

(1973) 07 MAD CK 0010
In the Madras High Court

Maxhemeijer Jr. (India) Private Limited	APPELLANT
Vs	
Zainub Bi and Others	RESPONDENT

Date of Decision : 26-07-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 rule 8
Transfer of Property Act, 1882 — Section 53

Citation : (1974) ILR (Mad) 383 : (1978) 87 LW 234 : (1974) 1 MLJ 455

Hon'ble Judges : M. M. Ismail, J

Bench : Division Bench

Judgement

M. M. Ismail, J.—The first defendant in O.S. No. 107 of 1965 on the file of the Court of the Subordinate Judge, Chingleput, is the appellant

herein. Admittedly the suit property of an extent of 3.06 acres belonged to the partnership by name Haji M. Shaik Abdul Kader, M. S. Abdul

Rahiman and Company, consisting of two partners Haji M. S. Abdul Rahiman Sahib and Haji M. S. Adam Mohideen Sahib. Haji M. S. Abdul

Rahiman Sahib died on 30th April, 1958 leaving behind defendants 2 to 7 as his heirs and legal representatives. Haji M. S. Adam Mohideen Sahib

died on 12th March, 1955 leaving behind defendants 8 to 13 and one Hablbma, who is not a party to these proceedings, as heirs and legal

representatives. The first respondent herein claiming to have entrusted her jewels and liquid cash with the said partnership took proceedings for

recovery of the same from defendants 2 to 13 herein out of the assets of the partnership in their hands. She filed a petition O.P. No. 295 of 1958,

on the file of the City Civil Court, Madras represented by her son and next friend, as she was of resound mind then. The said O.P. prayed for

permission of the Court to institute a suit in Jorma pauperis. Subsequently it was

transferred to this Court and numbered as C. S. No. 119 of

1960. Pending that suit, the first respondent obtained on 11th July, 1961 an order of attachment of the suit property as well as another item of

property in Application No. 1104 of 1961. However, it is admitted that the attachment was not effected. A decree in favour of the first respondent

was passed "by this Court for a sum of Rs. 29,130 on 24th November, 1961. Meanwhile, under Exhibit B-18 dated 5th June, 1961 the appellant

herein entered into an agreement with defendants 2 to 13 for the purchase of the suit property for a consideration of Rs. 40,000. One of the debts

for the discharge of which the suit property was agreed to be sold by defendants 2 to 13 was a debt in favour of the Eastern Bank Limited,

Madras, and this "fact was mentioned in Exhibit B-18 itself, even though the amount due to the Eastern Bank was not actually specified. Under the

original of Exhibit B-19 dated 7th July, 1961, the appellant herein obtained an assignment of the decree in favour of the Eastern Bank Limited, for

a consideration of Rs. 10,243-73. Thereafter, the appellant purchased the suit property under two sale-deeds, the originals of Exhibit B-2 dated

10th August, 1961 executed by defendants 3 to 13 and Exhibit B-3 dated 12th January, 1962 executed by the second defendant. With regard to

the share of Habibma, the appellant executed the decree in favour of the Eastern Bank Limited, Madras, assigned in its favour under the original of

Exhibit B-19, and purchased her share in the suit property, in Court-auction. Nearly three years after these sales, the present suit was instituted by

the first respondent herein for the following reliefs:

(b) declaration that the sale-deed dated 10th August, 1961 and 13th January, 1962 (mistake for 12th January, 1962) executed by defendants 2 to

13 in favour of 1st defendant is invalid and inoperative and not binding on the plaintiff;

(c) for setting aside the sale-deed dated 10th August, 1961 and 13th January, 1962 (mistake for 12th January, 1962) executed by defendants 2 to

13 in favour of the 1st defendant in respect of "B" schedule;

(d) for an injunction restraining the 1st defendant from demolishing or constructing on the suit property

Subsequently, the plaint was amended by inclusion of the following prayer:

(c) (1) or in the alternative for a decree for Rs. 39,760 as on 7th August, 1964

against the first defendant with 6 per cent, interest in satisfaction of the decree in C.S. No. 119 of 1960 on the file of the High Court, Madras.

In the plaint, the first respondent had contended that the sale of the suit property by defendants 2 to 13 in favour of the appellant herein was a

collusive and fraudulent transaction entered into by the parties with the intention of defeating the rights of the first respondent under the decree in

C.S. No. 119 of 1960 on the file of this Court. The first respondent had contended that even though the order of attachment of the suit property

was not actually effected, the son of the first respondent actually met the Managing Director of the appellant herein and informed him of the

existence of the order of attachment and warned him against the purchase of the property. It is on the basis of these allegations, the suit was

instituted for the reliefs referred to above. The appellant herein filed a written statement contending that it had purchased the property bona fide

and there was absolutely no collusion between the appellant and defendants 2 to 13. The appellant denied that the Managing Director of the

appellant was informed of the existence of the order of attachment passed by this Court and notwithstanding the knowledge of that order and the

warning given, he purchased the property in collusion with defendants 2 to 13. Except the 12th defendant, the other defendants remained ex parte

and the 12th defendant filed a written statement denying the allegations contained in the plaint. On the basis of these pleadings, the learned Principal

Subordinate Judge framed the following issues:

(1) Was the first defendant not aware of the suit C.S. Nos. 119 of 1960 and the attachment application No. 1104 of 1961, High Court, Madras in

respect of the suit property prior to its purchase of the suit property?

(2) Have the defendants 2 to 13 colluded with the first defendant to deprive the plaintiff of the fruits of her decree?

(3) Has the first defendant pushed through the purchase of the suit property with a view to obtain unfair advantage to itself and thereby colluded

and helped the defendants 2 to 13 to defraud the plaintiff?

(4) Is the suit barred by limitation?

(5) To what relief, if any, is the plaintiff entitled?

On 5th November, 1966, three additional issues were framed, presumably after

the amendment of the plaint, and they are as follows:

(1) Is the plaintiff entitled to damages against the first defendant?

(2) Is the claim of the plaintiff maintainable?

(3) Is the claim made by the plaintiff barred by limitation?

In the course of his judgment, the learned Principal Subordinate Judge recast issue No. 1 on the ground that the issue originally cast threw the

burden on the first defendant, while the burden should be really on the plaintiff, and the issue so recast is as follows:

Issue No. 1 : was the first defendant aware of the suit C.S. No. 119 of 1960 and the attachment application No. 1104 of 1961, High Court,

Madras, in respect of the suit property prior to its purchase of the suit property?

2. The learned Principal Subordinate Judge, on a consideration of the materials placed before him, held on the principal issues against the appellant

herein. With regard to issue No. 1, his finding was that the first defendant was aware of the suit, C. S. No. 119 of 1960 and the attachment

application No. 1104 of 1961 in respect of the suit property prior to its purchase. His answers to issues Nos. 2 and 3 were in the affirmative. On

issue No. 4 he held that the suit was not barred by limitation. On additional issue No. 1, he did not go into details, in view of his conclusion that the

first respondent was entitled to have the sales under the originals of Exhibits B-a and B-3 declared void and inoperative and not binding on her.

However, he held that if she were to fail in her main prayer for setting aside the two sales referred to above, she will be entitled to damages as

against the appellant on his finding that the appellant's Managing Director D.W. 1, had colluded with defendants 2 to 13 and had caused loss to

the first respondent, depriving her of the fruits of her decree in. C. S. No. 119 of 1960 by purchasing the suit property for a low price on account

of such collusion and fraud. With regard to additional issue No. 2, the finding of the learned Principal Subordinate Judge was that the alternative

claim for damages was maintainable. On additional issue No. 3, the finding was that the suit was. not barred by limitation and as a matter of fact

that question was not argued by the Counsel for the contesting defendants before him. In view of these findings, by his judgment and decree dated

31st March, 1967, the learned Principal Subordinate Judge decreed the suit with costs, granting a declaration that the sale deeds dated 10th

August, 1961 and 12th. January, 1962, were invalid and inoperative as against the plaintiff (first respondent) and setting aside the said sales.

However, he dismissed the prayer, for an injunction against the appellant herein. It is against this judgment and. decree that the first defendant in the suit has preferred the present appeal.

3. The principal question for consideration is, whether the suit instituted by the first respondent herein is a suit coming within the scope of Section

53 of the Transfer of Property Act,. hereinafter referred to as the Act. It is fairly conceded that the first respondent can succeed in her prayer with

regard to the suit property sold under the originals of Exhibits B-2 and B-3 only if the suit comes within the scope of Section 53 of the Act. That

section so far as is relevant for the purpose of this case is as follows:

Section 53 (1) -- Every transfer of immovable 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.

Without reference to any decided cases, simply as a matter of construction of the section itself, the following characteristic features of the section

can be noticed:

1. The suit contemplated by the section must be one instituted by a creditor of the transferor of the property.
2. The transfer of the immovable property should have been made with intent to defeat or delay the creditors of the transferor.
3. The plaintiff in the suit must be one of the creditors so defeated or delayed.
4. The suit instituted by a creditor under this section to avoid a transfer on the ground mentioned in the section shall be instituted on behalf of or for

the benefit of all the creditors.

5. The provisions of this sub-section shall not impair the rights of a transferee in good faith and for consideration.

We are not referring to the provisions if the section regarding the law of insolvency, since that has no relevancy to the facts of the present case.

One other feature of this section is that a transfer as such is not prohibited and is not void and it is merely rendered voidable at the option of the

creditors who were sought to be defeated or delayed by the transferor. As a matter of fact, a transfer as between the transferor and the transferee

will be binding and neither of the parties can put forward a contention that the transfer is hit by Section 53 of the Act and it is only a defeated or

delayed creditor who can put forward the said contention under the provisions of that section. Consequently, for the section to be applied, the

plaintiff must necessarily institute the suit in a representative capacity, because the fourth paragraph of the subsection clearly provides for the said

requirement. Apart from this, the basis and gist of the action under this section is the intention on the part of the transferor to defeat or delay the

creditors at the time when the transfer was effected. It should be noticed that the section uses the words, ""to defeat or delay the creditors"" and not

to defeat or delay the creditor"". Consequently, in a suit instituted u/s 53 of the Act, the plaintiff must plead and prove that the transfer which is

impugned by the plaintiff was effected with the intention to defeat or delay the creditors of the transferor generally and not to defeat or delay this

particular creditor or that particular creditor. The fraud, for the purpose of this section consists of the intention to defeat or delay the creditors of

the transferors. An intent to defeat or delay the creditors as a whole in the enforcement of this right is what is regarded as a fraudulent intent under

this section. This requirement of the section is easily understandable, because the normal rule is, any person is entitled to deal with his property in

any way he pleases and the restriction imposed on the said power of alienation is only by way of equity in favour of other persons and one such

equity is that which is recognised in favour of the creditors" of the transferor. The right of the creditors, taken as whole, is that the entire assets of

the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with, without consideration or

reserved or retained by the debtor to their prejudice. The test, therefore, to see whether a particular transfer falls within the scope of the section or

not is whether the debtor intended to prejudice the creditors as a whole by parting with his property without consideration or by securing or

reserving a benefit to himself.

4. Having regard to this background of the statutory provisions and requirements let us now consider whether the plaint, in the present case comes

within the scope of Section 53 of the Act or not. In the first place, it is admitted that the plaint does not refer to Section 53 of the Act at all. We are

of the opinion that the non-mention of that section cannot be fatal to the suit being within the scope of Section 53 of the Act, provided the

ingredients of Section 53 are otherwise satisfied. Equally in the plaint, the language of Section 53 has not been referred to either expressly or by

necessary implication. Thirdly, admittedly the suit has not been instituted in a representative capacity on behalf of the creditors of defendants 2 to

13 and the permission of the Court under Order 1, rule 8, Code of Civil Procedure, has not been obtained. Therefore, we shall refer to the

allegations in the plaint to find out, what exactly was the case of the first respondent in her plaint. After referring to the facts as to her filing a suit,

getting an order of attachment passed by this Court on 7th July, 1961 and also obtaining a decree on 24th November, 1961 in C.S. No. 119 of

1960 on the file of this Court, she states in paragraph 2 of the plaint that defendants 2 to 13 with a view to defraud the plaintiff of the fruits of the

decree in her favour colluded with the first defendant (appellant herein) to dispose of the suit property to the first defendant (appellant herein). In

the same paragraph she again states: "Defendants 2 to 13 are evilly disposed towards the plaintiff and bear a grudge and indignation against the

plaintiff and have been manoeuvring and manipulating ways and means to deprive the plaintiff of her rightful claim and in pursuance of the said

objective have sold the property to the 1st defendant herein in spite of attachment.

In paragraph 3 she states:

The plaintiff charges the defendants with collusion and fraud and with a view to defeat the claim of the plaintiff the defendants have colluded and

have brought about the sale of the suit property.

Thus, the plaint proceeds solely on the basis of defendants 2 to 13 and the appellant having colluded to deprive the plaintiff of the fruits of her

decree in C.S. No. up of 1960 on the file of this Court. There is absolutely no averment or allegation anywhere in the plaint that the transfers under

the originals of Exhibits B-2 and B-3 were effected with the intention on the part of defendants 2 to 13 to defeat or delay their creditors generally.

As a matter of fact, the issues framed by the trial Court, which we have extracted, will clearly reflect the allegations and the case of the parties. It

will be seen that there is not a single issue to the effect whether the transfers under the originals of Exhibits B-2 and B-3 were effected by

defendants 2 to 13 with the intention of defeating or delaying the creditors of the transferors. Consequently, it must be held that the entire plaint

proceeds on the allegation that the transfers under the originals of Exhibits B-2 and B-3 were intended to defeat the rights of the first respondent

under the decree in C.S. No. 119 of 1960 on the file of this Court and there is absolutely no whisper about the said transfers having been effected

with intent to defeat or delay the rights of the creditors of the transferors generally. Mr. S.K. Ahmed Meeran, learned Counsel for the first

respondent, contended that when the first respondent happens to be the only creditor, it is not necessary for the first respondent to aver that the

intention of the transferors in effecting the transfers under the originals of Exhibits B-2 and B-3 was to defeat or delay the rights of the creditors.

We are unable to accept this argument. Whenever a plaintiff comes to Court with a suit u/s 53 of the Act, that plaintiff will have to allege and prove

for succeeding in the suit that the transfer impugned by the plaintiff was effected with the intent to defeat or delay the creditors of the transferor. As

a matter of fact, the legal position is that even if the transferor had no creditor on the date of the transfer, but if he had intended to defeat or delay

the future creditors, the section will be attracted. This position has been considered by a Bench of this Court in Umar Sait and Others Vs. Union of

India and Another, . The Bench extracted the following passage from Halsbury's Laws of England, 3rd Edition, Volume 17 at page 660 :

With the above exceptions, all creditors who have been prejudiced by the alienation made with intent to defraud them, whether their debts were

owing at the date it was made or were incurred subsequently, may avoid the alienation and share in the distribution of the property comprised

therein. Although subsequent creditors have the same right to set aside an alienation made with intent to defraud them as creditors whose debts were due at the date of the alienation, they have a more difficult task than the latter class of creditors in proving a fraudulent intent on the part of the grantor in the case of a voluntary settlement. In such a case they must prove either an express intent to defraud creditors, that, immediately after the settlement, the grantor had no sufficient means or reasonable expectation of being able to pay his then existing debts. In the absence of an express intent to defraud, a voluntary deed will not be set aside at the instance of a subsequent creditor if all creditors existing at the date of the deed have been paid off.

The Bench further approved the following observation of Tek Chand, J., in *Mohammed Ishaq v. Mohammed Yusuf* AIR 1927 Lah. 420

But where there are no debts due at the time and the transferor runs into indebtedness subsequently, the presumption will be regulated by the peculiar circumstances of each particular case. If, for instance, the transfer was made to ward off the effects of a threatened litigation or in anticipation of the transferor embarking upon a commercial venture or on the event of his going into trade, the intent to defeat or delay future creditors will be presumed. But in other circumstances the transaction will be presumed to be bona fide and it will lie on the future creditors to prove that the transfer was made with an intent to defeat or delay them.

We are referring to these passages in the judgment of this Court merely for the purpose of showing that the section will be attracted even if there are no creditors on the date of the transfer, but the transferor intends to defeat his future creditors by transferring the property in question.

Therefore, even assuming that the first respondent herein was the sole creditor of defendants 2 to 13 on the dates when the originals of Exhibits B-

2 and B-3 came into existence, it does not absolve the first respondent from pleading and proving that on the dates of Exhibits B-2 and B-3,

defendants 2 to 13 intended to defeat or delay their creditors generally and not merely to defeat the rights of the first respondent under the decree

in C.S-No. 119 of 1960 on the file of this Court., However, as far as the present case is concerned, there is ample evidence to show that on the

dates of Exhibits B-2 and B-3 there were other creditors of defendants 2 to 13.

As a matter of fact, P.W. 1, son of the first respondent, in his evidence admitted that he took out execution proceedings against other properties and no amount could be recovered as they had gone away to the South Indian Bank and other creditors. Similarly with regard to certain other moneys deposited in the Court which the first respondent sought to attach in execution of the decree in her favour, P.W. 1 stated that they were taken by the sales tax authorities as well as Income Tax authorities towards the moneys due to them, by the partnership. Therefore, in this case even the evidence let in on behalf of the first respondent clearly establishes that in addition to the first respondent herein, there were other creditors of defendants 2 to 13 at the time when the originals of Exhibits B-2 and B-3 were executed. Consequently, there is absolutely no excuse for the first respondent not pleading in the plaint that the transfers under the originals of Exhibits B-2 and B-3 were intended to defeat or delay the rights of the creditors of the transferors generally, if she wanted to succeed in a suit u/s 53 of the Act. The intent to defeat or delay the creditors of the transferor being the most essential requirement of the section, so long as such a plea was not put forward, the suit cannot be considered to be one coming within the scope of Section 53 of the Act. As a matter of fact, all that the first respondent stated in her plaint in paragraph 2 is: The plaintiff reliably understands that she is the only creditor who has been defrauded by the defendants 2 to 13.

In *Thaheer Unnissa Begum Vs. Sherfunnissa Begum*, , this Court held:

There was no allegation by this decree-holder that there was a transfer by the husband in favour of this appellant, his wife, "in order to defeat or delay or to defraud his creditors", and that he was entitled to avoid the transfer on the ground that it had been made with intent to defeat or delay the creditors. Simply because the lower Court observed, in its order, that this patta transfer was made with a view to defeat and delay the present decree-holder, Section 53 will not be invoked. It is significant to note that the lower Court itself did not say that the transfer was made with a view to defeat and delay the creditors, but only to defeat and delay the present decree-holder, one creditor of his. Section 53 will apply only when the transfer is made with intent to defeat and delay the creditors of the transferor, and not one single known creditor and that one the executing

decree-holder. Here too, I must note that the decree-holder did not mention that there was a transfer by the appellant's husband to her, and that

the transfer was made with intent to defeat and delay him, and that he was therefore entitled to avoid it. He simply proceeded against the

properties as his judgment-debtor's. So, Section 53 cannot possibly come into operation.

We are of the opinion that this passage in the judgment of the learned single Judge of this Court correctly represents the legal position. As a matter

of fact, the view of the learned Judge as to the requirements of Section 53 as expressed in the above extract was approved by a Bench of this

Court to which one of us was a party in *Rajeswari and Co. and Others Vs. The Union of India and Another*, . Consequently, we are unable to

share the view of a Bench of the High Court of Andhra Pradesh in *Bhaskara Chalamiah (died) Piler Khasim Saheb and Others Vs. The Body of*

Creditors of Piler Khasim Saheb, , that the observations of this Court in *(Pakkiri) Mohideen Tharagan and Another Vs. Muhammad Mustappah*

Rowther and Others, and in *Thaher Unnissa Begum Vs. Sherfunnissa Begum*, , were merely obiter. Therefore we are clearly of the opinion that the

suit in so far as it purports to be one u/s 53 of the Act cannot be maintained and it is liable to be dismissed.

5. As far as the representative character of the suit is concerned, Mr. Ahmed Meeran, contended that the first respondent happened to be the only

creditor at the time when she instituted the suit and therefore there was no obligation on her part to institute the suit in a representative capacity.

We are unable to accept this argument. In the first place, there is no averment in the plaint that on the date of the suit, the first respondent was the

sole creditor of defendants 3 to 13. As a matter of fact; no plaintiff, who comes to Court with a suit u/s 53 of the Act, can assert that apart from

him or her, there are no other creditors of the transferor. All that a plaintiff can say in such circumstances is that to the best of his or her information

and knowledge there are no other creditors. That does not absolve a plaintiff from the obligation of instituting the suit in a representative capacity

so that other creditors of the transferor, if any, will be benefited by the suit and seeking the permission of the Court under Order 1, rule 8, Code of

Civil Procedure. If this requirement is not satisfied, the suit is liable to be dismissed summarily. That was the view taken by a Bench of this Court in

Madina Bibi Sahiba Vs. The Ismail Durga Association and Another, and Anr. Bench of this Court in Seth Nandaramdas Atmaram by Agent

Hemrajmul Vs. Zulika Bibi and Others, . It is in view of this alone, when a suit is instituted in a representative capacity, the cause title will have to

be in the form of the plaintiff suing on behalf of himself and all other creditors of the transferor and the decree also will have to be in the form of

Civil Procedure Code, 1908, Schedule I, Appendix D-13 declaring the transfer void, as against the plaintiff and all other creditors, if any, of the

defendant. In this case admittedly this procedure has not been followed and we have rejected the only, explanation offered by the first respondent

and therefore on this ground also the suit is liable to fail.

6. We may mention in this context that even the learned trial Judge did not record any finding anywhere in the course of his judgment that the

transfers under the originals of Exhibits B-2 and B-3 were effected with the intention of defeating or delaying the creditors of defendants 2 to 13

generally. In paragraph 9 of his judgment, the learned trial Judge states that the evidence of P.W. 1 was very definite that defendants 2 to 13 were

saying that they would see that the plaintiff would not get a pie and that therefore they and Major Hakim, the Managing Director of the first

defendant company, who has been examined as D.W. 1, colluded together and defrauded the plaintiff of the fruits of her decree by bringing about

the transfer of the suit property under the originals of Exhibits B-2 and B-3. Again in the same paragraph, the learned trial Judge concludes that

D.W. 1 had to join hands with defendants 2 to 13, who, though strangers to him were bent upon defrauding the plaintiff of the fruits of her decree

in C.S. No. 119 of 1960. In paragraph 10 again he states that the haste with which the transfer under the original of Exhibit B-2 had been effected

would also indicate the collusion between the first defendant and defendants 2. to 13 and the fraud on their part to defeat the rights of the plaintiff.

Towards the end of that paragraph, he records his finding as follows:

All these circumstances go to indicate the collusion between the first defendant and defendants 2 to 13, the debtors of the plaintiff and the fraud

perpetrated by them on the plaintiff by bringing about the impugned sale of the suit property in favour of the first defendant to defeat the rights of

the plaintiff's decree.

In paragraph 11 again, he states that all of them joined together and brought about the sale of the suit properties under the originals of Exhibits B-2

and B-3 with a view to defeat and delay the plaintiff's rights under the decree. Consequently, throughout the judgment of the learned trial Judge,

the emphasis is the defeating of the rights of the plaintiff under the decree in C.S. No. 119 of 1960 and there is not a whisper in the judgment about

there being any intention on the part of defendants 2 to 13 to defeat or delay the creditors generally when executing the originals of Exhibits B-2

and B-3.

7. It is only towards the end of paragraph 11 and in paragraph 12 that the learned trial Judge refers to Section 53 of the Act. Even here, the learned

trial Judge has not referred to the most essential and important requirement of the section to which we have already drawn attention. The learned

trial Judge says in paragraph 12 of his judgment:

But u/s 53 itself a creditor is given a right to avoid such a fraudulent transfer by filing a suit for the benefit of all creditors. It means that it should be

a representative suit on behalf of all the creditors of the vendors. But the suit on hand is filed only by the plaintiff a creditor of the vendors,

defendants 2 to 13. But I have to point out that the definite averment in the plaint that the plaintiff is the only creditor, who has been defrauded by

the vendors has not been controverted by the first defendant or the 12th defendant in their written statements. Therefore, there is no point in

insisting that the plaintiff should have filed a suit in a representative capacity on behalf of all the creditors. Further, equity looks to the spirit and not

to the letter of the law. Therefore, even if it is shown, that there are other creditors of the vendors, the plaintiff's suit need not fail on that ground of

such technicality. Anyhow, I am satisfied that the plaintiff is the only creditor of defendants 2 to 13 and the present suit filed by her is maintainable

under the provisions of Section 53 of the Transfer of Property Act.

For the reasons we have indicated already, the above statement in the judgment of the learned trial Judge is clearly erroneous. It is difficult to

understand how the learned trial Judge could have satisfied himself that the plaintiff was the only creditor of defendants 2 to 13 in the absence of

such a case put forward by the plaintiff herself either in the plaint or in the evidence. Equally untenable is the stand of the learned trial Judge that

equity looks to the spirit and not to the letter of the law and therefore even if there are other creditors of the vendors, the plaintiff's suit need not fail

on the ground of such technicality. These observations of ours on the finding of the learned trial Judge are independent of the fact that that the

learned trial Judge had never considered the question of intention to defeat or delay the creditors of the transferors, generally.

8. Mr. Ahmed Meeran, then contended that such a point was not taken by the appellant either in the written statement filed before the trial Court

or even in the grounds of appeal before this Court and consequently we should not go into this question at the instance of the appellant in this

appeal. We are unable to accept this argument. We have already indicated that the plaint itself does not contain any indication that it was one

instituted u/s 53 of the Act. Only if the plaint was purported to have been instituted under that section, there would be an opportunity for the

defendant to put forward a contention that the requirement of that section had not been satisfied. It is only because of this feature, the appellant in

its written statement merely pointed out that the suit was not maintainable in the form in which it had been filed by the plaintiff. Apparently during

the course of the arguments in the trial Court, Section 53 of the Act was relied on and the learned Judge has referred to that section. It is only

because of this, in the grounds of appeal before this Court, the appellant put forward a contention that the learned trial Judge has misconstrued the

scope of Section 53 of the Act.

9. Apart from this, there is another misleading feature in the plaint itself. A suit coming within the scope of Section 53 of the Act need not pray for

setting aside the sale deeds, because the plaintiff was not a party to such sale deeds. As early as 1939, the question whether a suit coming within

the scope of Section 53 of the Act should pray for setting aside a transfer or should merely pray for a declaration that the said transfer was not

binding on the plaintiff was considered. In Vellayya Konar (died) and Another Vs. Ramaswami Konar and Another, . Wadsworth, J., had

considered this question with reference to the quantum of the court-fee payable for such a suit. The learned Judge held that a suit brought by a

creditor u/s 53 of the Act for a declaration that an alienation by the debtor is void against the creditors is not a suit for cancellation of a document

securing money or property, falling u/s 7 (iv-A) but a suit to obtain a declaration where no consequential relief is prayed for. The reasoning given

by the learned Judge is:

There is a difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding upon the

plaintiff. When plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a

decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or

declared void in toto and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration.

But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to

get that decree or that deed cancelled in toto. That is a thing which can only be done by parties to the decree or deed or their representatives. His

proper remedy therefore, in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far

as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed.

It is in view of this only that a suit u/s 53 of the Act is one for a bare declaration u/s 42 of the Specific Relief Act, 1877 (corresponding to Section

34 of the 1963 Act) and not one for cancellation of the document u/s 39 of that Act (corresponding to Section 31 of the 1963 Act). In this case,

as we have pointed out already, the plaint contains a specific prayer for setting aside the sale deeds., dated 10th August, 1961 and 12th January,

1962 in favour of the appellant herein and that can put anybody on a wrong scent with regard to the nature of the suit and the provision of law

under which it has been instituted, particularly when the plaint makes no reference whatever to Section 53.

10. Under these circumstances, we are clearly of the opinion that the suit instituted by the first respondent herein cannot come within the scope of

Section 53 of the Act. There being no other provision of law under which the first respondent can seek a declaration that the originals of Exhibits

B-2 and B-3, sale deeds are not binding on her, the prayer of the first respondent in this behalf must necessarily fail. As we have pointed out

already, the question of the first respondent obtaining a decree setting aside the sale deeds does not arise, because the first respondent herself was not a party to the sale deeds.

11. Since we are holding that the suit does not come within the scope of Section 53, it is unnecessary for us to consider the question whether the appellant herein is a transferee in good faith and for consideration or not.

12. Then there remains the alternative relief claimed in the plaint, after the amendment of the plaint, namely, the claim for damages being the amount payable to the plaintiff under the decree in G.S.No. 119 of 1960. This claim has been made only against the first defendant and not against the other defendants. We have already pointed out that the learned trial Judge did not go into the details with regard to this claim, in view of the fact

that he has granted the other prayer of the first respondent, but expressed his opinion that the first respondent would be entitled to damages from

the appellant herein. We asked Mr. S.K. Ahmed Meeran, learned Counsel for the first respondent, to show what cause of action the first

respondent had against the appellant for claiming damages. Certainly it is not a case of damages for breach of contract. Consequently it can be a

claim for damages only on the basis of a tortious act on the part of the appellant herein. No such tortious act was brought to our notice and Mr.

Ahmed Meeran, frankly expressed his inability to support the claim for damages against the appellant on the basis of any such tortious Act.

13. Under these circumstances, the appeal is allowed and the judgment and decree of the learned Principal Subordinate Judge, dated 31st March,

1967 in O.S. No. 107 of 1965 are set aside and the suit instituted by the first respondent herein will stand dismissed. As we have pointed out

already, the suit itself was instituted in forma pauperis and since the learned Principal Subordinate Judge has decreed the suit as prayed for, he

directed the defendants to pay the Court-fee payable on the plaint. However, since we have held that the suit instituted by the first respondent is

liable to be dismissed, the said direction given by the learned Principal Subordinate Judge will stand vacated. Instead, since we are dismissing the

suit, we direct that the Court-fee payable on the plaint shall be paid by the plaintiff-first respondent. There will be no order as to costs both in this

Court and in the lower Court.