

(1982) 10 GUJ CK 0004

In the Gujarat High Court

Case No : First Appeal No's. 58 and 587 of 1979 with Civil Application No. 3026 of 1979

Sushilabehn and Others

APPELLANT

Vs

Anandilal Bapalal and Others

RESPONDENT

Date of Decision : 18-10-1982

Acts Referred:

Constitution of India, 1950 — Article 133
Transfer of Property Act, 1882 — Section 5, 53

Citation : AIR 1983 Guj 126 : (1983) 1 GLR 278

Hon'ble Judges : B.K. Mehta, J;A.S. Qureshi, J

Bench : Division Bench

Advocate : K.B. Pandia, for the Appellant; V.P. Shah and D.K. Parikh, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Mehta, J.—Original defendants 2 to 6 of Civil suit No. 3646 of 1973, on the file of City Civil Court, Ahmedabad, being aggrieved by the judgment and decree of the learned City Civil Judge holding that the release deed dated February 11, 1972 executed by original defendant 7 in their favour amounted to fraudulent transfer within the terms of Section 53, T. P. Act inasmuch as it was executed with the ulterior motive to defeat and delay the creditors plaintiffs 1 to 5 whose suits were pending at the relevant time of the execution of the said deed, and in which ultimately decrees were made in their favour against him, have filed First Appeal No. 50/79 and original defendant 1 has filed First Appeal No. 587/79.

2. It is not necessary to set out elaborately the minutest facts leading to these appeals. Suffice it to state a few facts in order to appreciate the contentions urged on behalf of the appellants in these appeals it should be stated that First Appeal 587/79 is an appeal preferred by original defendant 1 of the said suit against the same judgment and decree which is the subject matter of First Appeal 50/79. Since the contentions urged are more or less similar in both these

appeals which arise out of the same suit and directed against the same judgment and decree of the City Civil Court, we intend to dispose of these two appeals by this common judgment. We will refer to the appellants as well the Respondents of both these appeals by reference to their original position in the suit.

3. Defendant No. 2 is the wife of the first defendant while defendants 3 to 6 are their sons. The plaintiffs, who are the respondents 1 to 5 in both these appeals, are the creditors and they filed three suits in the City Civil Court, Respondents 3, 4 and 5 were the plaintiffs of Summary Suit No. 501/71, respondent 2 was the plaintiff of Summary Suit No 502/71 and respondent 1 was the plaintiff of Summary Suit No. 503/71 on the file of the City Civil Court. Ahmedabad. The amounts for which decrees were passed in the said suits were respectively (i) Rs. 21335/- (ii) Rs. 12750/-and (iii) Rs. 35655/-. Respondent 6 herein was also a creditor of the first defendant, who was permitted to be shown as plaintiff 6 in the suits out of which these appeals arise. It is claimed by these plaintiffs-respondents 1 to 5 herein that the first defendant was doing business in partnership in the name and style of "Asian Enterprises". The said defendant had for the purposes of the business, it is claimed, borrowed various amounts from the plaintiffs. It is claimed by the respondents-plaintiffs 3, 4 and 5 that the first defendant had borrowed in all a sum of Rs. 15,000/-in 1967. Similarly defendant 1 had borrowed from the respondent-plaintiff 2 in June 1968 a sum of Rs. 10,000/-. He had also borrowed from respondent-plaintiff 1 between May and July. 1981 a total sum of Rs. 25,000/-. The first defendant had agreed to pay interest at the rate of 15% on all these borrowings and accordingly the interest was paid by the said firm in which the first defendant was a partner. Accordingly interest was paid to respondents-plaintiffs 3, 4 and 5 for a period up to April 30, 1968 and to plaintiffs 1 and 2 for a period up to April 30, 1969. Since the said firm closed down its business, the plaintiffs by their notices of March 25, 1971 called upon the original defendant 1 as well as his firm to arrange to pay the amounts found due at the foot of the accounts of the said firm. Notices were served on the firm as well as the partners including the first defendant who failed to give any reply to the said notice, while the other partners gave evasive replies but neither the first defendant nor his firm nor the other partners complied with the demand made in the notice with the result that three suits as aforesaid were required to be filed in the City Civil Court. Ahmedabad on March 2, 1971. It is common around that the first defendant had executed a release deed on February 11, 1972 in favour of original defendants 2 to 6 relinquishing all his right, title and interest in the immovable property standing on the land admeasuring 93 sq. yards of S. Nos. 876, 877, 878 and 4358/B situate within ward No. 2-Dariapur in the city of Ahmedabad and bearing municipal census Nos. 551 and 352 for a consideration of Rs. 20,000/- being the value of his 1/6th share in the joint family comprising of himself, his sons and wife who had 1/2 share in the said property. The other 1/2 share was of the brother of original defendant 1. Respondents-plaintiffs 1 to 5 were, therefore, required to seek a declaration by filing the present suit that the said release deed amounted to

fraudulent transfer within the terms of Section 53 of the T. p. Act inasmuch as it was executed with the ulterior motive to defeat and delay the creditors and particularly because at the relevant time of the execution of the said deed, not only the original defendant No. 1 was heavily indebted to the other creditors but also because of the pendency of the suits of the respondents. It is claimed by the present respondents-plaintiffs that the original defendants 2 to 6 were members of the coparcenary and, therefore, their shares in the suit property were also liable for the satisfaction of the debts owned by the first defendant and, therefore, if the first defendant had created or brought about a bogus and a fraudulent release deed, it is essentially with a view to avoid and defeat the creditors by creating a facade of the relinquishment of the share and interest of the first defendant. The respondents-plaintiffs further claimed that since the first defendant was the Manager and Karta of his joint Hindu family comprising of himself, his wife and sons, the debts owed by him which were antecedent in point of fact and in point of time and being pre-partition debts, the suit property which is the subject matter of the said deed of release is liable for the satisfaction of the debts on the principle of pious obligation of the sons to pay the debts of his father. The respondents-plaintiffs 1 to 5, therefore, prayed that it be declared that the impugned release deed was executed fraudulently and illegally with the ulterior motive of defeating and delaying the creditors and, therefore, not binding the plaintiffs as well as the other creditors, and the entire share and interest of the joint family property of the first defendant, his wife and sons in the said property was liable for the debts of the first defendant, and in the alternative, they prayed for a declaration that the right, title and interest of original defendants 2 to 6 were liable for the debts of original defendant 1 as they were antecedent in point of time and fact, and the said defendants were all liable to satisfy the said debts.

4. The first defendant resisted the suit by his written statement, Ex. 26, while defendants 2, 4, 5 and 6 have adopted the written statement filed by defendant 3. Broadly stated, the case of defendant 1 was that the partnership business was not the joint family business, and that defendants 2 to 6 were not liable for the debts of the said business. He specifically joined issue with the respondents-plaintiffs that the impugned release deed was executed with an ulterior motive to avoid the creditors and was bogus and got up one. He also pleaded that the suit was bad for mis-joinder of causes of action and parties. Defendant 3, whose written statement was adopted by the other defendants 2, 4, 5 and 6, also raised the plea of multifariousness inasmuch as diverse causes of action have been clubbed together and the plaintiffs whose reliefs arose out of different causes of action, have joined, in filing the suit which was not legally permissible. It was specifically contended that these defendants were in no way concerned with the business carried on by the first defendant and, therefore, could not, under any circumstances, be held liable for such debts. They joined the issue with respondents-plaintiffs that the business was a joint family business and, therefore, they were liable to satisfy the debts. They supported the impugned

deed of release since the first defendant being coparcener, was entitled, to relinquish his right, title and interest, and if at all the release was made with a view to save the rights and interest of other coparceners, it cannot be assailed on the ground of it being a fraudulent transfer or that it was bogus and concocted with the ulterior motive.

5. On the above pleadings, the learned City Civil Judge raised necessary issues and, on consideration of the evidence adduced by the parties, oral as well as documentary, reached the conclusion that the impugned release deed was clearly within the terms of Section 53, T. P. Act, inasmuch as it was executed by the first defendant with a view to defeat and delay the creditors particularly, because the first defendant and for that matter all the defendants knew that the first defendant was heavily indebted at the relevant time of the execution of the decree and having regard to the important fact that no provision was made at the time of execution of the said release deed for debts of the first defendant, it must be held that the purpose underlying the execution of the said release deed was solely actuated by the desire to defeat and delay the creditors. The learned Judge rejected the contention urged on behalf of the defendants that the release deed would not amount to transfer since it is merely a change in the mode of enjoyment and, therefore, could not be assailed as fraudulent transfer u/s 53, T. P. Act. In support of his view, the learned Judge preferred to follow the decision of Madras High Court in *The Official Assignee, Madras Vs. Tehmina Dinshaw Tehrani and Another*, in preference to the view of the Oudh High Court in *B. Sundar Lal v. B. Gur Saran Lal* AIR 1938 Oudh 65. In the view of the matter which he had taken, the learned City Civil Judge granted the declaration that the impugned, release deed of February 11, 1972 was executed with intent to defeat and delay and hamper the claim of the creditors of the first defendant and, therefore, it should be set aside and be granted a further declaration that all the properties mentioned in para 18 of the plaint including the interest of original defendants Nos. 2 to 6 were liable for satisfying the debts of the first defendant, it is this judgment and decree of November 30, 1978 which is the subject matter of this appeal before us.

6. The following four contentions were urged on behalf of the appellants before us;

(1) The learned City Civil Judge was clearly in error in holding that the release deed would amount to a transfer and, therefore, would be within the purview of Section 53, T. P. Act.

(2) The learned City civil Judge failed to appreciate the evidence adduced by the first defendant that it was with a bona fide intention to release his interest from the joint family property that the release deed was executed, and whatever consideration received being the value of his 1/6th share in the said property was utilised for the sole purpose of paying the debts of the creditors of the first defendant and it, therefore, could not be concluded that the impugned release deed was executed with ulterior motive.

(3) in any case, on the own pleadings of the plaintiffs that the impugned release deed was a bogus and a sham transaction. Section 53 would not be attracted which postulates that there should be a genuine transfer between the parties.

(4) In any view of the matter, it could not have been urged successfully that the first defendant was indebted heavily at the relevant time of the execution of the impugned release deed, or for that matter who were the creditors so as to warrant the inference from the factum of the existence of some debts that the release deed in question was actuated with ulterior motive.

7. We will deal with these contentions in the same seriatim order in which they have been raised. However, we must, at the outset, state that we are not impressed by any of these contentions. Re : Contention No. 1:

8. The learned Advocates for the appellants were at great pains to persuade us that when a coparcener released his interest in the coparcenary property, or for that matter when the coparceners partition their property, there is merely a change in the mode of enjoyment which will not amount to transfer within the meaning of the term "transfer of property as prescribed in Section 5, T. P. Act, and if that be the correct position, and in submission of the learned Advocates for the appellants that is the position which is accepted in the classical Hindu law which is well established on the matter of principle as well as authority, it cannot be gainsaid that such a release deed, or for that matter such a partition cannot be assailed as equivalent to transfer within the purview of Section 53, T. P. Act. Though it is not necessary for us to refer to in details the various authorities cited at the bar since we are bound by the decision of the Division Bench of the Bombay High Court on this point, we have thought it" fit to examine alternatively this aspect of the question in the light of the decisions of different High Courts as well as the Supreme Court. In the first instance we must state that the contention is not open to the appellants in view of the concluded position so far as this Court is concerned by the decision of the Division Bench of the Bombay High Court. As back as in 1935 a Division Bench of the Bombay High Court consisting of Barles and Sen JJ. held in Waman Ramkrishna Ghotge Vs. Ganpat Mahadeo Nevagi, that a partition of joint family immovable property between coparceners of the family operates as a transfer within the meaning of the term as defined in Section 5. T. P. Act. 1882, and if fraudulent, falls within Section 53 of the said Act. The Division Bench was precisely concerned with the question of the validity of the deed of release executed by the two grandsons of a partner named Motiram of a partnership firm who was a member of Navagi family. The validity was challenged in the suits filed by another partner on the basis of two promissory notes executed by said Motiram on December 3, 1924 in which ultimately the decrees were granted. In execution of the said decrees, the entire family estate of Motiram was sought to be attached. It was claimed that on April 8, 1925, that is, five months before the filing of the aforesaid suits, two sons of Motiram executed a deed of release to the remaining members of the Navagi family and took as their share five items of property, two of which were

immovable properties and three were movables free from all debts. Their share, which together was one-sixth of the entire property, was valued at Rs. 8,800/-. In the execution, a contention was urged that there was a partition amongst the Navagi coparceners before the date of attachment and, therefore, the decree-holder was entitled to proceed against Motiram alone. The decree holder was, therefore, required to sue for declaration that the entire Nevagi estate was liable to attachment and sale in execution of the decrees, and that the farkhat and award-decree were fraudulent and liable to be set aside. In that context, the Division Bench of the Bombay High Court, speaking through Sen, J., held as under:

".....If seems to us that the line of reasoning on which the view of the Calcutta High Court is based is sound, and that for purposes of Section 53, T. P. Act, "partition", where the immovable property has been partitioned among co-owners by metes and bounds, must be held to be "transfer". This does not appear to be an unreasonable or farfetched interpretation, partition can in fact be adequately described as a mixture of the surrender and the conveyance of rights in property. There can be no doubt that a partition can be effected with as fraudulent an intent as a transfer in the ordinary sense, and we have no sufficient reason to suppose that the mischief sought to be remedied by this section does not include the fraudulent conveyance of rights involved in a fraudulent partition. We would, accordingly, hold that the partition in this case was a transfer within the meaning of this section."

9. The said decision was followed by another Division Bench of the Bombay High Court consisting of Bawdekar and Jahagirdar JJ. in *Jivram Jagjivandas Dave Vs. Kantilal Keshavlal Trivedi and Others*, where the Division Bench held that members of a coparcenary family under the Mitakshara law are entitled at any time they so choose, to put an end to the joint status among themselves, and a partition does not become fraudulent merely because it is effected even pending a creditor's suit. It however, ruled that it would amount to transfer, and in case it is shown that the partition, for example, was unfair to the creditor inasmuch as where the debt was due only from one member it assigned to that member property which was of less value than his proper share in the joint family property, then the transfer could be said to be in fraud of that particular creditor. It is held that similarly, where there is a body of creditors if it can be shown that the transfer is fraudulent of the creditors in this sense, then the plaintiff will be entitled to avoid the partition in a suit filed by him on behalf of himself and other creditors.

10. In *Soniram v. Dwarkabai*. AIR 5951 Bom 94. another Division Bench consisting of Bhagwati & Chainani JJ., held that a partition by metes and bounds between the members of a joint Hindu family amounts to a transfer within the meaning of Section 5. T. P. Act. The said Division Bench was concerned in that case with the question as to what would be a transfer within the meaning of the terms as used in the proviso to Section 2, Bombay Hindu Women's Right to

Property (Extension to Agricultural Land) Act, 1942. The joint family in Soniram's case consisted of five sons of one Ragho who died in 1918. In September, 1942, three sons of Ragho viz. Soniram, Beniram and Waman effected a partition of the joint family properties among themselves making due provision for the maintenance and residence of Dwarkabai and Bhagirathibai, who happened to be widows of Shridhar and Shankar the two pre-deceased sons of Ragho, who were plaintiff and defendant 1, respectively, in the suit out of which the appeal went before the Division Bench. The properties which were divided also included agricultural lands. It was assumed by the aforesaid three surviving brothers that they had the consent of the two widows of their deceased brothers and they, therefore, proceeded to enjoy the properties which fell to their respective shares as exclusive owners thereof. Dwarkabai filed suit in April 1946 against the descendants of the three branches of the family of Soniram. Beniram and Waman for recovering her 1/5th share in the properties by actual partition and for possession, mesne profits and costs. Bhagirathibai was impleaded as a defendant in the suit as she was entitled to an equal one-fifth share along with her. The properties in respect of which the suit was filed included the agricultural land also. The defendants inter alia contended that by virtue of proviso to Section 2 Bombay Hindu Women's Right to Property Act, the plaintiff and defendant 7 were not entitled to any share in the agricultural lands belonging to the joint family because in September 1942, that is before the Act had been passed, the transfer of agricultural land had been effected by and between the three brothers. The trial Court held that neither the plaintiff nor defendant 7 was consenting party to the partition. The trial Court was also of the opinion that the proviso was not attracted and would not operate to estop any party claiming partition in respect of the agricultural land. In that context, the Division Bench, speaking through Bhagwati. J., followed the earlier decision of the Bombay High Court in Waman Ramkrishna Ghotge's case (AIR 1936 Bom 10) (supra) and held as under in para 4 on page 97 :

"4. These observations do really show that even though there may be no acquisition of property as such by reason of a partition, the property having devolved upon the co-owners of the co-sharers by inheritance or having been held as joint family property by them by processes known to Hindu Law, the effect of partition is that the property which was hitherto enjoyed by all the members of the joint family as co-owners or co-sharers is after the partition, so far as the shares allotted to the respective members of the joint family are concerned enjoyed by them for their sole use and as their sole property. The co-ownership and the joint enjoyment no doubt come to an end and in its place and stead is substituted the sole enjoyment and the sole ownership of the property, which falls to the share of each member of the joint family, But as a necessary corollary of this, there is an extinction of the right which the other co-owners or co-sharers of the property had of enjoying that property in common with the co-owner or co-sharer to whose share that particular property is allowed as a result of the partition. That extinction of the right is brought about by what may be

described as the process of the exchange of similar rights between the various co-owners and co-sharers of the joint family property or by a renunciation at the right by the other co-owners or co-sharers in favour of the co-owner or co-sharer to whom the property is allotted as a result of the partition, or by a conveyance of these rights of enjoyment of the property in common by the other co-owners and co-sharers in favour of the co-owner or co-sharer to whom that property is allotted as a result of the partition, whatever be the process which may be said to bring about this result of the co-owner or co-sharer to whom the property is allotted by partition getting the property for his sole use, the result is that the person who gets the property on partition is constituted the sole owner of that property and he acquires in that particular property not only his own share, right title and interest therein which he erstwhile enjoyed but also the shares, right, title and interest of the other co-owners or co-sharers of his in that property. This certainly would be a transfer of property within the meaning of Section 5. T. P. Act, we are in perfect accord with that reasoning and we are of the opinion that a partition by metes and bounds between the members of a joint Hindu family amounts to a transfer within the meaning of the definition thereof contained in Section 5, T. P. Act."

11. This would have otherwise concluded the matter here since the first contention which has been urged on behalf of the appellants is covered so far as this Court is concerned. However, our attention was invited to the decision of the Supreme Court in V.N. Sarin Vs. Ajit Kumar Poplai, , where the Supreme Court was concerned with the Question as to whether a partition of a coparcenary property amongst the coparceners can be said to be an acquisition by transfer within the meaning of Section 14(6) Delhi Bent Control Act, 1958. In that context, rejecting the contention urged on behalf of the appellant that when an item of property belonging to the undivided Hindu family is allotted to the share of one of the coparceners on partition, such allotment in substance amounts to the transfer of the said property to the said person and it is, therefore, an acquisition of the said property by transfer, Gajendragadkar C. J., speaking for the Court observed as follows:

"10.....Prima facie, it is not easy to accept this contention. Community of interest and unity of possession are the essential attributes of coparcenary property; and so the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family. In other words, what happens at a partition is that in lieu of the property allotted to individual coparceners they, in substance, renounce their right in respect of the other properties they get exclusive title to the properties allotted to them and as a consequence, they renounce their undefined right in respect of the rest of the property. The process of partition, therefore, involves the transfer of joint enjoyment of the properties by all the coparceners into an enjoyment in severally by them of the respective properties allotted to their shares, Having regard to this basic character of joint Hindu family property, it cannot be denied that each coparcener has an antecedent title to the said property, though its extent is not

determined until partition takes place. That being so partition really means that whereas initially all the coparceners have subsisting title to the totality of the property of the family jointly, "that joint title is by partition transformed into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively.....As was observed by the Privy Council in *Girja Bai v. Sadashiv Dhundirai* (1916) 43 Ind. App. 151 : (AIR 1916 PC 104 :

"Partition does not give him (a coparcener) a title or create a title in him; It only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers",

12. It was urged on behalf of the appellants that having regard to the true nature of the partition and for that matter the renunciation or release of the coparceners share or interest which does not involve any transfer of right, title or interest, on principle and on authority as affirmed by the Supreme Court in *V.N. Sarin Vs. Ajit Kumar Poplai*, , the entire reasoning adopted by the three different Benches of the Bombay High Court for purposes of holding that a partition or a release deed amounts to transfer does not appear to be well founded and the view of the Bombay High Court is, therefore, now no longer a good law. We are afraid that this is too specious a contention to which we cannot agree easily since *Gajendragadkar J.*, speaking for the Supreme court in *Sarin's* case (*supra*) referred to the conflict of judicial opinion in relation to this aspect of the question in para 11 and observed as under:

"11.....It must be conceded that to a number of cases, the High Courts in India have held that partition amounts to a transfer within the meaning of Section 53 vide for instance, *Soniram Raghushet and Others Vs. Dwarkabai Shridharshet and Another*, and the cases cited therein. On the other hand, there are some decisions which have taken a contrary view, vide *Naramsetti Venkatappala Narasimhulu and Others Vs. Naramsetti Someswara Rao and Another*, and *Gutta Radhakristnayya minor, by mother and guardian Nagarattamma Vs. Gutta Sarasamma*, ."

The Supreme Court, however, in *Sarin's* case (*supra*), confined its decision to the narrow question which arose before it relating to construction of Section 14(6). *Delhi Rent Control Act. 1958.* and did not go into this larger question as to whether a partition would amount to transfer within the meaning of Section 5, T. p. Act. We do not, therefore, think that this question is *res integra*, since, we are bound by the decision of the Bombay High Court on this question. The learned Advocates for the appellants, therefore, attempted to persuade us that the Supreme Court has indicated in the very para 11 to which we have just referred to above, as to how the question whether a partition amounts to transfer or not is to be answered. The relevant portion of the said paragraph on which reliance has been placed by the learned Advocates for the appellants reads as under:

"11. Mr. Purshottam, however strongly relies on the fact that there is preponderance of judicial authority in favour of the view that a partition is a

transfer for the purpose of Section 53, T. P. Act. It will be recalled that the decision on the question as to whether a partition under Hindu Law is a transfer within the meaning of Section 53 naturally depends upon the definition of the word "transfer" prescribed by Section 5 of the said Act. Section 5 provides that in the following sections, "transfer of property" means an act by which a living person conveys property in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons....."

It was, therefore, urged on behalf of the appellants that before a partition or for that matter a release deed can be held to be a transfer within the meaning of Section 5, T. P. Act, it must be shown that it is, in effect and substance, a conveyance and if a given transaction amounts to a conveyance, it should be treated as a transfer. We are afraid that this very contention defeats the cause of the appellants because it is debatable so far as the impugned release deed with which we are concerned in this appeal, that it would not amount to conveyance. We are not expressing any opinion as regards this subsidiary contention urged on behalf of the appellants because the question has been kept wide open by the Supreme Court in Sarin's case (supra). Our attention was drawn to the legal position as to what is the true nature of partition, in Mulla's Transfer of Property, Sixth Edition, at page 53 where the position has been summed up by the learned author as under:

"Partition is not actually a transfer of property, but is analogous to an exchange, Mookerjee J., in a Calcutta case said that partition signifies "the surrender of a portion of a joint right in exchange for a similar right from the co-sharer". Spencer. J., in a Madras case said that a partition "effects a change in the mode of enjoyment of property but is not an act of conveying property from one living person to another". In Sarin v. Poplal, Gajendragadkar, C. J., has observed that "the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family".....The correct view," it is submitted, is that a partition is apt a transfer and therefore strictly not governed by the Act, but that many of the provisions of the Act may govern partitions as embodying rules of justice, equity and good conscience....."

Assuming, however, that partition and for that matter release deed does not amount to a transfer, within the meaning of the term "transfer of property" as prescribed in Section 5 and, therefore, not within the purview of Section 53, the principle of that section can be invoked and would apply even though the section may not apply in terms since the principle underlying it is of wider application and Section 53 is not exhaustive. If the object of a given instrument of a partition or a release deed is not merely to give to a sharer his rightful share in the family properties but to effect a partition in such a way that such a sharer would be able to defeat the creditors, it would amount to a fraudulent partition, It is a trite position of law that a statute pertaining to fraudulent transfer may not be applicable in terms but the principles contained therein are of general

application on account of their essential equity and it is essential to the effectiveness of such a jurisdiction that it should not be subject to defeated by unfair arrangements made with a view to preserving to the debtor the estate which ought to be applied in satisfying his debts (vide. Rangilbhai Kalyandas v. Vinayak Vishnu ILR (1887) Bom 666 677 and Abdul Hye v. Mirmussamut Mozuffer Hossein (1883 ILR 18 Cal 616 ..

13. The learned Advocate appearing on behalf of the respondent-plaintiffs I to 5 has drawn our attention to the two decisions of the Full Bench of Kerala and Nagpur High Courts where they have taken a similar view as we are inclined to take, in respect of the view which has been canvassed, and which we have considered on assumption that a partition or for that matter a release deed is not a transfer strictly within the definition of the term u/s 5, T. P, Act. and, therefore, within the purview of Section 53. A Full Bench of Kerala High Court in Thattaliyath Panchali and Others Vs. Cheruvari Panniyodan Manni and Others, as well as Full Bench of Nagpur High Court in AIR 1944 44 (Nagpur) have taken a similar view that Section 53 is not exhaustive and therefore, the principle of the section would apply in cases of fraudulent transfers even if the section may not apply in terms. The first contention, therefore, stands rejected. Re : Contention No. 2 :

14. We have been taken through the entire evidence on this aspect of the question and the relevant part of the judgment where this question has been dealt with by the learned City Civil Judge. The learned Judge has considered the admitted position as emerging from the evidence of the first defendant that his Hindu undivided family had only two immovable properties --one was a property in Kalyannager in Shahpur in the city of Ahmedabad and another was the property with which we are concerned in this appeal. The Kalyannagar property was a block in a residential building in Shahpur locality and was sold away in November, 1961 for Rs. 51,000/- with the result that the family was left with the only immovable property which is the subject matter of the present proceedings. The joint family of the first defendant has only one-half share therein and the value of the property, according to the first defendant, was Rs. 2,16,000/- with the result that the value of the share of his joint family would be to the tune of Rs. 1,08,000/- By the impugned release deed which has been produced at Ex. 51 on the record of the trial Court, the first defendant had purported to relinquish his right, title and interest in the said one-half share in the said property including his share in the property which has been already sold for a consideration of Rs. 20,000/- only. The learned Judge thereafter referred to the unequivocal admission made by the first defendant in his evidence that when they sold their Shahpur property and he executed the release deed of his share in the joint family interest in the suit property, it was done with full knowledge that the suits had been filed by the creditors against him. The learned Judge, therefore, concluded that it left no doubt in his mind that the only intention which the first defendant had in passing the release deed was to "see that the suit property was saved from the creditors. The learned Judge has recorded his

finding in the following terms;

"....As stated by me above, after the Kalyannagar property in Shahpur was sold away, the only substantial property, and the only immovable property that was left with the family was the Delhi Chakla property. Defendant 1 was fully aware of the fact that his creditors had filed suit against him. Suits Nos. 501 of 1970, 502 of 1970 and 503 of 1970 had been filed on March 2, 1970. After those suits were filed, and with the knowledge of those suits, the first defendant sold away the Kalyannagar block for a sum of Rs. 51,000/- and then he executed the impugned document Ex. 51, on February 11, 1972. He has also admitted that before 1972. His Highness of Chhota Udepur had obtained a decree for Rs. 10,000/- against him from the Bombay City Civil Court. Therefore, over and above the claims of the present plaintiffs against him, there was a decretal debt owed by him against the Ex-Ruler of Chhota Udepur. The total amount which the present plaintiffs Nos. 1 to 5 have claimed against him and against the other partners in the three suits Nos. 501, 502 and 503 of 1970. was just about Rs. 70,000/-, The decretal dues under the decree passed by the Bombay City Civil Court was about Rs. 10,000/- and plaintiff No. 6 added subsequently (O. S. Brothers) also had a claim against him in his capacity to the tune of about Rs, six to seven thousands. These facts would show that the first defendant was heavily indebted. Some of his creditors had filed suits; one of them had already obtained a decree from the Bombay Court, and the other suits were pending. If, under these circumstances, knowing full well the facts about the suits and the debts, he transfers his interest in the H. U. F., properties in favour of his wife and his sons, I think, there could be no escape from a finding that the transfer impugned by the plaintiffs has been made by him with an intent to defeat, delay or hinder claims of his creditors."

The learned City Civil Judge thereafter proceeded to consider whether the defendants have been able to establish the payment of the consideration, He found from the deposition of defendant 4. Bharat Dhirubhai Gandhi, that "the consideration was paid by cheque and the counter foil of the cheque by which the payment of Rs. 20,000/- was said to have been made to the first defendant towards the consideration of the release of his right, title and interest was produced by the said witness. The learned Judge, however, was unable to persuade himself that the fact of payment has been established since the original instrument, though called for, was not proved by proper evidence. The learned Judge also considered that though statements from the concerned Banks had been produced to prove this payment it was not proved as required by the Bankers Book Evidence Act, 1891. He was, therefore, unable to look into the counter instrument of cheque or statement of accounts and, therefore, concluded that the payment of the consideration has not been established. The learned Advocates for the appellants made a serious grievance about the erroneous conclusion of the learned City Civil Judge since the learned Judge ought to have, in the submission of the learned Advocates for the appellants, held that the consideration was proved from the counter foil of the cheque which was

produced in the evidence of Bharat Dhirubhai Gandhi, Assuming that the learned Judge was not right in holding that the factum of the payment of consideration was not established, even then, the matter will not conclude there. The real question is what was the intention of the parties to the impugned release deed in executing the said instrument and if the attendant circumstances, which in the present case are so speaking, are taken into consideration, the ultimate conclusion of the learned Judge that the release deed amounted to fraudulent transfer is, in our opinion, unexceptionable. It should be recalled that the most Important circumstance in the present case is that the parties have not made any provision for the debts of the first defendant who is the father of Defendants 3 to 6. It is an admitted position that besides the suit property, there was no other property of the joint family and none came to, the share of original defendant 1. except a sum of Rs. 20,000/- which is hardly amounted to less than 1/3rd of the total debts of the respondent-plaintiffs. It should be noted that on the own showing of defendant 1. he had other debts besides the debts of the plaintiffs, since he was claiming that he had utilised this amount of Rs. 20,000/- which he had received for the release of his interest towards the payment of such debts though this fact also has been found to be not proved by the learned Judge. In Waman Ramkrishna Ghotge's case (AIR 1936 Bom 10) (supra). the Division Bench of the Bombay High Court considered as to what, was the extent of the debts of and what was the value of the property which was allotted to the defendants releasing their rights, interest and title in the joint family property, and considered whether the share allotted to defendants 5 and 6 under the award and decree was sufficient to pay up the debts for which those two defendants were responsible and it was evident that their share being sufficient for this purpose, the members of the family could not have intended to defraud or delay their creditors by effecting such partition. Here the admitted circumstance that the parties to the impugned release deed have not considered the extent of the debts of the first defendant, and in any case, the value of the share which has been paid to him, is so meagre that he would be hardly able to pay about 25% of his total debts. This one circumstance alone is sufficient to establish that the intention was not merely to release his share in the interest of the suit property but was to defeat and delay the creditors. The second contention, therefore, also re-quires to be rejected.

Re: Contentions Nos. 3 & 4.-

15. Both these contentions are to be stated for being rejected. In support of the third contention, reliance is sought to be placed on the decision of Allahabad High Court in Roshan Lal v. Ramji Lal 1964 All LJ 1079 where the learned single Judge of the Allahabad High Court held that Section 53 postulates a genuine transaction, and if it is the case of the plaintiffs themselves that the transaction was a bogus and a sham one. Section 53 could be invoked. We do not think that this contention is well founded on the facts of the present case before us because the respondent-plaintiffs have in terms prayed far a declaration that the release deed being a fraudulent one in nature is not binding and that the entire joint

family property of the joint family of defendants 1 to 6 was available for the debis of the first defendant. In the decision of the Allahabad High Court, the Court has referred to the relief clause where the plaintiffs in the case before it sought a declaration that the transferee did not acquire any interest in the property detailed at the foot of the plaint by means of the sale deed and the learned judge, therefore, concluded that it left no room for doubt that his case was not that the sale deed was fraudulent and therefore voidable u/s 53 but that it did not represent a real and a genuine sale at all. We do not think, therefore, that the third contention has any substance in it.

16. The 4th contention is also to be rejected since admittedly the impugned release deed was executed when the suits were pending in which ultimately the respondent-plaintiffs have obtained decrees. The first defendant has clearly admitted in his evidence the pendency of those suits and that in spite of the knowledge of the suits the joint family had sold away the Shahpur property, and that he executed the impugned release deed. The 4th contention, therefore, also requires to be effected.

No other contentions have been urged.

17. The result is that" both these appeals fail and are dismissed The judgment and decree of the City Civil Court are confirmed The appellants shall pay one set of costs to the respondent-plaintiffs. Civil Application No. 3026/79 does not survive and it stands dismissed. Interim relief vacated

18. The learned Advocates for the appellants in both these appeals make an oral application for giving certificate under Art. 133 of the Constitution of India for enabling the appellants to prefer an appeal tp the Supreme Court. We do not think that there is any substantial question of law of general public importance which requires to be decided by the Supreme Court Oral application is therefore rejected.