
(1966) 10 RAJ CK 0005
In the Rajasthan High Court
Case No : Second Appeal No. 379 of 1961

Ganesh Mal and Another

APPELLANT

Vs

Meghraj and Another

RESPONDENT

Date of Decision : 27-10-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 21 Rule 58, Order 21 Rule 63
Limitation Act, 1908 — Article 11, 22
Limitation Act, 1963 — Article 98, 21
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1967 Raj 283 : (1967) RLW 307

Hon'ble Judges : I.M. Modi, J

Bench : Single Bench

Advocate : S.B.L. Sharma, for the Appellant; Kistoor Mal Singhvi, for the Respondent

Final Decision : Dismissed

Judgement

I.M. Modi, J.—This is a civil regular second appeal by the defendants Ganeshmal and Tarachand alias Otmal against an order of the learned Civil Judge, Sirohi, dated the 1st March, 1961, by which he set aside the judgment and decree of the trial Court dismissing the plaintiffs suit as barred by time and remanded it back to the Munsiff for disposing of it on the merits.

2. This was, to start with, a simple suit under Order 21 Rule 63 C. P. C. which was instituted in the Court of the Munsiff Sirohi on the 18th July, 1957, and has had a chequered history principally because it has been mishandled by the parties and the Courts below and the Court of first appeal in particular (Mr. Sardar Singh Civil Judge Sirohi). The plaintiff Nathmal and his son Meghraj alias Maganlal obtained a money decree against defendant No. 3 Pratapchand who is respondent No. 2 in this appeal and took out execution thereof. They attached two houses alleging them to be of the judgment-debtor Pratapchand, the description whereof was given in paragraph 2 of the plaint.

Defendants-respondents Ganeshmal and Tarachand alias Otmal raised an objection before the execution court under Order 21, Rule 58. C.P.C., to the effect that the said houses had been mortgaged to them by defendant Pratapchand for a sum of Rs. 1,500 carrying interest at the rate of eight annas per cent. per mensem with a stipulation that if the mortgage was not redeemed within a period of two years, the mortgaged property will be treated as having been sold to the mortgagees, and as the mortgage had actually not been redeemed within the time-limit specified in the mortgage-deed, the defendants-mortgagees had become absolute owners of the properties in question. The plaintiffs contended that the mortgage had been made to defeat their claim and was without consideration. By its order dated the 5th August, 1956, the executing court upheld the mortgage and on that view ordered that the attached properties be sold subject to the mortgage.

Thereupon the plaintiffs instituted the suit, out of which this appeal arises, on the 18th July, 1957, on the allegation that the mortgage was a collusive one entirely without consideration and had been entered into between defendant No. 3 and defendants Nos. 1 and 2 solely with a view to delay and defeat the plaintiffs' claim. The plaintiffs, therefore, prayed that the mortgage dated the 5th October, 1953, being without consideration and collusive and having been made with a view to delay and defeat their claim be declared to be inoperative against the plaintiffs and that the properties under attachment be held to be liable to attachment and sale in execution of the plaintiffs' decree.

3. The defendants mortgagees resisted the suit. They contended that the mortgage-deed was genuine and for consideration and had not been made to defeat the plaintiffs claim and consequently prayed that the plaintiffs' suit be dismissed.

4. The trial court by its judgment dated the 29th June, 1959, repelled the defence and upheld the plaintiffs' contention that the houses in suit were liable to be sold in execution of the plaintiffs' decretal claim without being subjected to any liability under the mortgage deed dated the 5th October, 1953. The defendants went up in appeal to the learned Civil Judge, Sirohi, before whom it seems to have been argued on behalf of the appellants for the first time that the plaintiffs' suit had been brought u/s 53 of the Transfer of Property Act as a representative suit on behalf of the creditors but as it had not been brought on behalf of or for the benefit of the creditors of the judgment-debtor Pratapchand and the permission of the court to bring such a suit had not been obtained under Order 1, Rule 8, C.P.C., it deserved to be summarily dismissed.

The learned Judge below somehow held that there was no doubt that the suit brought by the plaintiffs was a suit as contemplated by Section 53 of the Transfer of Property Act. He further held that it was settled law in such a case that the provisions of Order 1, Rule 8, C.P.C., must have been complied with and then went on to hold that he would have dismissed the suit but for an application for amendment by the plaintiffs which had been moved before him. The learned

Judge, therefore, allowed the appeal accepting the application for amendment and sent the case back to the trial court for disposing of it according to law.

On the question of limitation which seems to have been further raised before him in consequence of the amendment allowed and he thought fit to give the direction that if on publication of a notice on an application to be made for permission under Order 1, Rule 8, C.P.C., certain other creditors should apply for being made a party to the suit the Munsiff shall consider the question of limitation having regard to the provisions of Section 22 of the Limitation Act. But if no other creditor or creditors should apply to be Joined as parties to the suit then the Munsiff was ordered to dispose of the case on the merits obviously implying thereby that the question of limitation would not arise in such a contingency, because he further added that in case the other creditors applied for being made parties to the case and the application was granted by the trial court and the suit was considered to be within limitation, then only the Munsiff will try the suit afresh on the merits.

5. I pause here to point out though I proposed to deal with this point at some length later on that the plaintiffs' suit as it was originally brought was, as already stated, a simple suit brought under the provisions of Order 21 Rule 63 C.P.C., with a view to get rid of the effect of the summary order made against him in a proceeding under Order 21, Rule 58, C.P.C., and, for reasons which I am entirely unable to comprehend, such a suit was held by the learned Civil Judge in appeal not to be maintainable, and that he was wholly wrong in doing so with the result that the plaintiffs were reduced to the necessity of amending their suit so as to bring it within the four walls of Section 53 of the Transfer of Property Act, and this litigation thus was made to start over again from the very beginning, a result which, in my opinion, is greatly to be deplored.

6. I should further like to mention here two things in particular. The first is that in this suit all that the plaintiffs averred was that the mortgage had been made by the Judgment-debtor Pratapchand to the defendants mortgagees with a view to defeat their claim and they had not made the slightest mention therein that the mortgage had been made to delay or defeat the claims of the creditors generally or as a whole. The second thing to which I want to draw special attention is that although the objection as to the non-maintainability of the suit as falling u/s 53 of the Transfer of Property Act had been raised by the contesting defendants and upheld by the court below, it had never been pointed out there that there were any other creditors of the Judgment-debtor at all. In fact the learned Judge below himself accepted in his judgment that the defendant had not shown to him as to how many other creditors there who were interested in the present suit. And yet the case took the unfortunate turn it did.

7. Be that as it may, the case went back to the trial court. The plaintiffs on their suit as amended u/s 53 of the Transfer of Property Act made an application for permission to sue under the provisions of Order 1, Rule 8, C.P.C. This permission was granted to them by the trial court. No other creditor however came forward

to Join in the suit and so there was hardly any necessity of any fresh evidence being recorded and the case was set down for arguments before the trial court on the preexisting material. It was now argued before that court that the plaintiff's suit was barred by limitation as having been brought on the 18th April, 1960, after more than a year of the order in the claim case in the executing court which was passed on the 2nd August, 1956, and by virtue of the provision contained in Article 11 of the Limitation Act, 1908, which it was urged governs this case. This plea prevailed with the trial court and the plaintiff's suit was dismissed on the ground of limitation alone without any findings having been given on the other issues raised in the case.

8. Now it was the plaintiffs' turn to go in appeal and the same learned Judge (Shri Sardar Singh) allowed the appeal, reversed the judgment and decree of the trial court and remanded the case once again for a decision on the merits. In coming to this conclusion, the learned Judge held that the trial court had failed to give proper effect to the observations made by him in his earlier Judgment as regards the applicability of Section 22 of the Limitation Act as he had made it clear there that the point of limitation would only arise for consideration if certain other parties applied to be impleaded in the suit; but if no one so came forward, the question of limitation would not arise and in that case, all that was and would be necessary for the trial court to do was to dispose of the case on the merits.

This was all right so far as it went, and it was the Munsiff who was in error at that stage in having thrown out the plaintiff's case on the ground of limitation even though no new party applied to be impleaded as a party in the case, the suit being of course a representative suit u/s 53 of the Transfer of Property Act. Reference may be made at this place to Seth Nandaramdas Atmaram by Agent Hemrajmul Vs. Zulika Bibi and Others, It was held in this case that a suit u/s 53 of the Transfer of Property Act to be properly framed must be instituted on behalf of or for the benefit of all the creditors and not merely for the benefit of the plaintiff alone, and that it would be further necessary in such a suit to obtain the permission of the court to sue in a representative capacity under Order 1, Rule 8, C.P.C., and it was further held that where the suit was wrongly framed and the permission of the court had not been obtained under Order 1, Rule 8, it was liable to be summarily dismissed.

As regards the applicability of Section 22 of the Limitation Act to such a case it was laid down that it would be attracted into application when new parties came to be introduced into the case; and it was made clear and that is important to note for our present purpose, that where an amendment did not seek to bring a new party but only varied the ground on which the relief was originally sought or bad asked for a different or additional relief without change in the cause of action, or, again where a party was already on the record either as a plaintiff or as a defendant and the amendment sought merely altered the capacity of the pre-existing party to one of a different character that would not involve any addition of a new party to the case within the meaning of Section 22 of the

Limitation Act, and, therefore, it would not be attracted into application at all and in such a case the suit must be dealt with for purposes of limitation as filed in the very first instance. I am in respectful agreement with this view as in the class of cases which was and is before the court the parties would substantially remain as before and it cannot justly be said that a new plaintiff or defendant was substituted or added after the institution of the suit so that the suit as regards such a person may have to be treated as instituted when he was so made a party.

9. For the opposite view, reliance is placed by learned counsel for the appellant on *Hubli Panjarapole and Others Vs. Saraswatevva Bayappa Kala Ghatki*, In that case the suit was first filed against an unregistered association with numerous members through its chairman by the plaintiff. A plea was raised that the suit was incompetent as it was not filed in accordance with the provisions of Order 1, Rule 8, C.P.C. The suit was thrown out as improperly framed. Permission to sue was then applied for under Order 1, Rule 8, C.P.C. and this was granted subsequently. It was under these circumstances that the question was raised that the suit was barred by limitation and it was thrown out on the ground that it was lawfully brought against the association only after leave was granted under Order 1, Rule 8, C.P.C. and Section 22 of the Limitation Act was clearly attracted into application.

The ratio of the decision was that the Association had not been properly sued in the first instance and the suit against it became a proper representative suit only when permission had been granted under Order 1, Rule 8, and, that being so, it was not a case of a mere formal amendment in the plaint, and that the true legal position was that the suit which would have been dismissed as having been improperly filed was allowed to be converted into a proper and competent suit by the amendment and that such material alteration in the nature of the suit could not operate retrospectively. This case, therefore, is entirely distinguishable on facts and has no application to the facts and circumstances or the present case.

10. Even assuming but not conceding for the sake of argument that the present suit as amended was a proper suit for declaration u/s 53 of the Transfer of Property Act for the benefit of all the creditors of the defendant judgment-debtor, there is authority for holding that such a suit would be governed by six years" limitation under Article 120 of the Limitation Act, and the limitation will commence from the time when the cause of action arises which would be the elate on which circumstances entitling the plaintiff to have his interest guarded first came to his knowledge as it would be then that the right to sue would accrue to him. Reference may be made in support of this view to *Abdullakhan v. Purshottam* AIR 1948 Bom 265 *Synabhog Marthandu Rao (died) Vs. Rao Bahadur Chenna Basappa Kuruba Gond and Others*, *Rambilas Sitaram v. Ganpat rao Pandharinath* AIR 1954 Nag 129 and *Ahmed Ali v. B. Veeralla* AIR 1959 AP 280.

11. Now the defendants mortgagees raised their objections before the trial Court on the 17th October, 1955, and the amended plaint was filed in the trial Court on the 18th April, 1960, on which date also permission to bring the suit under Order

1 Rule 8 was granted to the plaintiffs. Taking the date of the filing of the objections as the date on which the plaintiffs first came to know that the mortgage of the properties had been made and was being pressed into service to defeat their interests, the amended suit brought on 18th April, 1960, would be well within time. Thus from whichever angle, we might look at the case, the trial Court was in error in coming to the conclusion that the plaintiff's suit was barred by time, and the Court of first appeal was correct in setting that order aside.

12. A good deal of the complications that have arisen in this case have, however, been caused because the learned Judge when the appeal in the case was first taken to him held that this was a suit u/s 53 of the Transfer of Property Act and not under Order 21 Rule 63 C. P. C. Curiously enough, when the case came before the same learned Judge in appeal for the second time and he gave the judgment which is the subject-matter of this appeal, he felt persuaded to say that it was not necessary for the plaintiffs being the sole creditors of the defendant judgment-debtor to have brought the suit u/s 53 of the Transfer of Property Act and resorted to the provisions of Order 1 Rule 8 C. P. C. and they were well within their rights to bring a suit under Order 21 Rule 63 C. P. C.

I feel bound to point out that on this view it was a sheer exercise in futility for the learned Judge to have remanded this case when it was brought to him in appeal for the first time, the more so, as stated by him in his judgment dated the 28th January, 1960, the defendants mortgagees had failed to show that there were any other creditors of the defendant judgment-debtor other than the plaintiffs whose rights were sought to be defeated or delayed by the mortgage in question, nor was that the case of the plaintiffs themselves.

In fact, this objection had never been taken by the said defendant in the trial Court, and that being so the learned judge below, in my opinion, should not have allowed this point to be taken up at the stage of appeal for the first time. If any authority is needed for this view, I would invite attention to *Asgar Ali v. C. V. R. M. Firm* AIR 1936 Rang 117 *Girraj v. Sankatha Prasad* AIR 1938 Oudh 33 and (*Thedla*) *Ranganayakamma Vs. Maddi Jagayya and Others*, The ratio of these decisions is that in such a case the defendant must be deemed to have waived the objection if any as to the frame of the suit and should not be allowed an opportunity of raising it in appeal.

13. I should also like to invite attention in this connection to the language of Order 21 Rule 63 C. P. C. It reads as follows :--

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive"

This rule gives a statutory right of suit to the party against whom an order is passed in a claim proceeding, and such a suit had to be filed within one year from the date of the order as prescribed by Article 11 of the Limitation Act of

1908 which admittedly governs this case, and if no such suit is filed, the order becomes conclusive as to the rights asserted in the objection proceeding.

Now, to hold that this right has been taken away by anything contained in Section 53 of the Transfer of Property Act, in my opinion, would be going too far. The relevant portion of Section 53 reads as follows :--

"A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of or for the benefit of, all the creditors"

This amendment was introduced in the Act by the Transfer of Property Amendment Act, 1929 (Act No. 10 of 1929). I have no hesitation in saying that this provision cannot be interpreted so as to take away the right of a suit given to a creditor under Order 21 Rule 63 C. P. C. For if that was so, the Legislature should not have failed to amend Order 21 Rule 63 of the Code. As I look at the matter, where there is a single creditor of the judgment-debtor, a suit u/s 53 for avoiding such transfer on the ground of its being fraudulent as defeating or delaying the creditors of the transferor cannot be brought within the meaning of Section 53 as it necessarily contemplates that the judgment-debtor has a number of creditors, and, at any rate more than one.

Again, Section 53 property speaking is an enabling provision which confers a right or privilege on a decree-holder to impeach a transaction of his debtor in the interest of other creditors as well but it cannot be so interpreted as to preclude a single creditor from establishing his own right, if he chooses to do so or compel him to bring a representative suit thereunder. Indeed, such a suit can certainly be brought within the meaning of Order 21 Rule 63 even if there is a single creditor and he has levied execution and has failed to successfully reach the property of the judgment-debtor in execution of his decree.

Such a suit if brought need not be representative at all, for what the plaintiff really seeks in a suit of this nature is to avoid the fraudulent transaction which is set up against him as defeating his own right and not the general right of the creditors as a whole, Reference may be made in support of this view to *Shrimal Kasturchand Marwadi Vs. Hiralal Hansraj Marwadi, Ahmed Ali Khan Bahadur (died) and Another Vs. Banguluru Veeralla and Others, Radhanath v. Madhusudan* AIR 1958 Ori 58 and *U. Maung Nge v. P. L. S. P. Chettiar Firm* AIR 1934 Rang 200.

14. The correct position in law, with all respect, therefore, seems to me to be that where a decree-holder seeks to enforce his own individual right as a result of an order made against him in a claim proceeding on the ground that the transaction by which his right stands affected is sham and colourable one and it adversely affects his own individual or personal rights, then it is open to him in law to bring a suit under the provisions of Order 21 Rule 63 C. P. C and he cannot be compelled necessarily to frame his suit so as to satisfy the

requirements of Section 58 of the Transfer of Property Act.

In this view of the matter, I have no hesitation in saying that the conclusion to which the learned Civil Judge came on this aspect of the case in his judgment dated the 28th January, 1960, was wholly wrong and all that was proper and necessary for him to do at that stage was to dispose of the defendants' appeal on the merits, and it was the learned Judge's failure to grasp the correct position at that stage that has unfortunately led to the protraction of this litigation without any real purpose.

15. As the whole position now emerges, the order of the learned Civil Judge under appeal calls for no interference, and, there fore, I hereby dismiss this appeal with costs. Leave to appeal is refused.