(1919) ILR (Bom) 707

Bombay High Court

Case No: None

Bhikabhai Muljibhai Patel		APPELLANT
	Vs	
Panchand alias Chhaganlal Odhavji Patel		RESPONDENT

Date of Decision: Feb. 12, 1919

Acts Referred:
Transfer of Property Act, 1882 â€" Section 53

Citation: (1919) ILR (Bom) 707

Hon'ble Judges: Hayward, J; Basil Scott, J

Bench: Division Bench

Judgement

Basil Scott, Kt., C.J.
Joitaram Chhagan and Magan Joitaram traded in grain and cloth in partnership from the year 1908 till April 19.11

when Magan died and the business of the firm came to an end. Eight days after the death of his partner, namely, on the 27th April 1911, Joitaram

executed two registered documents by which he purported to mortgage practically the whole of his Immovable property to the plaintiff for Rs.

5,000 or thereabouts. The property which was his by right of ownership was mortgaged for Rs. 4,000, and the property which he held as

mortgagee was assigned to the plaintiff as security for Rs. 1,400. In June in the same year the defendant, a creditor of Joitaram, brought a suit

against him and obtained a decree In execution of which the properties mortgaged to the plaintiff were attached. The plaintiff then applied that the

properties should be sold subject to his lien, but his application was rejected and the plaintiff has brought this suit for a declaration that the

defendant is not entitled to attach the properties and bring them to sale. The defendant''s case; is that the mortgage to the plaintiff was merely

intended to defeat and delay the creditors of Joitaram who was an insolvent at the time, and was not entered into in good faith for valuable

consideration. On behalf of the plaintiff it is alleged that the consideration for the transaction was an already existing debt in respect of four loans

previously made by the plaintiff to Joitaram of Rs. 2,000 1,200, 1,300 and 1,000, amounting in all to Rs. 5,500.

2. The findings of the lower Courts establish that this case of four existing loans as a consideration for the mortgage transaction is entirely false, and

that the only sum for which the plaintiff; was a creditor of Joitaram at the time was possibly Rs. 1,300, but more probably, Rs. 1,000. The value of

the properties mortgaged, apart from those of which Joitaram was the mortgagee, was about Rs. 4,000, and in this appeal we are only concerned

with that mortgage for Rs. 4,000. The finding of the lower appellate Court is that ""it is, to say the least of it, very doubtful, whether the transaction

was intended to be a genuine mortgage at all. It purported to be a mortgage with possession, but the plaintiff never got possession, and though

Joitaram executed some rent notes in his favour, he never paid any rent. The explanations given of this are very unconvincing. If this was a real

mortgage, and not a sham, one cannot understand why the plaintiff took no steps to exercise his rights under it and insist on the payment of rent.

The learned Judge also holds that considering the circumstances in which the transaction took place good faith on the plaintiff''s part is out of the

question. The inevitable conclusion appears to be that the plaintiff and Joitaram were in collusion in framing a mortgage deed upon a false

consideration of Rs. 4,000, whereas the only sum owing did not exceed Rs. 1,300, and considering the financial condition of Joitaram one must

conclude that the parties were in collusion for the purpose of screening Joitaram''s property from his creditors.

3. The only question which gives rise to any difficulty is whether the plaintiff is entitled to a declaration that he has a lien to the extent of the debt

existing at the time of the mortgage. The case must be decided according to the provisions of Section 53 of the Transfer of Property Act, for

although there has been no suit to avoid the mortgage, the action of the defendant is tantamount to an avoidance if he has the right to avoid it as a

creditor defeated or delayed. Section 53, so far as material, provides that every transfer of Immovable property, made with intent to defeat or

delay the creditors of the transferor, is voidable at the option of any person so defeated, or delayed, but nothing in the section shall impair the rights

of any transferee in good faith for valuable consideration. There can be no doubt that the mortgage is a transfer of Immovable property, and that

the plaintiff is a transferee, and upon the findings of fact there can be no doubt that the plaintiff is not a transferee in good faith. Therefore the

concluding words of the section do not apply to his case. The inferences deducible from the established facts show that both the transferor and the

transferee had the intention of defeating or delaying the creditors of the transferor, and under those circumstances it appears to us that the

document must at the option of the person defeated or delayed be treated as void in toto, and not merely as void in so far as there is no

consideration.

4. In May on ''Fraudulent and Voluntary Dispositions of Property,'' 3rd Edition, at p. 63, it is stated, as the result of the English authorities, that a

fraudulent intention, to which the purchaser was a party, will override all inquiry into the consideration, and among the cases cited in support of:

that proposition is Ex parte Chaplin : In re Sinclair (1884) 26 Ch. D. 319 where a transfer was stated to he for a consideration which was entirely

false, although there was some consideration proceeding from the transferee, and Lord Justice Fry held that the whole deed was void under the

Statue of Elizabeth.

5. Similarly in Hakim Lal, v. Mooshahar Sahu (1907) 31 Cal. 999, Mr. Justice Mookerjee states, after an exhaustive discussion of the authorities,

that a conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with the intent

to hinder, delay or defraud creditors, is void as to them.

6. It has been contended on behalf of the appellant that the judgment in Hakim Lal v. Mooshahar Sahu (1907) 31 Cal. 999 is inconsistent with that

in Rojani Kumar Dass v. Ganr Kishore Shaha (1908)35 Cal. 1051. In the later case, however, at p. 1057, we find the following passage. ""It has

not been shown by any evidence, which may be said to be cogent, that the transaction of mortgage between the plaintiffs and the Deb defendants

was entirely fraudulent, or for a grossly inadequate consideration and was intended only to defeat or delay the realization of the dues of the Dass

defendants. If the considerations for the mortgage (we use the plural number, to include the two different sums--Rs. 4,853 and Rs. 3,617--which

make up Rs. 8,500) could not be separated from each other, there would be good grounds for holding that the transfer evidenced by the deed was

fraudulent. In that case the failure of consideration to the extent of Rs. 3,647 taken with the other proved facts would lead to a reasonable

conclusion that the mortgagees intended to help the mortgagors to defeat the realization of the debt covered by the hatchitta in favour of the Dass

defendants. Such conduct on the part of the mortgagees and mortgagors would lead to the inference that they were acting in collusion."" Then

further on the Court indicates with regard to the Rs. 3,647, as to the reality of which as part of the consideration there was some doubt, ""it

might...be that the plaintiffs had a bona fide intention of advancing the additional sum for enabling the mortgagors to carry on their business, that

they put off payment until the money was needed or until registration of the deed, but that as the Dass defendants either commenced their suit, or

were about to do so for a larger sum than Rs. 3,647, the plaintiff withheld payment of the additional sum. They might not have had any such

intention as would invalidate the instrument u/s 53 of the Transfer of Property Act. Their moral turpitude in making a false case afterwards in the

present proceedings would not be sufficient to deprive them of their legal rights, though a false case might reflect discredit on the original

transaction."" It appears from this that the Judges in that case did not in any way dissent, from the law as laid clown in the earlier Volume. Being of

opinion then that the consideration stated in the mortgage deed must, in the circumstances of the case, be treated as one and indivisible, we are of

opinion that the plaintiff"s case must fail. We, therefore, affirm the decree and dismiss the appeal with costs.