

(1952) 08 KL CK 0008

In the High Court Of Kerala

Case No : Second Appeals No's. 81 to 86 of 1124

Abubaker Muhammad and Others

APPELLANT

Vs

Kunju Muhammad and Others

RESPONDENT

Date of Decision : 08-08-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 13(2)
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1952 Ker 321

Hon'ble Judges : K.T. Koshi, C.J.;Gangadhara Menon, J

Bench : Division Bench

Advocate : K.P. Abraham, for the Appellant; T.R. Atchutha Warriar, for the Respondent

Judgement

Koshi, C.J.—These second appeals arise from six suits instituted before the Crangannur Munsiff's Court by the receiver appointed by the Parur District Court in O.S. 75 of 1104. Those suits were to enforce six kuri security bonds executed severally by different subscribers in favour of the foreman. The said O.S. 75 was one instituted for the administration of his estate. There were three Plaintiffs in the suit and the Court made one of them receiver. On certain grounds common to all the six suits the District Munsiff dismissed them all. The Plaintiff preferred appeals against those decrees before the Anjikaimal District Court but he died before they were disposed of. The two remaining Plaintiffs in O.S. 75 and the legal heirs of the original Plaintiff got themselves impleaded as additional Appellants in all the appeals. The objection the Respondents in the various appeals raised against the legal competence of the new Appellants to come on record and continue the appeals was repelled by the learned Additional District Judge before whom the appeals came up for disposal. His ultimate decision was however that the appeals should all be dismissed. These second appeals are against the decree so rendered.

2. The learned District Munsiff and the learned Appellate Judge concurrently

found that the claims under the several bonds put in suit were all duly satisfied. With respect to the bonds in S.A. Nos. 81 and 85, discharge was effected by payments to certain non-prized subscribers as per the foreman's directions and he himself passed the necessary vouchers to the respective obligors. Exs. III and II are the relative vouchers. As per the bonds in the other suits some were transferred by the foreman himself and the Ors. after his death by his legal heirs to certain other non-prized subscribers. The obligors under those bonds paid the amounts due by them to the respective transferees. Before us the factum and the validity of the payments under all the six bonds were sought to be impugned. Whether in second appeal we can or should go into these questions is a matter for serious consideration.

3. However before we proceed, it is worthwhile to mention the other questions argued before us. While the Respondents challenged the correctness of the lower appellate Court's decision that the present Appellants had the right to continue the appeals preferred before that Court by the original Plaintiff, on behalf of the Appellants it was strenuously contended that both the lower Courts went wrong in holding that the receiver appointed by the Parur District Court had no "locus standi" to maintain the suits he brought before the Crangannur Munsiff's Court. The suits were filed so long ago as 1119 and it was only a few months after the institution of these second appeals that the integration of the States of Travancore and Cochin took place. Before that the Parur Court was a foreign court to the Crangannur Court in the sense of private international law. The question whether the suits instituted by the foreign receiver were maintainable will depend on the view whether the kuri security bonds sued upon constituted moveable or Immovable properties. A further point argued was that in view of the amalgamation of the two states the bar, if any, was removed, and that this Court could now pass the decrees originally asked for.

4. Nice and interesting as these questions are, they need not in our opinion be decided here inasmuch as a prior decision of ours arising out of a suit in respect of the identical kuri furnishes a proper answer to the claims made in these suits. Under that decision, these suits must fail on merits. We have in mind - "Mohamad Abu Backer v. Ouseph Chekku" AIR 1951 TC 97 (A). That case arose out of a suit brought by the present Appellants in the Parur Munsiff's court to enforce a security bond similar to the bonds sued upon here and the defence was that the amounts due as per the bond were set off against certain claims which the Defendant thereto had acquired against the Plaintiffs by virtue of certain purchases he made of the rights of a few non-prized subscribers. The question arose whether that set off was valid as it was effected long after the foreman had committed default to conduct the kuri. After referring to certain decisions of the Travancore High Court, and the insolvency law as administered in that jurisdiction when the said set off was made we held that the suit was not sustainable. In other words we upheld the validity of the set off. In our opinion that decision must govern these cases. Nothing that we heard in these appeals has induced us to think that a different rule should be applied here. Even if all

other questions are decided in favour of the Appellants that will be of no avail unless they could show they are entitled to succeed on the merits. In - "Mohamed Abbu Backer v. Ouseph Chekku (A)", no technical grounds as we have here arose as the suit was before a Travancore Court.

5. Before we explain how that decision would rule these cases two other points have to be disposed of. One relates to the truth of the discharge pleaded in these cases and the other to the true meaning of Clause 15 of the "kuri Vaimpu". We have said that the decisions of the two lower Courts are concurrent about discharge. The Appellants urged that there was no legal evidenced to sustain the finding on this point and that appellate Court had not brought to bear on the question any independent consideration. The appellate judgments no doubt give room for such a complaint but on reading the trial Court's judgments and the evidence we do not think we should pay any heed to either aspect of the criticism. In all the cases the plea of discharge is supported by registered documents and there is also formal evidence in corroboration. In the circumstances we cannot in second appeals go behind] the concurrent decisions the lower Courts made on the question.

6. Nor are we able to accept the Appellant's construction of Clsuse 15 of the "Kuri Vaimpu". That clause is reproduced verbatim m the main judgment of the lower appellate Court and as explained there all that it means is that, the kuri assets shall in the first instance be applied to discharge the liabilities of the kuri transaction. It does not as contended for on behalf of the Appellants create any proprietary interests over the said assets in favour of the non-prized subscribers or even create a charge or a trust in their favour. There is no evidence that the "Kuri Vaimpu" was registered. The proposition that the moment the foreman commits default to conduct the kuri he ceases to have any authority to deal, with the assets of the kuri is unwarranted by the terms of the "vaimpu". To uphold it would be to create an impossible position with respect to conduct of kuries and to extend the rule of "relation back" even beyond its scope and amplitude under] the Bankruptcy Law in England or under the Presidency-towns Insolvency Act. No doubt if the kuri assets are alienated in such a way as to defeat or delay the non-prized or unpaid prized subscribers such alienations will be voidable at the instance of such subscribers. The law does not go beyond that. See - "Chenthi Perumal v. Kesava Perumal" 26 Trav LJ 1178 at p. 1181 (B).

7. The decision in - "Padmanabhan v. Kunju" 25 Trav LJ 1288 (C), relied upon by the learned Counsel for the Appellants is clearly distinguishable. There, pursuant to a voluntary transfer of the rights in a kuri security bond the transferee had not actually recovered the money from the obligor thereof. In an action by the transferee against the obligor other non-prized subscribers were also impleaded as Defendants. Some of them had attached the rights in the kuri security bond a but the point of time of the attachment is not clear from the judgment. The Court held that the transferee could not have any preferential right but that all non-prized subscribers should rateably share the amounts due under the bond.

8. In the suits giving rise to these second appeals the position is entirely different. All these six suits were filed on 30-6-1119. The foreman's default occurred in 1092. The administration suit O.S. 75 was instituted only in 1104. The preliminary decree in that suit was not passed until 23-4-1108. The discharge of the claim in S.A. 81 was on 20-3-1096 (Ex. III) and that in S.A. 85 was on 23-3-1093 (Ex. II). The rights in the bond sued upon in S.A. 82 were transferred on 9-9-1095 (Ex. IV) and the transferee realised his amounts by bringing to sale through Court the properties secured under the bond and purchasing them himself. (Exts. v. to VIII). The transfer of the bond in S.A. 83 was on 27-7-1099 (Ex. XI) and there was a further transfer on 8-5-11 (Ex. XII). The second transferee had to bring a suit to realise his amounts. (Exs. XIII to XVIII. Ex. XVIII evidences the transfer of the rights under the bond in S.A. 84 and the transferee realised his amounts out of Court long before the administration suit was brought. (See Exts. XIX to XXXI). The last payment was on 17-2-1104 (Ex. XXIV). The legal heirs of the foreman parted with the rights under the bond sued upon in A.S. 86 on 13-12-1100. To hold that the transfers or discharges as the case may be in these various suits will not bind the Plaintiffs would be to decide these cases without a legal basis to sustain the decisions. The Appellants argument was that the transfers made by the foreman or his legal heirs, or payments made were all "ab initio void". That position is not supported by any authority and we have shown that the decision in - "26 Trav LJ 1178 (B)", is opposed to that view.

9. Here we would quote an extract from our own decision in - "AIR 1951 Trav-C 97 at p. 99 (A)". We said:

Order XX Rule 13(2), Code of Civil Procedure, so far as it is relevant for our present purpose, provides that when it appears in an administration suit that the estate of the deceased is insolvent, the rules that are in force for the time being with respect to the estates of persons adjudged or declared insolvent shall apply as regards the respective rights of secured and unsecured creditors and the debts and liabilities provable. Under the insolvency law in force in Travancore in 1104 payments made to or realizations made by creditors before adjudication were protected. See - "Chandy v. Quseph" 16 Trav LJ 166 (F.B) (D). Another Pull Bench decision reported in the same volume - "Pothan Thommy v. Sukla Pai" 16 Trav LJ 152 (E), decided that the words "date of the order of adjudication" in Section 33 cannot be construed to mean the date of the presentation of the petition of insolvency to which the order of adjudication relates back by virtue of Section 16 Clause (6) and that those words meant nothing more or less than the date on which the order of adjudication is made. When that law is applied to administration suits, the date of adjudication is equivalent to the date of the preliminary decree. See - 32 Trav LJ 525 (F). In that case the District Judge held that creditors when they prove their claims in an administration suit have to give credit to the amounts they realised before the passing of the preliminary decree and that such amounts should be deducted from the dividend due to them in the administration suit. The High Court reversed the District Judge's decision and

held that the amounts realised prior to the preliminary decree are not to be taken into account in adjusting the lights of the parties. The present is an a fortiori case in that the realisation was made even before the administration suit was instituted.

In this batch of appeals we saw the foreman had either received payment to pay off non-prized subscribers or towards the same end he or his legal heirs had parted with the rights in the bonds long before the administration suit was filed. In the case in - "32 Trav LJ 525 (F), referred to in the above extract, Nokes J. said:

Section 33 of the Insolvency Act of 1090 (now Section 51) protected moneys realised by such creditors as these before adjudication, as decided by a Full Bench in - "16 Trav LJ 166 (D)" and adjudication meant the actual date thereof as decided by Anr. Full Bench in - "16 Trav LJ 152 (E). In the application of this law to administration, the date of adjudication is equivalent to the date of the preliminary decree.

This was the law obtaining in the jurisdiction where the kuri was conducted when the impugned transfers and payments took place. The payments through the foreman evidenced by Exts. II and III and the transfers evidenced by Exts. IV, X, XI and XVIII were all before the Insolvency Act was amended in Travancore in 1108. Under that amendment protection was given only to payments made prior to the presentation of the petition which when applied to an administration suit would be the date of the institution of the suit. The transaction mentioned are all before 1104, The rule of relation back does not under the Travancore or Cochin Acts or under the Provincial Insolvency Act, 1920, relate to a period anterior to the presentation of the petition. Transactions which do not come under that rule are prima facie valid unless they can be avoided under some express statutory provision, e.g., Sections 53 and 54, Insolvency Act (these sections are the same under Travancore, Cochin and the Provincial Insolvency Acts) or Section 53, Transfer of Property Act, 1882 in other words, the Appellants cannot demand payment over again unless the transactions impugned fall within the mischief of Section 53 or Section 54 of the Insolvency Act or Section 53 of the Transfer of Property Act. The avoidance of a voluntary transfer u/s 53, Insolvency Act, is confined to cases where the transferor is adjudged insolvent within two years after the date of the transfer and Section 54 covers only cases where the presentation of the petition in insolvency is within three months of the transfer.

10. Reference is made to these provisions as in certain respects Order 20, Rule 13(2), CPC makes the law of insolvency applicable to administration suits. In the extract from "AIR 1951 TC 97 (A) this aspect is mentioned. Even if the foreman or his estate was sought to be declared insolvent by means of a petition presented on the date of the institution of O.S. 75 the payments and transfers impugned here would have remained protected.

11. One aspect of the case yet remains to be considered. We indicated that yet

Anr. mode of avoiding these payments and transfers was by means of a suit u/s 53, Transfer of Property Act. No such suit was brought in respect of these dealings and assuming that a suit need not specifically be brought as a necessary preliminary to claim the amounts due as per the several bonds, the question whether the transactions were bad did not arise on the pleadings in the case. Even after the Defendants in the various suits filed their written statements pleading discharge the Plaintiff did not seek to make any amendment to the plaints filed by him. Unless an issue was raised and tried it will be unfair to the Defendants to hold that the various payments or transfers were all invalid merely because the transfer deeds themselves refer to the foreman's default to conduct the kuri. The decision would no doubt have been different were we able to accept the contention that these transactions were all "ab initio void. To send the cases back now for the necessary amendments will be to permit amendments long after six years from the date the Plaintiff came to know of the circumstances entitling him to have the transfers or payments avoided. If he did not know of these payments and transfers when the suits were originally filed he came to know of them when the written statements came to Court. To hold that we can in these suits, and as the pleadings now stand, declare these payments and transfers invalid as fraudulent preferences or on other grounds will be to circumvent the law of limitation.

12. The second appeals have therefore to be dismissed and we decide accordingly. The legal heirs of the original Plaintiff happened to come on record as the trial Court's decree made the original Plaintiff personally liable for costs. The lower appellate Court modified the trial Court's directions regarding costs to the further detriment of the Appellants. Regard being had to all the circumstances we think these to be proper cases where the parties should be asked to bear their respective costs throughout, and that will be our decision on the question of costs in these cases. To quote precedents for such an order is certainly unnecessary but we find one in - "Ram Iyer v. Sundareswara Sastri" 30 CLR 598 (G). That was a suit more or less similar to the suits now before us.

13. The Court fee payable to the State on all the six plaints will be realised out of the estate under administration in O.S. 75 of 1104 of the Parur District Court. The Appellants will not be personally liable for the same. Decreed accordingly.