

Authikesavaloo Naicker Vs. Syed Shah Abdulla HussaIn Sahib Khadiri and ors.

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Court : Chennai

Decided On : Mar-19-1915

Reported in : AIR1916Mad494; 29Ind.Cas.62

Judge : Sadasiva Aiyar and ;Napier, JJ.

Appellant : Authikesavaloo Naicker

Respondent : Syed Shah Abdulla HussaIn Sahib Khadiri and ors.

Judgement :

Sadasiva Aiyar, J.

1. The plaintiff is the appellant. The learned City Civil Judge correctly describes the suit as praying for a declaration that the sale of the property mentioned in the plaint on 1st April 1909, in favour of 1st defendant is null and void against plaintiff and that it is liable to be proceeded against in execution of the decree in Suit No. 89 of 1909 passed in favour of the plaintiff. The learned Judge further describes the suit as praying for an injunction restraining the 1st defendant from alienating the plaint property, but this seems inaccurate.

2. Turning to that portion of paragraph 12 of the plaint which refers to injunction, the prayer contained in that portion is that the 1st defendant be restrained by an injunction from alienating the plaint property in any manner 'pending the disposal of this suit.' This cannot be treated as a prayer for an injunction to be embodied in the decree to be passed in the suit, but only as a prayer for an interlocutory order of injunction. Treating then this suit as a suit for a declaration of the invalidity of the alienation in favour of the 1st defendant as against the plaintiff, who is a creditor under a simple mortgage bond and who has obtained a decree for sale and who expected to get a decree on the personal covenant contained in the mortgage-deed after the mortgaged property was sold in execution of the decree passed in Suit No. 89 of 1909, the questions for decision are (1) whether he is a creditor within the meaning of Section 53 of the Transfer of Property Act and, therefore, entitled to bring a suit to have it declared that the alienation was in fraud of him and other creditors and is void as against him and them, and (2) whether his suit is barred by limitation.

3. Having regard to Order XXXIV, Rule 14 of the Civil Procedure Code (Old Section 90 of the Transfer of Property Act), it cannot, in my opinion, be argued that a simple mortgagee, whose rights under the personal covenant have not been barred, is not a creditor of the mortgagor and that he is not entitled to bring a suit to declare the invalidity of the alienations of other properties by his mortgagor (debtor).

4. As regards the question of limitation, I think the cases of Tallapragada Sundarappa v. Boorugapalli Sreeramulu 30 M.K 402 : 17 M.L.J. 288 : 2 M.L.T. 360 and Pachamuthu v. Chinnappan 10 M.L 213 establish that the limitation for a suit of this nature is provided for by the general Article 120 (6 years) and not by Article 91 or 95 of the first Schedule to the Limitation Act. The decision of the learned City Civil Judge that the suit is barred by the three years' period of limitation cannot be sustained.

5. I must also state that the observation of the learned City Civil Judge in his judgment, dated 10th May 1913, that the plaintiff had taken no steps whatever to add Hakim Muhammad Ghouse Sahib as a party to the suit, is not accurate as the plaintiff on the 12th March 1913 had applied to the lower Court for bringing Hakim Muhammad Ghouse Sahib on record as the 8th defendant in the case and also prayed for an amendment of the plaint. Another amendment petition, filed on the 18th March 1913, also makes it clear that he wanted Hakim Muhammad Ghouse Sahib to be made a party and to amend the plaint by inserting additional allegations, to the effect that the plaintiff apprehended (and I take it that he meant it was a reasonable apprehension) that the sale of the mortgaged properties in execution of the decree in suit No. 89 of 1909 could not fetch the whole of the amount due under the decree. I would, therefore, further set aside the orders of the learned City Civil Judge refusing the prayers of the two petitions, dated 12th and 18th March 1915, and would grant the prayers of those petitions. The amendments should be made by the plaintiff within two weeks of the receipt of the records by the City Civil Court or such other time as may be allowed by that Court. The decision of the City Civil Judge is set aside and the suit remanded for disposal on the other issues, which arise on the pleadings already on record and which might hereafter be raised in due course of law.

6. Costs hitherto incurred will abide the result.

7. Napier, J.--I concur.

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