

(1960) 12 P&H CK 0018
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 723 of 1959

Badri Dass Nihala Mal

APPELLANT

Vs

Chunilal Roda Mal and Another

RESPONDENT

Date of Decision : 28-12-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100 , 101
Transfer of Property Act, 1882 — Section 53(1)

Citation : AIR 1961 P&H 398 : (1961) 2 ILR (P&H) 378

Hon'ble Judges : Mehar Singh, J;K.L. Gosain, J

Bench : Division Bench

Advocate : A.C. Hoshiarpuri and V.C. Mahajan, for the Appellant; H.L. Sarin, K.C. Sud, Surjit Taunque and H.L. Soni, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Gosain, J.—This is a second appeal against the appellate decree of Shri G. C. Jain, District Judge, Hoshiarpur, dated the 29th April, 1959, affirming that of the trial Court dated the 22nd April, 1958.

2. Kishori Lal who was the owner of the property in dispute made a mortgage of the same along with his residential house in favour of Messrs. Mulkh Raj Radha Krishan of Pathankot for a sum of Rs. 5,000/- by means of a document executed on the 4th April, 1948. On the 5th July, 1956 he sold the property in dispute in consideration of Rs. 5,000/- in favour of Badri Das by means of a registered document Exhibit D. 1. On the same day he executed a rent deed in favour of the aforesaid vendee and thus became his tenant.

On the 6th May, 1957 Chuni Lal plaintiff-respondent brought the suit giving rise to this appeal for a declaration to the effect that the sale deed dated the 5th July, 1956 executed by Kishori Lal in favour of Badri Das relating to the property in dispute was fictitious, collusive and had been made with the intention of defeating and delaying the claim of the plaintiff and other creditors. The suit was contested by Kishori Lal vendor as also by Badri Das vendee who averred that

the sale had been made for consideration and who denied that there was any intention to defeat and delay the creditors. It was also pleaded by the defendants that the suit did not lie in its present form inasmuch as it was not a representative suit. The trial Court framed the following four issues :

1. Is the present suit a representative suit on behalf of all the creditors of Kishori Lal and if not what is its effect ?
2. Whether the sale in question was for consideration ?
3. If so, whether the sale was effected with a view to delay the creditors of Kishori Lal ? If so what is its effect ?
4. Relief.

After recording the evidence of the parties the trial Court decided all the four issues in favour of the plaintiff and passed a decree in his favour. In appeal the learned District Judge agreed with the findings of the trial Court on all the issues and in the result affirmed the decree of the learned trial Judge.

3. In this second appeal two points are urged before us which are:

(a) that the plaintiff had not brought the suit on behalf of all the creditors and that the suit as framed did not lie; and

(b) that the findings of the Courts below on issues Nos. 2 and 3 were erroneous. After giving our careful consideration to the whole matter and after hearing the learned counsel for the appellant at great length we are wholly unable to accept any of his two contentions. It is true that the last portion of Sub-section (1) of Section 53 of the Transfer of Property Act specifically provides that a suit of this nature shall be instituted on behalf of, or for the benefit of the creditors. If the Transfer of Property Act were in force in the Punjab, we would have no option but to accept the contentions raised on behalf of the appellant. The Act, however, is not in force in this State and although the principles underlying it, based as they are on uniformly accepted notions of justice, equity and good conscience, have been invariably followed, the technicalities and procedure prescribed in certain sections of the Act have never been treated as the prevailing law. Precisely the same point which is now before us came up for decision before a Division Bench of the Pepsu High Court in *Zora Singh v. Nauhar Chand*, 1949 1 PLR 198, and a similar contention of the vendee in that case that a suit u/s 53 of the Transfer of Property Act could only be filed under Order 1 rule 8 of the CPC on behalf of or for the benefit of all the creditors, was rejected.

We are in respectful agreement with the view taken in that case supported as it is by a ruling of the Division Bench of the Lahore High Court in *Sunder Singh v. Ram Nath*, AIR 1926 Lah 167. Two cases were relied upon by Mr. Hoshiarpuri in support of his contention on this point and they are *China Mal v. Gul Ahmad*, AIR 1923 Lah 478 and *Banto Devi v. Firm Lala Shiv Parshad. Sri Kishen Das*, AIR 1943 Lah 96.

4. In the first of these cases the suit had been brought by a judgment creditor and it was held by the Division Bench deciding the case that he was not bound to bring a representative suit on behalf of all the creditors of the debtor. There is no doubt that some observations were made in this case distinguishing the case of the judgment creditor from an ordinary creditor in the matter of form of the suit and saying that while the former is not bound to bring a representative suit on behalf of all the creditors of the debtor, the latter could bring an action only on behalf of the general body of the creditors.

These observations were, however, only in the nature of obiter dictum inasmuch as the Hon"ble Judges in that case were not dealing with the case of an ordinary creditor and perhaps no arguments were addressed to them so far as the case of an ordinary creditor was concerned.

5. In the second case, i.e. the one reported, in AIR 1943 Lah 96, the facts were that a decree had originally been passed in favour of firm Shiv Parshad Shri Kishen Das against the estate of Milkhi Ram deceased. Milkhi Ram had died leaving two sons Chiranji Lal and Dev Raj and two daughters, one of whom Mst. Banto Devi was a widow and was living in the family residence situated in Ferozepore. In the execution of their decree, the decree-holder firm secured the attachment of the aforesaid house, but on objections being filed by Mst. Banto Devi that the same had been mortgaged to her with possession, by Chiranji Lal and Dev Raj, the sons of Milkhi Ram, the house was released.

The decree-holders then filed a suit for a declaration in respect of the house under Order 21, Rule 63 of the CPC and therein claimed that the mortgage to Mst. Banto Devi was fictitious, without consideration and collusive, and that it had been effected by Chiranji Lal and Dev Raj with a view to defeat and delay the plaintiffs and their other creditors. The said suit was decreed and Mst. Banto Devi filed an appeal against the said decree. During the pendency of the appeal the decree-holders were paid in full and were left with no further interest in the litigation and they were no longer represented.

An application, however, was made by one Mst. Reoti representing herself to be an heir of another creditor, under Order 41, Rule 20, and Order 1, Rule 10 of the CPC to be made a party to this appeal on the ground that the mortgage had been declared invalid qua all the creditors and that she was, therefore, interested in the appeal. This application was accepted by a learned Single Judge, but the Division Bench set aside that order in Letters Patent appeal and held that the suit of the decree-holders in the aforesaid circumstances could not be regarded as a representative suit.

6. Obviously the facts of both the rulings were distinguishable from those of the present case and none of them is, therefore, of any assistance to Mr. Hoshiarpuri except to the extent that there are some observations in the first case which are helpful to him.

7. The second contention of Mr. Hoshiarpuri must be refected on the short

ground that the findings on issues Nos. 2 and 3 are purely of fact and cannot be assailed in second appeal. No error of law has been shown to us which would vitiate the said findings. There was a good deal of direct and circumstantial evidence brought on record and the Courts below have based their findings on the said evidence.

8. In the result, the appeal fails and is dismissed with costs.

Mehar Singh, J.

9. I agree.