

Mathan Philip Vs. Ithak

Mathan Philip Vs. Ithak

SooperKanoon Citation : sooperkanoon.com/719080

Court : Kerala

Decided On : Nov-28-1958

Reported in : AIR1960Ker98

Judge : Varadaraja Iyengar, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 52

Appeal No. : Second Appeal No. 594 of 1955 (E)

Appellant : Mathan Philip;ithak

Respondent : ithak;mathan Philip

Advocate for Def. : K.P. Abraham, Adv.

Advocate for Pet/Ap. : K.K. Mathew, Adv.

Judgement :

Varadaraja Iyengar, J.

1. This second appeal is by the defendant in a suit to set aside an order refusing to remove an obstruction in execution and for recovery, which was dismissed by the trial court but allowed by the court below.

2. Kora Ulahannan started a chitty scheme in 1108 as foreman but it collapsed in or about 1110. There were five unprized subscribers to whom paid-up

subscriptions were due, viz., D.W. 1, D.W. 2, plaintiff, Kurien and Kuriacko. It is the defendant's case that 3 meeting was held of these chitty creditors, the foreman and others on 9-6-1110 when measures were taken for the settlement of the debts by sales of the chitty security properties. In due course. Exts III, IV and V sale deeds were executed in favour of D.W. 1, Kurien and D.W. 7 respectively on 12-6-1110, and Ext II sale was executed in favour of the defendant with recitals on 15-6-1110 to pay off, the plaintiff and Kuriacko, all the documents being registered on 19-6-1110.

The delay in executing Ext. II and in the registering of all the documents was accounted for by the fact that there was no time to prepare all the deeds on the first of the days, viz. 12-6-1110 and again by the failure of P.W. 7 to appear in time on 15-6-1110 for purpose of the registration. Whatever it be, the plaintiff whose claim was about to get barred on 15-6-1110 filed suit O. S. 1443 of 1110 late on 15-6-1110, and obtained Ext. D, ex parte decree on 30-10-1110. Following it up, he purchased certain of the chitty security properties in two instalments under Exts. B and H sale sannads.

On the plaintiff seeking to take delivery of the property covered by Ext. II, the defendant obstructed successfully, Ext. A dated 23-2-1120 being the order allowing the obstruction. This suit was thereafter filed on 15-4-1120. The plaint averred that Ext. II and other documents were all executed on 19-6-1110 after the institution by plaintiff of his suit O. S. 1443 but were fraudulently ante-dated, that Ext. II was in fraud of creditors and also was affected by lis pendens and plaintiff as the owner under court sale was entitled to recover the property from defendant with mesne profits.

3. The defendant resisted the suit. He pleaded that the plaintiff had knowledge of the transactions inclusive of Ext. II and also was a consenting party thereto, having in fact taken a leading part in the meeting of the creditors, that plaintiff's suit was only by way of after-thought with a view to get more than what was recited in Ext. II. The defendant denied that Ext. II was a fraudulent transfer or was affected by lis pendens O. S. 1443 of 1110.

He alleged that he had offered the plaintiff the amount of Rs. 130-23 Chs-4 Cash recited in Ext. II but without response from plaintiff. He was however willing to pay the same with interest even now.

4. Elaborate evidence was led by either side in support of their respective cases. The Munsiff found that the defendant's version as to execution on 12th and 15th and registration on 19th was true, further that plaintiff was a consenting party as alleged and that plaintiff could not therefore impeach Ext. II. There was according to him no transfer in fraud of creditors or lis pendens. So he dismissed the suit. The Judge found in favour of the plaintiff all along the line and so allowed the suit. Hence this appeal by the defendant as I commenced by saying.

5. Having heard learned counsel on both sides it seems to me that the case has to be decided in the light of the answers to the question (i) whether Ext. II is vitiated by lis pendens and the defendant is accordingly out of court, and (ii) whether even otherwise, the plaintiff is entitled to ignore Ext. II because it is in fraud of creditors. The question whether Ext. II and other deeds were in the nature of a composition between the, chitty foreman and his creditors inclusive of the plaintiff so as to preclude the plaintiff from enforcing his debt otherwise than under the composition arrangement, which was discussed elaborately and found upon differently by the courts below, is not it seems to me, of importance in this case.

For if Ext. II is vitiated by lis pendens, the arrangement thereunder in favour of the plaintiff must have been put in issue in that suit, and to the extent it is admitted that was not done, there is an end to that plea. If on the other hand, Ext. II is not so vitiated, then the plaintiff's decree and execution proceedings in O. S. 1443 of 1110, can-not avail him as against the defendant-transferee under Ext. II because he was not a party to the suit.

And again there was no case for the defendant that the composition arrangement with the plaintiff contemplated a mere promise of the defendant to pay as distinguished from an actual payment, in satisfaction.

6. Taking up the above two questions and for purpose of convenience the second of them as to fraudulent transfer to begin with, it seems to me that the reasoning

and conclusion of the trial court is preferable to that of the court below, It is unnecessary for me to deal with the matter in detail, It is enough to emphasise that all the chitty creditors except the plaintiff have no complaint and there was after all no incentive for indulging in fraud.

And if secrecy is a badge of fraud, then the transactions here were too open to admit of any fraud. Some point was sought to be made of the defendant's failure to get at possession for some time but as the trial court observed this was no way conclusive of the matter. It would appear that the property which was the subject of sale under Exts. III, IV and V were hypothecated under Ext. VII of 1105 in favour of D.W. 6. So provision was made, in Ext. II in favour of the defendant to pay off D.W. 6 and the defendant's father actually executed Ext. VI sale of his own property for discharging Ext. VII and got endorsement of its discharge under Ext. VII-a.

The significant circumstance here is that Exts. VI and VII-a also were written on Ext. II dated 15-6-1110 and registered on 19-0-1110 along with all the other documents. I hold therefore along with the trial court, that Ext. II cannot be impeached as in fraud of creditors,

7. Going to the first question as to lis pendens : The court below arrived at its conclusion that Ext. II was vitiated by lis pendens solely on its finding that Ext. II like the other documents were all written on 19-6-1110 but were fraudulently antedated. I have already found that Ext. II was not executed in fraud of creditors and there was no reason to doubt its genuineness otherwise. Learned counsel for the plaintiff says that lis pen-dens would still apply because the plaint in O. S. 1443 of 1110 was filed on the same day as Ext. II, viz., 15-6-1110 and official acts which according to him should include the numbering of a plaint are presumed to take place at the earliest part of the official day. This precise question came up for consideration in Rafiuddin v. Brijmohan, 21 Ind Cas 602 (Nag), and the court held:

'A party relying on the provisions of Section 52 of the Transfer of Property Act must establish that his suit was instituted before the execution of the deed of transfer which he is impeaching.

The admission of execution before a Sub-Registrar is not a dealing with property within the meaning of Section 52 of the T. P. Act.'

The learned Judges observed:

'The contention on behalf of the appellants that the law does not recognise fractions of a day is untenable. As remarked by Grove, J. in *Camp-bell v. Strangeways*, (1877) 3 CPD 105 at p. 107, *Chick v. Smith*, (1840) 8 Dowl. 337, and the other cases cited explain where the law will distinguish the fractions of a day, viz. where it is necessary -- not merely as was once said, for the 'purpose of justice,' which is a vague expression, but -- for the purpose of the decision to show which of two events first happened.'

Then they referred to the observation of *Subbaya v. Yellamma*, ILR 9 Mad 130 at p. 132,

'judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done'

and went on to say:

'But the filing of a plaint is not a judicial proceeding any more than the issue of a writ as was held by the Court of Appeal in *Clarke v. Bradlaugh*'. (1881) 8 QBD 63.

8. In this case there was no evidence on the side of the plaintiff that he filed the plaint in O. S. 1443 of 1110 earlier in point of time than the execution of Ext. II. Indeed according to him Ext. II was not executed at all on that day. The defendant on the other hand brought it out from the counsel who filed that plaint on behalf of the plaintiff that it was only late in the day that the plaint was really filed. I therefore hold that Ext. II is not vitiated by *lis pendens* Ext. D suit. The result is the plaintiff cannot seek to impeach Ext. II to any extent.

9. But it seems to me that in the ends of Justice the defendant cannot escape except by payments to the plaintiff of his real dues under the chitty scheme. This must be deemed to have crystallised under Ext. D decree. I therefore direct that the defendant would pay off the plaintiff the amounts due as principal and interest

accrued till date under Ext. D apart from the costs provided under it. The defendant will have two months from this day to pay off the plaintiff. If payment is made, this appeal will stand allowed and the suit dismissed, as the Munsiff had decreed but without costs. If the amount is not paid this appeal will stand dismissed again without costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com