

(1920) 07 MAD CK 0028
In the Madras High Court

Sami Asari alias Aiyam Perumal Asari	APPELLANT
Vs	
Adinam Azhagiya Pillai and Another	RESPONDENT

Date of Decision : 28-07-1920

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : 61 Ind. Cas. 580 : (1920) 12 LW 718

Hon'ble Judges : Sadasiva Aiyar, J; Napier, J

Bench : Division Bench

Judgement

Sadasiva Aiyar, J.—The plaintiff is the appellant. He purchased the plaintiff lands 44 cents., besides two other properties, for Rs. 500, on the 9th April 1901 under Exhibit A from Subramaniya Asari who was then involved in debt. The three properties were worth Rs. 1,200 and it is found by both the lower Courts that the conveyance to the plaintiff was intended to defraud the creditors of Subramaniya Asari. The Court of first instance held that the sale was a sham transaction but the lower Appellate Court held that it was intended to be a real transaction (though also intended to defeat the creditors) and that the whole of the consideration was paid.

2. As regards the defendant's sale-deeds it was for Rs. 275 executed by the same Subramaniya Asari in August 1912, about 16 months after the plaintiff obtained his sale-deed. The defendant's sale deed related only to the plaintiff item of 44 cents and the purchase money was Rs. 275. Out of this amount of Rs. 275, Rs. 75 was due on a mortgage of the plaintiff-property itself to a third person and the defendant undertook to pay it. The lower Appellate Court finds that he did not pay it. It may, therefore, be taken that the defendant purchased the equity of redemption of the plaintiff-property for Rs. 200. He paid the whole of the Rs. 200, according to the finding of the Munsif which has not been dissented from by the lower Court. The said Rs. 200 included a sum of Rs. 57-8 0 due to the first defendant himself under a Small cause decree obtained against Subramaniya Asari secured on Immovable property other than the plaintiff-property. The lower

Appellate Courts found that the plaintiff's sale-deed was intended to be acted upon, that the plaintiff did get possession and that the defendant dispossessed him evidently as soon as the defendant obtained his sale-deed 16 months afterwards. The question which has to be considered on these facts is, whether the plaintiff has got a title which will avail against the defendant's title.

3. I am not inclined to decide the question on the mere possessory title which may be set up on the plaintiff's behalf, as it raises the large question considered in *Narayana Row v. Dharmachar* 26 M. 514, which is, no doubt, in the plaintiff's favour, so far as the principals of that decision may be applicable to the facts of this case. The second defendant, being the son of the first defendant whose rights are shared by the second defendant. I have been using the term defendant" shortly to denote the first defendant.

4. The defendant relies upon Section 53 of the Transfer of Property Act, and contends that the plaintiff's transfer is voidable, at his (defendant's) option as he is a person defrauded, defeated or delayed by the sale-deed in the plaintiff's favour. Now, Section 53 classifies the persons who may be defrauded by a transfer as follows: (1) a prior transferee for consideration; (2) a subsequent transferee for consideration; (3) a Co-owner having an interest in the property; (4) other persons having an interest in the property, and (5) creditors of the transferor. Now, the defendant can come in only under either of the two Classes (2) and (5), namely, either as a subsequent transferee for consideration, or as a creditor of the transferor. If he contends that he can avoid the transfer to the plaintiff as a subsequent transferee of Subramaniya Asari, he would have to establish that the prior transfer was intended to defeat his subsequent transfer. It is very difficult for a subsequent transferee to establish that a prior registered transfer deed was intended to defeat his subsequent transfer. Whatever may be the case in England where deeds of sale need not be registered, under the Indian Law most of the deeds of transfers relating to Immovable property have to be registered; registration is, prima facie, sufficient notice to subsequent transferees. A subsequent transferee with notice of the prior transfer would clearly be in a very difficult position when he seeks to establish that he was intended to be defrauded by the prior transfer. The finding also of both the Courts is not that the sale deed to plaintiff was intended to defeat any subsequent transferee but that it was intended to defeat the creditors of Subramaniya Asari.

5. Taking it, then, that the defendant can come only under the class of creditors of the transferor, the questions for decisions are, (1) Has he avoided the plaintiff's transfer, as a creditor? (2) When did he so avoid it (3) Is he entitled to avoid the whole of the conveyance under Exhibit A made in plaintiff's favour or only to a limited extent and, if so, to what extent? (4) To what extent has he avoided it, and (5) has his avoidance the result of conferring of him a good title under his own sale deed, Exhibit I.

6. The full Bench decision in *Ramaswami Chettiar v. Mallappa Reddiar* 59 Ind.

Cas. 947 has now established that the avoidance by a creditor need not be by a suit brought on behalf of all the creditors or even by that one creditor, and that an open and unequivocal declaration of the intention to avoid it expressed by a creditor is sufficient in law to enable him to treat it as void and to take steps on that footing to enforce his rights as a creditor for obtaining satisfaction of his debt. The declaration can, of course, be made by open unequivocal conduct. In the present case there can be no doubt, on the facts found, that the defendant knew of the sale to the plaintiff and, notwithstanding that knowledge, made a subsequent purchase of one of the lands sold to the plaintiff ignoring the plaintiff's sale and treating it as if it conveyed no title to the plaintiff so far as these 44 cents, were concerned. I think there was here an unequivocal expression of an intention by the defendant to avoid the alienation to the plaintiff so far as these 44 cents, were concerned. It is not reasonable to credit a person with an intention to interfere with other's rights except in so far as it is necessary to protect his own, and hence it is not proper to hold that he intended to avoid the sale of all the three properties sold to the plaintiff.

7. The next question is, when did the defendant so avoid the sale of the 44 cents? If he avoided it after he became the transferee under Exhibit I and after his debt was thereby extinguished by the purchase-money under the transfer, he cannot, of course, rely on Section 53 so far as it says that a creditor can avoid a transfer intended to defeat him, because he ceased to be a creditor on the transfer. But his intention to avoid had, in my opinion, clearly been made and expressed by conduct before (it may be only just before) he obtained the transfer under Exhibit I and, therefore, there is nothing in the contention of the appellant that the avoidance by the defendant was made as transferee and not as creditor. In this connection I may refer to a decision in *Vasudeo Raghunath Oka v. Janardan Sadashiv Apte* 59 Ind. Cas. 947 quoted by the learned Pleader for the appellant. In that case the plaintiff purchased certain lands in 1906, the purchase being found to be a fraudulent purchase intended to defeat the creditors of the vendor. A creditor of the vendor attached the lands with notice of the plaintiff's purchase (but clearly intending to treat as void) and brought the lands to sale. The defendant became the auction-purchaser at that sale held in 1909. The plaintiff then sued the defendant in ejectment, and the Bombay High Court upheld the plaintiff's suit in ejectment on the ground, that though a creditor who had attached, and brought the property to sale

8. was entitled to avoid the plaintiff's purchase, an auction purchaser who purchased at the Court-sale brought about by the decree-holder had no such right as he was not the representative of the decree holder. With the greatest respect, I differ from the conclusion in this case. If, of course, the decision was based on the view that till a suit is brought to set aside the sale, even a creditor cannot by a mere expression of intention or an overt act indicating such an intention, avoid a fraudulent sale, the decision is right, provided the above view is also legally sustainable. But in this Court it has been held by a Full Bench decision already referred to that a formal suit is unnecessary to set aside a

fraudulent sale. If, however, Vasudev Raghunath Ohav. Janardan Sadashiv Apte 29 Ind. Cas. 497 intended to hold that, notwithstanding that a suit to set aside the sale by a creditor was unnecessary and the creditor could set it aside by an unequivocal expression of intention, the auction-purchaser could not take advantage of the act of the decree-holder, I must, with great respect, say that the decision, in my opinion, erroneous, because the promotion given to the creditor and the privilege given to him to recover his debt by bringing the property to Court-auction sale notwithstanding the prior fraudulent purchase by another would be made of no effect and become a purely illusory right, if the Court auction-purchaser is not to get a clear title overriding the fraudulent purchase. The very object of allowing the creditor or decree-holder to take advantage of his avoidance of a fraudulent transaction is to give the auction-purchaser in the sale brought about by the creditor a clear title, and if the auction-purchaser gets no such title, he can get back the purchase-money from the decree holder on the ground that no title passed to him under his purchase. See Order XXI, Rules 91 and 93.

9. Then, the next point to be considered is, whether the defendant is entitled to avoid the whole transfer to the plaintiff or only to a limited extent, and, if so, to what extent. The creditor's right to avoid is based upon his right to get satisfaction of his debt. He should, therefore, exercise his option to avoid in a reasonable and bona fide manner. That limitation does not involve, in my opinion, that to be fraudulent transferee is entitled to the greatest consideration and that the creditor should take the utmost trouble and should exercise the utmost ingenuity to see that the transfer is avoided to as small an extent as possible. We must take the facts of such transaction in each particular case as a whole and arrive at a conclusion on the question, after considering the facts with minds inclined indulgently towards the creditor than towards the fraudulent transferee, the question, namely, whether the creditor has exercised his right to avoid the prior transfer in a reasonable and bona fide manner. So considering the circumstances of this case, I am satisfied that the defendant avoided the transfer with a bona fide view to recover his debt from the plaintiff's property and that, as it is not shown that he could have as easily recovered his money in any other reasonable way that it is open to him or that he maliciously adopted the course of avoiding the sale of the whole 44 cents, I would decide the question in his favour. No doubt, usually, a decree-holder-creditor who avoids a prior transfer by his debtor does so in order to attach the property and bring it to sale in execution of the decree. But Section 53 of the Transfer of Property Act does not state that a creditor could avoid it only for the purpose of proceeding against the property by attachment through Court and sale through Court for the purpose of recovering his debt, If he has in view any other reasonable transaction through which also without incurring the expenses of execution he could make available the value of the property to satisfy his debt, I do not see there is anything in Section 53 which prevents him from doing so. What steps he should take after avoiding a fraudulent transfer in order to recover his own debt is not indicated in

the section and the argument of the appellant's learned Vakil that it is the proceedings of a Court of Justice alone which ought to be resorted to by the creditor to recover his debt (for the purpose of recovering which he avoided the sale) cannot be upheld.

10. The next questions are, to what extent has the defendant avoided the sale of 44 cents and has he obtained a title under the transaction which he resorted to, to recover his debt on such avoidance? He has, by his purchase, dearly shown that he had the intention to avoid the sale of the entire 44 cents, and the manner in which he has appropriated the purchase-money of Rs. 200 which was fixed as the value of the equity of redemption sold to him indicates that it was a bona fide transaction so far as he was concerned, which ought to be upheld. He has, therefore, obtained a valid title to the property purchased by him,

11. As regards the English decisions based on the Statute of Frauds, the language of that Statute is different from that used in Section 53 of the Transfer of Property Act and I always distrust my ability to reconcile conflicting English decisions and even some times, I fail to understand how plain words like "void" have been interpreted to mean voidable in some of those decisions. I shall not deal with those English decisions or with cases like *Sankarappa v. Kamayya* 3 M.H.C.R. 231 which were decided in Indian Courts before the Transfer of Property Act was enacted.

12. In the result, I would dismiss the second appeal with costs.

Napier, J.

13. In my opinion the District Munsif is right, and this suit should fail altogether and I would apply equities in favour of the plaintiff as the lower Appellate Court has done. There is, however, no memorandum of objections in this case. There is no doubt that, at the time that the defendant took Exhibit I, he was a creditor, and I agree with my learned brother that he took the sale-deed with the intention of avoiding the prior sale-deed, Both Courts find that the prior sale was in fraud of creditors. That being so, the defendant can treat it as avoided from the date of Exhibit I. The Vakil for the appellant suggests that the first defendant could only avoid the sale when he is, at the date of the suit, a creditor for the full value of the property. This proposition tends to no support from any decided case in England under the Statute of Elizabeth or in India under the Transfer of Property Act. It is true that in some cases the Chancery Courts have in creditors actions at the time of declaring a conveyance void against the creditors and making the property available for them, treated the balance over as vesting in the prior Assignee, but no case has been brought to our notice where a Court has considered only the particular creditor before the Court.

14. Under the Transfer of Property Act, the title of the plaintiff has failed on the finding of the lower Appellate Court, The plaintiff has, therefore, no title that he can rely on in this suit. It is suggested that he has a good possessory title against the defendant. Such a title might enable him to recover against a mere

trespasser but cannot avail him against a person in possession under an assignment not fraudulent, it may be that the defendant might have been able to recover the property from the plaintiff if the latter had been in possession but, on the facts of this case, the suit should fail altogether and the appeal must be dismissed with costs.