

(1939) 04 MAD CK 0017
In the Madras High Court

Vellayya Konar (died) and Another

APPELLANT

Vs

Ramaswami Konar and Another

RESPONDENT

Date of Decision : 03-04-1939

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 1939 Mad 894 : (1940) ILR (Mad) 73 : (1939) 50 LW 248 :
(1939) 2 MLJ 400

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The question raised in this appeal is whether a suit brought by a creditor u/s 53 of the Transfer of Property Act for a

declaration that an alienation by the debtor is void against the creditors is a suit for cancellation of a document securing money or property falling

u/s 7(iv-A) of the Court-Fees Act as amended in Madras, or whether it is a suit to obtain a declaration where no consequential relief is prayed,

falling under Article 17-A of Schedule II of the same Act. Both the Courts below have found that the suit falls u/s 7(iv-A). The plaint recites that

the properties in suit are in the possession and enjoyment of the second defendant against whom the plaintiff got a decree on a promissory note, the

suit being filed on 2nd August, 1924 and decreed on 12th November, 1924. It is alleged that on 19th June, 1924, the second defendant,

collusively and with a view to cheat the plaintiff's claim, executed a sale deed in favour of his brother-in-law, the first defendant, conveying all his

properties benami and for no valid consideration, there being no intention that the sale deed should be given effect to. The plaintiff therefore prays

for a declaration that the properties conveyed to the first defendant are liable to

be attached in realisation of the decree debt obtained by the plaintiff against the second defendant and the plaint recites that the plaintiff sues for himself and as representing the other creditors of the second defendant. The judgments of both the Courts below seems to me to have proceeded on a misunderstanding of the cases quoted, one case in particular being quoted under one reference as supporting the plaintiff and the same case under another reference as supporting the contesting defendants and both the learned Judges seem not to have grasped the difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding upon the plaintiff. Leaving aside for the moment the complication due to the fact that the plaintiff in this suit sues in a representative capacity, the distinction between the two classes of suits seems to me to be well established by the decisions. When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has, been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void in toto and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled in toto. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore, in order to clear the way with a view to establish his title is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed. This distinction was made clear in *Unni v. Kunchi Amma* ILR (1890) 14 Mad. 26, which is followed in *Chathu Kutty Nair v. Chathu Kutty Nair* (1923) 19 L.W. 249, and the distinction is clearly observed in the cases quoted by the Court below, except that there is some obscurity arising from a decision of Ramesam, J., in *Balakrishna Nair v. Vishnu Nambudiri* (1930) M.W.N. 509, where though the learned Judge quite clearly has this distinction in mind, he frames his formula in rather more general terms than were perhaps desirable and on those grounds has been criticised by the Bench which decided the

case of Venkatasiva Rao v. Satyanarayanamurthi (1932) 62 M.L.J. 764 : ILR 56 Mad. 212. My attention has not been drawn to any decision

which throws any real doubt on the general proposition that when a person seeks to establish title which cannot be established without removing a

decree or an instrument to which he is himself a party, then whatever be the garb in which" he dresses his suit, its substantial character must be a

suit for the cancellation of the decree or instrument; but if the establishment of his title is being impeded by the effect of a transaction¹ between

other parties, he cannot legitimately ask for the cancellation of that transaction but can only ask for a declaration that so far as he is concerned, it is

not binding.

2. The respondent has quoted a decision of mine reported in Venkatakrishniah v. Alli Sahib AIR 1938 Mad. 921, which on the facts falls clearly

within the rule laid down in the decisions which I have quoted. 1 It was a case of a minor whose lawful guardian on his behalf made an alienation,

which the minor on attaining majority wished to get rid of as a preliminary to recovering possession of the properties alienated. He was through his

guardian a party to the alienation and necessarily had to get the conveyance cancelled before he could get possession of the properties. The

document of alienation, as I then stated, was an insuperable obstacle to the prayer for possession and it had to be declared void or cancelled.

Therefore, the relief came u/s 7(iv-A) of the Court-Fees Act. Now on the basis of my, observations in that case, it is contended that here the

alienation from the second defendant to the first defendant is an insuperable obstacle to the attachment of the property as the properties of the

second defendant in execution of a decree against the second defendant and that therefore the relief which the plaintiff prays for is in effect the relief

of cancellation; more especially as the suit is filed not only in the interests of the plaintiff himself but also of the other creditors, namely, of the

second defendant. It seems to me however that the same rule must be applied to suits u/s 53 of the Transfer of Property Act. The matter is made

clear by taking an extreme case. Suppose that the creditors together have debts amounting to Rs. 10,000 and that in fraud of the creditors the

debtor alienates properties worth Rs. 50,000, are we to take it that the creditors by their suit u/s 53 of the Transfer of Property Act are entitled or

required to pray for the cancellation of this alienation in toto? I do not think that they are. The form of the prayer would be, for a declaration that the alienation is not binding or is void so far as the creditors are concerned. Except in so far as the creditors are -concerned the alienation will stand and the creditors have no power to ask for its complete cancellation. The only circumstances in which a suit u/s 53 of the Transfer of Property Act would in effect bring about the complete avoidance of the transfer would be in the case when the value of the properties alienated is less than the amount of debts. But as between the alienor and the alienee, the transfer stands, subject only to the right of the creditors, established by the decree, to enforce their debts by the sale of the property just as if the transfer had not been made. What the creditors therefore seek is not the cancellation of the sale, but a declaration that it is not valid so far as their claims are concerned. In other respects, it may be perfectly good; that is a matter which does not concern the creditors; and the fact that they are creditors and that this transaction was entered into with the motive of defrauding them would not give them the right to have the sale cancelled except to the extent to which they have been defrauded. From this reasoning it seems to me to follow that the proper prayer in such a suit as that now filed is a prayer for a declaration that the sale is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the sale-deed.

3. In this view, I hold that the suit falls in substance under Article 17-A(1) of the Second Schedule of the Court-Fees Act and that the plaint has been wrongfully rejected by the Courts below. The appeal is therefore allowed and the suit remanded to the trial Court. Costs throughout will abide by the result of the suit. Court-fee paid here and in the lower appellate Court to be refunded.