(1973) 03 GUJ CK 0002

In the Gujarat High Court

Case No : First Appeal No. 324 of 1970

Kanbi Ramji Hirji — APPELLANT

Vs

Kanbi Ramji Gopal and Others — RESPONDENT

Date of Decision : 15-03-1973

Acts Referred:

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

Citation : AIR 1974 Guj 153 : (1974) 15 GLR 243

Hon'ble Judges : S.H. Sheth, J;J.B. Mehta, J

Bench : Division Bench

Advocate : K.N. Mankad and A.K. Mankad, for the Appellant; Y.S. Mankad, for the Respondent

Judgement

S.H. Sheth, J.—The plaintiff filed against the father of defendant No. 2 Regular Civil Suit No. 110 of 1950 in the Court of the District Judge at Bhuj to recover a sum of Rs. 10,558/-. On 31st March 1958 the suit was dismissed on the ground that the Court had no jurisdiction to entertain it. First Appeal No. 17 of 1958 was filed against that order in the High Court of Bombay at Rajkot. On 19th September, 1962 this High Court allowed it, set aside the order of dismissal and remanded the suit to the trial Court for decision on merits. On 9th August 1965 the suit was decreed in favour of the plaintiff. Thereafter the plaintiff filed against the defendant No. 2 an application for executing the decree in order to recover the total decretal amount of Rs. 21,875.85 p. including cost and interest. In execution of that decree he attached a piece of land which has been described in the judgment of the trial Court as the suit verandah. The defendant No. 1 resisted the attachment. He applied for setting aside attachment. His objections were heard under Order 21, Rule 58 of the CPC by the Executing Court. On 16th January, 1967 the Executing Court allowed his application and set aside the attachment because on 15th June 1959 the defendant No. 2 had sold the suit verandah to the defendant No. 1.

2. Thereupon the plaintiff filed the present suit for a declaration under Order 21, Rule 63 that the suit verandah belongs to the defendant No, 2 and that he is entitled to attach and sell it in order to recover his decretal dues. He also prayed for a declaration that the sale of the suit verandah by the defendant No. 2 to the defendant No. 1 was without consideration and, therefore bogus and void.

3. In defence it was contended by the defendants that the sale of the suit verandah by the defendant No. 2 to the defendant No. 1 was genuine and was for valuable consideration. It was also contended that the suit as not maintainable because it was not filed as a representative suit under Order 1, Rule 8 C. P. C. It was next contended that the suit was barred by limitation.

4. The learned trial Judge after having framed the issues, recorded the evidence and heard the parties, held that the suit was maintainable and that it was not necessary for the plaintiff to file a representative suit under Order 1, Rule 8. He, however, held that the sale transaction was not bogus or fraudulent. However, on the question of limitation he recorded the conclusion that the suit was barred by limitation. He, therefore, dismissed the suit.

5. It is that decree which is challenged by the plaintiff in this First Appeal.

6. Mr. K. N. Mankad, appearing for the plaintiff, has raised before us two contentions. His first contention is that the suit, filed under Order 21, Rule 63, was filed within the period of limitation and that, therefore, the trial court was in error in holding that the suit was barred by limitation. On merits he has contended that the sale of the suit verandah effected by- the defendant No. 2 in favour of the defendant No. 1 was void for want of consideration and that in any case it was effected in order to defeat the plaintiff''s claim. Mr. Y. S,. Mankad, in his turn, has in addition to answering the contentions raised by Mr. K. N. Mankad tried to support the decree of the trial Court on the ground that the suit ought to have been filed as a representative suit under Order 1, Rule 8 and that the contrary finding recorded in that behalf by the trial Court is not correct.

7. So far as the question of limitation is concerned, we have got to decide it on the strength of the averments made by the plaintiff in his plaint. A look at paragraphs 3, 10 and 14 makes it clear beyond doubt, that the plaintiff has filed the suit under Order 21, Rule 63. Averments made by the defendants in paragraph 10 of the written statement lend support to what the plaintiff has stated in the aforesaid paragraphs in his plaint. If the suit was filed under Order 21, Rule 63 it was governed by Article 98 of the Limitation, Act, 1963, which prescribes one year as the period of limitation commencing from the date of the final order, recorded in proceedings under Order 21, Rule 58. In the instant case the finial order in proceedings under Order 21, Rule 58 was recorded on 16th January, 1967 and the suit was filed on 14th March, 1967, It was, therefore, filed within time,

8. The trial Court has, however, applied Article 113 of the Limitation Act, 1963 which corresponds to Article 120 of the Indian Limitation Act, 1908. Article 113 is

a residuary article. It governs those suits for which no period of limitation has been prescribed elsewhere in the Schedule to the Limitation Act. Article 120 of the Indian Limitation Act, 1908 was also a residuary article which governed suits for which no period of limitation was prescribed by that Act. No doubt it prescribed a -period of six years for such suits and the period of limitation under Article 120 of that Act commenced from the date when the right to sue accrued to the plaintiff. The period of limitation prescribed under Article 113 of the Limitation Act, 1963 also. commences from the date when the right to sue accrues to the plaintiff. A residuary article cannot apply to a suit which is governed by a specific or a particular article in the Schedule to the Limitation Act.

9. In his attempt to take the pre sent suit out of the purview of Article 98 Mr. Y. S. Mankad has relied upon the reasoning which has weighed with the learned trial Judge and has also tried to put -some more strength into it. He has contended that the plaintiff has filed the Present suit in order to avoid the sale of the suit verandah effected by the defendant No. 2 in favour of the defendant No. 1 and that, since the plaintiff is the creditor of the defendant No. 2 who has effected the impugned sale in favour of the defendant No. 1 the case falls, according to him, squarely within the bounds of Section 53 of the Transfer of Property Act. In other words, according to him, the defendant No. 2 effected the sale of the suit verandah in favour of the defendant No. 1 in order to defeat or delay the plaintiff''s claim. He has further argued that unless the plaintiff is able to avoid the sale effected by the defendant No. 2 in favour of the defendant No. 1 he cannot succeed. Therefore, argues Mr. Y. S. Mankad, not only has the plaintiff prayed for setting aside the order made by the Executing Court in proceedings under Order 21, Rule 58 but he has also Prayed for a declaration that the sale is void. We are unable to accede to this argument raised by ''Mr. Y. S. Mankad for more than one reason. The plaintiff has in express terms stated that he has filed the present suit under Order 21, Rule 63 after the Executing Court recorded against him an order in proceedings under Order 21, Rule 58. We cannot overlook or ignore such an express averment made by the plaintiff in his plaint. If we give that averment the weight which it deserves we have got to apply Article 98 which governs a suit filed under Order 21, Rule 63. It may be that a suit filed under 0. 21, R. 63 may to a certain extent overlap a suit filed under S. 53 of the Transfer of Property Act in order to avoid the transfer made by a debtor of his property in favour of a third party. Merely because a suit filed under Order 21, Rule 63 produces a semblance of some of - the characteristics of a suit filed u/s 53 of the Transfer of Property Act it cannot be said that the suit has been filed under the latter provision. Mr. Y. S Mankad has also tried to rely upon Article 58 of the Limitation Act, 1963. Articles 56, 57 and 58 provide periods of limitation for suits relating to declarations. Articles 56 and 57 govern suits in which declarations specified in those articles are sought. Article 58 is a residuary article so far as the suits for declarations are concerned, and governs suits for declarations which do not fall within, the purview of Articles 56 and 57. Whereas Article 113 is a residuary article with general amplitude, Article 58 is a

residuary article having a limited or a particular amplitude. In relation to Article 98 both are residuary articles. If the present suit was not governed by Article 98 we would have certainly considered the applicability either of Article 58 or Article 113 to the instant case. In our opinion, though it is not strictly necessary for us to do so we propose in course of this judgment to deal with the'' position which would obtain if Article 58 or Article 113 was applicable to the instant case.

10. In Ganesh Mal v. Meghraj AIR 1967 All 283 a somewhat similar question arose before a learned Single Judge of that Court. In paragraph 13 of the report he has held that Order 21, Rule 63 gives a statutory right of suit to the party against whom an order has been passed in a claim'' proceeding under Order 21, Rule 58 and that a suit under Order 21, Rule 63 has. got to be filed within the period of one -year prescribed by Article 11 of the Indian Limitation Act, 1908 to which Article 98 of the Limitation Act, 1963 corresponds. He has further held that there is nothing in Section 53 of the Transfer of Property Act which takes away the right conferred upon an aggrieved party by Order 21, Rule 63. He has unhesitatingly held that Section 53 cannot be interpreted so as to take away the right to file a suit given to a creditor under Order 21, Rule 63 of the Code of Civil Procedure. In his opinion, if the intention of the legislature was that a creditor who can avail himself of the remedy u/s 53 of the Transfer of Property Act should not have a right to file a suit under Order 21, Rule 63 the legislature would not have failed to say so by making an appropriate amendment to Order 21, Rule 63. He has also observed that where there is a single creditor of a judgment-debtor, a suit u/s 53 for avoiding a transfer, made by the debtor, on the ground of its being fraudulent so as to defeat or delay his creditor cannot be brought because Section 53 necessarily contemplates a judgment debtor having more than one creditor. This decision of the learned single Judge of the Rajasthan High Court is identical with the view which we are taking in this case,

11. Mr. Mankad has tried to place reliance upon a Division Bench judgment of the High Court of Bombay in Abdallakhan, Daryakhan v. Purshottam Damoda AIR 1948 Bom. 265. It was not a case where an order had been made against the creditor in claim proceedings under Order 21, Rule 58 forcing him to file a suit under Order 21, Rule 63. Article 98 of the Limitation Act, 1963 contemplates a very particular type of situation. It contemplates execution proceedings against a judgment-debtor, attachment by the judgment-creditor of some property belonging to the judgment-debtor and resistance to that attachment by a third person who claims an independent title to it. It further contemplates an order against the creditor in those proceedings. If these are the circumstances which are present in a case as they are present in the instant case, the suit filed by a creditor under Order 21, Rule 63 must necessarily be governed by Article 98 of the Limitation Act, 1963 which has been enacted to govern such suits,

12. Assuming that we are in error in recording this conclusion; even then, in our opinion, the present suit is not barred by time. The sale of the suit verandah was effected by the defendant No. 2 in favour of the defendant No. I on 15th January

1959. At that time Indian Limitation Act, 1908 had been in force. Assuming that the cause of action arose on account of the aforesaid sale, if at all any cause of action arose, the Plaintiff could file a suit within six years from the date when the right to sue accrued --to him. Article 113 of the Limitation Act 1963 in terms corresponds in this respect to Article 120 of the Indian Limitation Act, 1908. Article 58 of the Limitation Act, 1963 upon which Mr. Y. S. Mankad has placed reliance also specifies as commencing point the date on which the right to sue accrues to the plaintiff. When does a right to sue accrue to the plaintiff within the meaning of Article 120 of the Indian Limitation Act, 1908 or within the meaning of Articles 113 and 58 of the Limitation Act, 1963?

13. In Mst. Rukhmabai Vs. Lala Laxminarayan and Others, a similar question arose in relation to Article 120 of the Indian Limitation Act, 1908. It has been laid down in that decision that within the meaning of the aforesaid article the right to sue accrues to the Plaintiff when there is a clear and unequivocal threat by the defendant to infringe the plaintiff''s right. Relying upon a `long line of decisions in that behalf the Supreme Court has laid down the aforesaid principle. There may be successive invasions or denials of the Plaintiff''s right, but the right to sue accrues to the plaintiff within the meaning of Article 120 of the Indian Limitation Act, 1908 when the plaintiff''s right has been clearly and unequivocally threatened so as to compel him to institute a suit to establish that right. Every threat by a defendant to the plaintiff''s right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to -compel him to file a suit. In other words, the threat to or invasion of the plaintiff ''s right by the defendant must be of such a nature as to give rise to -a compulsory cause of action. A compulsory cause of action for the plaintiff arises when the threat effectively invades or jeopardizes the said right. W hen was the plaintiff''s right in the instant case effectively invaded or jeopardized? In 1959, the evidence tends to show, the plaintiff only knew that there was a transfer of the suit verandah by the defendant No. 2 to the defendant No. 1. The defendant No. 1, the purchaser from the defendant No. 2, did not invade, threaten or jeopardize, much less effectively, the plaintiff''s right to recover his dues from the defendant No. 2. In our opinion, the effective, clear and unequivocal threat to and invasion of the plaintiff''s right to recover his decretal dues by attaching and selling the suit verandah arose when the defendant No. 1 resisted the attachment, lodged objections against it and obtained an order in his favour in claim proceedings under Order 21, Rule 58. This indisputably happened in 1967. Therefore, even if we apply Article 120 of the Indian Limitation Act, 1908 corresponding to Article 113 of the Limitation Act, 1963 or Article 58 of limitation Act, 1963, the result is not at all different so far as the plaintiff is concerned. In any view of the matter the learned trial Judge was, therefore, in error in holding that the -plaintiff''s suit was barred by time because it was governed by Article 120 of the Indian Limitation Act, 1908 and also because the period of limitation started or commenced running from the date of the transfer of the suit verandah by the defendant No. 2 in favour of the defendant No. 1. We, therefore, set aside

the finding recorded by the learned trial Judge on this point and hold that the plaintiff''s suit was filed within time and that it did not suffer from any bar of limitation.

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28. Mr. Y. S. Mankad has tried to support the decree by raising the contention that the plaintiff ought to have filed the present suit as a representative suit under Order 1, Rule 8 of the Code of Civil Procedure. On evidence the learned trial Judge has found that the defendant No. 2 had no other creditors at the material time than the plaintiff. If a debtor has only one creditor and no more, it is not necessary for such a creditor to file a representative suit under Order 1, R. 8 in order to avoid the transaction entered into by his debtor which in his opinion may have been entered into for defeating his claim. A representative suit is not an empty formality. It must enure for the benefit of creditors other than those who sue. If there are no other creditors who are going to be benefited by a representative suit and when there is only one creditor, Section 53 of the Transfer of Property Act does not come into Play and it is-not necessary for the sole creditor to file a representative suit. Next, when a judgment-creditor files a suit under Order 21, Rule 63, C. P. C. it is not necessary for him to file a representative-suit because he is principally concerned with getting rid of the order passed against him in claim proceedings under Order 21, Rule 58, In the instant case, therefore, in our opinion the contention raised by Mr. Y. S. Mankad is not well-founded. A similar view has been taken by the Rajasthan High Court in the case of Ganesh Mal and Another Vs. Meghraj and Another, . We are in agreement with the principle laid down in that decision.

29. For the reasons stated above, we allow the appeal, set aside the decree passed by the learned trial judge and substitute in its'' place the following decree.

30. It is hereby declared that the plaintiff is entitled to attach and sell the suit verandah in execution of the decree obtained by him against the defendant No.2 in the suit originally numbered as Civil Suit No. 110 of 1950 (later on renumbered as Special Civil Suit No.2 of 1963). The defendants shall pay the costs of the plaintiff in both the Courts.

31. Appeal allowed.

