(1917) 05 PAT CK 0017

Patna High Court

Case No: None

Fakira Singh Under the Guardianship of Ram Charan Singh		APPELLANT
	Vs	
Majho Singh and Gajadhar Singh		RESPONDENT

Date of Decision: May 21, 1917

Acts Referred:

- Transfer of Property Act, 1882 - Section 53

Citation: AIR 1917 Patna 448 : 40 Ind. Cas. 685

Hon'ble Judges: Chapman, J; Atkinson, J

Bench: Division Bench

Judgement

Atkinson, J.

This suit is brought by the plaintiff seeking a declaration that 5-dams share of the village of Muhammadpur Oro is his proprietary right and that the defendant No. 1 has no right to bring this share of the property in suit to sale in satisfaction of a debt due by the defendant No. 2 to the defendant No. 1. The defendant No. 2 was the original proprietor of this property. He contracted a debt with the defendant No. 1, and on the 5th December 1911, the defendant No. 2 sold the property in suit to the plaintiff who is his nephew for a consideration stated to amount to Rs. 995. This deed of transfer or sale was made by the defendant No. 2 to the plaintiff a fortnight after the defendant No. 1 had instituted a suit to recover the moneys due to him by the defendant No, 2. The consideration to support the deed dated the 5th December 1911 is set out in the deed; a part of it was to be applied in satisfaction of debts due by the defendant No. 2 to certain creditors, and part was to be paid to him in cash. It appears that at least two of the creditors specified in the deed were paid, and that the plaintiff retains still in his hands of the purchase-money the sum of Rs. 325 to discharge the claim of one Gendo Singh on foot of a mortgage-bond. The learned Munsif who tried the case came to the conclusion that the deed was a fraud on the

creditors of defendant No. 2; that no consideration, in fact, passed to support the deed of sale, and that the transfer of the property was an attempt by the defendant No. 2 to defeat the rights of his creditors in the realization of their debts; the property in suit being the only Immovable property which the defendant No. 2 had. The learned District Judge, however, came to a somewhat different conclusion. The learned Judge was satisfied that the deed of sale was executed and that it was duly registered. The learned Judge thought, as I gather from his finding that proof of the foregoing facts cast the onus upon defendant No. 1 of showing and proving that the deed was a deed executed by the defendant No. 2 with the intent of defeating, delaying and hindering him as a creditor of the defendant No 2. As a matter of law the learned Judge was quite right in throwing the onus on defendant No. 1 of proving that the deed of sale was intended as a fraud. However, the learned Judge in point of law held that Section 53 of the Transfer of Property Act could not possibly apply to this case, because the intention of the defendant No. 2 in effecting the sale to the plaintiff was at best on the evidence only an intention to defeat the rights of one particular creditor and that consequently Section 53 of the Transfer of Property Act had no application. The Judge seems inclined to hold, though he does not do so expressly, that the intention on the part of the defendant No. 2 and his other creditors was to effect a transfer of the property in suit in order to defeat the defendant No. 1''s rights in realizing his debt. With great respect to the learned Judge we think he has misconstrued and misapplied the law embodied in Section 53, Clause (1) of the Transfer of Property Act. The learned Judge considers that before Section 53 can apply the intention must be shown to defeat the entire body of creditors but that merely to intend to defeat one creditor would not be within the provisions of Section 53, With great respect to the learned Judge we think that he was entirely wrong in so holding. Section 53 of the Transfer of Property Act applies even though only one creditor may have been defrauded and hindered in realizing his debt. The law on the subject is well summarised in the case of In re Le Moroney (1887) 21 Irish 27, This case is of great authority representing the considered opinion of seven Judges of the Court of Appeal in Ireland, and in addition this decision has been approved of by the Privy Council in the recent case reported as Musahar Sahu v. Hakim Lal 32 Ind. Cas. 343 : 20 C.W.N. 393 : 30 M.L.J. 116 : 3 L.W. 207 : 14 A.L.J. 198 : (1916) 1 M.W.N. 198 : 19 M.L.T. 203 : 23 C.L.J. 406 : 18 B L.R. 378 : 43 C. 521 (P.C.) as containing a most clear and able exposition of the Law of England and Ireland relative to the fraudulent transfers of property with intent to defeat creditors and which is made applicable to the law of India by virtue of Section 53 of the Transfer of Property Act. Section 53 in effect is only a re-enactment, in a more concise form, of the provisions of the Act of 10th Charles, Chapter I in Ireland, and the Statute of Elizabeth in England. The case cited is an authority not only on the construction of the English Statute of Elizabeth but also on the Irish Statute of Charles. The learned Master of the Bolls dealing with this very point says:

Next Mr. Carton contended, in reference to the Statute of Charles, that the transaction before us was not intended to defeat creditors in the plural, but only one creditor and Wood v. Dixie (1845) 7 Q.B. 892 : 9 Jur. 796 : 115 E.R. 724 68 R.R. 590 was relied upon on this point. It is important in this connection to again consider what are the words of the Statute of Charles. Its intent is stated in the recital or preamble which I have already read, and which, no doubt, speaks of creditors. It was necessary there to use the plural and not the singular number. But when we come to the operative part of the section, the words used are not in the plural only; for we have "that person or persons, his or their heirs etc." and, therefore, no argument in favour of exempting the case of a single creditor can be deduced from the language of the Act. It would be the summit of absurdity to suppose that a mischief of this kind was to be struck at if two or more persons were affected, but that a single creditor was to be without protection.

2. That was the view taken in Ireland and to the same effect is the decision reported as Ishan Chunder Das Sarkar v. Bishu Sirdar 24 C. 825 : 1 C.W.N. 665 : 12 Ind. Dec. 1217 and there the Hon''ble Judges Sir Francis Maclean and Mr. Justice Banerjee say:

Reading this section as a whole then, what it means, so far as it is applicable to a case like the present, is this, that where a transfer of Immovable property is made with intent to defeat or delay any creditor of the transferor it is voidable at his option.

3. Clearly, therefore, the learned District Judge was wrong in ruling that Section 53 only applies when it can be established that there was an intent to defraud or defeat the general body of creditors from realizing their debts. The section applies with equal force and effect if a debtor disposes of his property with the intention of defeating one single creditor. But if the property of the debtor is transferred for consideration and bona fide to a purchaser and such transfer has the effect of putting the debtor''s property out of the reach of the creditors as an asset capable of being realized to satisfy their debts nevertheless the transfer will be effective and the creditors will not be entitled to have the transfer set aside or declared void. I think it right to cite at some length the judgment of the Irish Court of Appeal because in the case cited the entire law on this subject is carefully considered and laid down. At page 57 of the report the Master of the Bolls says:

Vice-Chancellor Kindersley, one of the greatest Equity Judges who has sat in England in recent time, there said that in the construction of the Statute of Elizabeth it was not a ground for invalidating a bona fide sale, that it is made in order to defeat an intended execution. That is decided by Wood v. Dixie (1845) 7 Q.B. 892 : 9 Jur. 796 : 115 E.R. 724 68 R.R. 590. The sale of property for good consideration, made bona fide, is, therefore, sufficient to defeat the execution of a judgment-creditor. And I have only to consider whether the sale was bona fide, and on that point every case stands on its own merits.

4. At page 62, the Lord Chief Baron Palles sets out very fully what the law is and says:

Again, the right of the creditors is, not that the debtor shall not part with any of hid property, but that no such parting shall be without consideration, If ''says Alderson B. in Siebert v. Spooner (1836) 1 M. & W. 714 : 1 T & G. 1075 : 2 Gale 135 : 5 L.J. Ex. 249 : 46 R.R. 471 : 160 E.R. 621 an equivalent is given, there is only a change in the nature of the property which the party has, but not a conveying of it away.'' When, therefore, there is a bona fide sale for value of part of the property of the debtor really intended to have effect and operation between the parties to it, the right of the creditors is not invaded. No doubt the property sold has ceased to be available for their demands, but in lieu of it, there has been substituted the consideration for the sale, which may be assumed to be a substantial equivalent. Such a sale, therefore, would not be a fraud within the Statute, merely because it was made with the express intent to defeat or delay the execution of a creditor. Were there nothing more in the case, the consideration would remain capable of being made available, not under the intended execution but by some one or other of the modes known to the law, and, therefore, in such a case, there would not be a fraud within the Statute. This was the ground of the decisions in the only other cases cited by the appellant on this branch of the argument, viz. Wood v. Dixie (1845) 7 Q.B. 892 : 9 Jur. 796 : 115 E.R. 724 68 R.R. 590 and Hale v. Salcon Omnibus Co. (1859) 4 Drew. 492 : 28 L.J. Ch. 777 : 7 W.R. 316 : 62 E.R. 189 : 113 R.R. 430. It is to be observed, however, that the decision in Wood v. Dixie (1845) 7 Q.B. 892 : 9 Jur. 796 : 115 E.R. 724 68 R.R. 590. goes no further than determining that an intent to defeat a particular creditor in the case of a bona fide sale for value, does not per se and as a matter of law, render the conveyance fraudulent. If, however, in such a case, the intent were not only to sell the property, but forthwith to abscond with the proceeds, so as in effect to withdraw the property from the fund available for the creditors without providing an equivalent. I should entertain no doubt that in such a case there would be an intention to defraud creditors, which, if the purchaser had notice of, would avoid the sale.

5. That appears to me to be a very clear and accurate exposition of the law on this subject. Thus in this particular case if the learned Judge on re-consideration is satisfied that there was a bona fide sale duly intended to be acted upon between the parties, and that the property was to pass from the defendant No. 2 without any reservation to the plaintiff and the plaintiff was to pay good and valuable consideration for the property, then even though it may have been intended to defeat the rights of the defendant No. 1 in the realization of his debt, the defendant No. 1 would not be entitled to a declaration that the deed of sale was voidable as a fraud on him as a creditor of defendant No. 2. We think that in order to arrive at a right conclusion on these points, which have not been considered, that it is necessary to remand the case to the learned Judge. It will be unnecessary for him to consider whether the deed was duly executed and duly registered; that has already

been determined but we do think in the light of the evidence that the Judge should bring his mind to bear on the facts and to ascertain whether the deed was a deed for valuable consideration; and whether it was a deed bona fide between the parties. If he so holds then, in our opinion, in point of law he should grant the plaintiff, the relief he seeks. If, on the other hand, the learned Judge holds that the deed is not bona fide; that it is lacking in reality; and that it was merely a colorable transaction designed and intended to defeat the rights of the defendant No. 1 as a creditor of the defendant No. 2, and that no consideration, in fact, passed that then he ought to dismiss the plaintiff''s suit. We remand the case in entirety and having given our opinion as to what the law is we leave it to the learned Judge to decide the facts accordingly.

6. The appeal is, therefore, allowed and the costs will abide the result of the final determination of the suit.

Chapman, J.

7. I agree.