
(1926) 09 MAD CK 0057
In the Madras High Court

Punyam Visvananda Reddi

APPELLANT

Vs

Gali Raja Venkata Reddi and Others

RESPONDENT

Date of Decision : 02-09-1926

Acts Referred:

Citation : AIR 1927 Mad 278 : (1927) 25 LW 223

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The plaintiff's suit is for a declaration that the sale to him by the Defendants 2 to 4 is a bona fide transaction and that the plaint property is not liable for attachment and sale in execution of a decree obtained against his vendors. The District Munsif held that:

the sale deed relied on by plaintiff is not true, valid and binding on 1st defendant but it is a sham transaction unsupported by consideration and executed with a view to defraud 1st defendant of his debt

and dismissed the suit. On appeal the Subordinate Judge held that the sale deed Exhibit B was

a clearly colourable and fraudulent transaction and cannot prevail against 1st defendant.

2. The plaintiff has preferred this Second Appeal.

3. The only point urged by Mr. T. R. Ramachandra Ayyar for the appellant before us is that his client is entitled to a charge for the amount of consideration paid by him. Both the Courts have found that about Rs. 500 was paid by the plaintiff out of a nominal consideration of Rs. 2,000. On this finding Mr. T. R. Ramachandra Ayyar contends that his client is entitled to a charge for that amount on the property sold to him. The sale in plaintiff's favour evidenced by Exhibit B has been found to be a fraudulent one intended to defraud, defeat or delay creditors. In the face of this finding, the question is: Can the plaintiff be given the relief he

asks for?

4. It is not possible to lay down a hard and fast rule in cases of this kind. We should consider in each case the circumstances under which the document came into existence and the portion of the consideration paid. If it is found that the vendee or the transferee aided or abetted the vendor who was in embarrassed circumstances to defraud his creditors by conveying or alienating his property to him the Court would hesitate to show him any consideration. It is not opposed to Section 53 of the Transfer of Property Act for a creditor to take a mortgage or sale of the debtor's property when he finds that the debtor is unable to pay him the debt but the transaction would become voidable u/s 53, if in order to help the debtor the creditor takes the mortgage or sale for a larger amount than his debt, on the understanding that the rest of the consideration is to be for the benefit of the debtor and that the mortgage or sale should be used as a shield against other creditors. Even though a creditor may know that his debtor is in embarrassed circumstances and that there are other creditors who are pressing for the payment of their debts, if he is diligent enough in securing from the debtor a sale or a mortgage in consideration of the debt due to him and if insolvency does not supervene within 3 months, such a transaction cannot be held to be bad u/s 53 of the Transfer of Property Act. The transaction is voidable only when both the transferee and the transferrer intend to defraud, defeat or delay creditors and the transaction is entered into for that purpose.

5. If the transaction is bad u/s 53,. could the Court help the transferee by giving him a charge for the amount actually paid by him towards the consideration for the alienation? In a few cases Courts have given a charge for the amount paid by the vendee or the mortgagee but in such cases there was a discharge by the vendee or mortgagee of some prior encumbrances on the property conveyed or mortgaged to him. This cannot furnish a ground for the argument that in all cases where a portion of the consideration is found to be good the alienee should have a charge for it. Where an alienee pays off some unsecured debt due by his vendor and takes a sale for a much larger amount than the amount actually paid by him, he cannot as a matter of right ask that he should have a charge on the property. The debt discharged being only a money debt he can only be placed in the position of the creditor whose debt he discharged.

6. The facts in this case are such that the plaintiff is entitled to no consideration at the hands of the Court. The 1st defendant filed a suit on 10-2-20 and obtained an interim attachment of the property of Defendants 2 to 4 before judgment on 10-2-20 and obtained a decree on 28-2-20 and the order for attachment was made, absolute the same day. Exhibit B was executed on 5-2-20 and no part of the consideration was paid till 6 or 7 months thereafter and even then only one-fourth of the consideration was paid. The plaintiff paid the portion of the consideration, recited in Exhibit B in order to support the claim petition filed by him in 1920. Under such circumstances, we think, it would not at all be right to allow the plaintiff a charge on the plaint property for by doing so he would obtain

an advantage over a bona fide creditor who filed a suit and obtained a decree so far back as 28-2-20.

7. It is well settled that a transfer of immovable property made with the object of defeating, defrauding or delaying creditors is voidable even though the transferee paid a portion of the consideration recited in the deed of transfer. The contention that the payment of a portion of the consideration would make the transaction a bona fide one was specifically negated in 30 Mad. 6. There must be both consideration and good faith. When only a portion of the consideration is paid it cannot be said that the transaction had consideration. Consideration in such cases means the whole consideration recited in the document of transfer. Mr. Ramachandra Ayyar relies upon Palamalai Mudaliar v. The South Indian Export Company [1910] 33 Mad. 334 Chinna Pitchiah, In re [1911] 36 Mad. 29 as supporting his contention. In Palamalai Mudaliar v. The South Indian Export Company, [1910] 33 Mad. 334 it was found that only a portion of the consideration was paid and that went towards the discharge of an encumbrance of the property. The learned Judges held that the transaction was void as it was intended to defeat or delay creditors and that inasmuch as the transferee had discharged a valid mortgage on the property it would be equitable to give him a charge for the amount which he expended in discharging the mortgage decree against the suit property. This case can be distinguished from the present for no encumbrance on the plaint property was discharged by the plaintiff herein. If the plaintiff had discharged an encumbrance on the property he might reasonably ask that inasmuch as he discharged an encumbrance on the property he should be put in the position of a person who has taken over the mortgagee's rights. In Chinna Pitchiah v. Peda Kotiah [1911] 36 Mad. 29 Mr. Justice Sundara Ayyar observed:

That the fact that the mortgage was for an amount larger than was really paid was no reason for not upholding it to the extent that it was supported by a debt existing at the date of the mortgage.

8. If the learned Judge meant to lay down that in all cases where a mortgagee paid only a portion of the consideration that he should be given a decree for that portion on the footing of that mortgage, with due respect, we are unable to agree. If a person who is in embarrassed Circumstances in order to shield his property from his creditors transfers it to another and if only a portion of the consideration recited in the document of transfer is paid and the balance is left with the transferee for his benefit and if this is done to the knowledge of the transferee, then, the transaction is one coming u/s 53. In the case of a prior mortgage which does not come within the provisions of Section 53 the mortgagee will get a decree for the actual amount paid by him. Where the transfer is bad u/s 53, the transferee is not entitled as a matter of right to get a mortgage decree for the amount actually paid by him. The decision in 36 Madras is opposed to the decisions of this Court as well as of the Privy Council. The next case relied on by Mr. T. R. Ramachandra Ayyar is Loorthia Udayar v. Gopalaswami

Ayyar A. I. R. 1924 Mad. 450. In that case there was a suit on a pronote pending against the 1st defendant and his son. The 1st defendant filed a written statement denying the execution of the pronote. After the filing of the written statement and before the decree was passed the 1st defendant mortgaged her properties to the 2nd defendant her brother's son for Rs. 10,000. After the execution of the mortgage the 2nd defendant discharged the debt of the 1st defendant to the extent of about Rs. 7,000. Mr. Justice Venkatasubba Rao and Mr. Justice Phillips held that the transaction was not wholly void as against the decree-holder. Mr. Justice Venkatasubba Rao who delivered the judgment in the case which was concurred in by Mr. Justice Phillips relies very strongly upon two judgments of the Privy Council for his view, that the transaction cannot be said to be wholly void. An examination of the two cases *Musahar Sahu v. Lala Hakim Lal* [1916] 43 Cal. 521 and *Mina Kumari Bibi v. Bijay Singh Dudhuria* [1917] 44 Cal. 662 shows that they do not support the broad proposition laid down by Mr. Justice Venkatasubba Rao.

9. In *Musahar Sahu v. Lala Hakim Lal* [1916] 43 Cal. 521 two kobalas or conveyances were executed by a person in embarrassed circumstances and one was found to have been executed for proper consideration and the other without consideration. It was contended for the appellant before the Privy Council that both the conveyances should be considered as one conveyance and therefore both of them were fraudulent and void u/s 53 of the Transfer of Property Act. The Judicial Committee of the Privy Council held on the facts that the two kobalas or conveyances were different transactions and that they stood on their own merits. Lord Wrenbury in delivering the judgment of the Privy Council observes:

As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent the debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

10. After quoting *Palles, C. B.*, in *In Re Moroney* [1887] 21 Irish. 27 the learned Lord observed:

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes the property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid.

11. It is difficult to see how the principle laid down in this case could support the conclusion arrived at by Mr. Justice Venkatasubba Rao that when a portion of the consideration is good the transaction is not wholly void. But for the law of Bankruptcy the debtor would be able to pay any creditor he likes in preference to others. He is entitled to prefer one creditor to another and pay him in full. It is only the law of Bankruptcy that stands in the way of his doing so. A fraudulent preference is deemed an act of bankruptcy and the person who is guilty of it may

be adjudicated an insolvent within three months thereof.

12. Where a person pays his creditor the full amount of his debt, it cannot be said that he

intends thereby to defeat other creditors, it may lead to that result but it does not necessarily follow.

13. That is the principle laid down in *Musahar Sahu v. Lala Hakim Lal* [1916] 43 Cal. 521. In *Mina Kumari Bibi v. Bijoy Singh* [1917] 44 Cal. 662 the same principle was reiterated. Sir Lawrence Jenkins who delivered the judgment of the Judicial Committee laid down the law in the following terms:

That a debtor, for all that is contained in Section 53 of the Transfer of Property Act may pay his debts in any order he pleases, and pay any creditors he chooses.

14. But such an act would be considered fraudulent preference if the debtor is adjudicated an insolvent. With great respect we are constrained to differ from the view of Mr. Justice Venkatasubba Rao that though only a portion of the consideration was paid and even though the intention was to defeat, defraud or delay creditors the transaction cannot be regarded as wholly void.

15. In *Sama Row Vs. Doraisami Chettiar, Miller and Sadasiva Ayyar JJ.*, held that a mortgage was wholly bad as against the creditors defeated and could not be upheld even to the extent of the consideration actually advanced. Mr. Justice Sadasiva Ayyar declined to accept the view of a Bench of the Calcutta High Court in *Rajani Kumar Das v. Gour Kishore Saha* [1908] 35 Cal. 1051 that where consideration is separable, the transaction should be supported to the extent of the consideration actually paid. He observes at page 269:

With great respect, I am clear that, on the authorities the two parts of such a single transaction are not separable and ought not to be separated in order to favour a creditor who has been guilty of fraud against his fellow creditors.

16. In *Ammachakutty v. Ammachakutty Haji* [1915] 29 I. C. 583 it was found that the transferee had partially discharged a mortgage on the property. The learned Judges gave the mortgagee a charge for the amount paid by him. We do not think the learned Judges intended to lay down any broad proposition that the transferee under a fraudulent document, intended to defeat or delay creditors, should have a charge for the amount actually paid by him. In *Bikabhai Muljibhai v. Panachand* [1919] 43 Bom. 707 it was held:

it being found that both the transferrer and the transferee had the intention of defeating or delaying the creditors of the transferrer and the consideration for the mortgage being treated as one and indivisible u/s 53 of the Transfer of Property Act, the document must at the option of the person defeated or delayed be treated as void in toto and not merely as void in so far as there was no consideration.

17. Scott, C. J., makes the following observations with regard to the contention

that the transferee is entitled to a charge in respect of a portion of the consideration paid by him.

The inference deducible from the established facts show that both the transferrer and transferee had the intention of defeating or delaying the creditors of the transferrer and under these circumstances it appears to us that the document must at the option of the person defeated or delayed be treated as void in toto and not merely as void in so far as there is no consideration.

18. The decision in 35 Cal. 1051 is considered and explained by the learned C. J. The argument that the consideration which was paid is separable from the consideration not paid is based upon *Rajani Kumar Doss v. Gour Kishore Saha* [1908] 35 Cal. 1051.

The learned Judges in that case do not lay down any principle opposed to the current of decisions but in such cases they make a distinction between the amount actually paid and the amount which was intended to be paid by the transferee. At page 1057 they observe: They might not have had any such intention as would invalidate the instrument u/s 53 of the Transfer of Property Act. Their moral turpitude in making a false case afterwards in the present proceedings would not be sufficient to deprive them of their legal rights though a false case might reflect discredit on the original transaction.

19. In *Krishnan Kumar Nandy v. Joy Krishna Nandy* 21 C. W. N. 401 the learned Judges allowed the mortgage to enforce his right for so much of the consideration as was proved to have been paid by him to the mortgagor. The facts found in that case were not sufficient to bring it within the scope of Section 53 of the Transfer of Property Act. The learned Judges assume for the purpose of their decision that the mortgage was within the mischief of Section 53 and proceed to consider whether the transaction was wholly bad. They observe:

In the present case it is plain from the orders in the execution proceedings wherein the 2nd defendant became the purchaser, that he acquired the hut subject to the lien of the plaintiff. Consequently, if at his instance the mortgage is avoided he should be granted relief, only on condition that he satisfied that lien.

20. This case does not lay down any principle. On the facts the learned Judges gave relief to the mortgagee to the extent of the consideration paid by him. In this case the plaintiff knowing perfectly well that the object of the transaction was to defeat the first defendant obtained a sale of the plaintiff property and paid a portion of the consideration some months after the 1st defendant attached the property before judgment and obtained a decree against Defendants 2 to 4. In these circumstances it would be against all principles of equity to allow the plaintiff a charge for the amount paid by him. In the result the Second Appeal fails and is dismissed with costs.