit for a declaration in the beginning, it is open to the decree-holder to attach the property in execution of his decree and when the transferee prefers a claim under Order XXI, Rule 58, Civil Procedure Code, and his claim is allowed, the decree-holder may file a suit under p. 63 within the statutory period of limitation without regard to the lapse of time from the date of

the alienation or from the date when he came to know it. Similarly, if the claim of the transferee is disallowed and the transferee files a suit under Rule 63, the decree-holder may defend it by contending that the transfer was in fraud of his creditors. In such cases, the decree-holder exercises his option -without resort to a suit u/s 53 in the first instance, and, as pointed out by Venkatasubba Rao J. it would be anomalous to say that although his right to file a suit is barred, his right still subsists to question the transfer by these other methods.

14. The plaintiff in this suit did follow such other methods. He wanted to recover his decretal amount out of the property in dispute and the right to bring this suit accrued only when he was obstructed in doing so. He knew that in spite of the transfer defendant No. 1 was in a position to pay his creditors. His son defendant No. 2, who was prospering in his business in South Africa, used to send him funds to enable him to pay off his creditors and it has been found that he did pay off several creditors in that way. Mr. Coyajee points out that if the plaintiff had such hopes he would not have found it necessary to file a suit against defendant No. 1. But that may be due to a dispute regarding the amount due to the plaintiff. But once the decree was passed, the plaintiff might hope that defendant No. 1 would satisfy it. Hence the right to sue accrued to the plaintiff only when he decided to exercise the option given to him by Section 53 of the Transfer of Property Act to challenge the transfer and to seek to recover his dues out of the property transferred. This happened when the plaintiff sought to attach the crops on the land in suit, although he knew that the land had been already transferred by the judgment-debtor to his son. This suit brought within six years thereafter is, therefore, in time.

15. The appeal is, therefore, dismissed with costs.