

(1953) 09 KL CK 0026
In the High Court Of Kerala
Case No : A. S. No. 15 of 1951

Kula Mydeen Pillai Hussain Pillai

APPELLANT

Vs

Narayanan Madhavan ana others

RESPONDENT

Date of Decision : 24-09-1953

Acts Referred:

Citation : AIR 1953 Ker 312

Hon'ble Judges : Joseph, J; Govinda Pillai, J

Bench : Division Bench

Advocate : K.S. Nataraja Sarma, for the Appellant; T.K. Narayana Pillai, for the Respondent

Final Decision : Allowed

Judgement

Joseph, J.—This is an appeal by the plaintiff from the decree dismissing his suit on the ground of limitation. The suit was filed under the following circumstances. One Narayanan Kesavan was the foreman of a chitty for the due conduct of which certain immovable properties had been given by him as security. A suit, O. S. No. 652 of 1102, was filed against him by a subscriber in the chitty who obtained a decree against him and the chitty assets. The plaintiff got an assignment of that decree and in execution of the same purchased the properties scheduled to the plaint and got delivery of the same.

The defendant claiming to be a subscriber in the same chitty, obtained a decree in O. S. No. 75 of 1105 against the foreman and charged on the scheduled properties. In execution of the latter decree, the defendant purchased the same properties and sought to get delivery of possession. It was alleged by the plaintiff that the decree obtained by the defendant was fraudulent and collusive and was intended to defeat creditors. The plaintiff prayed for a declaration that the decree in O. S. No. 75 of 1105 was obtained fraudulently and collusively and for setting aside the same and execution proceedings taken by the defendant.

The suit was contested by the defendant who denied all the material averments

in the plaint and contended "inter alia" that the plaintiff's suit was barred by limitation, inasmuch as the same was filed 3 years after the dismissal of a petition filed in O. S. No. 75 of 1105, by the plaintiff challenging the validity of the decree and execution proceedings including court sale. The question of limitation was decided against the plaintiff and the suit was dismissed holding that the article applicable to the suit was Art. 82 of Travancore Limitation Act. The other questions in the suit were not decided. The correctness of this decree is attacked in this appeal.

2. We are unable to uphold the finding of the trial court on the question of limitation or the decree which is based on that finding. The plaintiff was not a party to the decree, the validity of which was challenged in the suit. As a stranger to the decree, he cannot seek to get the decree set aside but all that he can ask for is a declaration that his interests cannot be affected by the collusive decree. It is unnecessary for the plaintiff to get the decree set aside, if he is otherwise entitled to relief.

No doubt the plaint contains a prayer for setting aside the decree in O. S. 75 of 1105 on the ground of fraud and collusion, but it is an instance of loose proceedings. In substance what he wants, is a declaration that his interests cannot be affected by the decree or execution proceedings in O. S. No. 75 of 1105. The fraud contemplated in Art. 95 is fraud practised on a party to the decree. Treating the suit as one for a declaration that his interests are not affected by the impugned decree or execution proceedings, the suit falls under Art. 120 of the Indian Limitation Act which relates to a suit for which no period of limitation is prescribed elsewhere in the schedule and for which a period of 6 years is allowed.

This view is supported by the decisions in - Saburdas Mahasukhram Gandhi Vs. Gopalji Nandas Patel, ; - "Chunder Nath v. Thirthanund", 3 Cal 504 (B) and - "Tallapragada Sundrappa v. Boorugapalli Sreeramulu", 30 Mad 402 (C). The decree passed by the trial court has to be set aside.

3. In the result we allow the appeal, set aside the decree of the court below and remand the suit to the trial court under R. 23 of O. 41, for trial and decision according to law. The appellant will get refund of the court-fees paid in this Court. The rest of the costs will abide the final result, and will be provided for in the decree to be passed by the trial court.