

(1963) 06 KL CK 0006

In the High Court Of Kerala

Case No : A.S. No"s. 419, 440, 542 and 543 of 1959

Ittyavirah and Others

APPELLANT

Vs

Sri Subramoniasway Devaswom and Others

RESPONDENT

Date of Decision : 12-06-1963

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : (1964) KLJ 258

Hon'ble Judges : M.S. Menon, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : T.K. Kurien in A.S. 419/1959 and A.S. 440/59 and Respondents 3 to 5 and 7 in A.S. 542/59 and Respondents 4 to 7 in A.S. 543/59, for the appearing parties; Joseph Vithayathil, George Vadakkal, A.K Abraham, E.V. Abraham in A.S. 419/59 and 440/59 and Appellants in A.S. 542 and 543 of 1959, T.S. Krishnamoorthi Iyer and G.R. Menon For 1st Respondent in A.S. 542 and 543 of 1959, for the Appearing Parties

Final Decision : Dismissed

Judgement

M. Madhavan Nair, J.—A.S. Nos. 440 and 543 of 1959 have arisen in O. S. No. 39 of 1950 on the file of the Subordinate Judge, Kottayam, which, is for recovery of two items of landed property with mesne profits. Plaintiffs therein claim to be the lessees of the properties, 4 odd and 17 odd acres respectively, in extent, under the Neendoor Subrahmaniaswami Devaswom. They claim to have been in possession of the properties in 1122 and been ousted by defendants in 1123. The 2nd defendant therein is a rival claimant to item 1. He asserted that that was his absolute property and had subsequently instituted O. S. No. 130 of 1952 in the same court to establish his title thereto. The 1st defendant in O. S. No. 39 claimed to be the purchaser of the rights of a prior lessee of item No. 2 under the Devaswom and denied liability to surrender it to the plaintiffs. Based on the removal of crops on the two items by the defendants which the plaintiffs claim to have had raised, the latter have instituted O. S. No. 291 of 1124 for damages. These three suits were tried jointly and disposed of together. O. S. Nos. 39 and

291 were allowed in regard to item No. 1 and the crop thereon and dismissed in regard to item No. 2 and its crop; and O. S. No. 130 dismissed. It is convenient in the circumstances to refer to the parties by their position in O. S. No. 39. A.S. Nos. 419 and 440 are by the 2nd defendant against the dismissal of his suit O. S. 130 and the decree regarding item No. 1 in O. S. 39. A.S. Nos. 542 and 543 are by the plaintiffs against the dismissal of their suits O. S. 291 and 39 as regards item No. 2 and its crop. Item No. 2 along with others is stated to have been leased by the Devaswom to the Koyikkal family whose interests devolved on Mathu Korula. For resumption of the property with arrears of rent, the Devaswom instituted O. S. No. 958 of 1107 against Mathu Korula and his assignee Cheriyan Varghese. It was decreed on 5-2-1110. Ext. A is a copy of that decree. It was assigned by the Devaswom in favour of Mathen Simon as per Ext. O dated 10-1-1111. The same day the Devaswom granted a lease of both the items to Mathen Simon, which is evidenced by Ext. LX here.

2. Before the institution of the aforesaid suit, Mathu Korula had on 28-7-1102 hypothecated his leasehold interest along with other properties to Nilakanta Iyer, the father of D. W. 4, who enforced the same in O. S. No. 17 of 1107 and purchased the interest on 1-4-1110 and took delivery on 13-7-1110 evidenced by Ext. XV, attested by Cheriyan Varghese.

3. Thereafter on 2-11-1117 Matheu Simon purported to take delivery of the property in execution in O. S. No. 958 of 1107, from Mathu Korula and Cheriyan Varghese. He then assigned his interests in the properties to the 3rd defendant (who is none other than the son of the 2nd defendant in this case) as per Ext. B dated 17-9-1118. On 31-11-1121 the plaintiffs obtained a lease of both the items from the Devaswom; and on 10-1-1122 got a surrender of the properties from the 3rd defendant as per Ext. D. Thus, the plaintiffs claim possession of the properties under the delivery of 1117.

4. It is in evidence that Mathu Korula was adjudicated insolvent on 20-5-1105 (vide Ext. XII) and the assignment of lease he executed in favour of Cheriyan Varghese (Ext. N) was annulled by the Insolvency Court on 18-12-1109 (vide Exts. XIV and XXIII). In Ext. A decree the only defendants were Mathu Korula and Cheriyan Varghese. As the former had been adjudicated insolvent his estate was vested in the Official Receiver who was not made a party thereto. Counsel for the appellants contended that the transfer to Cheriyan Varghese was only a voidable one, and therefore valid and effective till it was annulled by the Insolvency Court and that not having occurred in 1107 the institution of O. S. No. 958 of 1107 must be held to have been proper. That may be so. But when the assignment in favour of Cheriyan Varghese was annulled by the Insolvency Court in 1109, the property reverted to the insolvent to be immediately vested in the Official Receiver. It must then follow that subsequent to 18-12-1109 the only person who could represent the property was the Official Receiver. The decree Ext. A was in 1110 only. At the time of that decree, the leasehold in the property was not represented by any party thereto.

5. Counsel for plaintiffs contended that the vesting in the Official Receiver by virtue of the annulment in 1109 having been during the pendency of O. S. No. 958 of 1107, was affected by *lis pendens* and therefore cannot avail against the delivery proceedings evidenced by Ext. XV. We cannot agree. The analogy of Section 52 of the Transfer of property Act cannot be drawn to cases of annulment of transfers in insolvency. In *Puninthavehu Mudaliar v. Bhashyam Ayyangar* (25 Madras 406) Sir Arnold White C. J. observed :

It has been argued on behalf of the appellant that the Official Assignee is bound by the decree, though not a party to the suit inasmuch as the devolution of interest took place *pendente lite*. This, in my opinion, is clearly not so.....The interest devolved by operation of law, and so far as the Official Assignee is concerned the devolution was in *invitum*.

Bhashyam Ayyangar J., agreeing with the learned Chief Justice, observed:

The principle of the decision in *Wood v. Surr* is that the Official Assignee being one appointed "in *invitum*" and not a "voluntary purchaser" as in the case of a transfer by act of parties or by an "insolvency sale" in execution of a decree, the doctrine of *lis pendens* cannot affect him and the party seeking to bind him (the Official Assignee) by the result of the suit, pending which the interests of its subject-matter has devolved on him by operation of law, ought to take proceedings to join him as a party to the suit and obtain the decree against him.

In *Mokshagunam Subramania Aiyar Vs. S.V. Ramakrishna Aiyar, Sadasiva Aiyar J.* held that as soon as adjudication is made, the property vests in the court or the Receiver, that any decree obtained thereafter against the insolvent is nullity and that the doctrine of *lis pendens* does not affect the court or the Receiver.

In *Indian Cotton Co. Ltd. v. Ramachandranlal Chunnilal* (A. I. R. 1939 Nag 128) Pollock J. observed :

If the Receiver stands in the same position as a transferee *pendente lite*, he will be bound, for it is not obligatory on a plaintiff to implead a transferee *pendente lite*. S. 52 T.P. Act, provides that during the pendency of any suit in which the right to immovable property is in question the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto. The question is whether property can be said "transferred or otherwise dealt with when its owner files an insolvency application and is adjudged insolvent so that his property vests in the Court or the Receiver appointed by the Court. In such a case it cannot, in my opinion, be said that the former owner of the property has transferred it or otherwise dealt with it. His whole estate has devolved on the Receiver just as, in case of his death, it would devolve on his heir.....

The position then is, as in 42 Cal. 72, that no proper steps were taken to bring the Receiver before the Court and obtain an order binding on him; accordingly he was not bound by anything which was done, and further the judgment-debtors

had at the time of the sale no right, title or interest which could be sold or vested in a purchaser and consequently the respondents acquired no title to the property.

It then follows that at the time of the decree (Ext. A) in O. S. No. 958 of 1107 Mathu Korula had been adjudicated insolvent and his properties vested in the Official Receiver; Cheriyan Varghese's title deed had been annulled by court; therefore neither was competent to represent the leasehold interest in the property that was once with Mathu Korula; and that that interest was then vested in the Official Receiver who had not been made a party to the decree. The decree, and the delivery proceedings that followed it, were null and void and with them must fail the plaintiff's claim of possession traced thereunder.

6. On the other hand, the leasehold interest had been the subject of a court-sale and delivery in favour of Nilacanta Iyer in O. S. No. 17 of 1107 to which the quondam lessees, Mathu Korula and Cheriyan Varghese, and the Official Receiver were parties. The leasehold interest must therefore be held to have passed by those proceedings to Nilacanta Iyer, who was succeeded by his son D. W. 4. The latter had leased out item 2 to the 2nd defendant and later filed O. S. No. 127 of 1121 to resume the property from him. The last mentioned suit was compromised on 31-12-1122 (vide Ext. XVIII) and the 2nd defendant surrendered the property back to D. W. 4. On 2-8-1123, D. W. 4 sold suit-item 2 to the 1st defendant. The claim of title from Mathu Korula to the 1st defendant is thus complete and has no legal defect about it. It must then follow that the title to the leasehold interest that was once in Mathu Korula has devolved on the 1st defendant. The decree of the court below finding the 1st defendant to be the present lessee of item No. 2 under the lease Ext. XXXIII of 25-2-1073 is accepted and A.S. Nos. 542 and 543 dismissed.

7. As regards plaint item 1, the 2nd defendant is admittedly in present possession. He claims absolute title thereto and denies the Devaswom to have any right therein. He traces his title to registration ordered in Puthuval File 75 of 1087 in favour of D. W. 1, Sankara Pillai. To evidence the decision in the Puthuval case he has produced Ext. IV, thandapper. Sankra Pillai assigned the property to Kesava Pillai as per Ext. VI dated 21-6-1104, and the latter assigned to the 2nd defendant on 15-9-1117, the relative instrument being Ext. IX. The 2nd defendant examined as D. W. 7 admits his deposition in a former suit, concerning the present plaint items Nos. 1 and 2, between the same parties, namely O. S. No. 336 of 1123, on the file of the Munsif, Ettumanoor, which is marked here as Ext. T. He has admitted therein categorically even in his examination-in-chief that the present plaint item 1 was part of the property involved in that suit and that the entire property belonged to the Devaswom. He has gone further to state therein that the lease of both the items granted by the Devaswom to Mathen Simon, Ext, LX here, was benami for him. When he was confronted with the above deposition of his, the only explanation he had to give was that that statement was given by him as per an agreement come with the plaintiff's

counsel. Counsel has not been cited to bring out that agreement. The Presiding Officer before whom he was examined has disbelieved him and, in view of his prior admission, accepted the plaintiffs' case and held the title to the plaint item No. 1 to be with the Devaswom which has leased it to the plaintiffs. Appeal Nos. 419 and 440 also fail. In the result, the decree of the court below is accepted in full and all the four appeals are dismissed. The 1st respondent in A.S. No. 543 of 1959 and the respondent in A.S. No. 440 of 1959 will have their costs from the respective appellants and there will be no order as to costs in the other two appeals.

Decree accordingly.