

(1998) 09 KL CK 0034
In the High Court Of Kerala
Case No : C.R.P. No. 1184/98 H

Karuna Kuries and Finance

APPELLANT

Vs

Kunju Vareed and Others

RESPONDENT

Date of Decision : 22-09-1998

Acts Referred:

Kerala Court Fees and Suits Valuation Act, 1959 — Section 25, 40
Specific Relief Act, 1963 — Section 31
Transfer of Property Act, 1882 — Section 53, 53(1)

Citation : (1998) 2 KLJ 748

Hon'ble Judges : S. Sankarasubban, J

Bench : Single Bench

Advocate : K.N. Narayana Pillai, S. Vidyasagar, Dinesh Shenoy, P. Viswanalhan and V.P.K. Panicker, for the Appellant; K.C. Eldo and S. Sreekumar, for the Respondent

Final Decision : Allowed

Judgement

S. Sankarasubban, J.—This revision petition is filed by the Petitioner who is the Plaintiff in O.S. 673 on the file of the Additional Munsiff's Court, Irinjalakuda. The revision is directed against the order dated 19th June 1998 in I.A. 4220/97. The Respondents are the Defendants in the suit. The first Respondent is a debtor of the Petitioner having borrowed several amounts. The Petitioner then filed O.S. 229/87 for realisation of money from the first Respondent before the Sub Court, Irinjalakuda. The suit was decreed. Proceedings for execution were taken and it is pending as E.P. 540/93. According to Petitioner, the first Respondent is a prosperous land owner. But he filed objection in the execution proceedings stating that he has no means to pay the amount. On enquiry, it was found that the first Respondent had contracted debts with the Petitioner firm and several others and in 1985 he had fraudulently and clandestinely transferred all the properties in the name of his wife and others by executing fraudulent and grossly undervalued documents. Two of such documents are document No. 1051/85 and 4143/85 of Chalakudy Sub Registrar Office. The suit was filed seeking relief by

declaring the documents as invalid and cancelling the two documents. The Plaintiff had contended that the properties were valued for more than Rs. 50 lakhs. But they transferred it for a paltry amount of Rs. 50,000. The transfer is in fraud of creditors and it is not binding on the creditors. The suit was filed u/s 53 of the Transfer of Property Act. As already stated in the plaint, the prayer was for cancelling the two documents. Subsequently it was realised that it was enough if the Plaintiff obtains a declaration that documents are fraudulent and executed in fraud of creditors and therefore not binding on the creditors u/s 53 of the Transfer of Property Act. Hence the Petitioner filed I.A. 4220/97 to amend the plaint to change the prayer from one to set aside the two fraudulent documents to one to declare that the documents were, fraudulent created with intent to defeat and delay creditors. The Petitioner also wanted amendment in the valuation portion for changing the computation of Court fee for u/s 25(d)(ii) of the Kerala Court Fees and Suits Valuation Act. This was objected to by the Defendants. The Court below after considering the arguments of both sides, by the impugned order rejected the amendment application and hence this revision petition is filed.

2. The reason given by the Court below is that the proper remedy in a suit wherein it is contended that the document is vitiated by fraud is to get it set aside as contemplated by u/s 31 of the Specific Relief Act. According to Court below, the relief to be granted is to set aside a document and the Court fee has to be paid u/s 40 of the Kerala Court Fees and Suits Valuation Act. Hence the Court below came to the conclusion that the attempt of the Plaintiff was to protract the suit without paying the requisite Court fee.

3. On a reading of the plaint the relief which was prayed for by the Plaintiff is for a declaration that the two documents were executed to defraud the creditors and that the Plaintiff is entitled to proceed against the first Respondent ignoring the documents. Thus essentially is a suit coming u/s 53 of the Transfer of Property Act.

4. The main reason of the Court below to dismiss the amendment application is that the Plaintiff ought to have prayed for cancelling the documents and that the amendment was only with a view to avoid payment of Court fee u/s 40 of the Kerala Court Fees and Suits Valuation Act.

5. Now what is the effect of a declaration u/s 53 of the Transfer of Property Act. Whether such a declaration amounts to cancellation of the documents. No doubt if the prayer actually amounts to set aside document, then Court fee will have to be paid u/s 40 of the Kerala Court Fees and Suits Valuation Act. The effect of a declaration u/s 53(1) of the Transfer of Property Act came up for consideration before a Division Bench of the Travancore-Cochin in *Anantha Raman v. Arunachalam* AIR (39) 1952 Koshi, J. (as he then was) speaking for the Division Bench held as follows:

Where a document is executed to defeat or delay creditors, as between the parties thereto, the document is valid and it must remain valid for all times. The

executant cannot impugn it on the ground that he executed it to defeat or delay creditors. That bar is not one personal to the executant alone. It would extend to all those who claim the properties through him as also to persons claiming under such persons.

6. In *Rambilas Sitaram v. Ganpatrao Pandharinath* AIR 1954 Nag 129 the same question came up for consideration, where in it was held as follows:

The effect of the declaration u/s 53 T.P. Act, is that the transaction does not affect the creditors 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.

7. In *Nanjamma v. Rangappa* AIR 1954 Mad 173 it is held as follows:

When a transfer is declared void as against creditors u/s 53 the result is not to annul it altogether, but only to render it inoperative as against creditors.

Various other decisions were also cited including AIR 1963 kar 257 (*Ramasubba Sastry v. Official Receiver*) where Hegde, J. (as he then was) followed the decision of Travancore-Cochin High Court and the Nagpur High Court. Thus on going through the above decisions, it is clear that there is no setting aside of a document when a declaration is prayed for u/s 53 of the Transfer of Property Act. The document exists as valid between the parties thereto. Section 40 of the Kerala Court Fees and Suits Valuation Act comes into play only when it is necessary to set aside a decree or a document. On the other hand, u/s 53, what is obtained is a declaration that the document is not binding on the creditors. In such circumstance, it is not necessary to pay Court fee u/s 40 of the Kerala Court Fees and Suits Valuation Act. As held by the Full Bench of this Court in *Pankajaksha Kurup v. Fathima* 1998 KLT 668 if a decree is null, and void it is not necessary to set aside the same. Hence prayer for declaration is sufficient, the Court fee need be paid u/s 25(b) of the Kerala Court Fee and Suits Valuation Act. In the present case, the Petitioner has prayed for payment of Court fees u/s 25(d) (ii). I think in view of the above facts, the Court below ought to have allowed the amendment application. Hence I allow I.A. 4220/97 and allow the Civil Revision Petition. The Plaintiff will file the amended application. The Defendants will be given an opportunity to file amended written statement.