

Usha Viswanathan Vs Pradeep Kumar

Court: High Court Of Kerala

Date of Decision: March 31, 2021

Acts Referred: Transfer Of Property Act, 1882 & Section 53

Hon'ble Judges: T.V. Anilkumar, J

Bench: Single Bench

Advocate: A. Jani

Final Decision: Disposed Of

Judgement

1. The substantial relief sought by the petitioner in this original petition is for issue of a direction to the court below to consider and dispose of Ext.P3

I.A.No.1/2020 filed by her for attachment of respondent's property before judgment in the suit.

2. In the nature of relief sought in the original petition, issue of notice to the respondent was found unnecessary and accordingly dispensed with.

3. The suit was filed by the petitioner for recovery of money from the respondent on 30.11.2020. Ext.P3 application for attachment of property was

also filed along with the suit. The court below not being inclined to order conditional attachment, ordered notice to the respondent. By the time when

the notice was served on the respondent, he transferred the property and after appearance in the suit, he objected to Ext.P3 and contended that the

property was not liable to be attached in as much as he had already parted with the property. Subsequently he remained ex parte in the suit itself.

4. The grievance expressed by the petitioner in this original petition is that the delay and inaction on the part of the court below in passing expeditious

orders on Ext.P3, has caused prejudice to the petitioner. This original petition was therefore filed for issue of a direction to the court below for urgent

consideration and final disposal of Ext.P3 petition for attachment.

5. I heard the learned counsel for the petitioner.

6. It is submitted that the entire conduct of the respondent in the suit sufficiently discloses that the transfer of property made after the suit is fraudulent

and consequentially voidable at the option of the petitioner/creditor. The learned counsel relying on a Full Bench decision reported in Verizon Builders

and Developers Ltd. (M/s.) and another v. Jyothi Susan John & ors. (2018(5) KHC 821), submits that a creditor can assail a fraudulent transfer and

avoid it in a proceeding under Order XXXVIII Rule 8 CPC, otherwise than by a suit under Section 53 of the Transfer of Property Act, 1882

(hereinafter for short, 'the TP Act').

7. The argument of the learned counsel for the petitioner does not appear to be sound. In my view, the law laid down in the Full Bench decision does

not support the contention canvassed by the learned counsel.

8. Once the property is transferred by the debtor/defendant in the suit, prior to an order of attachment being passed in the suit, either before or after

the institution of the suit, no plea made for attachment before judgment by the plaintiff, could then sustain in the proceedings. Order XXXVIII Rule 5

of CPC does not empower the court to order attachment before judgment in the aforesaid situation for legal reasons. The conditions in Order 38 Rule

5(a) and (b) namely, "about to dispose of" or "about to remove the whole or part of his property", no longer apply when the property was

already sold prior to an order of attachment being passed because the property has ceased to be "his" as the respondent has already parted with

the land in favour of a third party. Further, Order XXXVIII Rule 10 of the CPC also prohibits prior interest of a person, who is not a party to the suit

being attached.

9. The question that arises then is, what is the remedy open to the aggrieved petitioner/the creditor in the suit. Under Section 53 of the TP Act, the

transfer made by the debtor to defeat his creditor is voidable at the option of the creditor and according to the said provision, institution of a suit may

be necessary for avoiding the transfer as fraudulent. Once a decree invalidating the transfer is obtained against the transferee, the creditor may apply

for sale of the property transferred, in execution of the decree against the debtor. The Full Bench decision aforesaid only said that in a claim petition

brought by the transferee, the creditor could very well assail the validity of the transfer of property without having to file a suit under Section 53 of the

TP Act. That situation comes into play only when a creditor has already obtained an order of attachment before judgment and has an opportunity to

seek to sustain the order. The factual position in the instant case, therefore, is no comparison for the facts decided by the Full Bench.

In the result, the original petition is disposed of directing the court below to take up Ext.P3 I.A.No.1/2020 for urgent consideration and pass necessary

orders after hearing the parties, in accordance with law. It is made clear that if the petitioner applies for amendment of the suit for adding a relief

under Section 53 of the TP Act, it may be considered in accordance with law after hearing parties on either side.

All pending interlocutory applications are closed.