(1971) 09 AP CK 0014

In the Andhra Pradesh High Court

Case No : Second Appeal No. 684 of 1870

Namburi Rajyalakshmamma APPELLANT

Vs

Kongara Rajamma and Another RESPONDENT

Date of Decision : 23-09-1971

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1973 AP 126

Hon'ble Judges : Madhava Reddy, J

Bench : Single Bench

Advocate : K. Jagannadha Rao, for the Appellant; C. Padmanabha Reddy, for the Respondent

Judgement

1. The principal question that falls for consideration in this Second Appeal is whether the sole creditor must necessarily file a suit in a representative capacity and cannot maintain a suit merely on his behalf for a declaration that the alienation made by the judgment-debtor was in fraud of the creditors.

2. The first defendant who is the appellant herein is the wife of the 2nd judgment-debtor against whom the 1st respondent herein had obtained a money decree on 3-8-1961 in O. S. No. 6 of 1961 on the file of the District Munsif''s Court Nuzvid in execution of which he attached the properties in question in E. P. No. 194 of 1961. The 1st defendant filed a claim petition E. A. No. 70 of 1962 in E. P. No. 194 of 1961 on the file of the District Munsif''s Court, Nuzvid claiming that the properties were alienated under a sale-deed dated 11-10-1960 in his favour. The claim petition was allowed on 17-9-1962. The decree-holder, therefore, filed the present suit O. S. No. 185 of 1963 on the file of the District Munsif''s Court, Nuzvid (1) for setting aside the order in the claim petition E. A. No. 70 of 1962 in E. P. No. 194 of 1961 and (2) for declaring the plaintiff''s right to attach and sell the plaint schedule properties for recovering the decree debt due to her by the 2nd defendant. The 1st defendant resisted the suit among

others on the ground that the suit ought to have been filed by the decree-holder in a representative capacity to ensure for the benefit of general body of the creditors as contemplated by Section 53 of Transfer of Property Act. The defendant however, in the written statement categorically stated that the alienation was not in fraud of the creditors other than the plaintiff. In other words, the plaintiff was the sole creditor. Both the Courts below have decreed the suit holding that the alienation was in fraud of the creditors. It is not necessary for the purpose of this appeal to note that on an earlier occasion this matter had come up by way of second appeal No. 558 of 1966 and was remanded to the lower appellate court for fresh disposal ; suffice to note that both the courts below have now held that the alienation was in fraud of the creditors and accordingly decreed the suit.

3. It is not to the appellant in the Second Appeal to canvass the correctness of this concurrent finding of the Court below. So the main question that survives for consideration is whether the suit ought to have been filed in a representative capacity on behalf of the general body of creditors.

4. It must be found as a fact, in view of the admission of the 1st defendant appellant in the written statement, that neither on the date of alienation nor at any time thereafter there was any creditor other than the plaintiff-decree-holder. Even now the 1st defendant-appellant is not in a position to assert that there are any other creditors. Thus, on the date of the alienation as well as subsequent thereto upto the date of institution and now upto the date of hearing of the second appeal, except the plaintiff-respondent there is other creditor. The plaintiff-appellant is the sole creditor.

5. Section 53 of the Transfer of Property Act enjoys that a suit instituted by a creditor 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, all the creditors. The question whether the representative suit contemplated by Section 53 of the Transfer of Property Act is designed to represent the creditors on the date of the alienation or the creditors subsequent to the date of the alienation also, may now be taken as concluded by a decision of this Court in Bhaskara Chalamiah (died) Piler Khasim Saheb and Others Vs. The Body of Creditors of Piler Khasim Saheb, their Lordships observed as follows :

"The representative suit contemplated by Section 53, Transfer of Property Act was made necessary for two reasons ; firstly, that the debtor shall not be harassed by a multiplicity of suit, and secondly, that the assets of the debtor shall be made available to the general body of creditors.

6. Having regard to the above principles, their Lordships cautioned that the reasons given above for the representative suit may not lead to the necessary inference that the sole creditor, cannot avail Section 53 of Transfer of Property Act, and further observed that there is no sufficient reason for distinguishing between a case where a transfer had a single creditor and a case where a

transfer had several creditors. Earlier in Ayyamperumal Chettiar (died) and Others Vs. Palaniandi Chettiar, it was observed that a suit by an attaching creditor may, in certain circumstances, be in essence a suit u/s 53 and even though it is by a single creditor it must be filed in a representative capacity. A Division Bench of the Patna High Court in Fakira Singh v. Majho Singh. AIR 1917 Pat 448 held that a suit u/s 53, even if filed by the sole creditor must be brought in a representative capacity. It is not necessary for the purpose of this case to go into the question. In any event as the Division Bench of this Court held in Bhaskara Chalamiah (died) Piler Khasim Saheb and Others Vs. The Body of Creditors of Piler Khasim Saheb, that even in the case of a sole creditor, a suit must be filed in a representative capacity. I am bound by that decision, although that decision is based on the Division Bench decision of the Patna High Court in Fakira Singh Under the Guardianship of Ram Charan Singh Vs. Majho Singh and Gajadhar Singh, in which the question was whether the suit should be brought in a representative capacity even if a single creditor was sought to be defrauded, and not whether even if there is only one creditor, a representative suit should be filed ; while the question that arose for consideration in the above referred case before the Division Bench was whether the suit must necessarily be filed in a representative capacity even though there was no other creditor either on the date of the alienation or on the date of the suit.

7. Having regard to the wording of Section 53 of the T. P. Act and O. 1. R.8. Civil P. C. if a suit must be filed in a representative capacity for the benefit of the general body of creditors the creditor instituting the suit must profess to represent some existing creditors i.e., existing on the date of the suit. On the date of alienation there may have been only one creditor, but by the date of the suit other creditors may have come into existence on account of the borrowings of the judgment-debtor. The purpose and intent of Section 53 of the Transfer of Property Act, as laid down by the Division Bench in Bhaskara Chalamiah (died) Piler Khasim Saheb and Others Vs. The Body of Creditors of Piler Khasim Saheb, is that the debtor and the alienor should not be harassed with a number of suits in respect of the alienations made by the debtor and the same question may not be agitated and tried in different courts in different proceedings with consequent possibility of conflicting judgments being pronounced. In such a contingency the suit filed under S. 53 of the Transfer of Property Act must necessarily be a suit in a representative capacity representing not only the creditors existing on the date of the alienation, but also the creditors existing on the date of the suit. But any such representative suit cannot obviously have reference to persons who are not in existence on the date of the suit. When there is a sole creditor, both on the date of the alienation and the date of the suit, such creditor is not in a position to file suit in a representative capacity, for the simple reason that there are no other creditors. In order that a person may file a suit u/s 53 of the T. P. Act in a representative capacity, there must be some other creditors whom that person could profess to represent. There cannot be any representative suit when the plaintiff is not in a position to represent any one else except himself ; he cannot

profess to represent when there are none be can represent.

8. In A. K. A. C. T. V. Chidambaram v. R. M. A. R. S. Firm, AIR 1934 Rang 302 it was observed that a suit brought u/s 53 of Transfer of Property Act in representative capacity is " to avoid the transfer for the benefit of all the creditors both present and future. " Whatever may be the effect of such a suit on future creditors, the question whether the suit should be filed in a representative capacity, when there were no other creditors existing on the date of the suit, was not gone into that decision, obviously for the reason that the suit in fact was filed in a representative capacity and no objection was taken u/s 53 on that score. On the contrary, the objection was that the suit ought to have been filed under Order 21, Rule 63, Civil P. C. And not u/s 53 of the Transfer of Property Act.

9. Mr. K. Jagannadharao, learned counsel for the appellant, however relied upon the decision in Kallubandi Nanjamma Vs. Kethe Rangappa and Others, . That was a case in which Venkatesama Ayyar, J .,held that u/s 53 it is not merely the creditors who are in existence at the date of the transfer but also subsequent creditors that are entitled to avoid it. That was not a case of a sole creditor. In holding that not only the creditor on the date of the transfer but also subsequent creditors are entitled to avoid it, his Lordships was not called upon to decide whether, if no creditors were in existence even by the date of the suit except the plaintiff-creditor the suit should have been filed in a representative capacity. Further, his Lordship was not concerned with the question whether the subsequent creditors include creditors who are not at all in existence on the date of the suit.

10. The next decision on which reliance is placed by the learned counsel for the appellant is Deokali Pattah v. Ramadevi, AIR 1941 Rang 76 wherein it was held that even when there are no other creditors, the sole creditor can maintain a representative suit. That is not the question before me, the question being whether the sole creditor is bound to file a representative suit.

11. In Magnibai Kishorjee v. Kesrimal Sawairam, (AIR 1955 MP 159) however, a Bench of the Madhya Bharat High Court held that the word " creditors " in Section 53 would include even the future or subsequent creditors and therefore the essence of the matter is not whether it is made to defeat numerous or general body of creditors but it is whether it is made to defeat or delay the creditors. In that decision their Lordships were dealing with the question whether the alienation was intended to defraud a creditor existing on the date of the transfer or the creditors from whom the alienor intended to obtain debts. It is with reference to the creditors that have come into existence subsequent to the transfer that the words '' future or subsequent creditors '' have been used. That was not a case where even on the date of the suit there was no other creditor existing. Following this decision a Bench of the Madhya Pradesh High Court also observed in Mt. Kanchanbai and Another Vs. Motichand and Others, that the word '' creditor '' in S. 53 of the Transfer of Property Act would include even future or subsequent creditors. That was also a case wherein creditors other than

the creditor existing on the date of transfer had sprung up by the date of the suit and not a case where there were no other creditors even by the date of the suit.

12. In Brahmayya and Co. Official Liquidators, Hanuman Bank Ltd. (In Liquidation) Vs. V.S. Ramaswami Aiyar and Another, . Sadasivam, J. Was primarily considering the question whether the transfer could be deemed fraudulent even though the transferor had not incurred any debts by the date of the transfer ; and in that context held that the term " creditor " in Section 53 of the Transfer of Property Act includes not only the creditors existing at the time of the transfer, but also those who subsequently became creditors. In this connection the judgment of lord Hardwicks in Stileman v. Ashdown. (1742) 2 ATK 477 at 480 which is to the effect that " it is not necessary that a man should be actually indebted at the time he enters into voluntary settlement to make it fradulent for if a man does it with a view to his being indebted at a future time it is equally fradulent and ought to be set aside ", was referred to. The question whether the suit should be filed in a representative capacity did not fall for consideration, much less the question whether such a suit should purport to represent the creditors who were in existence on the date of the suit.

13. In State Bank of Travancore Vs. A.K. Nanan and Another, referring to Thomas Pillai v. Muthurama Chettiar, ILR (1910) Mad 205 ; Murli Motiram v. Rewachand Dhanomal, AIR 1946 Sind 137 ; Ram Das and Others Vs. Debu and Others, , it was held by Raghavan, J., as follows :-

"The law does not require that the time of the institution of the suit more than one creditor should be in existence. The representative suit is a suit that would fall within Order 1, Rule 8 of the CPC ; and the form of the decree in such a suit is shown in Schedule I, Appendix D, No. 13 of the Code. This shows that the transfer should be held void as against the plaintiff and all other creditors, if any, of the defendant. "

14. But the decisions on which reliance is placed for this conclusion do not deal with cases of a single creditor ; nor do they lay down that the sole creditor is bound to file a suit in a representative capacity for a non-existent body of creditors or for the benefit of such creditors as may come into existence subsequent to the institution of the suit.

15. The learned counsel for the appellant also relied upon the decision in Ex Parte Russell in Re Butterworth, (1882) 19 Ch D 588 at p. 598 wherein it was laid down that a transfer made with a view to defraud the future creditors also can be avoided. To the same effect is the decision in (1742) 26 ER 688. No exception can be taken to this proposition that in order that the transfer may be treated as in fraud of the creditors the transfer need not follow the borrowing ; it may be with a view to defraud the future creditors i.e., creditors subsequent to the transfer. But the question whether, even though there is no such creditor by the date of the suit, the suit should necessarily be filed by the sole creditor in a representative capacity, did not fall for a consideration in those cases.

16. In my view, there is no warrant for the assumption that a sole creditor is bound to institute a suit in a representative capacity even though there are no other creditors either on the date of the transfer or subsequent thereto upto the date of the institution of the suit. Requiring such a creditor to file such a representative suit is to assume that there are some other creditors whom he purports to represent. Order 1, Rule 8, Civil P. C. Does not envisage that even though there is no other person in existence whose right or interest is similar to that of the plaintiff, the plaintiff should purport to represent such persons in anticipation of such persons coming into existence at some distant future. The procedure envisaged in Order 1, Rule 8, Civil P. C. Contemplates that persons having an interest similar to that of the plaintiff should have an opportunity to join in the suit. That necessarily is on the assumption that there are some other persons having similar interests in existence. Even if it is clear to all the parties concerned and to the court that there is no other creditor except the plaintiff, the plaintiff cannot be called upon to file a suit in a representative capacity. That would be carrying a legal fiction to realm of fantasy. That would not be the intention of S. 53 of the Transfer of Property Act as well, for S. 53 speaks of a suit to avoid the alienation for the benefit of all the creditors which could only mean " at least existing on the date of the suit ". Taking any other view would be contrary to the express provisions of Section 53 and to the necessary intendment of O. 1 R. 8, Civil P. C. However the sole creditor would be in a position to comply with the requirements of Section 53 of the Transfer of Property Act and Order 1, Rule 8, Civil P. C., where, though he was the sole creditor on the date of the transfer, some other creditors have come into existence by the date of the suit. In such a case, he must file the suit in a representative capacity. But on the facts of this case, however, when it is clearly established that there is no other creditor even by the date of the suit, there is neither any possibility, nor any legal necessity of filing a suit in a representative capacity. The suit as filed is maintainable. In this view of the matter, it is not necessary to go into the other question whether the attaching creditor has an independent personal right to maintain the suit under Order 21, Rule 63, Civil P. C. De hors Section 53 of the Transfer of Property Act and whether he is not bound to file representative suit as required by Section 53 of the Transfer of Property Act.

17. Even otherwise, in the instant case, if it were necessary to call upon the plaintiff to file the suit in a representative capacity, this court would have no hesitation in granting him permission to amend the plaint and seek a declaration that the alienation was in fraud of the creditors. In fact, the plaintiff purported to file the suit as representing the general body of the creditors, though he confined his relief to setting aside the claim order and for a declaration that he is entitled to proceed against the plaint schedule properties for the recovery of the decree debt. The appellant, as already stated, is not in a position to assert that any of the creditors has come into existence since the date of the institution of the suit upto this day. Conversion of the present suit into a representative suit in these circumstances would be of only academic value and would not serve any material

purposes. That apart the interests of the creditors, if any, in existence are not in any way affected by holding that the alienation is void and the decree-holder is entitled to proceed. As there are no other creditors in existence by bringing the properties to sale, the existing decree alone would be satisfied and if any surplus amount is realised, that would always be available to the other creditors that may hereafter come into existence. However, having regard to the view I have taken on the first point, it is not necessary to allow an amendment of the plaint.

18. In the result, I donot see any ground to interfere with the judgment and decree of the court below. The second appeal therefore, fails and is accordingly dismissed with costs. No leave.

19. Appeal dismissed.