(1976) 12 MAD CK 0038

In the Madras High Court

S. Karuppa Gounder APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 03-12-1976

Acts Referred:

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

Citation : (1977) 90 LW 684 : (1977) 2 MLJ 55

Hon'ble Judges : T. Ramaprasada Rao, J

Bench : Single Bench

Judgement

T. Ramaprasada Rao, J.—A very peculiar situation has arisen in this case. The State of Tamil Nadu represented by the Deputy Commercial Tax Officer, Bhavani, filed a suit obviously u/s 53 of the Transfer of Property Act for the cancellation of a sale deed executed by the first defendant who was an assessee under the Tamil Nadu General Sales Tax Act and who was in default in payment of such tax payable by him. The case of the plaintiff-State was that the said sale was in fraud of the creditors as it was in favour of his own, wife who was the second defendant in the action. At the time when the suit was filed, no permission was sought nor does it appear on record that the suit was instituted by the plaintiff on behalf of or for the benefit of all the creditors. The suit was filed in the year 1971. During the pendency of the suit, the second defendant died and it is common ground that the legal representatives of the second defendant have not been brought on record and the suit abated as against the second defendant. In 1975 an application under Order 1, Rule 8, CPC was filed by the State to permit the plaintiff-State to treat the suit filed by it in its name as one so filed or instituted on behalf of the general body of creditors of the first defendant. This application was allowed by the Court below. It is as against this that the present civil revision petition has been filed.

2. The learned District Munsif in the beginning of his order states thus:

If it is found that there are some other creditors also then the suit filed by the petitioner as the sole creditor of the respondent is not maintainable. Therefore, the petitioner has to be permitted to file the suit on behalf of the general body of the creditors of the 1st defendant.

The learned Munsif has noticed that this application was hopelessly belated. But on some ground which is not quite clear to me, he allowed the petition.

3. Section 53 of the Transfer of Property Act cannot be used as a weapon. But if it is invoked at all by any one creditor, he has to follow it strictly and the mandates therein have to be reasonably followed. This section which is the counterpart of the action which a creditor can initiate under the insolvency jurisdiction, cannot be lightly invoked without a strict adherence to the prescriptions in the section itself. In fact, this is one of the alternative methods provided to a creditor to come to a civil Court of original jurisdiction instead of going to the Court having insolvency jurisdiction to achieve his object of setting aside an alienation made by the debtor with intent to defeat or delay his creditors. Even then a creditor has an option to treat such a transfer as a void transaction. If, however, he chooses to invoke the peculiar jurisdiction available to him so as to set at naught a transfer of immovable property made by a debtor with intent to defeat or delay the creditors of the transferor, then the fourth para. of Sub-section (1) of Section 53 has to be strictly followed. That para, says:

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.

A special procedure, therefore is contemplated in Section 53 itself which is mandatory. If such a suit is filed and when it is brought to the portals of the civil Court of original jurisdiction, then the creditor concerned has to take the elementary precaution of contemporaneously filing an application under Order 1, Rule 8, Civil Procedure Code, so as to make it appear that he was instituting the suit not on his own behalf, but on behalf of or for the benefit of the general body of the creditors. This mandate which is conclusive and for which there appears to be no option cannot be bypassed and the sole creditor who comes to Court, after a period of four years cannot be permitted to convert the suit which is initially defective into one which comes within the purview of Order 1, Rule 8, Civil Procedure Code. Apart From the unexplained delay of four years in the matter of filing this application for conversion of the suit into a representative suit, I am of the view that in the absence of any attempt on the part of the plaintiff to make the cause as one filed on behalf of the general body of creditors and in the absence of any impression gained that when the suit was filed such was the intention of the plaintiff the suit is not maintainable at all. What cannot be maintained in the eye of law cannot be cured by a later insipid attempt to make it regular. The words a creditor" and "shall be instituted" appearing in paragraph 4 of Section 53(1) of Transfer of Property Act, do have a clear bearing upon the intent and content of the peculiar procedure contemplated under the Act. Thus, it follows that if a litigant including the State wants to avail the special procedure under the Transfer of Property Act, then it is necessary for the plaintiff in such a suit to strictly adhere to the manner and method by which such suit could be brought to the portals of a Court of original civil jurisdiction avoiding a Court exercising insolvency jurisdiction. The learned District Munsif did not give any reason at all as to why he allowed this application except to say that it was in the interests of justice and for proper appreciation of the case. I am of the view that neither in the interests of justice nor for the appreciation of the facts of the present case, it is necessary that an ordinary suit filed by the State should be converted into a representative suit as if the general body of creditors are interested in the same. Besides, the Court having noticed the delay did not give any reason why it accepted the same as explained delay. For the reasons stated supra, I am of the view that the order of the lower Court is without jurisdiction besides the same suffering from material irregularity. The civil revision petition is allowed and the impugned order of the Court below is set aside. There will be no order as to costs in this petition.