(1985) 07 KAR CK 0032

Karnataka High Court

Case No: F.A. No''s. 45 to 47 and 82 of 1975

Basavegowda and etc.		APPELLANT
	Vs	
S. Narayanaswamy (by Lrs.) and Others		RESPONDENT

Date of Decision: July 9, 1985

Acts Referred:

- Transfer of Property Act, 1882 - Section 53, 53 (1)

Citation: AIR 1986 Kar 225 : (1985) ILR (Kar) 3048 : (1985) 2 KarLJ 389

Hon'ble Judges: M.S. Patil, J; K. Jagannatha Shetty, J

Bench: Division Bench

Advocate: H.T.Narayan, H.S. Sundara Kumar and V.K. Varadachari, for the Appellant; S. Gundappa, C.R.V. Swarni, M.S. Purushotharn Rao and Kadilal Manjappa, for the Respondent

Judgement

Shetty, J.
These four appeals are directed against the common judgment and decree dated Sept. 25, 1974 made by the Civil Judge at Mandya in O.S. Nos.21 of 1969 and 62 of 1970.

Both the suits were by creditors, apparently under S. 53 of the Transfer of Property ACL. The credit or have impeached the bona fides of transfer of plaint ''A'', ''B'', ''C'' schedule properties effected by their debtor

Channiah.

2. To avoid confusion, we consider it would be convenient to refer to the parties by their array in O.S. No. 21 of 1969.

Channiah - defendant 1 is the father of defendants 4 to 7. He was an ''A'' Class P. W. D. Contractor and the owner of ''A'', ''B'', ''C'' schedule properties. Defendant 3 is the brother of Channiah, but taken in adoption by his uncle Defendant 2 is a

businessman with whom Channiah used to buy his requirements.

''A'' schedule consists of a house at Mandya Town; ''B'' schedule consists of six items out of which 5 are agricultural lands and one is a village house and ''C'' schedule also consists of 5 items out of which one is again a village house and the rest are agricultural lands.

3. On Mar. 28,1966, Channiah sold under Ex. D1 the ''A'' schedule property for Rs. 60,000/- in favour of defendant 2. On July 22, 1966, he sold ''B schedule properties to defendant 3 for Rs. 10,000/- under Ex. D2. On July 25,1966, he sold ''C'' schedule properties to defendants 4 to 7 for Rs. 5,000/- under Ex. D20.

In 1964 and 65, Channiah continually had taken few loans from plaintiffs he could not or did not repay those loans. In 1967 and 68, plaintiffs filed suits and obtained decrees to recover their dues. On coming to know of the alienations of ''A'', ''B'', ''C'' schedule properties made by Channiah, plaintiffs instituted O.S.No. 21 of 1969 on Mar 26, 1969 and another set of creditors instituted O.S. No. 62 of 1970 on Oct. 12, 1970, for a declaration that the alienations in favour of the defendants were intended to defraud the creditors and as such they were not binding on them or other creditors.

4. Broadly stated, the common contention taken by the defendants-alienates in their written statements was that the sale deeds in their favour were genuine; that they were not parties to the design, if any, of Channiah to defraud his creditors and, at any rate, they are bona, fide purchasers for value in good faith.

Channiah although filed his written statement justifying the alienations of ""A'', ''B'', ''C'' schedule properties did not participate in the proceedings.

5. Plaintiffs in support of their case have examined as many as six witnesses. The first plaintiff has been examined as P.W. 1; third plaintiff as P.W. 2; fourth plaintiff as P.W. 3 and second plaintiff as P. W. 4. P. Ws. 5 and 6 are two other creditors. They have also produced documents Exts. Pl to P16.

On the side of the defendants, defendant 2 has been examined as D.W. 8; defendant 3 as D.W. 4 and Kempamma, guardian of minor defendants 5 to 7 has been examined as D. W. 7. In all for the defendants there are 8 witnesses besides documents got marked as Exts. D1 to D48.

6. The trial Court on a consideration of all the oral and documentary evidence produced by the parties has written a lengthy judgment, the conclusions may be summarised as follows :

(i) The considerations paid under Exts. Dl, D2 and D20 were not proved to be inadequate; (ii) Defendant 2 has paid full consideration of Rs. 60,000/- but there was no good faith on-his part, He has not made reasonable enquiries as to why Channiah was selling his house. The house sold to defendant 2 was, no doubt,

subjected to two prior mortgages, but there was no pressure by the mortgages to redeem the mortgages. Defendant 2 has helped Channiah to, convert his property into cash with an intent to avoid the demands of his creditors. Since defendant 2 has discharged the two prior mortgages on the house property one to Ramakrishna Iyer and another to Vishalakshiamma, he should be subrogated to the extent of the amounts paid by him i.e. to the extent of Rs. 37,652.50.

(iii) With regard to ''B'' schedule properties transferred under Ext. D2, it was held that the transfer of those properties to defendant 3 was intended to defeat the creditors'' claim, but it could be valid to the extent of Rs. 2,670/-gaid under Ex. D6. The rest of the payments said to have been made by Channiah were only make believe arrangements since no such debts were in fact in existence. The properties sold were also not shown to have been in possession of defendant 3 after the alienation.

(iv) As to ''C'' schedule properties transferred under Ext. D20, there was not much problem for the trial Court to give the declaration sought for by plaintiffs. There, learned counsel for defendants 4 to 7 has fairly conceded that the transfer under Ext. D20 was voidable at the instance of the creditors of Channiah since it was apparently effected in order to delay or to defraud them. The Court also observed that even otherwise defendants 4 to 7 being the sons of Channiah are bound to discharge the debts of their father under the doctrine of pious obligation.

With these conclusions, the trial Court decreed the suits as prayed for, subject to the amounts paid by defendants 2 and 3 to the creditors of Channiah to the extent of Rs. 37,562/- and Rs. 2,670/- respectively for which amount they are held entitled for subrogation.

7. Being aggrieved by the judgment, defendant 2 has preferred R.F.A. No. 82/75, defendant 3 has preferred R.F.As.45 & 46/75 and defendants 5, 6 and 7 have preferred R.F.A.No. 47/75.

8. Before going into the validity of the contentions urged by the counsel for the appellants, we could conveniently dispose of R.F. A. No. 47/75 which is concerned with the validity of transfer of, C ''schedule properties in favour of defendants 5 to 7. Under the doctrine of pious obligation, where the sons are joint with the father, as in the present case, and the debts have been contracted by the father even for his own personal benefit and not for family purposes, the sons are liable to pay the debts to the extent of their interest out of the estate they have received. This liability arises under the Mitakshara law to discharge the father''s debts, where the debts are not tainted with immorality. This liability arises whether the father be alive or dead Venkatesh Dhonddev Deshpande Vs. Sou. Kusum Dattatraya Kulkarni and Others, Having regard to these principles, it was indeed correct on the part of learned counsel for defendants 5 to 7 to concede that the transfer under Ex. D20 by Channiah to his children would still be available to the creditors since the property

has not gone out of the family. It may also be held that the transfer is voidable within the terms of S. 53(1) of the T. P. Act at the instance of plaintiffs-creditors at whose hands Channiah has suffered many decrees. Hence, R.F.A. No.47/75 deserves to be dismissed in limine.

9. We may now notice the contentions urged in the other three appeals.

Mr. Varadachari, learned counsel for the appellant in R.F.A. No. 82/75 in which the validity of the transfer of ''A'' schedule property is in question, suggested that plaintiffs have not established that defendant 2 has shared the fraudulent intention of Channiah to defeat or delay his creditors to convert the Immovable property into cash. They have not even challenged the encumbrance on the said property to the extent of Rs. 37,000/-odd, by way of two prior mortgages. Channiah was a Class I P. W.D. Contractor moving in a Fiat car and not placed in any embarrassing circumstance at the time of sale of ''A'' schedule property. There was then not even any suit filed by plaintiffs against Channiah to recover their dues. There was, therefore, no need for Channiah to convert the property into cash and to defeat or delay his creditors. The counsel also urged that defendant 2, regard being had to the terms of sale deed Ext.D1 and the business transactions he had with Channiah, was a bona fide purchaser for value in good faith. The contentions of Mr. Narayan, learned counsel for appellants in R.F.As. Nos. 45 and 46/75 are more or less similar although he could not properly explain the application of the consideration received under Ext. D2.

The gravamen of the attack by Mr. Swami, learned counsel for the respondents-plaintiffs, is as to the conduct of Channiah in reserving an appreciable portion of the consideration received under each of the sale deeds Exts. D1 and D2 at a time when he knew that he had to discharge so many loans taken by him from plaintiffs. The counsel urged that that conduct itself indicates that Channiah intended to defeat or delay his creditors.

10. While appreciating these contentions, it must be borne in mind that the onus of proving want of good faith in the transferee is on the creditor who impugns the transactions. But where fraud on the part of the transferor is established, i.e. by the terms of Para (1) of S. 53(l), the burden of proving that the transferee fell within the exception upon him and in order to succeed the transferee must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer has been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. (See: C. Abdul Shukoor Saheb Vs. Arji Papa Rao and Others, .

In the light of these principles of law and due regard being had to the material on record, the following questions arise for our consideration:

(1) Whether the transfer under Exts. D1 and D2 was made with intent to defeat or delay the creditors?

(2) If so, was the purchaser in each of the transactions a transferee in good faith and for consideration?

11. We will take up the validity of Ext.D1 first for consideration. To appreciate the contentions urged in this context, it is necessary to set out some more facts :

''A'' schedule property consists of a house at Mandya Town. On Jan. 29, 1958, it was purchased by Channiah from one Gopinatha Iyengar for Rs. 9,000/-. On Oct. 14, 1959, Channiah mortgaged the property for

Rs. 5,000/- to a House Building Society at Mandya. The loan was intended for reconstruction of the house. It appears, improvement was made to the house and the loan was also repaid. On June 12, 1962, Channiah mortgaged the house under Ext. D39 to Ramakrishna Iyer for Rs. 10,000/-. On May 19, 1962, Channiah again mortgaged the house for Rs. 25,000/- to Smt. Vishalakshiamma the wife of defendant 2. On Mar. 28, 1966, he sold the house to defendant 2 under Ext.D1 for Rs. 60,000/-. We must proceed on the basis that the consideration paid under Ext. D1 was adequate since there is no acceptable evidence adduced by plaintiffs to the contrary although Kasturi Rangachari (P.W. 5) has stated that the value of the house would be at Rs. 75,000/- and Boregowda (P.W. 3) has stated that the value of the house would be about Rs. 1,00,000/-. This appears to be a wild guess. No attempt has been made to value the property on scientific basis. No comparable sale deeds of similar properties have been produced even. In 1958, the house was purchased for Rs. 9,000/-. There is no precise evidence as to the nature and extent Improvements made to the house. There were two encumbrances by way of mortgages with the interest mounting. There is, therefore, no justification to hold that the sale price of Rs. 60,000/- paid in 1966 under Ext. D1 was inadequate.

12. It will now be useful to refer to some of the recitals in Ext. D1. Therein it is stated that the sale was necessitated to discharge the mortgage debt of Rs. 10,000/- to Ramakrishna Iyer and also to pay the mortgage debt of Rs 25,000/- due to the wife of defendant 2. Out of the balance of consideration, Rs. 12,437.50 was payable before the Sub-Registrar and the remaining Rs. 10,000/- would be paid in a week thereafter. It is also stated that the sale was effected to discharge the sundry debts and to meet the agricultural expenses of Channiah.

There is no dispute that defendant 2 himself has discharged the two prior mortgages. In all he has paid Rs. 37,562.50. Regarding the application of the remaining amount, there is no acceptable or definitive evidence except the recitals in Ext. D1. The recitals are self-serving and cannot be relied upon without corroborating evidence.

"Recitals in mortgages or deeds of sale with regard to the existence of necessity for an alienation have never been treated as evidence by themselves of the fact. To substantiate the allegation, there must be evidence aliunde." (Mayne on Hindu Law 11th Edn., p. 475).

The lack of evidence in regard to application of a substantial portion of -the consideration received under Ext. D1 undoubtedly leads to an inference that Channiah had kept it for his own use without discharging the other debts. That may lead to an inference that Channiah wanted to convert the house property into cash so as to keep it away from the reach of his creditors. Such a transaction has always been held to be voidable in terms of S. 53(l) of the Transfer of Property Act although the transfer might be for adequate consideration. The earliest decision on this principle is that of the Privy Council in Musahar Sahu v. Hakim Lal AIR 1915 PC 115. There is a series of decisions of the Madras High Court. (See Errachi Reddiar v. Vellayya Reddiar AIR 1968 Mad 256 which has been explained by a Division Bench of the same High Court in N.L.N. Lakshman Chettiar (Died) and Others Vs. Jayarama Chettiar and Another,

13. But such a presumption in our opinion, cannot, be drawn if the transferor was still left with other valuable properties by which he could think of conveniently discharging his remaining debts. The proper approach to such a case has been explained by the Supreme Court in C. Abdul Shukoor Saheb Vs. Arji Papa Rao and Others,

"Before leaving this point it is necessary to advert to one matter which was suggested by learned counsel for the appellant. He submitted that the property sold was only a part of the assets of the partners and that unless there was evidence to show that nothing was left available for the creditors after the impugned sale, its validity could not be impugned under S. 53 of the Transfer of Property Act. We consider that there is no force in this submission. As a matter of fact there is no evidence as to what other properties the partners had beyond what is contained in the deed of dissolution on March 31, 1949. But that apart, the terms of S. 53(l) are satisfied even if the transfer does not defeat" but only "delays" the creditors. The fact therefore that the entirety of the debtors'' property was not sold cannot by itself negative the applicability of S. 53(l) unless there is cogent proof that there is other property left sufficient in value and of easy availability to render "he alienation in question immaterial for the creditors ....."

What follows from the above observation is that it is not sufficient to point out that Channiah even after the sale of ''A'' schedule property under Ext. D1 was left with other properties. There must be material on record to show that the properties still possessed by Channiah are of considerable value and of easy availability to other creditors to satisfy their'' demands. Then and then only, the transfer effected by Channiah could escape the clutches of S. 53(l) of the Transfer of Property Act.

14. In the light of these principles, we may now turn to the evidence as to the value of the properties remained with Channiah after the sale of ''A'' schedule property. Plaintiffs themselves have indicated the value of ''B'' and ''C'' schedule properties in Para VI of the plaint:

"..... While ''B'' and ''C'' schedule properties are worth Rs. 50,0001- and they were worth so much even on the dates of the sales, respectively....."

Krishnappagowda (P. W. 1) - plaintiff 1 has stated in the chief-examination:

"The suit properties belong to the defendant 1. The defendant has properties in Talashasan, Pandavapur Taluk. It is a Tari land measuring about 2 acres 10 guntas. It is in the possession of the defendant 1 and is worth about Rs. 50,000/-. He has a house at Mandya worth about Rs. 1 lakh. He owns other lands at Yalechakanahalli, Tubinakere and Ragi-Muddanahalli; worth about R& 50,000/....."

Boregowda (P.W. 3) - plaintiff 4 in his evidence has practically corroborated the statement of P.W. 1. Kasturi Rangachari,P W. 5), the additional plaintiff, has stated

"..... When I advanced the loan to him he owned a house in Mandya town worth more than a lakh besides a fiat car worth Rs. 20,000, besides immovable properties 4V2 acres and a house, worth R& 20,000/- the land worth at the rate of Rs. 15,000/- per acre. At that time he was Class I P.W.D. Contractor. At that time his turnover relating to contract work was more than 3 lakhs....."

The evidence of P.W. 5 further indicates that he advanced Rs. 2,500/- on a pronote dated Jan. 18, 1966. A little over two months later, Channiah sold ''A'' schedule property under Ext D1. It was on Mar. 28, 1966. The evidence thus indicates that Channiah was then a Class I P.W.D. Contractor with a turnover of Rs.3,00,000/- in contract work. He had a Fiat car worth Rs. 20,000/- and other properties. The other properties consist of fertile agricultural wet lands measuring 3 acres 4 guntas and an equal extent of dry lands besides two village houses. The value of these properties as per the evidence of P.W. 1 and P.W. 3 would be above Rs. 50,000/-, According to P.W. 5, it might be even above Rs. 75,000, whereas the debt due to each of the plaintiffs was ranging from Rs. 2,000/- to Rs. 7,500/-and collectively it comes to about Rs. 42,000. There could, therefore, be no scope for holding that Channiah disposed of ''A'' schedule property in order to defeat or delay his creditors. Nor there was any reason for defendant 2 to suspect the bona fides of Channiah when the latter offered that property for sale, since there was no indication that Channiah was a sinking man. Plaintiffs, therefore, cannot successfully impeach the alienation under Ext.D1

15. Mr. Swami next referred to us the other features imminent in Ext. D1 which according to him would expose the fraudulent nature of the transaction. He said that there was no pressure on ''A'' schedule property so as to sell the same to defendant 2, and defendant 2 did not even examine the original sale deed before purchasing the property. It is true that defendant 2 was not given the original sale deed of ''A'' schedule property in spite of his demand. Channiah appears to have promised to deliver the same, but he did not. But that cannot lead to an inference that Channiah wanted to defraud or delay his creditors. Channiah was not a stranger to defendant 2. They knew each other well for a number of years. They had

business transactions over the years. Secondly, defendant 2 was not unfamiliar with the house property or its title deeds. It was already mortgaged in favour of his wife for Rs. 25,000/-. Defendant 2 was, therefore, familiar with the title deeds of the property Defendant 2 when examined as D. W. 8 has stated that he was satisfied about the title in view of the encumbrance certificate and also on the assurance given by Channiah that he would produce the original sale deed later. In these circumstances, we could see nothing fatuous or fraudulent in the transaction under Ext. D1.

16. Nor do, we find any substance in the contention urged by Mr. Swami that there was no pressure on the property so as to alienate in favour of defendant 2. It may be that there was still about a year left to redeem the mortgage, in favour of Vishalakshiarnma. But that does not mean that a mortgagor cannot discharge his debts and redeem the mortgage earlier to avoid accumulation of interest. That apart, there was another loan of Rs.10,000/- due to Ramakrishna Iyer on the security of the same property. That mortgage was executed on June 19, 1962 and it was undisputedly overdue. It cannot, therefore, be said that there was no need or compulsion for Channiah to transfer the property in favour of defendant 2.

17. This takes us to the legality of transfer made under Ext. D2. Channiah transferred all the''B'' schedule properties for Rs. 10,000/- in favour of Basavegowda, defendant 3. As stated earlier, the trial Court taking into consideration all the circumstances and the relationship between Channiah and Basavegowda, held that that transfer was not bona fide and most of the debts said to have been discharged were fictitious. We agree with the conclusion of the trial Court. Under ''B'' schedule, six items of properties were transferred to defendant 3. He is the natural brother of Channiah but given in adoption to his uncle. Ext. D2 furnishes the reasons for the sale. It has been stated that Rs. 2,500/- was due to Sudarshan Trading Company, a sum of Rs. 3,000/- with interest was due under a pronote Ext. D3 to Kulla Venkategowda and a sum of Rs. 3,450/- was due to Karigowda under Ext.D4. The remaining amount of Rs. 540/- was said to have been received in cash by Channiah for which he has executed a receipt Ext. D5. Defendant 3 in his evidence has asserted that out of the consideration received under Ext. D2, he discharged the debts due under Exts. D3 and D4 besides clearing the liability to Sudarshan Trading Company. So far as the payment to Sudarshan Trading Company is concerned, there is a Shara Ext. 136(a) evidencing the payment. But when we turn to Exts. D3 and D4, we find them totally unacceptable. The trial Court at the instance of plaintiffs, appointed a Commissioner who is none other than a Stamp Expert at Nasik Mint and the Commissioner has given a report Ext. P16 stating that the stamps affixed on the said pronotes were issued by the Mint subsequent to the date of execution of the deeds. No more evidence is, therefore, needed to examine the fraudulent nature of the said pronotes. They are apparently got up documents and should be excluded from consideration. That means defendant 1 had appropriated Rs. 7,500/- out of the consideration of Rs. 10,000/- received under Ext. D2. This circumstance

coupled with the close relationship with defendant 3 and the subsequent transfer of, C'' schedule properties under Ext. D20 to his own children indicates that the transaction under Ext. D2 was fraudulent within the terms of sub-sec. (1) of S. 53 of the T. P. Act.

In the result and for the reasons stated, R.F.A. No. 82/75 is allowed and the judgment and decree in 0. S. No. 21/69 in respect of ''A'' schedule property is reversed and the suit to that extent only stands dismissed. The judgment and decree of the Court below in other respects are kept undisturbed. R.F.A. Nos. 45, 46 and 47/75 are dismissed.

In the circumstances of the case, we make no order as to costs.

Mr. Swami, learned counsel for the respondents-plaintiffs in R.F.A. No. 82/75 seeks a certificate for appeal to the Supreme Court.

We do not think that the case involves any substantial question of law of general importance which needs to be decided by the Supreme Court.

Certificate prayed for is, therefore, refused.

18. Order accordingly.