
(2017) 03 KL CK 0017
In the High Court Of Kerala
Case No : OP(C).No. 2880 of 2013 (O)

Laila	Vs	APPELLANT
Soosamma Chacko		RESPONDENT

Date of Decision : 20-03-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Transfer of Property Act, 1882 — Section 53

Citation : (2017) 2 KerLJ 706 : (2017) 2 KLT 575

Hon'ble Judges : Mr. P. Somarajan, J.

Bench : Single Bench

Advocate : Sri. John Joseph and Sri. C. Joseph Johny, Advocates, for the Petitioners; Sri. Alias M. Cherian, Advocate, for the Respondent No. 1; Sri. P.K. Nijoy, Advocate, for the Respondent No. 2

Final Decision : Dismissed

Judgement

P. Somarajan, J.—Challenging Ext.P5 order in I.A.No.74 of 2013 in O.S.No.357 of 2011 of the Principal Sub Court, Kottayam, dated 15.6.2013, the first defendant came up with this petition.

2. The said application was filed by the first respondent/ plaintiff for amending the plaint, incorporating a prayer for a declaration that the conveyance made by the defendant in favour of her daughter, who is not a party to the suit, is a fraudulent transfer intended to defeat the creditors. Another prayer for impleadment of the beneficiary under the document of transfer was also incorporated in the said application. The said application was allowed by the lower court, allowing impleadment of the defendant's daughter, the beneficiary under the settlement deed, as additional defendant in the suit (2nd defendant) and allowing amendment of the plaint. Aggrieved by the said order, the first defendant came up with this petition.

3. Heard Sri.John Joseph Vettikad, learned counsel appearing for the petitioner, Sri.Alias M. Cherian, learned counsel appearing for the first respondent and

Sri.P.K.Nijoy, learned counsel appearing for the second respondent.

4. The amendment sought to be made in the plaint is to incorporate a prayer to declare that the settlement deed executed by the defendant in favour of her daughter as a sham document on the ground that it was created for the purpose of and with an intention to defeat and delay the creditors including the plaintiff herein. The original suit was filed by the plaintiff for recovery of money due from the defendant.

5. The application was objected by the defendant stating that the proposed amendment will alter the nature and character of the suit and it is not at all permissible to raise such an amendment in the present suit. The lower court, on hearing both the parties, repelled the contention raised by the defendant and allowed the application, granting amendment and impleadment.

6. Section 53 of the Transfer of Property Act, 1882 (hereinafter referred to as the "T.P. Act") is really an exception to the general principle governing transfer of immovable property. The transfer of immovable property can be avoided if it was intended to defeat or delay the creditors of the transferor at the option of any creditor. A transfer in good faith and for consideration is excluded. Section 53 of the T.P. Act is extracted below for reference:

"53. Fraudulent transfer.- (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purpose of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

7. Going by the 4th part of Section 53(1) of the T.P. Act, it is clear that a suit under Section 53 of the T.P. Act shall be instituted on behalf of, or for the benefit of, all the creditors. The present suit was instituted by the plaintiff in her personal capacity. It is not a suit either filed in a representative capacity or on behalf of some other persons. In order to bring a suit under Section 53 of the T.P.

Act, the plaintiff must show, aver and plead that the suit was instituted for himself/herself and also for and on behalf of all the creditors. It should be a representative suit for the creditors. In a representative suit leave of the court has to be obtained by complying with the requirement under Order I Rule 8 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the C.P.C."). In other words, when a suit under Section 53 of the T.P. Act is filed (other than a claim under Rule 58 Order 21 of the C.P.C.) it must be for and on behalf of the creditors and it is the duty of the plaintiff to comply with the requirement under Order I Rule 8 of the C.P.C. so as to enable all the creditors to join as a party to the suit. It is not at all necessary that the plaintiff should know about the details of all the creditors or whether any other creditor is available or not while instituting such a suit. But the mandate under Order I Rule 8 of the C.P.C. has to be complied with. In other words, it is not at all permissible to incorporate such a prayer in a suit for recovery of money filed by the plaintiff in her personal capacity. Hence, the order passed by the lower court allowing amendment of the plaint and impleading additional second defendant does not reflect proper application of the law in force. Hence the impugned order is liable to be set aside and I do so but without prejudice to the right of the plaintiff to institute a proper suit as per Lex fori Lex Loci.

8. In the result, this petition is allowed. The impugned order of the lower court allowing impleadment and amendment in I.A.No.74 of 2013 dated 15.6.2013 is hereby set aside. The application is hereby dismissed, without prejudice to the right of the first respondent/plaintiff to institute a proper suit in accordance with Lex fori and Lex Loci. No order as to costs.