

(1961) 11 MP CK 0018
In the Madhya Pradesh High Court
Case No : First Appeal No. 40 of 1957

Shantilal Bardichand Mahajan

APPELLANT

Vs

Champalal Radhaji and Others

RESPONDENT

Date of Decision : 29-11-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 99
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1962 MP 363 : (1962) J LJ 604 : (1962) 7 MPLJ 596 : (1962) MPLJ 596

Hon'ble Judges : T.C. Shrivastava, J; H.R. Krishnan, J

Bench : Division Bench

Advocate : N.R. Newaskar, for the Appellant; S.L. Dubey, for the Respondent

Judgement

Krishnan, J.

This is an appeal by the transferee, by the ostensible sale for Rs. 10000/-, of a house by his father and his uncle, (who at that time were indebted to the time of at least Rs. 7000/-, and had no other properties of much value), from the judgment and decree of the Civil Judge, Class I, Dhar, declaring the said sale void and inoperative as against the creditors, four of whom sued, in accordance with, though without mentioning, Section 53, Transfer of Property Act. The appellant had raised quite a number of questions in the memorandum, but in argument, the only ground pressed is that the suit should be dismissed, as there is no order permitting the four creditors to sue in a representative capacity, and no notices issued on the other creditors (known or unknown) at the instance of the plaintiffs.

The questions for decision are :

(i) Whether the suit is really one u/s 53, Transfer of Property Act.

(ii) If so, whether the recital in the plaint, and the absence of express permission, and of notice, under Order 1 Rule 8, C. P. C., is a disability that can

be raised in appeal.

(iii) In case it is found necessary that they are necessary, whether the permission can be granted by this Court now, and the notice directed to be issued in this appeal.

(iv) In case this suit is not one u/s 53, Transfer of Property Act, if it can be treated as one by the four creditors in their individual capacity, whether u/s 42, Specific Relief Act or generally without reference to that section, but on lines of similarity to the illustration regarding reversioner"s suits.

The facts of the case are simple. The defendants Nos. 1 and 2 Onkarlal and Bardicnand, uncle and father respectively of the appellant, had borrowed in 1951 money, at least from these four creditors, a total of Rs. 6700/- in round figures. On 19-6-1952 they sold a house the identity of which is not in dispute, to the appellant (defendant No. 3 in suit), son of defendant No. 2 and nephew of defendant No. 1, who had just then come of age. The deed was registered, and the ostensible consideration was Rs. 10,000/- which in the lower court the defendant No. 3 tried to show, unconvincingly however, had been received by him from his maternal grandmother. The four creditors filed the present suit on 8-7-1953 alleging that the transfer had been made with the intention of defeating and delaying them in their realisation of the debts. Inter alia it was pleaded :

"The defendants 1 and 2 have effected this sale fraudulently ?iksdj rksjls? This sale is with the purpose of delaying the plaintiffs and other creditors in their realisation; the plaintiffs and the other creditors may not be able to realise their debts from this house. Accordingly, this has no effect in the eye of law and should not bind the plaintiffs."

"The plaintiffs are filing this suit for themselves and for other creditors and seek permission that they might do so on behalf of the other creditors."

It was a representative suit, and permission was expressly sought. When seven months, after the filing of the plaint, a written statement was filed, neither was there an order of permission, nor the issue of notice under Order 1 Rule 8, but no grievance was made of this omission. We do not hear of these two topics at any time during the trial; nor was this raised in the argument or discussed in the judgment which was delivered about four years later on 20-8-1957. In the memorandum of appeal, the absence of order and the notice were not raised as such; but the position sought was that having alleged that the sale itself was void in the eye of law, the plaintiffs should not have brought a suit to avoid it. In argument, however, the appellant"s position is that this is a suit u/s 53 Transfer of Property Act, and the absence of the permission and the notice on other creditors is fatal, and it should be dismissed.

Ground No. (i):--Section 53, T. P. Act, presupposes a transfer which is prima facie valid, and would be operative but for any action taken by the creditors

individually or in a representative capacity. This position has to be distinguished from another, where the sale is ab initio void, and docs not exist in the eye of law; in that event, the creditors need not bring any suit for avoiding it, but need only, after obtaining a decree against the transferor-debtor, attach the property, and in the event of a transferee filing a claim case or a suit, plead the transfer was ipso facto void.

In practice, however, it may be that the initial voidness of the transfer might not be so patent; an apparent sale may turn out to be gift with delivery of possession, or there might be an arguable case. In that event, the creditor would be bringing a suit, assuming the best in favour of the transferee, that the transfer is not void in itself j but only voidable. The court nay decide that (i) the suit is unnecessary, the transfer being void in itself, or (ii) avoid the sale u/s 53, T. P. Act, the avoidance being in favour not of one or more individual creditors who may be suing, but the entire body; or (iii) refused to find that the transfer was with intention of defeating or delaying the creditors and dismiss the suit.

But where, the court has found that it is voidable, the defendant, cannot seek to get the suit dismissed, on the ground that the position is really worse for him, the sale being void ab initio, and not merely voidable, as found by the Court. No party to a suit can make a grievance that the finding is somewhat, more in its favour than it might have been. Here, for example, the transfer is good against all the world, until, a creditor attaches the house in execution of a decree for his loan obtained against the transferors if it is void ab initio, it will be nul est before the whole world.

Looked at this way, there is really nothing Wrong in the framing of the suit, which is clearly one u/s 53, Transfer of Property Act; the pleadings already quoted, show this, though the section as such is not mentioned.

Grounds Nos. (ii) and (iii) :--This is the real controversy at the present stage. As Section 53 lays down that the suit should be in the representative capacity, it was incumbent on the plaintiffs to obtain permission and get the notice served individually, if they know the names of the other creditors, or collectively by a general notice by public advertisement if they do not know them but consider their existence possible. Even if the plaintiffs do not know any other creditors, still it would be obviously safe to assume their possibility. The transferors or transferee would naturally not be helpful, and even if they chose to make a statement that there are no other creditors, that is no assurance of its correctness. The permission was certainly sought in the plaint, but the appropriate course was to have filed a separate petition along with the process fee and other requirements for the notice. In a case of this nature, the permission should have been granted as a matter of course, and the notices ordered (at plaintiffs' costs) as a routine step. But it appears that everybody concerned, including the Court, forgot completely about this. The plaintiffs themselves did so despite their unmistakable averment in their plaint; the defendants either forgot it, or just let the omission remain unadverted to, hoping

to take advantage of it at a later stage in the litigation, in our view, the Court is also to share at least part of this responsibility.

In our country (and as for that matter, even in those where civil suits are still decided by jury) the Court is not merely an umpire watching a battle of wits between the parties from a distance through a telescope. It is charged with the responsibility of guiding the procedure, and apprising the parties whenever necessary of their duties. If, even having been apprised of this, a party still would, not see to it, it has to thank itself. But the law is complicated, the individual litigant is most often a layman, and legal advice at the bar cannot always as efficient as can be desired, the Court may have to direct the party on the requirements of the law whenever there has been a patent omission. In this case, for example, the Court presumably read the plaint and went through the record before delivering the Judgment; still the omission was not detected.

While we surely disapprove of this state of affairs, we are of the opinion that in this case, this omission is an inadvertent mistake, without any ulterior purpose on the part of the plaintiffs. Not only had they absolutely nothing to gain by it, but they had clearly pleaded to this effect, and also sought the permission, though in the plaint. Legal procedure everywhere, especially in our country, is full of traps; if a litigant happens to stumble, the courts should give a helping hand, except when this is the result of an attempt to be clever and overreach the Court, or to do something inequitable to the other side. In the latter event, the party concerned should be dealt with severely.

But where, as in the instant case, it is the slip of Inadvertence, the only consideration is whether in the interval, the other side has acquired an equity by the operation of limitation or otherwise. In this case, for example, the transferee has not acquired any. For most of the time, there had been a finding avoiding the transfer; no other creditor, if he exists at all, has brought a similar suit, because the present suit is not properly speaking one in representative capacity. It is worth repeating that, for more than one reason, litigation is a heavy and tricky burden on the litigants, and we need not worsen it by trying to make the law-courts a school for discipline, in which of course they are not. Thus we have a case in which it is pre-eminently reasonable that the omission should be remedied even at this stage,--of course, at the costs of the plaintiffs.

That this can be done at an appellate stage in cases like this, is in accordance both with the purpose of the rule and with reported decisions. A notice under Order 1 Rule 8, C. P. C., is calculated to appraise the other members of the class that some of them had already brought a suit. In all representative suits, a member of the class who is not interested in seeking or availing of the relief, is altogether unconcerned. If the suit is for a right that can be exercised by every member of the class, quite a number of them can choose not to exercise it; but their indifference to the relief does not, in the least manner, affect the competency of those who do want to avail it. There may be some members who are not indifferent, and are anxious that the suit should be prosecuted effectively

in the light of materials they might be able to place before the Court. They might appear and seek to be joined as plaintiffs; this has to be allowed, as the results are binding on them and they cannot, afterwards, bring a fresh suit. Thus in addition to giving information, the notice also puts the other members on guard. As for the defendants, they gain by the permission and notice, as they are thereby saved from future harassment by fresh suits by different members or batches of the same class, in case the suit is dismissed as one in individual capacity only.

The plaintiffs-respondents have taken the position that the permission by the court, and notices on other creditors are only elements of procedure; therefore the omission not having been taken as a ground of defence, and not having caused any prejudice to the defendants, stands condoned u/s 99, C. P. C. There has been no prejudice caused by the absence of permission and notice but It is still difficult to agree that this is purely procedural. In our view, it is something more than one regarding the manner of doing a thing which has either been - done somehow, or the failure to do which is now of no practical effect The non-party creditors still remain uninformed of the suit, and unbound by the results. Thus the omission cannot be condoned u/s 99, C. P. C.; but it can be remedied by permission and notices at this stage.

These questions have come up before the courts on several occasions. For example, in the case reported in *Bhiya v. Mangta* ILR (1955) 5 Raj 910, it was ruled that the provisions of Order 1 Rule 8 were mandatory, breach was calculated to affect the decision, and a failure on the part of the Court to perform the duty of issuing notices is not one of mere technicality curable u/s 99, C. P. C., the reason being that on the issue of notice a large number of persons may come forward and ask to be joined as parties to the suit. It was at the same time held that in the event of omission substantially to comply with Order 1 Rule 8, the proper course was not to dismiss the suit to set aside the decree and remand the case to be proceeded with according to law. We shall consider if we should do this in the instant case, or give the permission and issue the notice in this court itself.

In the earlier case reported in *Mookka Pillai alias Sudalaimuthu Pillai Vs. Valavanda Pillai and Others*, , it was held that, in the appellate Court the persons suing in individual capacity can be permitted to sue in representative capacity even by amending the plaint if necessary, in the present case, the plaint is clear enough and the plaintiffs' position is in fact stronger. In the case reported in *Mukaremdas Mannudas and Others Vs. Chhagan Kisan Bhawasar and Others*, , the plaint was filed, as in the instant case, as one in the representative capacity. There was no formal permission recorded in the order but some notices were issued. So the court held that the absence of a formal order giving permission was really Immaterial; but in the earlier Bombay case reported in *Hubli Panjarapole and Others Vs. Saraswatevva Bayappa Kala Ghatki*, , there was a real omission to issue notices and it was held that during the pendency of the

suit itself, permission could be sought and notices issued. Thus, authority is ample for the view that the omission can be remedied even at the appellate stage, if the nature of the suit is not changed.

Ground No. (iv) :--It is urged that though the suit has proceeded as was originally intended, as one in a representative capacity, still the four creditors could in any event sue as individuals, and the decree now obtained is good as a decree, as far as they are concerned, though it might not bind the other creditors. Now such a declaratory suit would normally be filed u/s 42, Specific Relief Act. Interpreted literally, that section implies that the plaintiff should have a "legal right" at the time of the suit; of course, the creditor does not have such a right until he obtains a decree against the transferor and attaches the property, which these creditors had not done at the time of the suit. On the other hand, there is another view that Section 42, Specific Relief Act, is not exhaustive, and there can be declaratory suit, brought by analogy with Section 42, though not within the strict letter of it.

This view is supported by one of the Illustrations, and broad equitable considerations. There is difference of view between the High Courts in this regard, the Calcutta High Court holding that Section 42 is exhaustive, and Madras High Court holding the contrary. We have noted the arguments for the pros and cons but it will not be necessary to give a decision on this, unless the plaintiff-respondents decline or fail to remedy the omission in the manner to be set out presently.

The alternative before us is therefore to set aside the decree under appeal and send back the suit to the trial Court for according permission, which has in a sense been tacitly granted, and to issue notices at the cost of the plaintiffs, and then to rewrite the judgment in the light of the averments, if any, of the new creditors, if any, who appear and join as plaintiffs. The other alternative is to suspend judgment and pass an order of permitting the representative suit and direct notices to be issued from here; wait for one month after the Service and deliver judgment after taking into account the arguments already mentioned and grounds that might be urged by any other creditors who might care to appear here as plaintiffs-respondents. Considering that several years have elapsed, and the case set up here by the transferee-appellant, and the first alternative would lead to unnecessary delay and expenses without any corresponding advantage to either party; so we choose the latter.

It is ordered that the prayer made in the paragraph No. 5 in the plaint is granted by this Court, and the plaintiffs-respondents are permitted to sue in a representative capacity. It is further ordered that on deposit of the proper fees for issue of notices by the plaintiffs-respondents by public advertisement, the notices be issued to all the creditors of defendants Nos. 1 and 2 informing them of the filing of the suit by these four plaintiffs-respondents, the gist of the decree in their favour by the trial Court and the fact of the appeal by the transferee, and Inviting them if they care, to appear in the appellate Court and join as creditors-

respondents.

If the process-fee is not filed within three weeks, suit would be treated as one in the individual capacity and the appeal disposed of in the light of arguments already made. If the notices are issued, the case would be put up on the date fixed for the appearance of the other creditors, if any.

Costs according to final result of the appeal.

T. C. Shrivastava, J.

I agree.