(1944) 08 MAD CK 0027

In the Madras High Court

Krishnaveni Ammal and Another — APPELLANT

Vs

M.D. Soundararajan and Others — RESPONDENT

Date of Decision : 09-08-1944

Acts Referred:

Citation : AIR 1945 Mad 53 : (1945) ILR (Mad) 412 : (1944) 57 LW 526

Hon'ble Judges : Mockett, O.C.J.;Kuppuswami Ayyar, J;Kuppuswami Aiyar, J

Bench : Full Bench

Judgement

Mockett, Offg. C.J.

1. In these connected appeals respondent 1 filed a suit O.S. No. 109 of 1941 against Elayaperumal Naicker as defendant 1, his wife Rule Balammal as defendant 2 and his daughter Krishnaveni Ammal, as defendant 4. There was also a claim against one Nataraja Pillai, defendant 4, Defendant 1''s clerk relating to the transfer of a motor-car. Defendants 2 and 8 appeal and so far as they'' are concerned the form of the suit was for a declaration that certain alienations made in favour of the wife and daughter respectively were benami in nature for the purpose of defrauding Defendant 1''s creditors. The learned trial Judge, Chandrasekhara Aiyar J., decreed the suit in favour of the plaintiff and defendant 3 appeals in Order S.A. No. 79 of 1942 and defendant 2 in Order S.A. No. 8 of 1943. The form of the plaint, and this is made clear by the prayer, is for a declaration that the properties transferred to the appellants were benami in nature. Paragraph 5 states that the transactions are benami and fictitious. This means that the plaintiff alleges not that there was an actual transfer to the defendants but that there was only a transfer in form, the actual property remaining with the transferor. The learned Judge has so found. Accordingly the learned Judge held that Section 53, T.P. Act, had no application, it not being a transfer binding between the parties. It was therefore not void able at the instance of the creditor. The plaint, however, as already stated, proceeds on the basis that there was no real transaction, the transfers being benami, that is to say, in the name of the wife and the daughter, but the property actually

remaining with the husband.

2. The appellants have contended before us that following upon this finding the learned Judge should have dismissed the suit and that Section 42, Specific Belief Act, could not be called in aid by the respondent in the absence of facts attracting the provisions of Order 21, Rule 68, Civil P.C. The appellants argued that for these reasons the suit could not be regarded as a declaratory suit. It is not suggested that any claim or objection had arisen for investigation within the meaning of Rule 63. The learned Judge, however, held that Section 42 was not exhaustive and that the suit although not within Section 53, T.P. Act, would lie apart from the provisions of Section 42, Specific Belief Act. That the provisions of Section 42 are not exhaustive is well established by authority: Robert Fischer v. Secretary of State (1904) 22 Mad. 270, Ramachandra Rao v. Secy, of State AIR R. 1916 Mad. 1061 and Secretary of State v. Subbarao AIR 1933 Mad. 618. In each of those cases on the facts the defendants had challenged a substantive right of the plaintiff. In Robert Fischer v. Secretary of State (1904) 22 Mad. 270 the plaintiff prayed for a declaration that an order of the Government to his prejudice be declared invalid. In Ramachandra Rao v. Secy, of State A.I.R.1916 Mad. 1061 a suit for a declaration, that an order debarring one from acting as vakil for ''another in a village Court was void, was held to be maintainable, though not covered by Section 42, Specific Belief Act. In the latest Madras decision, Secretary of State v. Subbarao AIR 1933 Mad. 618 Beasley C. J. and Bardswell J. held that a suit by a karnam for a declaration, that an order of the Board of Revenue was invalid as being to his prejudice, was maintainable although not comprehended by Section 42, Specific Belief Act. At p. 755 Bardswell J. discusses the question as to what extent Section 42 is not exhaustive of declaratory suits and he refers to the decision of the Privy Council in Sheoparsan Singh v. Ramanadan Prasad Singh AIR 1916 P.C. 78 of the Privy Council case Sir Lawrence Jenkins makes the following observations regarding Section 42:

A plaintiff coming under this section, must, therefore, be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves? Clearly not; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh''s estate in case of an intestacy after the death of the defendant widows.

3. Sir Lawrence Jenkins went on to say that the suit must fail at the very outset, the plaintiffs not being clothed with a legal character of title which would authorize them to ask for it declaratory decree sought by the plaint. In Ramakrishna v. Narayana AIR 1915 Mad. 584. Napier J. held that although Section 42 was not intended to be exhaustive, declaratory relief would not be given in respect of rights arising out of a contract affecting only the pecuniary relationship between the parties unless there were exceptional circumstances to take it out of the ordinary rule. The learned Judges at page 83 stated that no such case had been brought to their notice. In Sheoparsan Singh v. Ramanadan

Prasad Singh AIR 1916 P.C. 78 referred to above, their Lordships refer to a Kathanw Nachiar v. Doraisingha Tevar (1975) 2 I.A. 169, wherein it is stated that reversionary suits were in a special class and had been entertained by the Courts ex necessitate rei.

4. It is well to consider the exact allegations of the plaintiff in his plaint. The effect of the plaint may be stated as follows: Paragraph 3 alleges that defendant 1 owes the plaintiff a large sum of money in respect of which he, the plaintiff, had filed C.S. No. 121 of 1939 in the High Court. Paragraph 4 alleges defendant 1 was heavily indebted to various creditors. Paragraph 5 and following paragraphs allege the transfers by defendant 1 to his wife and daughter, the subject of the suit. Such facts are of almost daily occurrence in the various Courts of this Presidency and the usual and proper remedy in such circumstances would have been for the plaintiff to apply to the Court for an order for attachment before judgment. Had he obtained such an order, he could have attached the properties transferred to the wife and daughter as being the properties of defendant 1. That would have been a perfectly logical course in that he alleges in para. 5 that the transfers were made in the name of the wife and daughter. It may be added that the decree in C.S. NO. 121 of 1939 was not passed until November 1941, so that at the time of this plaint the plaintiff was in no different position from any other creditor of defendant 1. I am of opinion that this suit does not lie and should have been dismissed. It was clearly not within Section 58, T.P. Act, as with respect the learned Judge rightly held, It is not, I consider, a suit to which Section 42, Specific Belief Act, applies. There is no authority for the proposition that on the facts such as these an ordinary declaratory suit can lie. If it were so, the Courts would be flooded with suits by creditors attacking transactions made by debtors. As already stated the machinery of the Code relating to attachment before judgment, Order 38, Rules 5 to 13, is available to creditors. In such proceedings, if adopted, for example in this case, it would have been for the present appellants to establish their title and very probably a suit could have been properly instituted Under Order 21, Rule 63, Civil P.C. Whilst the exact facts of this case are not covered by authority in this High Court, there are two decisions of the High Court of Rangoon on the topic. In K.R.M.A. Firm v. Maung Po Thein AIR 1926 Bang. 124 the plaintiffs in the suit claimed a declaration of their right to attach certain properties in execution of a decree in another suit. The learned Judges, observing that the suit before them did not fall within the provisions of Order 21, Rule 63, proceeded to discuss the applicability of Section 42, Specific Relief Act. They noted that the plaintiffs had not adopted their remedy by attachment. At p. 24 there appear the following observations:

Before appellants can succeed they must show that they have a right ''as to the property" in suit. The only right which they claim is a right to attach that property under a decree for money. They do not claim that they have themselves any title to the property or to any part of it. All that they are seeking to establish is that their judgment-debtors have rights as to the properties.

5. They held that the suit was rightly dismissed since the plaintiff claimed no right of his own in the property. More recently in Maung Ba Maung v. Maung Ba Yin AIR 1939 Bang. 332 a Full Bench of the Rangoon High Court considered the following question:

Can a creditor sue u/s 42, Specific Belief Act, for a bare declaration that a transfer has been made by hip judgment-debtor fraudulently with intent to defeat or delay his creditors, or must he sue for cancellation of the deed of transfer either as his sole remedy or as a relief further to that declaration?

6. The learned Judges held that K.R.M.A. Firm v. Maung Po Thein AIR 1926 Bang. 124 was tightly decided. They discuss cases within Section 42, Specific Relief Act where the suit for a bare declaration could only lie when the plaintiff is entitled to any legal character or to any right as to any property. Dunkley J. at page 71 observes:

It is essential to bear in mind the distinction between a substantive right and a right which is conferred by rules of procedure. The right of a judgment-creditor to attach the property of his judgment-debtor is a mere procedural right, conferred by the Civil Procedure Code. It is not a substantive right as to the property, and therefore cannot give rise to a right of suit u/s 42, Specific Belief Act.

7. I respectfully agree with the decisions in both K.R.M.A. Firm v. Maung Po Thein AIR 1926 Bang. 124 and Maung Ba Maung v. Maung Ba Yin AIR 1939 Bang. 332. It is true, as laid down in the various decisions to which I have referred, that the general view is that Section 42, Specific Relief Act, is not exhaustive, but there is no authority for the proposition that a suit for a declaratory decree will lie when the plaintiff is neither entitled to any legal character nor to any right in the suit property. To return to the judgment of their Lordships, Sheoparsan Singh v. Ramanadan Prasad Singh AIR 1916 P.C. 78 their Lordships repeat the warning given in Sree Naraii Mitter v. Kishan Soondary Dassee (1972) I.A. Sup.162, where it was stated:

There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

8. I consider that this suit should have been dismissed for exactly the same reason as given by their Lordships in Sheoparsan Singh v. Ramanadan Prasad Singh AIR 1916 P.C. 78 to which reference has already been made, namely, because the plaintiff in the appeals before us is clothed with neither a legal character nor title to the suit property. I will conclude by adding that their Lordship after noticing the facts in relation to the plaintiff''s legal position did not even discuss whether the suit would lie aliundi. For the above reasons I consider that these appeals should be allowed with costs against respondents 3-7 and the suit dismissed without costs.

Kuppuswami Ayyar J.

9. I agree.

