Lalitha Kunder Vs. Syndicate Bank, Surathkal Branch, Dakshina Kannada District and Others

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Court : Karnataka

Decided On : Mar-09-1998

Reported in : 1999(1)KarLJ694

Judge : T.N. Vallinayagam, J.

Acts : Transfer of Property Act, 1882 - Sections 53(1); Code of Civil Procedure (CPC), 1908 - Order 21, Rule 58; Limitation Act, 1963 - Sections 14

Appeal No. : Regular Second Appeal No. 193 of 1995

Appellant : Lalitha Kunder

Respondent : Syndicate Bank, Surathkal Branch, Dakshina Kannada District and Others

Advocate for Def. : Sri Radesh Prabhu for ;Sri Tukaram S. Pai, Adv.

Advocate for Pet/Ap. : M/s. Shetty and Hegde Associates, Adv.

Judgement :

1. The petitioner in Miscellaneous Case No. 171 of 1980 succeeded before the Trial Court in raising the attachment over the property on the ground that the property has been transferred even prior to the decree being passed in that suit.

The Lower Court accepted the petitioner and raised attachment while the Appellate Court reversed it holding that the attachment is valid. Hence the petitioner is before me in this second appeal.

2. The admitted facts are that there was a settlement in favour of the petitioner on 1-9-1978. But the decree was passed on 19-10-1978 against the settlors. The attachment was made long after the decree. Therefore, the question is whether the settlement was made with a view to defeat the realisation of the decree the plaintiff obtained against the settlors.

3. The learned Counsel for the respondents relied upon the decision in C. Abdul Shukoor Saheb v Arji Papa Rao (deceased) by L.Rs. and Others, to the effect that Section 53(1) of the Transfer of Property Act, 1882, can be applied even in proceedings where the attachment is sought to be attacked and it is not necessary to file a separate suit to set aside the document. But this dictum can be made applicable only when there is sufficient pleadings. In fact, the Supreme Court has considered the written statement at page 1153 as follows:

'(1) that the sale was a sham, a pretended sale without any consideration and not intended to pass any title to the nominal purchaser and in the alternative;

(2) that even if it were a real transaction supported by consideration and intended to pass title to the plaintiff, still the same was, having regard to the circumstances stated, a fraud upon the creditors and therefore voidable at his instance. Though the pleading in the written statement was in this form, the issues struck did not raise the two defences as distinct pleas but rolled both of them into a single plea raising the question 'whether the plaintiff had title to the suit property and whether the claim order was liable to be set aside'. No doubt the Supreme Court observed whether the written statement is artistically drafted on the points that were raised and those points were considered by the Supreme Court. But I find no counter filed by the Bank. The only allegation is the said document is the fraudulent document and the petitioner has no right, title to attack the execution because the property belong to the second respondent and hence the petitioner is entitled to believe the same as a sale. It is the real defence and other defences are mere denial. There is absolutely no averment seeking to declare this document as sham

and nominal or that the transaction was intended to defeat or delay the realisation of the claim or any other averment within the meaning of Section 53(1) of Transfer of Property Act'.

4. Cases must stand or fall by pleadings. Aa rightly put by the Supreme Court it is not the artistic drafting which is necessary but actual drafting of the pleading and only on the basis of the pleadings, evidence can be let in. Even if evidence is let in without pleading that cannot be relied upon. There is absolutely no pleading to bring Section 53(1) at all within the purview of this case. Section 53(1) of the Transfer of Property Act begins with the words 'every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable. .. .'.

In the absence of any pleading it is not open to the Appellate Court to come to a different conclusion.

5. I am satisfied that there is absolutely no pleading or no case set up to warrant any application of the dictum of the Supreme Court or intervention or to confirm the judgment and decree of the first Appellate Court.

6. In this view holding that the Appellate Court's finding is error apparent on the face of the record the second appeal is allowed. The attachment is raised. Liberty is given to the Bank to file a suit under Section 53(1) of the Transfer of Property Act and to attack the attachment if they are entitled to in law. It is also made clear that the pendency of this proceeding shall not be considered to save limitation under Section 14 of the Limitation Act.