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Court : Allahabad

Decided On : Aug-24-1936

Reported in : AIR1937All39; 166Ind.Cas.619

Appellant : Mt. Razina Khatun and ors.

Respondent : Mt. Abida Khatun

Judgement :

1. This is a defendant's appeal arising out of a suit brought for a declaration that the properties in suit are owned and possessed by the plaintiff and cannot be attached and sold in execution of a decree obtained by the principal defendants against the plaintiff's husband. According to the plaintiff, a sum of Rupees 52,000 was due to her as her dower from her husband and in satisfaction of that claim the husband transferred the property in suit to her on 4th January 1930 and got the sale deed registered, followed by mutation of names in her favour. Her case is that the defendants who have a money claim under an award, later incorporated in a decree, have no right to attach these properties. The defendants in their written statement denied that any dower was due to the plaintiff and pleaded that the sale deed relied on by her had been fraudulently and fictitiously executed without any consideration, with the intention dishonestly to evade payment of the defendant's decretal amount and that the plaintiff is not the owner in possession of the properties in suit. The issue framed as regards this plea was:

Does the sale deed relied on by the plaintiff represent a genuine and valid transaction of sale for consideration, or was it executed fraudulently and without consideration to defeat the defendants decree-holders?

2. There was another issue as to whether the claim was barred by Sections 52 and 53, T.P. Act. The Court below has found that the amount of the dower debt due to the plaintiff was in fact Rs. 52,000 and has accepted as proof of it an entry in a diary in the handwriting of the deceased husband of Mt. Bazina Khatun, who was the own brother of the plaintiff's husband. The learned Counsel for the defendant is unable to contest this finding. The Court below has further found that the dower was in fact prompt and that the transaction of sale was a genuine one with the intention that the properties should pass from the husband to the wife, and that the wife thereafter obtained actual possession of the properties. It has therefore upheld the transaction as being a good transaction for value and made in good faith. In appeal the findings of the learned Subordinate Judge are challenged, except as to the amount of the dower debt. In the first place, it is contended that no dower debt was payable because the plaintiff Abida Khatun in her cross-examination admitted that she and her husband had been on good terms upto the period of eight or nine years and said:

I demanded my dower debt as soon as our relations became strained. I demanded the dower debt on the very next day about eight or nine years ago. Maulvi Izduddin (her husband) replied that he would pay off when the property would be divided. I demanded the dower debt for the first time eight or nine years ago and thereafter I continued to make demands after a period of every two or three months.

3. It is therefore contended that time began to run against her some eight years before she was examined when she first made the demand. But under Article 103, Lim. Act, time begins to run not from the date of the demand but from the date of the refusal. In the absence of any allegation in the written statement, we are unable to interpret the admission made by the plaintiff as meaning that her husband had refused the payment of the dower debt. Indeed her statement rather suggests that he promised to pay it, though he wanted time until the property was

divided. We are therefore unable to hold, on any admission made by the plaintiff, that her claim for dower had become barred by the time when the sale deed was [made] in her favour. No doubt there are some circumstances which are very suspicious. Apart from the relationship of husband and wife between the parties, the sale deed appears to have been executed by the husband himself at Amroha and not in their residential village, and stamp-papers had been purchased by him and it was he himself who presented the document for registration. He was however at that time accompanied by his son, who might be representing his own mother. There is also this fact in favour of the appellants that shortly before the execution of the sale deed the present defendants had obtained an award in their favour under which Azd Uddin was liable to pay Rs. 5,962-9-0.

4. As against this we have the fact which has been well established that the amount of the dower debt was Rs. 52,000 and that that debt was due. We have also the fact that after the registration of the sale deed, mutation of names was duly effected. The case of the defendants that the husband continued to live with his wife in the same house may well be accepted because unless the feelings were really strained, he might continue to live in the same house with the permission of his wife even after a genuine transfer had been made in her favour. There is however no satisfactory evidence to show that the income of the estate was appropriated by the husband himself without the consent of the wife or that the wife never obtained possession of the property sold to her. We must therefore accept the finding of the Court below that a transfer of property took place and that there was an intention in the minds, of both the parties that the property should pass from the husband to the wife. At the same time, there seems to be every reason to believe that the intention of the husband was dishonest and he wanted to give preference to his wife over the defendants who had obtained the money decree against him. He very probably intended to defeat and delay their claims and perhaps also to cheat them. The wife on the other hand, even though knowing that a decree for money had been obtained by the defendants, might well like to have her debt satisfied first as it was earlier in date and was much larger in amount. Even if she were aware that the transfer of the property to her was tantamount to giving her preference over the other creditors, the transaction itself would neither be illegal nor void ab initio.

5. Their Lordships of the Privy Council in *Musahar Sahu v. Lala Hakim Lal* A.I.R. 1915 P.C. 115 laid down that where it was found that the transfer impeached was made for adequate consideration of genuine debts, and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy. In a case of such fraudulent and undue preference shown to one creditor over the others, the remedy of the aggrieved party, if there is not sufficient property left to meet their claims, is to approach the insolvency Court within two years of the transfer and get the debtor adjudicated an insolvent, in which case they would be placed on the same footing as the preferred creditor and the transfer would be avoided by the insolvency Court. But where the aggrieved party fails to seek the remedy provided by law and allows the period of two years to elapse, it is not open to such party to avoid the transaction merely on the ground that the effect of it was to give preference to one creditor over the others even though it be shown that this was a fact known to both the parties.

6. The learned Counsel for the appellants has strongly contended before us that the provisions of Section 53, T.P. Act, would be applicable, unless and until it is shown that the plaintiff was a transferee in good faith and for consideration, and it is therefore urged that if the plaintiff was aware of the defendant's claim or was in a position to ascertain the true facts and made no inquiries and took no steps to find out, then she cannot be said to have acted in good faith. In view of the exposition of the law as made by their Lordships of the Privy Council this contention cannot be accepted. Where there is no adequate consideration given and the transferee is aware of the claims of other creditors, certainly he cannot be said to be acting in good faith. But where full consideration is given, then a mere knowledge of the fact that there may be claimants or other creditors would not necessarily import bad faith on the part of the transferee into the transaction.

7. In *Suba Bibi v. Balgobind Das* (1886) 8 All. 178, where a husband had sold his property to his wife in satisfaction of her deferred dower debt and subsequently a creditor obtained a money decree and in execution attached the property so transferred, and when her petition was disallowed she brought a suit for a

declaration of her right, it was held that if there was in fact a subsisting debt due for dower from the husband to the wife and he transferred and she accepted, the 4 annas share in satisfaction of it, the transaction was a perfectly legitimate one and no Court had any power to disturb it. It was for the defendant, the judgment creditor, to establish either that the deferred dower debt did not constitute[^] such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower debt; and that, despite what appeared in the sale deed, the parties remained in precisely the same position as before it was executed, the 4 annas still remaining the property of the vendor and as such liable to attachment. It has now been made clear by their Lordships of the Privy Council in *V.E.A.R.M. Firm v. Maung Ba Kyin* that where the ostensible owner of a property under a registered sale deed institutes a suit under Order 21, Rule 63, Civil P.C., to establish his right thereto, the burden of proof to show that the sale is a fraudulent one is on the creditor who has attached the property for somebody else's debt.

8. It was laid down in the Full Bench case in *Hamira Bibi v. Zubeda Bibi* (1910) 7 A.L.J. 1025 that a wife's dower is a debt like all other liabilities of the husband and, whether prompt or deferred, is a debt due from the husband to the wife and that she is his creditor. The case in *Akram-un-nissa Bibi v. Mustafa-un-nissa Bibi* : AIR1929 All238 is clearly distinguishable. In that case under the arbitration award itself it was provided that the husband would have some benefit of the property transferred, for there was an express condition laid down in the award that the husband should have the right of residence in the dwelling house and that the wife should have no power to transfer the property during the lifetime of her husband without his consent. It was in view of these provisions as well as the other circumstances in the case that the Bench held:

In our view these provisions show that the husband was careful to protect his own interests in the property and that he never intended to surrender the beneficial ownership.

9. The Court accordingly held that the property had not in fact passed to the wife, but that the husband himself had remained in possession and enjoyment of the property and that therefore the transaction was really a colourable and fictitious one. It further found that the arbitrator was party to the fraud and collusion of the husband and the wife. In the present case no benefit was reserved 'for the husband. No doubt the amount of the dower debt was large which is nothing unusual. We have found that it was in fact due. Therefore it was a case of an out and out sale, and in the absence of proof that the transaction was a wholly bogus Mid colourable one, we cannot allow it to be avoided on the mere ground that the intention was to give preference to the wife over the present defendant. The defendants seem to have lost their proper remedy, namely, of approaching the insolvency Court and getting the transfer avoided on the ground of such fraudulent preference.

10. It is therefore not possible in this case to give any relief to the defendants. The amount of Rs. 5,962-9-0 which was awarded to them consisted of two parts, the bulk being an amount due to them on account of profits for previous years and a sum of Rs. 1,495-6-0 due as compensation for the deficiency in the field property allotted to them. The arbitrator however did not create any charge in their favour on account of this amount of compensation, as he might well have done, but simply gave them a money decree. The rights of the defendants therefore merged in the award in the decree. It is not now possible to invoke the analogy of the provisions of Section 120 read with Section 55, Sub-section (4)(b), T.P. Act, and hold that the charge should be declared in favour of the defendants. The provisions of that Act apply to private transfers and cannot apply to decrees based on an award which itself does not contain any declaration that a charge has been created. A further difficulty in the way of the defendants is that no property is specified, and it is not possible to ascertain what was the real property for which this compensation was awarded and it would not be easy to specify the property on which a charge exists. We are therefore unable to give any relief to the defendants we however feel that the defendants have been cheated out of their money. The evidence shows that the plaintiff obtained the sale-deed of almost the entire property owned by her husband leaving a few odds and ends which are not worth much. The husband himself is now dead and the decree cannot be executed

against him personally. In these circumstances we think that the parties should bear their own costs of this appeal. The appeal is accordingly dismissed but without any order as to costs.

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