

(1962) 01 KL CK 0002
In the High Court Of Kerala
Case No : A.S. No. 600 of 1957

John

APPELLANT

Vs

Cherian

RESPONDENT

Date of Decision : 29-01-1962

Acts Referred:

Evidence Act, 1872 — Section 92
Transfer of Property Act, 1882 — Section 53

Citation : (1962) KLJ 957

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : P.H. Sankaranarayana Iyer, for the Appellant; Varghese Kailiath for K.K. Mathew, for the Respondent

Final Decision : Dismissed

Judgement

M. Madhavan Nair, J.—This is an appeal by the plaintiff whose suit for recovery of plaint items 1 and 3 and the mortgage amount charged on item No. 2 has been dismissed by the court below. The plaintiff got suit items Nos. 1 and 3 and the mortgage right in item No. 2 in partition of his father's properties in 1109 M.E. On 30-3-1114 he executed a sale deed, Ext. I, for item No. 1 for Rs. 2,000/- to the defendant. On 6-11-1114 he assigned the mortgage on item No. 2 for Rs. 500/- to the defendant himself as per Ext. B; and on 28-2-1115 sold as per Ext. C suit item No. 3, along with other properties, to P.W. 2 who assigned item No. 3 by Ext. IV to the defendant on 25-8-1116 for Rs. 500/-. According to the plaintiff, he resolved in Chingom 1114 to join the war service and in view of the risk involved therein executed bogus conveyances of all his properties in favour of the defendant, his brother-in-law and P.W. 2, the brother so that if anything untoward happened to him they might take respective properties for themselves but if he returned safe, as he did in 1940, they should return the properties to him. As the defendant did not surrender the properties to the plaintiff on demand, the suit became necessary for their recovery. As the mortgage in suit item No. 2 had in the meanwhile been released by the defendant in favour of the

mortgagor, the prayer is for recovery of the amount thus received by the 2nd defendant with interest and of possession of suit items Nos. 1 and 3. The defence asserted the genuineness and validity of the conveyance concerned. The District Judge in the first instance allowed the suit as regards items Nos. 1 and 3 but dismissed the same in regard to the mortgage amount realised by the defendant. On appeal the Travancore-Cochin High Court set aside the decree and remanded the suit for a fresh disposal giving liberty to the parties to amend their pleadings. Accordingly the plaintiff amended the plaint averring therein that the impugned alienations were executed with a view also to defeat the City Bank Ltd. (in Liquidation), to which the plaintiff was indebted largely and the defendant filed a fresh written statement reasserting his title under the impugned conveyances. Both sides tendered additional evidence. The Additional District Judge dismissed the suit in its entirety. Hence this appeal. According to the original plaint, the impugned alienations Exts. I, B and C, were sham or colourable documents unsupported by consideration and intended to take effect only if the plaintiff met with his end in the war service. The plaintiff has admitted, as P.W. 1, that the suit properties were being cultivated by his brother and its proceeds delivered to the defendant. Referring to suit item No. 1 he deposed:

Though the plaintiff asserts that the proceeds were being paid to the defendant at the instance of the plaintiff there is no evidence in support thereof except the oral testimony of the plaintiff himself. P.W. 2, a brother of the plaintiff, who is a legal practitioner, has deposed:

Admittedly Mathai died in 1125. Plaintiff has no case that he has shared the proceeds of the suit properties at any time after their conveyances. His testimony is that the proceeds are taken by defendants only. P.W. 2's testimony also shows that possession passed to the defendant as per the conveyances in his favour, and the defendant was enjoying their profits thereafter. It then follows that the conveyances in favour of the defendant were not mere colourable documents, but came to full effect passing possession and enjoyment of the properties to the defendant.

2. The plaintiff admits that he returned from war service in 1940. There is no evidence, nor even an averment by the plaintiff, that he ever made a demand for the surrender of the properties before 1946. Ext. XIII, a letter addressed by the plaintiff to the defendant, makes a demand for surrender of the properties to the plaintiff. Though the letter is not dated, the demand therein is for surrender of the properties for the next cultivation early in 1122 M.E. The letter must then have been written in the latter half of 1121 M.E., i.e. 1946. It indicates that for about six years after return from war service, the plaintiff made no demand for surrender of the property to himself by the defendant. Ext. VII is a letter dated 12-8-1119 (1944) by Nainan, the eldest brother of the plaintiff addressed to the defendant, requesting suit item No. 1 for his cultivation in 1120 M.E. This is four years after the plaintiff returned from war service. The inference that follows from Ext. VII is that the elder brother of the plaintiff understood the title to the

property as vested in the defendant and the facts narrated above clearly show that it could only be under the impugned conveyance. Equally so is the import of Ext. VIII, a letter dated 7-7-1121 written by P.W. 2 to the defendant advising him not to entrust suit item No. 1 to Nainan. Ext. II, a letter by P.W. 2 contemporaneous with Ext. I, shows that it was P.W. 2 who transacted the sale under Ext. I. His letter, Ext. VIII clearly shows that title did pass to the defendant in regard to suit item No. 1 under Ext. I.

3. The fact that the documents were executed at pretty long intervals distributed over a period of 2 odd years indicates that they could not have been for the purposes alleged by the plaintiff. If the idea was that he should settle his properties on his brother and brother-in-law on the eve of his departure on war service one would expect the documents to be executed almost simultaneously and not at such long intervals. All these facts go to show that the conveyances in favour of the defendant were not sham but were real. Ext. XVIII thandaper shows that in 1115 mutation was effected as per Ext. I. In these circumstances the plea that the impugned conveyances were sham or colourable not intended to create any title in the defendant cannot be accepted.

4. The next alternative case put forward in that amended plaint is that these conveyances were created to save the property from the City Bank Ltd. (In Liquidation), to which the plaintiff owed largely. Ext. A, the decree obtained by the Bank against the defendant, shows that the plaintiff had executed a pronote in favour of the Bank on 17-8-1937 for Rs. 7,694/- odd, and in 1119 (1944) the Bank secured a decree thereon against him.

5. A fraudulent transfer intended to defeat or delay the creditors is not invalid as between the parties and therefore such a fraudulent design, even if true, cannot be availed by the plaintiffs as a ground to cancel the same. In Mulla's Transfer of Property Act 4th Edn., page 250, it is observed :

The motive of putting the property out of reach of the creditors does not by itself make the transaction a sham one. As far as the parties are concerned it is a perfectly valid and binding contract. It is open to the creditors to bring a suit for avoiding the sale.

In Kallubandi Nanjamma Vs. Kethe Rangappa and Others, Venkatarama Ayyar J. observed:

It is undoubted law that when a transfer is declared void as against the creditors u/s 53 T.P. Act, the result is not to annul it altogether, but only to render it inoperative as against the creditors and that too only to the extent necessary to satisfy their claims; and subject to their claims the transaction is valid and enforceable. In Story on "Equity Jurisprudence", Section 371, the law is thus stated :

"A conveyance of this sort (it has been said, with great truth and force) is void only as against creditors; and then only to the extent in which it may be

necessary to deal with the conveyed estate for their satisfaction. To this extent, and to this only, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditor, and the conveyance stands."

The effect of the declaration made in O.S. 232 of 1938 that the gift deed was void as against creditors, is therefore, not to extinguish the title of the appellant under Ext. A1, but to render it subject to the claims of the creditors.

Rambilas Sitaram v. Ganapatrao Pandharinath (A.I.R. 1954 Nag 129) observes:

The effect of the declaration under S. 53, T.P. Act, is that the transaction does not affect the creditor's right to recover their claims from the property transferred. The declaration still leaves the deed operative between the parties thereto and does not amount to cancelling or setting aside the deed because the creditors have no title or interest in the property to set aside the deed as between the parties thereto.

It is therefore clear that a fraudulent transfer intended to defeat the creditors is not invalid between the parties to the document. As between the parties the conveyance is good and operative even if it be found that it was fraudulent against the creditors of the executant, and it is not open to a party to the document to cancel it on the mere ground that it was executed under a fraudulent design. Ext. XIII, the letter written by the plaintiff to the defendant clearly avers that the plaintiff is prepared to repay the consideration paid by the defendant and demanded a reconveyance of the property on such repayment only. The consideration thus admitted to have been received by the plaintiff from the defendant in Ext. XIII also indicates that title has passed under the conveyances to the defendant.

P.W. 2 in the course of his examination stated the conditions under which the impugned alienations came to be executed as follows:

In Ext. XIII the plaintiff also states in the same tenor:

(Rs. 500/- were the consideration for Ext. IV). These averments spell out an oral contract for reconveyance between the parties at the time of the impugned alienations. The plaintiff's statements in Ext. XIII clearly show that the conveyances came to be executed because the plaintiff could not return the money advanced by the defendant and the understanding was that if ever he returns the amount, the properties should be reconveyed to him. Counsel for the plaintiff laid great stress on this aspect of the case and contended that the plaintiff is therefore entitled to get back the properties from the defendant. The defendant contended that such a contract cannot be proved u/s 92 of the Evidence Act. As pointed out by the Privy Council in *Veeraswami v. Nanayya* (A.I.R. 1949 P.C. 82) a plea of an oral contract for reconveyance cannot be so lightly brushed aside. Suffice it to say here that in this suit no claim for a specific performance of such a contract for reconveyance has been advanced, and the question is therefore left open. On the two grounds urged by the plaintiff in this

suit viz., of the document being sham and of being in fraud of creditors, the plaintiff is not entitled to the reliefs of declaration of his title to and recovery of the suit properties and therefore this suit fails.

The decree of the court below is therefore right and the appeal is dismissed with costs.