**(1943) 02 MAD CK 0024**

**In the Madras High Court**

Seth Nandaramdas Atmaram by Agent Hemrajmul — APPELLANT

Vs

Zulika Bibi and Others — RESPONDENT

**Date of Decision :** 23-02-1943

**Acts Referred:**
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63

**Citation :** AIR 1943 Mad 531 : (1944) ILR (Mad) 133 : (1943) 56 LW 583 : (1943) 2 MLJ 1

**Hon'ble Judges :** Krishnaswami Ayyangar, J

**Bench :** Division Bench

# Judgement

Krishnaswami Ayyangar, J.—This is an appeal from the judgment of the Subordinate Judge of Coimbatore dismissing in effect the suit (O.S.

No. 10 of 1940) instituted by the appellant for setting aside an order allowing the claim of the first respondent to certain properties which had been

attached before judgment by the appellant in an earlier suit. That suit (O.S. No. 98 of 1938) had been instituted by the appellant to recover a sum

of Rs. 7,800 due on hundies executed by one Babu Sahib and his three sons. The properties were attached before judgment 0n 8th and 9th April,

1938, and later on 4th August, 1938, the appellant obtained his decree.

2. Babu Sahib died in December, 1937. His three sons are respondents 2 to 4.The first respondent is the wife of his eldest son Mydeen Batcha

Sahib who is the second respondent here. Her claim, to the property is based on a deed of gift executed by Babu Sahib in her favour on. 27th

September, 1937. The properties gifted were of considerable value though their value is stated in the deed to be Rs. 9,000 only which there is

reason to believe was an under-estimate., The attachment was raised by an order of the executing Court dated 15th December, 1938 and the suit out of which this appeal has arisen was filed on 15th December, 1939, which was the last day of limitation under Article 11(1) of the Indian

Limitation Act.

3. Two questions were raised in the Court below, namely, (1,) that the deed of gift which has been marked as Ex. II was executed with intent to

defraud creditors, and (2) that the suit was barred by limitation. The learned Subordinate Judge was of opinion that the plea of limitation was good;

but he declined to give effect to it by reason of all order of amendment which he had earlier made during the course of the suit. On the question

whether the deed of gift was void as having been executed to defraud creditors he has recorded, a finding which means that his answer was in the

negative.

4. After discussing the evidence and finding that the gift was made with intent to defraud creditors his Lordship proceeded

5. We now pass on to the question of limitation which arises in this way The suit as originally framed was merely one to,set aside the summary

order made under Order 21, Rule 63, CPC and prayed for that order being set aside and the suit properties declared liable to be attached and

sold in execution of the decree in O.S. No. 98 of 1938. The material allegation in the plaint was that the alleged gift (Ex. II) was made at a time

when Babu Sahib and his sons were heavily indebted, with the sole object of cheating the appellant and other creditors and placing the properties

beyond their reach. Thus the suit was in substance a suit u/s 53 of the Transfer of Property Act and should have been instituted on behalf of or for

the benefit of all the creditors and not merely on behalf of the plaintiff alone. The provisions of Order 1, Rule 8, Civil Procedure Code, were not

invoked. The permission of the Court to sue on, behalf of or for the benefit of all the creditors was not asked. The suit was thus wrongly framed. In

these circumstances there was no alternative for the plaintiff but to proceed under Order 1, Rule 8. Otherwise the suit was liable to be summarily

dismissed (vide Madina Bibi Sahiba Vs. The Ismail Durga Association and Another, ). When objection to the frame of the suit was taken in the

written statement, the appellant applied to the Court for an amendment of the plaint so as to bring it in conformity with law and the amendment was

ordered and carried out on 22nd August, 1940. If this date is taken to be the crucial date the suit would be barred by limitation.

6. The contention of the respondent here, as, in the Court below, is that the amendment had the effect of introducing new plaintiffs into the suit

because there was a change of capacity on the part of the appellant. Whereas originally he had instituted the suit for himself as an individual he

became after the amendment the representative of a group of persons whose common interest it was to get rid of the deed of gift. It was argued

that after the amendment all these persons became in the eye of the law, plaintiffs in the suit though not in name yet in effect, by reason of the

representative character which the plaintiff thenceforth held. On this line of reasoning the respondent''s counsel urged that the suit should as regards

the other creditors be deemed to have been instituted only on the day when the amendment was made involving as it is said, their addition as new

plaintiffs to the action. Section 22(1) of the Limitation Act on which he relies is as follows:

Where, after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been

instituted when he was so made a party.

7. The argument was supported by reference to the decision of Wadsworth, J. in Patayath Parumpayil Sankara Menon Vs. Karumathil

Puthumanae Sanku''s son Kuttani and Others, where a suit to redeem a mortgage was instituted against a rnember of an unincorporated

association in his personal capacity as a mortgagee. The defendant having taken the objection that he did not hold possession of the mortgaged

property in his personal capacity but it was held by an unincorporated association of which he was a member, the plaintiff applied for an

amendment of the plaint so as to convert trie suit into one against the defendant as a representative of the association. The amendment was ordered

without objection. If the suit be regarded as having been instituted on the date of the amendment it was barred by limitation. This objection was

taken and accepted by Wadsworth, J., with the result that the suit was dismissed. The ground of the decision is contained in the following

observations of the learned Judge:

It is not a case to my mind of a person already on the record being by means of an amendment jmpleaded in another capacity or on other grounds.

 

If we look at the essence of the amendment,. it is a case in which by means of an amendment a very large number of fresh parties are added,

though fey a special procedure one of their number who happens already to be on the record in his per-sbnal capacity is treated as the

representative of the whole association. It seems to me that this is essentially a case of adding fresh parties after the period of limitation has expired.

8. It is clear that the view which prevailed with the learned Judge is that in representative suits or "" class actions "" as they are termed in England, the

parties to the action are not merely the representative or representatives actually on the record but the entire body of persons whom they are

allowed to represent. In view of the fact that Order 1 Rule 8 corresponds to Order 16, Rule 9 of the Rules pf Supreme Court in England it is

desirable to see how the English Courts have understood the position. In Madina Bibi Sahiba Vs. The Ismail Durga Association and Another,

decided before the enactment of the Supreme Court Rules, the Vice-Chancellor held that where a plaintiff files a bill on behalf of himself and all

other persons of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure; but after a

decree he cannot deprive the other persons of the same class of the benefit of the decree, if they think fit to prosecute it. It is difficult to understand

how a representative plaintiff can alone and without the consent or authority of those represented by him, if the latter are supposed to be also

parties to the suit, at his will have the suit dismissed. The position is, of course, different if the suit proceeds to the stage of a decree being passed,

as such a decree will enure to the benefit of and bind the other parties by the principle of res judicata. In Patayath Parumpayil Sankara Menon Vs.

Karumathil Puthumanae Sanku''s son Kuttani and Others, , which was an action commenced by a bondholder on behalf of himself and all other

bondholders, the plaintiff obtained an order for a receiver, whereupon one of the bondholders represented by the plaintiff, being dissatisfied with

the order, applied for leave to appeal. It was held that the order having been made in favour of the class to which the applicant belonged, and

having been obtained by the plaintiff, who represented him in the action, he could not appeal against it. The Court indicated that the proper course

for the dissentient bondholder was to apply to the Court to be made a defendant to the action. There can be little doubt that the decision proceeds on the footing that the dissentient was not actually a party; for, if he were, his right of appeal would be unquestioned. Patayath Parumpayil Sankara

Menon Vs. Karumathil Puthumanae Sanku''s son Kuttani and Others, was a similar case where a bondholder of a Railway Company, sued on

behalf of himself and all the bondholders of the company other than the defendant, but without obtaining an order under Order 16, Rule 9, that the

defendant should be sued as representing all bondholders who dissented from the plaintiff''s claim. One of the bondholders took out a summons

whereby he stated that neither the plaintiff nor the defendant properly represented the interests of himself and certain other bondholders, and

applied.to be made a defendant. Fry, J., held that the applicant was entitled to represent the bondholders who were dissentients from the plaintiff''s

view. It would be observed that there would be no necessity for the applicant to be made a party if he was already en the record, though not eo

nomine. In Wolff v. Van Bollen (1906) 94 L.T. 502 a receiving order followed by an adjudication in bankruptcy had been made against the

plaintiff in an action in which the claim on behalf of himself and all other creditors was for an order setting aside an assignment of personal property

by way of settlement made by the first defendant upon his wife, the second defendant, previous to his bankruptcy. ''-The question was whether the

action can be continued with the plaintiff on the record without the Official Receive-. Being substituted in his place. Kekwich, J., answered the

question in the negative. The decision is important in that it is manifest that the Court regarded the right of action as one which passed to the trustee

in bankruptcy on the adjudication of the plaintiff and was liable to dismissal if he did not choose to intervene within a time limited by the Court. The

following observations are worthy of note:

As I put it to his counsel in the course of the argument, if he had assigned any debt he could not recover it, and it would put an end to the action.

As a matter of course the action would have passed because the right is transferred. It is assigned by act of law; the act of law has assigned it for

him. As against that there are two arguments which merit notice. First, it was said that he was a trustee; and that, being a trustee, the debt has not

passed to the Official Receiver and trustees in his bankruptcy. Of course, if that is the true view, the matter is unarguable. But he is not a trustee of the action. He can discontinue it, by the leave of the Court, as dominus litis, but what he. would recover he would recover for the defendant''s

trustee, and, if he succeeds in setting, aside these assignments for the benefit of his creditors, what he recovers vests in the trustee fox them. That

would have to be applied for the benefit of the aseditors. He may become a trustee afterwards of the fruits of the action, but he is not a trustee of

the action, and therefore the right of action passes to the trustee in bankruptcy. Secondly, it is pointed out that there is a receiver appointed in this

action, and it is argued that that is equivalent to a judgment. In the first place the order appointing the receiver is not equivalent to a judgment or

anything approaching to it. It is an interlocutory process which is something to protect the property while the rights to it are yet unsettled and where

there is to be a judgment.

9. In Madina Bibi Sahiba Vs. The Ismail Durga Association and Another, , the point that arose for decision was whether an order for costs can be

made against persons who were represented by the plaintiffs in a class action brought on their behalf. Eve, J., said that the teachers whom the

plaintiff represented had actively supported the litigation brought by the plaintiff on their behalf, and had contributed towards the costs of carrying

on the action. They were thus before the Court, and were bound by any decision which the Court pronounced, but they were not in fact made

parties to the action. In these circumstances the Court had no jurisdiction to make the order for the payment of costs by them. This decision shows

the true position of the plaintiff vis a vis those whom he represents in the suit.

10. It seems to us that the principles laid down in the English cases have been kept in mind by the Legislature in enacting Order 1, Rule 8 and

Section 11, Civil Procedure Code. The provisions of Order 1, Rule 8, are it is obvious, designed to save time and expense and to ensure a

convenient trial of questions in which a large body of persons are interested, while avoiding at the same time a multiplicity. of suits and consequent

harassment to parties. Much of the benefit intended by, the rule and the simplicity of procedure secured by it would be lost by construing it to mean

that the entire body of persons interested in the litigation are or should be deemed to be actually parties to it. Such a construction is to some extent

negal-tived by Sub-rule (2) which says that any person on whose behalf or for whose benefit a suit is instituted or defended under Sub-rule (1)

may apply to the Court to be made a party to such suit. This provision suggests that he is not a party until the Court allows the application and

makes him a party. If we turn to Section 11, explanation 6 and examine its language, this inference is confirmed The explanation says:

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others all persons interested

in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

11. When the statute says that these persons shall be deemed to claim under the persons so litigating the meaning is that they are not in fact so

claiming, but they should only be regarded as doing so for the purpose of the section. Again it will be seen that the rule of res judicata is to be

applied not on the footing that these persons are themselves parties to the suit but only as persons claiming under the party or parties litigating.

12. An amendment which does not seek to bring in a new party but only varies the ground on which the relief was originally sought or asks for a

different or additietoal relief without changing she cause of action; does not bring the case within Section 22 of the Limitation Act. It is equally clear

that where a party is already on the record either as a plaintiff or as a defendant, an amendment which merely,. alters the capacity in which. he has

been impleaded to one of a different character does not involve an addition of parties so as to attract the provisions of Section 22. Some of the

cases which bear on this aspect of the question have been referred to in the judgment of Wadsworth, J. in Madina Bibi Sahiba Vs. The Ismail

Durga Association and Another, . But this line of cases does not, in our opinion, directly bear on the question which we have to decide in the

present case and we do not therefore consider it necessary to examine them in detail. A better guidance is afforded by two principles recognised

by the Court in working Order 1, Rule 8. In Patayath Parumpayil Sankara Menon Vs. Karumathil Puthumanae Sanku''s son Kuttani and Others, ,

Benson and Sundara Ayyar, JJ., stated:

The general rule of law, undoubtedly, is, that in suits where one person is allowed to represent "" others as defendant in a representative capacity

any decree passed can bind those others only with respect to the property of those others which he can in law represent and no personal decree

can be passed against them, although the parties on record eo nomine may be made personally liable. This is the principle applied in suits against a

Hindu family as represented by its managing member and in suits to which Order :, Rule 8 of the Civil Procedure Code, 1908, is applicable."" See

Sadagopachafi v. Krishnamachari I.L.R.(1889) Mad. 356 and Madina Bibi Sahiba Vs. The Ismail Durga Association and Another,

13. The basis of the rule is that persons other than those on the record are not parties to the suit in the full sense of the term. They may be bound

by the decision passed it affects the common interests of the entire body of persons represented but they cannot be personally bound, by the

decree unless they are actually impleaded as parties to the action. If they are not, a fresh suit must be filed, for obtaining such a decree against

them.

14. The point has been considered from another aspect also. If a member of the class who has not applied to be made a party under Sub-rule (2)

dies pending the action, is it necessary that his legal representatives should be brought on the record? A negative answer has been given to this

question in Udmi v. Hira I L.R.(1920) Lah. 582 and Malik Mohamed Sher Khan v. Ghulam Mohamed I.L.R.(1930) Lah. 92. The principle was

extended to appeals in Mt. Afzalunnissa v. Fayazuddin I.L.R.(1931) Lah. 195. This result can be understood only on.the footing that they are not

parties to the suit in fact.

15. The result of the foregoing discussion is that the amendment of the plaint by which the suit was converted into a representative action under

Order I, Rule 8, does not involve the addition of fresh parties. It is true that the capacity of the plaintiff changed, for after the amendment he

became a representative of a body of persons consisting of himself and the other creditors; but it is impossible to maintain, in the face of the

decision of the Privy Council in Peary Mohan Mookerjee v. Narendra Math Mookerjee I.L.R.(1930) Lah. 92 not to mention other cases, that the

amendment introduced fresh parties and having been made after the period of limitation, the suit is barred. We are therefore unable with all respect,

to accept the decision of Wadsworth, J., in Patayath Parumpayil Sankara Menon Vs. Karumathil Puthumanae Sanku''s son Kuttani and Others, as correct.

16. The result is that the appeal is allowed with costs here and in the Court below. There will be a decree in favour of the plaintiff in terms of

prayer (a) in paragraph 14 of the plaint.

17. The first respondent has preferred a memorandum of objections which was wholly unnecessary as it was open to her without these objections

to support the judgment in view of the provisions of Order 41, Rule 22. It is therefore dismissed, but without costs.

 