(1925) 03 MAD CK 0008

In the Madras High Court

Guntur Narasimham and Another — APPELLANT

Vs

Nyapati Narayana Rao Garu — RESPONDENT

Date of Decision : 12-03-1925

Acts Referred:
Transfer of Property Act, 1882 — Section 53

Citation : 92 Ind. Cas. 405

Hon'ble Judges : Venkatasubba Rao, J;Madhavan Nair, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—The question to be decided in this appeal is one of limitation. This suit was filed u/s 53 of the Transfer of Property

Act. The plaintiff, being the Receiver in insolvency represents the body of creditors of the insolvent. The transaction impeached is a mortgage,

dated 27th July 1908, executed by the insolvent in favour of the defendant. The suit was filed on the 15th of February 1918.

2. The first question that arises is what is the Article that is applicable? Article 120 seems to be the appropriate Article. The decisions seem to be

to the same effect: see Authikesavaloo Naicker v. Shalt Abdulla (1915) M.W.N 337 and Venkateswara Aiyar v. Somasundram Chettiar 44 Ind.

Cas. 551 : 7 L.W. 280 : (1918) M.W.N. 244. It was conceded before us, and, in my opinion, rightly that the Article applicable is Article 120. The

more difficult question, however, is what is the starting point of limitation? On this point, there is no authority. Phillips, J., in Venkateswara Aiyar v.

Somasundram Chettiar 44 Ind. Cas. 551 : (1918) M.W.N. 244 expressed the view that the time runs from the date when the plaintiff had

knowledge of the facts entitling him to relief. This though an obiter dictum is entitled to great weight as the point was fully considered by him.

Krishnan, J , in the judgment under appeal, as I understand it, is not quite definite on the point. He thinks that limitation runs from the date when the

creditor exercises his option; in the alternative from the date when he has knowledge of the facts that give him a right to relief. As I read his

judgment he is more inclined to take the former than the latter view. It seems to me that he expressed the alternative view, as on the facts,

whichever view was taken the same result followed. Krishnan, J., having held that the suit was filed in time, the defendant has filed this appeal and

Mr. Jagannadha Das has argued the case very fully on his behalf. His contention is that the date of alienation gives the starting point. He supports

his contention by relying on what I may describe as grounds of convenience. Before adverting to these grounds, I shall deal with the point with

reference to the two provisions of law that have a bearing, viz.... Section 53 of the Transfer of Property Act and Article 120 of the Limitation Act.

u/s 53 a transfer that offends against the rule enacted in it is voidable at the option of any person defrauded, defeated or delayed. Under Article

120 the suit may be brought within six years of the date when the right to sue accrues. The question resolves itself into this. When does the light to

sue accrues? If the transaction is voidable at the option of a creditor he may avoid it at any time at his pleasure. Section 53 does not say that, after

the lapse of a certain time, he shall not be able to avoid the transaction. It does not prescribe a limit of time. What then constitutes the exercise of

the option? In the words of Wallis, C.J. In Ramaswami Chettiar v. Mallappa Reddiar 28 M.L.T. 173, 12 L.W. 475 a voidable transaction may be

avoided by any open and unequivocal declaration of an intention to avoid it, see page 769 Page of 43 M.--[Ed.]. The right to sue accrues when

this option is exercised. Under Article 120 the suit may be instituted within six years from the date when the right to sue accrues. As that , right

accrues, as I have shown, when the plaintiff exercises his option, the suit may be filed within six years from the date of the exercise of the option.

The proper construction of the sections compels us to take this view and it seems to me that this is what Krishnan, J., intended to hold. If so, I

entirely agree with him.

3. The alternative view, namely, that time begins to run from the date when the plaintiff becomes aware of the facts that entitle him to relief found

favour with Phillips, J., in Venkateswara Aiyar v. Somasundram Chettiar 44 Ind. Cas. 551 : 7 L.W. 280 : (1918) M.W.N. 244. But a perusal of

his judgment shows that only two theories were put forward before him namely,. (1) the date of alienation gives the starting point, (2) the date of

knowledge. These were the two rival views that were placed before him and he preferred the view that knowledge gives the starting point.. His

judgment leaves no doubt in my mind that if what may be compendiously described as the option theory was suggested to him, he would have

gladly adopted it. Indeed in this connection, he uses the word ""option"" but does not go the necessary length. Section 53, it is needless to point out,

does not take note of knowledge at all. It speaks of option and not of knowledge. Under Article 95 of the Limitation Act which relates to a suit for

relief on the ground of fraud, knowledge, no doubt, would be a material element, ior the prescribed period of three years runs from the date when

the fraud becomes known to the party wronged. But the suit contemplated by Section 53 is not one for relief on the ground of fraud, and the

knowledge of fraud to which Article 95 refers is, therefore, not a material circumstance. Moreover, it is not necessary that there should be actual

fraud to invalidate a transaction unless Section 53 as the second Clause of that section shows, which runs as follows:--

Where the effect of any transfer of Immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or

for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

4. In my opinion, therefore, fraud or knowledge of fraud is not a relevant consideration and on the strict construction of the sections, I have arrived

at the result and it is a matter for satisfaction that considerations of convenience and justice point to the same conclusion. From this point of view, I

shall next deal with three different standpoints suggested.

5. First, let me take the date of alienation, being the starting point. Section 53 refers to an intention to defraud prior or subsequent transferees, co-

owners and creditors. I shall take the case of creditors as this is the most usual case. It is settled that the benefit of the section is not restricted to

existing creditors alone. Even subsequent creditors may impeach the transaction. Suppose then a trader makes an alienation of the property which offends against the terms of this section. Why should any creditor call in question the alienation if the trader is possessed of sufficient funds to

satisfy him? Why should a subsequent creditor be barred although the alienation was made long previous to his debt having come into existence?

Creditors are not generally interested in impugning the transaction entered into by their debtor. In spite of the fact that a property worth Rs. 10,000

has been alienated, the debtor may yet be possessed of assets worth laks and why should any creditor take the trouble of impugning the alienation,

or again the debtor may have alienated the property, but may still be expected to make large profits or to amass large wealth. The creditors are

only concerned with this that the debtor must one day be in a position to re-pay the amounts due. To say that the right to avoid a transaction

becomes barred at the lapse of six years from the alienation, is practically to throw upon them the burden of impeaching every suspicious

transaction, although for the time being, it may not be necessary to adopt this course of conduct. In the case of subsequent creditors whose interest

accrues at a period too remote, the section will remain on this construction a dead letter. Further, if the date of alienation is the starting point,

creditors may become barred for no fault of theirs, as it is very likely that they may not in time become aware of the transaction itself without even,

be it noted, any active steps being taken by the debtor to conceal the transaction from his creditors.

6. Let me now take the second theory suggested, the date of knowledge being the starting point, As I have said, it matters little to a creditor that

his debtor has alienated some of the property. Why should a creditor be driven to embark on litigation merely because it has come to his

knowledge that his debtor has entered into a transaction not above board? The property still remaining, as I have said, may suffice or they may

hope that the debtor may in time rally and no creditor can be expected to have before him a balance sheet disclosing actually the debtor''s affairs.

7. The view then I have taken, namely, that the exercise of the option is the starting point imposes no unnecessary burden on the creditors. When

they find that their interests demand that the transaction should be set aside they exercise the option and avoid the transaction. Moreover it is now

settled that the option may be exercised otherwise than by the institution of a suit. Firstly, a creditor may attach the property alienated and he may do so whatever may be length of time that lapses from the date of alienation. Secondly, if, on attachment, the transferee prefers a claim under

Order XXI, Rule 53, C.P.C., and the claim is allowed, the judgment creditor may file the statutory suit prescribed by Rule 63 without regard again

to the lapse of time from the date of alienation: see Kottarathil Puthiyapurayil Pokker v. Bulathil Parkum Chandrankandi Kunhamed 36 M.L.J.

231. Thirdly, if the claim, is on the other hand, disallowed and the transferee files the suit under Rule 63, the creditor may defend it by showing that

the transaction was in fraud of creditors: see Ramaswami Chettiar v. Mallappa Reddiar 39 M.L.J. 350, 28 M.L.T. 173, 12 L.W. 475. In all these

cases, the creditor exercises the option without resorting to the suit, u/s 53, and it would be anomalous to hold that although his right to file a suit is

barred, his right still subsists to question the transaction by these other methods.

8. Mr Jagannadha Das strongly argued that the starting point should not be made to rest upon such a shifting ground as exercise of option. 1 see

nothing objectionable in this To take another instance from the Limitation Act, under Article 60 the period of limitation for a suit to recover money

deposited under an agreement that it shall be payable on demand, is three years from the date when the demand is made. The making of the

demand is entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged and a suit may be instituted

without even a demand being made, in which case no question of limitation arises. The exercising of the option is analogous in this respect to the

making of the demand and the option may be exercised by the filing of the suit itself, in which case the question of limitation will likewise not arise.

Mr. Jagannadha Das in his exhaustive argument contended that this will be a startling result. X do not in the least agree with him. On the other

hand, the English cases show that this is assumed to be the normal position. In re Maddever; Three Towns Banking Co. v. Maddever (1884) 27

Ch. D. 523 : 53 L.J. Ch. 998 : 52 L.T. 35 : 33 W.R. 286 a creditor brought an action to set aside a conveyance several years after it was made

and although he had been aware of the facts during the whole period and gave no satisfactory reason for his delay, the Court of Appeal held,

affirming North, J., that his right to impeach the transaction was not barred. The only limitation recognised is that the debt should be subsisting.

North, J., puts it thus: ""Where the parties have been merely non-active, I do not see any reason why they should not take proceedings at any time

while the debt is a subsisting debt. The time might have arrived when the Statute of Limitations would be a bar, and, of course, when the debt was

gone, no proceedings could be taken in respect of it."" Cotton, L.J., observes. ""The plaintiffs in this case say ''We are creditors whose debt is not

barred, and we seek payment out of property conveyed away by the debtor by a deed which the Statute of 13 Eliz, c 5, makes void as against

us.'' The defendant relies on the delay of the creditor; but I am of opinion that this defence is not effectual."" See also May on Fraudulent

Conveyances, page 120, when the learned author says:

Since the right of a creditor to set aside a deed under 13 Eliz., c. 5 is a legal right, and not merely a right to set aside the instrument on equitable

grounds, the fact that the creditor has delayed to take proceedings to set aside the deed under that Statute, although with full knowledge of the

facts, is immaterial so long as the delay has not been such as to create a statutory bar. Until the right to recover the debt is barred by the Statutes

of Limitations, the legal right to avoid the deed exists, and no equity arises from the mere delay to enforce it.

9. Mr. Jagannadha Das next contended that the nature of the action is representative and if one creditor is barred the whole body of creditors

becomes barred. May a creditor bring a suit on his own behalf or must the suit be brought on behalf of all the creditors? This question does not

strictly arise although I may say that on this point the preponderance of authority, so far as Madras is concerned, is in favour of the view that a

creditor may bring such a suit on his own behalf: see Krishnan, J.''s judgment in Kottarathil Puthiyapurayil Pokker v. Balathil Parkum

Chandrankandi Kunhamed (1919) M.W.N. 39 : 9 L.W. 138 : 36 M.L.J. 231 and Sadasiva Aiyar''s observation at page 781 Page of 43 M.[Ed.]

in Ramaswami Chettiar v. Mallappa Reddiar 59 Ind Cas 917, 43 M 760, (1920) M.W.N. 572 12 L.W. 475. Again, u/s 11, Expl. VI, C.P.C., the

section relating to res judicata, the result of a suit brought by one creditor bona fide contested may be binding on the transferee and on the general

body of creditors. I express no opinion on this. But assuming that when there has been a suit the principle of res judicata applies, it does not by any means follow that the inaction of one creditor, that is to say, his failure to file a suit within six years of bis exercising the option, bars the general

body of creditors. u/s 53 of the Transfer of Property Act ""Any person so defrauded, defeated or delayed"" may avoid the transaction. An individual

right is conferred upon each creditor by this section and the inaction or laches of one cannot deprive the others of their rights. The learned Vakil for

the appellant relied on the analogy furnished by Challagundla Varamma v. Madala Gopaladasayya 46 Ind. Cas. 202 : 35 M.L.J. 57 : 24 M.L.T.

115 : 8 L.W. 62 : (1918) M.W.N. 461, where by reason of the nearest reversioner failing to sue within the time limited to set aside an alienation

by a Hindu widow, all the reversioners existing aswell as subsequently born were held equally barred. The matters are not in pari materia; special

considerations apply in the case of suits by reversioners and the analogy is misleading.

10. As the Receiver represents all the creditors, granting that the inaction of one may lead to the result contended for, it must be observed that in

this case it is not suggested that any particular creditor exercised his option at a time too remote for the suit to be brought. Therefore, though I have

dealt with the matter at some length, the question as to the nature of the suit u/s 53, Transfer of Property Act, does not, as I have said, on the facts

arise.

11. I hold that the suit is not barred by limitation.

12. It is lastly urged that the suit is quite a frivolous one as appears from the previous proceedings that transpired in insolvency, but this is a matter

we cannot go into as the suit remains to be tried on the other issues in the case.

12. The only order as to costs that we propose to make is that they shall abide the event.

Madhavan Nair, J.

13. I agree with my learned brother that the plaintiff''s suit in this case is not barred by limitation, but with regard to the grounds for that decision, I

regret I have to differ from him.

14. I agree that a creditor''s suit u/s 53 of the Transfer of Property Act is governed by Article 120 of the Indian Limitation Act; but I think that the

starting point for limitation is not the date on which the creditor exercises the option to avoid the transfer, but it is the date on which the circumstances entitling the creditor to have the transfer avoided, first become known to him. The result of holding that the starting point for

limitation is the exercise of option by the creditor is that the creditor in that case would be entitled to wait any number of years he pleases before

bringing the suit, which would mean that in effect, there would be no period of limitation at all for a suit u/s 53 of the Transfer of Property Act.

Having regard to the spirit and provisions of the Indian Limitation Act which contains also a residuary article for all suits not specifically provided

for, I think that we should not construe Section 53 of (he Transfer of Property Act, in such a way as to have the above-mentioned effect unless the

language thereof clearly compels us to adopt such a construction.

15. Section 53 of the Transfer of Property Act runs as follows:-- "" Every transfer of Immovable property, made with intent to defraud prior or

subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the

creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed"". The sole basis, as it appears to me, for the

view that the starting point for limitation is the date of the exercise of option by the creditors is the use of the expression ""at the option of"" in the

above section. In my opinion, it is not necessary, nor is it right, to interpret that expression in such a way as to make the exercise of option the

starting point. The same expression occurs in Sections 2, Clause (1), 19 and 19 (a) of the Indian Contract Act, there it has been used simply to

indicate at whose instance it is that the transaction referred to therein is voidable and has no reference at all, to any question of limitation, for Article

114 of the Limitation Act provides that the period of limitation for a suit for the rescission of a contract commences from the date when the facts

entitling the plaintiff to have the contract rescinded first became known to him. I think that the words ""at the option of"" which occur in Section 53 of

the Transfer of Property Act should also be construed in the same manner and the question whether a suit under that section is barred should be

judged solely from a consideration of Article 120 of the Limitation Act.

16. Under Article 120 the time from which the period begins to run is ""when the right to sue accrues"". I agree with my learned brother that the date

of the transfer (alienation) sought to be avoided cannot be the starting point for limitation. If we hold that the date of the transfer is the starting

point, then in a case where the creditor comes to know of the transfer only more than six years after the date thereof it would have to be held that

the right to sue had not only accrued to him, but had terminated as well before he himself knew anything about the transaction, which would mean

that the creditors would have no opportunity of avoiding the transfer at all. It is not, therefore, right to hold that the starting point for limitation is the

date of alienation. When once the creditor comes to know of the circumstances which entitle him u/s 53 to avoid the transfer, there can be no

further impediment in the way of his bringing the suit and. I think the right to sue accrues to him within the meaning of Article 120 from the date of

such knowledge. This view finds support in the judgment of Phillips, J., in Venkateswara Aiyar v. Somasundram Chettiar (1918) M.W.N. 244. At

page 283 Page of 7 L.W.--[E.d.], the learned Judge says ""that the cause of action arises on the date when the creditor-seeking to set aside the

alienation knows that he has been defrauded, defeated or delayed"". It is true that it is not specifically stated in Articlr 120 that this is the starting

point and that only the general expression ""when the right to sue accrues''' occurs in that Article but it is a residuary Article for all suits not

specifically provided for and as such, the language thereof has necessarily to be general. The interpretation to be put on that expression would, to a

certain extent, depend on the particular class of cases to which the Article is sought to be applied As observed by Phillips, J:-- ""In all cases of

fraud, misconduct, etc., the period of limitation for a suit begins to run from the time when the fraud, misconduct, etc, becomes known (vide Arts.

90, 91, 95 96, etc.), but no such provision could be inserted in Article 120, for it is a residuary Article and thus applicable to every variety of suits

not otherwise provided for and is not confined to suits based on, fraud. If such a suit coming within Article 120 is based on fraud, the time when

the right to sue accrues must, I think, be determined in consonance with the principle governing the other specific suits based on fraud, and that is,

that the time when the fraud becomes known, becomes the starting point for limitation."" No doubt it is stated by the learned Judge that a suit by a

creditor , Tinder Section 53 depends upon the exercise of option by him but he states this in order to negative the contention that the right to sue accrues on the date of alienation itself. I think, Krishnan, J., also in the judgment under appeal takes the same view; for he observes thus in the

concluding portion of his judgment:-- ""The Receiver himself puts the cause of action as having arisen on the 31st July 1915 when one Sambiah and

others learnt that the suit mortgage-deed was a collusive document; it does not appear that Sambiah knew it earlier. Taking this view it seems to

me that the suit is not barred by limitation"". It is true that the learned Judge makes reference in an earlier portion of his judgment to the exercise of

option by the creditor or by the Receiver ; but the context shows that he is there considering the question as to whether each of the creditors has

got a separate right of suit u/s 53 or whether if one creditor is barred by limitation from bringing the suit the rest are also barred; and I think that he

did not intend to lay down that the exercise of option is the starting point for limitation The decision in In re Maddever; Three Towns Banking Co.

v. Maddever (1884) 27 Ch. D. 523 : 53 L.J. Ch. 998 : 52 L.T. 35 : 33 W.R. 286 does not in my view help us in deciding the present question.

That case merely decides that delay on the part of the creditors to take proceedings even after full knowledge of the facts is immaterial provided

the delay is not such as to create a statutory bar.

17. It is true as pointed out by my learned brother that there would be some anomaly if a creditor is allowed to set up in a suit under Order XXI,

Rule 63 of the C.P.C., the fraudulent nature of the transfer as against the claimant even though he may be barred by limitation from bringing a suit

u/s 53 to have the transfer avoided, but it appears to me that the anomaly would still exist even if we adopt the ""option theory"", for supposing the

creditor exercises the option on a particular date and keeps quiet for more than six years without bringing a suit u/s 53, I take it that in proceedings

under Order XXT, Rule 63, such creditor, may still set up the fraudulent nature of the transler as against the claimant. This consideration, therefore,

does not, in my view give us any help in solving the present question.

18. For the reasons above stated, I am of opinion that the starting point for limitation is the date on which the circumstances entitling the creditor to

have the transfer avoided first become known to him. In view, of the fact that a few of the creditors in this case knew of the fraudulent character of

the alienation in 1909, i.e., more than six years before the suit, it becomes, necessary to consider whether the credit-v ors'' right of suit u/s 53 is an

individual right which eachindividnal creditor has or whether it is only a representative right in the sense that if one creditor is barred by limitation

from bringing the suit the others are also barred. I agree with my learned brother in thinking that the right of suit u/s 53 is an individual right which

each creditor has. It is true that if a creditor obtains a decree in a suit u/s 53 that decree accrues to the benefit of the other creditors as well, but I

think Section 53 confers on each of the creditors the right of bringing a suit on his own behalf. As the Receiver presents the whole body of the

creditors and as some at leest of the creditors knew that the suit mortgage-deed was a collusive document only within six years of the suit, I hold

the suit by the Receiver is not barred by limitation.

19. In the, result I agree that this appeal should be dismissed. I ""agree with him as regards the costs also.

