

(1954) 12 MP CK 0009
In the Madhya Pradesh High Court
Case No : First Appeal No. 37 of 1953

Magnibai Kishorjee

APPELLANT

Vs

Kesrimal Sawairam and another

RESPONDENT

Date of Decision : 17-12-1954

Acts Referred:

Transfer of Property Act, 1882 — Section 53, 53(1)

Citation : AIR 1955 MP 159

Hon'ble Judges : Nevaskar, J;Dixit, J

Bench : Division Bench

Advocate : G.M. Chafekar, for the Appellant;

Final Decision : Allowed

Judgement

Nevaskar, J.—The only question which is material for the purpose of this appeal is whether the suit out of which this appeal arose, is one by a creditor decree-holder for avoiding a transfer on the ground of its having been made with intent to defeat or delay the creditors of the transferor and as such bad in law by reason of provisions of S. 53, Transfer of Property Act.

2. Plaintiff Kesarimal obtained a decree against one Pema for money. While the suit was pending Pema effected a deed of gift in respect of certain houses belonging to him in favour of his wife Magnibai on 6-10-1948 and got it registered. On 18-10-1948 a decree was passed referred to above against Pema at the instance of the plaintiff. Kesarimal attached these houses. To this attachment Magnibai objected on the ground that she had obtained the same under a deed of gift duly registered. This objection of hers was allowed and the property was released from attachment. Plaintiff thereupon filed the present suit stating the aforesaid facts and claimed therein a declaration that the deed of gift dated 6-10-1948 having been fraudulently made to defeat his claim is inoperative and not binding upon him and that the property in suit is liable to attachment and sale in execution of his decree. On behalf of defendant Magnibai one of the points raised was that the suit being one to avoid a transfer said to

have been fraudulently made by the judgment-debtor in favour of his wife, ought to have been brought in a representative capacity. The suit therefore in the present form is not competent. This contention was overruled by the trial Court. The trial Court relied upon the decisions in -- "Budhermal v. Verharam" AIR 1946 Sind 78 (A); -- Mt. Bas Kuar Vs. Gaya Municipality and Others, and Mohammad Asghar Ali and Others Vs. Sh. Mohammad Ishaq Ali and Another, , for the view that under the circumstances of this case an unsuccessful decree-holder who has failed in an objection proceeding can bring a suit under O. 21 R. 63 and that a representative suit as contemplated under S. 53, Transfer of Property Act is not necessary.

3. Question which arises for consideration is whether this view of the lower Court is correct. If I hold that the view taken by the lower Court is incorrect and a suit being substantially one for avoiding the transfer cannot but be filed on behalf of or for the benefit of creditors, then it will be unnecessary to consider other questions involved in the suit and the appeal ought to succeed on this point alone and the plaintiff will have to be non-suited.

4. Section 53, Transfer of Property Act is as follows :

53 (1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

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.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

5. From para 4 of this section it is clear that where the suit is designed to avoid a transfer made with the specific intent mentioned in the paragraph then the only form which the suit can take is on behalf of or for the benefit of the creditors.

6. It appears from the view taken in some of the decided cases that the word "creditors" would include even the future or subsequent creditors. Therefore in my opinion the essence of the matter is not whether it is made to defeat

numerous or general body of creditors but is whether it is made to defeat or delay creditor or creditors. Supposing a transfer is made to defeat a particular creditor. No occasion arose however for that creditor to challenge that transfer. But later a subsequent creditor wanted to challenge the transfer on the ground that it was designed to defeat creditors. Can this not be done? In my opinion any creditor whether he be one at the time of transfer or even a subsequent one is clothed with a substantive right under S. 53, Transfer of Property Act to avoid such a transfer, the only limitation being that where he is required to file a suit it should take the form of a representative suit for the benefit of all the creditors.

6a. A view seems to have been taken in some of the cases notably in -- Guljarkhan Abdul Gafurkhan Sarguro Vs. Husenkhan Vaidkhan Sarguro, ; AIR 1946 Sind 78 (A) and -- U Maung Nge v. P. L. S. P. Chettiar Firm", AIR 1934 Rang 200 (E), that where a creditor decree-holder files a suit under O. 21 R. 63 after having lost in an objection proceeding and wishes to contend that the transfer is not binding upon him and does not wish to contend that it is not binding upon all the creditors of the transferor, then it is not necessary to file a representative suit as contemplated in S. 53, Transfer of Property Act. These cases do not appear to take sufficient notice of the fact that the plaintiff in such a suit wished to avoid a transfer on the ground that it was intended to defeat him as a creditor and if he be allowed to agitate that point alone and loses and the same question is allowed to be agitated again at the instance of another creditor, the very object of the section will be defeated. The principal object in compelling the plaintiff in such cases to sue on behalf of or for the benefit of all the creditors is that the transferees and the transferors may not be harassed by successive litigations of similar nature.

7. It is altogether different where the plea is that there is no real transfer at all and the real title continues to vest in the judgment-debtor the transaction being sham and inoperative. In such a case, there is no real transfer at all which needs to be avoided by resort to a suit under S. 53, Transfer of Property Act. The creditor decree-holder can show in a suit under O. 21 R. 63 that the transaction is sham and colourable and the title vests in the judgment-debtor. To such a suit no objection under S. 53, Transfer of Property Act can be raised. The whole thing depends upon the form in which the suit is filed. If the suit is filed, as in the present case, for avoiding a gift made in favour of the wife with no allegations as to nominal or sham nature of transaction, then it is difficult to see how it is possible to overcome the objection as regards the frame of the suit based on the provisions of S. 53, Transfer of Property Act particularly when the plaintiff alleges that the transfer was made to defeat him as creditor. I am supported in the view I take on the wording of S. 53, Transfer of Property Act and the decisions in -- Madina Bibi Sahiba Vs. The Ismail Durga Association and Another, ; -- Mt. Rukiayia Begum and Another Vs. Radha Kishan and Others, ; -- AIR 1944 133 (Nagpur) .

8. I may state here that the objection with regard to the frame of the suit was

taken in the written-statement but plaintiff continued the suit in spite of it. I therefore hold that the present suit as framed is incompetent. The appeal is therefore allowed and plaintiff's suit is dismissed with costs throughout.

Dixit J. :

9. I agree.