(1928) 02 MAD CK 0031

In the Madras High Court

R.M. Nagarathna Mudaliar and Others APPELLANT

Vs

S.M. Chidambaram Chettiar and Others RESPONDENT

Date of Decision : 01-02-1928

Acts Referred:

Citation : AIR 1928 Mad 860 : 113 Ind. Cas. 129

Hon'ble Judges : Reilly, J;Kumaraswami Sastri, J

Bench : Full Bench

Judgement

Kumaraswami Sastri, J.—This appeal arises out of a suit for specific performance filed by the plaintiffs against defendants 1 to 6.

2. The case for the plaintiffs is that defendants 1 to 3 were carrying on business as merchants, that there were dealings between the plaintiffs and

defendants 1 to 3, such dealings consisting in the plaintiffs advancing moneys to the defendants and also standing sureties for them in the Bank of

Madras, that about the date of the agreement to sell, evidenced by Ex. A, about Rs. 18,000 was due to the bank in respect of the suretyship

transaction, that Rs. 8,000 odd was due to the plaintiffs themselves by defendants in respect ''of moneys given as loans, that the defendants wanted

money to pay some other pressing debts and asked for a loan and that Rs. 8,000 odd was advanced in cash and that for this sum of Rs. 35,000,

made up of these transactions referred to, the defendants executed a promissory note filed as Ex. B in the case and an agreement to sell ten velis of

land evidenced by Ex. A in the case, the agreement being that, if the amount due on the promissory note, Ex. B, was not paid in one month, the

lands specified in Ex. A covering about 10 velis should behold for the consideration of Rs. 35,000. Defendants 1 to 3 were adjudicated insolvents and the Official Receivers have been brought on the record. The Official Receivers are defendants 7 and 8 in the case. Defendant 5 and 6 are

attaching creditors and defendants 4 is the minor brother of defendant 3. Defendant 1 was ex parte and the plea of defendants 2 and 3 was that, as

there was no consideration for the agreement, it was not binding on them. It was pleaded that there was a variation, a material alteration, in the

agreement Ex. A, that the original agreement which stipulated six months for payment was altered into one month. It is contended that that

alteration vitiates the transaction and makes the contract-unenforceable. It is also pleaded that the transaction was a transaction which was entered

into not bona fide but to defraud creditors and that the agreement cannot be specifically enforced because it was in fraud of creditors.

3. The Subordinate Judge finds that there was full consideration for this document. He also finds that there was no alteration and that, although six

months was ''originally mentioned in the document, it was before execution altered into one month, but he is of the opinion that the transaction

evidenced by Ex. A cannot be enforced as, in his view, although the full consideration passed, the transaction was entered into with a view to

defeat, defraud and delay creditors. It is not clear from his judgment whether he relies on Section 53, T. P. Act, or Section 54, Prov. Ins. Act. The

remarks in the concluding portion of his judgment seem to imply that he had these two sections in view. He ''dismissed the suit for specific

performance, but passed a decree for Rs. 35,525, against defendants 1 to 3 personally and the joint family properties of defendant 4. Against this

decree the plaintiffs have appealed.

4. The main grounds of appeal are based on the findings of fact that consideration was paid in full and that as the document was not fraudulently

''altered, there was no question of its being invalid under the provisions of Section 53, T. P. Act, and that as regards Section 54, Prov. Ins. Act,

the matter was one which could not be decided by a civil Court, it being entirely within the province of the insolvency Court to set aside the

transaction if the case fell within Section 54, Prov. Ins. Act and that in any view there is nothing in this case to support the inference that the

transaction was one which was liable to be set aside as a fraudulent preference coming u/s 54, Prov. Ins. Act.

5. We may dispose of the contention as regards the jurisdiction of the Court, u/s 54, Prov. Ins. Act, shortly. If the suit were one to set aside an

alienation or to set aside a contract as being a fraudulent preference, it is clear from the Official Assignee of Bombay v. Sundarachari A.I.R 1927

Mad. 684, which follows the earlier decision in the Official Receiver, Coimbatore v. Palaniswami Chetti AIR 1925 Mad. 1051, that the

Subordinate Judge would have had no jurisdiction to set aside the alienation as a fraudulent preference. It is argued by Mr. Ramachandra Ayyar

that this objection as to the competency of the Subordinate Judge to enter into the details of the transaction to ascertain whether it was a fraudulent

preference or not is not open to the appellants by reason of their conduct in an application'' filed before the District Judge under the Provincial

Insolvency Act to set aside the transaction u/s 54. It is argued that they appeared before the District Judge and stated that, as a civil suit was

pending before the Subordinate Judge raising all the issues that were then sought to be raised before the District Judge, this petition was

incompetent. The District Judge dismissed the application on the ground that the issues raised before him were covered by the issues in the

Subordinate Judge''s Court. It is contended that, having got that petition dismissed, it is not open to the plaintiffs to say that the Sub-Court had no

jurisdiction to go into the transaction so far as it could be said to be a fraudulent preference and therefore voidable on that. ground.

6. Mr. Ramachandra Ayyar also states that the suit being one for'' specific performance of a contract the Court would not grant a decree for

specific performance where the facts show that it was one which could be avoided as a fraudulent preference, there being no equity in such a

transaction in favour of the plaintiff who seeks specific performance of the contract. With regard to the first objection, it does not appear from the

record that the plaintiffs did anything which prevented the District Judge from going into the question of fraudulent preference. The opposition of

the plaintiffs was to stay the suit which was being part heard in the Subordinate Judge''s Court on the ground that an application was being made to

set aside the transaction as a fraudulent-preference. Reading the counter-petition and the affidavit carefully, it seems to me that all that the plaintiffs

said was that the petition was put in unnecessarily late, the written statements having been filed in 1920 and issues framed and that there was no provision of law for staying the proceedings in the Subordinate Judge''s Court. The Official Receiver in his application expressly stated that the

application to set aside the transaction as a fraudulent preference was not cognizable by the Subordinate Judge''s Court and Official Receiver,

Coimbatore v. Palaniswami Chetti AIR 1925 Mad. 1051 was a clear authority for the Official Receiver''s view. It does not appear why the District

Judge dismissed the whole application instead of investigating the question as to whether it was fraudulent and dismissing the application in so far as

it wanted to stay the suit before the Subordinate Judge. However, he dismissed the whole application but it is difficult to say that anything that the

plaintiffs did invited that decision, having regard to the careful way in which the counter-petition was drafted. However, on the second point raised

by Mr. Ramachandra Ayyar, we think that we cannot shut our eyes to circumstances which would render the transaction a fraudulent preference.

Specific performance being one which is (discretionary and a relief which is granted where parties come to Court with clean hands, circumstances

which would render la transaction unfair and avoidable as a fraudulent preference would materially influence the Court in decreeing specific

performance. Mr. Varadachariar states that he does not object to the Court deciding the question even u/s 54, Provincial Insolvency Act and he

does not raise any question as regards the jurisdiction as he wants some finality for this litigation which has been going on for several years. Under

these circumstances Mr. Ramachandra Ayyar also stated that he was not anxious to shut out the question. We have therefore gone into the

evidence having regard to both the aspects of the case and arguments were addressed to us on both sides, one side impeaching the transaction

both u/s 53, T. P. Act, and 54, Provincial Insolvency Act, and the other side supporting it on the ground that it does not offend against either of the

provisions of either Act.

7. The question we have got to determine is whether this is a transaction of which specific performance ought to be enforced. As I said before, the

Subordinate Judge finds that the promissory note and the agreement Exs. A and B are fully supported by consideration. (Here his Lordship

discussed the evidence in detail and then proceeded as follows:) Having regard to the nature of the transaction, we do not think that it can be said that it was merely an attempt to give the plaintiffs a fraudulent preference over the other creditors. I may also state that this is not a case where the

whole assets of the creditors are placed at the disposal of the transferee so as to leave them nothing to carry on, but only a case where at best a

fourth of the lands was sold, leaving three-fourths to the creditors and also other assets with which they could carry on business. It is also not a

case where there has been a sale of valuable property for low consideration as is often the case in the case of fraudulent preference or transactions.

There are several elements wanting in this case which are found in cases where transactions have been set aside on the ground of fraudulent

preference. It cannot be said that there was no demand or no pressure for the reasons already given, because Ex. G series and the evidence of

P.W. 7 show that there were demands being made.

8. It cannot also be said that the plaintiffs knew that the position of the defendants was so hopeless that pressure was only a cloak to hide a

voluntary transfer of properties in their favour. The Subordinate Judge think that Ex. T which is a letter requesting a loan of Rs. 2,000 promising to

repay it with interest at 18 per cent. in two weeks shows that plaintiffs knew that defendant 1 was paid up. The Subordinate Judge forgets that the

loan was given and that if plaintiffs knew that defendants were hopelessly insolvent or unable to pay their debts they would not have lent Rs. 2,000.

The fact that the loan was granted is the best evidence of the plaintiffs'' belief that though defendants were in financial difficulties they were not

unable to pay their debts. The form of the transaction, as I said before, was not one which a person who was intending to take a transfer of the

properties on the verge of insolvency would have entered into.

9. So far as the law on this subject is concerned, I think that several of the cases cited proceed on the facts in those cases which as found attract

the application of the general principles as to whether a transaction is a transaction intended to defeat the creditors or a transaction intended to give

undue preference.

10. As regards Section 53, T. P. Act, on the findings in this case of the Subordinate Judge which we accept, for the reasons given by us, no case

u/s 53 could arise. A debt was already due to the plaintiffs and it is clear that there is no case u/s 53, the elements required to constitute a fraudulent transfer being entirely absent in this case. We would only refer to the decision in Musahar Sahu v. Hakim Lal AIR 1915 P.C. 115 and

Hakim Lal v. Musahar Sahu [1907] 34 Cal. 999, from which 43 Cal. was an appeal in the Privy Council. As regards the question of fraudulent

preference, the real question is what was the dominant motive of the transfer, or was it to give a preference to one creditor over the rest. This point

has been considered in Official Assignee of Madras v. T.B. Mehta & Sons [1919] 42 Mad. 510, and it is clear from that authority that where a

debtor acts under pressure of his creditor and gives security the case is taken out of the category of cases of fraudulent preference. Having regard

to the facts, which we have already set out, it cannot be said that the dominant motive of the defendants in entering into the agreement was to

prefer the plaintiffs and give them undue advantage over the other creditors. We do not think that the facts in this case bring the case either within

Section 53, T. P. Act, or Section 54, Provincial Insolvency Act. We cannot refuse specific performance if in other ways it could be granted merely

on the ground that the transfer is one which gives plaintiffs a security which other creditors who were less diligent do not have. There is no finding

and no suggestion that there, was any undue influence or any fraud as between the plaintiffs and defendants 1 to 3 and no circumstances have been

invoked which would render a contract between two normal individuals unenforceable in a Court of equity. No doubt the sub"" sequent

adjudication has raised complications but, as observed before, there is nothing to show that this offends against either the Transfer of Property Act

or the insolvency law.

11. It was argued by Mr. Jayarama Ayyar for defendant 5 that the Court ought not to give specific performance because of the insolvency and the

vesting of the properties in the Official Receiver. His argument shortly is that the Official Receiver is not representative-in-interest of the insolvent,

that a decree for specific performance can only be granted against the persons entering into the contract or their representatives-in-interest and, not

falling within those two categories, the Court ought to refuse specific performance. I find it difficult to follow this argument the result of which will

be that all contracts enforceable against the insolvent at the date of his insolvency would cease to be enforceable against the Official Receiver in whom the properties vest by reason of the insolvency. Section 55, Insolvency Act, I think, makes the matter quite clear and, if any authority were

needed, I may refer to Purushotham Naidu v. Ponnurangam Naidu [1913] M.W.N. 897, where a similar question was decided by Sir Arnold

White, C.J., and Oldfield, 3., where it was held that specific performance of an agreement can be enforced against the trustee in bankruptcy of a

vendor. No authority has been cited to support the view that specific performance ought not to be granted simply because a person becomes

insolvent and the property vests in the Official Receiver. As I said before, the judgment of the Subordinate Judge is not clear as to whether he

dismissed the suit because it offends against Section 53, T. P. Act, or against Section 54, Provincial Insolvency Act. He thinks that the defendant''s

position was desperate, that the plaintiffs must have known that their position was at that time one of virtual insolvency without any hope of

redemption and that therefore the transfer though one for full consideration is one whose object is to prefer the plaintiffs to other creditors. We

have given reasons for holding that none of these conclusions follow from the facts. Taking the transaction as a whole, we have to see the position

of the defendants at that time and also whether the transaction is one which is not enforceable. Having regard to the facts set out above, we think

that the Subordinate Judge was wrong in holding that the contract was not capable of specific performance.

12. We set aside the decree of the Subordinate Judge and direct that a decree be passed that the defendants (except defendants 5 and 6 who are

merely attaching creditors) do convey to the plaintiffs the lands mentioned in the agreement Ex. A within two months from this date. On execution

of the conveyance, the promissory note (Ex. B) will be cancelled and delivered over to the Receiver. We do not think we need make a declaration

as regards mesne profits and, if the plaintiffs are so advised, they can file a separate suit.

13. Costs in the lower Court and in appeal will be paid by the Official Receiver out of the estate of the insolvent in his hands. Costs will be paid by

defendant 5 personally and defendant 8 will pay out of the estate of the insolvents in his hands.

Reilly, J.

14. I agree that we would not be justified in differing from the Subordinate Judge''s finding of fact on the oral evidence that the allegation that a

material alteration was made in Ex. A after its execution by changing six months into one month has not been made out. The plea set up by

defendant 5 that that document was antedated was not even mentioned before us; and the plea of defendants 2 and 3 that their signatures were

obtained to Ex. A by coercion and undue influence appears to have been dropped.

15. The learned Subordinate Judge appears to have been under the impression that he could apply to this case the principles of Section 53, T. P.

Act, and Section 54, Prov. Ins. Act, or a mixture of both. But I did not understand Mr. Ramachandra Ayyar, who appears for the Official

Receiver, seriously to contend that the principles of Section 53, T. P. Act, were applicable at all, and I think it is [quite clear that they are not. That

section, so far as it deals with defeating or delaying creditors, is aimed, not at;a debtor who chooses to prefer one creditor to another, to transfer

his property in satisfaction of one debt rather than another, but at a debtor who transfers his property with the object of screening it permanently or

temporarily from all his creditors, who uses the transfer as a cloak to preserve the benefited the property for himself or for some person in whom

he is interested, instead of letting it go towards the payment of any of his debts. If any authority is needed for that reading of the section, we need

not go further than the remarks of their Lordships of the Privy Council in Mushahar Shau v. Lala Hakim Lal AIR 1915 P.C. 115,. to find it. As for

Section 54, Prov. Ins. Act, as the Subordinate Judge was not sitting in insolvency, he was not directly concerned with it, nor are we in this appeal.

But I agree with Mr. Ramachandra Ayyar that he can legitimately ask us to look into this transaction and see whether it is one which would or

could be annulled under the provisions of Section 54. Prov. Ins. Act, had the transfer actually been made, and, if we come to that conclusion, to

consider whether this is a proper case for making a decree for specific performance. On the record, as it stands, I do-not think that this is a case in

which the principles of Section 54, Prov. Ins. Act, could be applied. (After dealing with the evidence His Lordship proceeded.) In my opinion, if

we had been sitting in insolvency, this is not a casein which we could have annulled the transaction had it matured into transfer,, under the provisions of Section 54, Prov. Ins. Act.

16. If we were dealing with a case under that section, we should be mainly concerned with the intention of defendant 1 in the master. But in the

present case what is really of more importance to us is the conduct and intention of Munuswami Mudaliar. We are only asked to look into the

transaction in order to see whether he and his representatives, the plaintiffs, are persons in whose favour we can properly make a decree for

specific performance. Now, as I have mentioned,, out of the Rs. 35,000 which was consideration for Exs. A and B, less than a. fourth represented

the debt due to Munuswami Mudaliar. For more than half of the consideration he was merely a surety for a loan from the Bank of Madras to

defendant 1, out of which he himself had not got any benefit, and as a surety he was entitled to, take steps to indemnify himself in case the bank

came down upon him. And as a creditor he was of course entitled to do what he thought best in his own interests. In regard to the Rs. 9,000, as I

have mentioned, he was not then a creditor in any sense, either an ordinary creditor or a surety; he merely advanced a further sum to defendant 1.

Is he to suffer for doing that? So far as I can see, he appears to have been a man who, when the business of defendants 1 to 4 was in difficulties,

came to their help in order to enable them to carry on and was not, as has been represented to us, just an ordinary creditor trying to steal a march

on other creditors. In these circumstances ought we to refuse a decree for specific performance? Mr. Jayarama Ayyar has argued that because to

give a decree for specific performance to the plaintiff will diminish the amount available for the other creditors we ought not to make that decree

and we ought to leave the Subordinate Judge''s decree as it is, a mere money-decree for Rs. 35,000, which will result in the plaintiffs being

creditors in the insolvency and getting such proportion of what is due to them as the other creditors get. But, if we look into the transaction

represented by Exs. A and B, in its essence it was a transaction by which it was intended that Munuswami Mudaliar should have security for what

was due to him and for the large amounts which he was then advancing. In my opinion it would be inequitable, when he was in effect a secured

creditor, to relegate him to the position of an unsecured creditor. And I agree that Mr. Jayarama Ayyar''s contention that a decree for specific performance cannot or ought not to be made against the Official Receiver cannot be upheld.

17. Mr. Ramachandra Ayyar raises one other contention. He urged that during the course of the suit, the plaintiffs, by a manoeuvre before the

District Judge, got a petition which the Official Receiver had presented u/s 54, Prov. Ins. Act-S. 53 is obviously a mistake-dismissed on the

representation that all questions arising in that petition could be disposed of in this suit and then turned round and said that in these proceedings,

which are not in insolvency, such questions could not be raised. I do not think that it has been established that the plaintiffs indulged in any such

manoeuvre, though at one stage of his arguments in this appeal Mr. Varadachari raised the question whether the principles of Section 54, Prov.

Ins. Act, could be applied in disposing of this suit. The District Judge certainly appears to have thought that the petition of the Official Receiver u/s

54, Prov. Ins. Act, was unnecessary as this suit was going on; but all that, so far as we can see, the plaintiffs did in the matter was to represent to

the District Judge that it would be a hardship to them if the trial of this suit was stayed while the belated petition of the Official Receiver u/s 54,

Prov. Ins. Act, was inquired into. I am reminded that the suit was actually part heard at that time. That objection appears to have been a

reasonable one for them to take. And, although the District Judge was wrong in saying that the petition did not lie at that stage, has any harm to the

defendants really been done by the dismissal of that petition? All the questions which could have been raised in that petition and all the evidence

which could have been given on that petition were before the Subordinate Judge; and, if we had come to the conclusion that no decree for specific

performance should be made, then that petition would obviously have been unnecessary, as there would have been no transfer to annul or to fear.

As the defendants were in effect invited to give all their evidence on the questions which would arise on that petition and had the opportunity of

giving all their evidence in the suit, I cannot see that they have been prejudiced in any way or that the plaintiffs have been guilty of any conduct in

the course of the litigation which would disentitle them to a decree for specific performance. I agree therefore with the order proposed by my

learned brother.

