C. Abdul Shukoor Saheb

Vs

Arji Papa Rao and Others

Civil Appeal No. 164 of 1962

(S. K. Das, K. Subha Rao, N. Rajgopala Ayyangar JJ)

14.11.1962

JUDGMENT

AYYANGAR, J. –

This appeal comes before us on a certificate of fitness granted by the High Court of Andhra Pradesh under Art. 133(1)(a) of the Constitution.

The following facts are necessary to be stated to appreciate the contentions urged before us. We consider it would be convenient to refer to the parties by their array in the trial Court. The 2nd defendant - firm Hajee Abdul Kadir Sahib and Lala Batcha Sahib & Co., had been apparently carrying on business in several places including Vizianagaram, Bellary, Madras etc., in skins and hides since 1941 when the partnership was formed between the 3rd and the 4th defendants. It was common ground that from about 1947 of 1948 the firm had not been doing any business in Vizianagaram and by the time it had contracted quit a large volume of debts, the tannery business there proving a loss. The two partners accordingly entered into a deed of dissolution dated March 31, 1949, in which it is stated that the book-debts, stock in trade, immovable properties and other assets including the goodwill of the firm were of the value of Rs. 2,90,000/-, and at the same time that the partnership which was admitted to be suffering losses owed debts to the extent of Rs. 2 1/2 lakhs. It was agreed between the partners that the 3rd defendant Abdul Shukoor Saheb should go out of the partnership taking with him one item of property in Vaniyambadi valued at Rs. 20,000/- while the suit tannery which was estimated as of the same value was to become the sole property of the 4th defendant who was described in the deed as "the continuing partner". Soon after this deed of dissolution the 4th defendant entered into an agreement with the plaintiff for the sale to him of the suit property for a sum of Rs. 19,000/-, and later executed the deed of sale on May 20, 1949. The plaintiff was, however, advised that it would be safer to have the conveyance in his favour executed by the other partner also and accordingly the 3rd defendant was also an executant of the sale deed. On the execution of the sale deed the plaintiff entered into possession and he claimed to have thereafter effected improvements to the property.

While so, the 1st defendant - Arji Papa Rao - filed suit O.S. 46 of 1950 in the Court of subordinate Judge at Visakhapatnam for the recovery of a sum of Rs. 12,950/5/8 against the 2nd defendant firm and its partners defendants 3 & 4 and obtained a decree for the sum claimed with interest and costs on June 19, 1951. Soon after filing the plaint he obtained an order for attachment before Judgment of the suit property and that order was on the passing of the decree made absolute, subject however, to the result of a claim petition which had been filed by the plaintiff for raising the attachment. The Subordinate Judge of Visakhapatnam dismissed the plaintiff's claim and this has led to the suit O.S. 145 of 1951 out of which this appeal arises to set aside that summery order under O. XXI, r. 63,

Code of Civil Procedure. The plaintiff impleaded as parties to the suit besides the attaching decree-holder who was made the 1st defendant, the debtor-firm and the two partners as defendants 2 to 4 respectively and the son of the 4th defendant who executed the sale deed as his agent under a power of attorney as the 5th defendant.

The plaintiff claimed that he purchased the property bonafide and for its full value, that since its purchase he having entered into possession, was in enjoyment thereof in his own right, paying the rates and taxes due thereon and had effected valuable improvements thereto, and that consequently the property was not liable to be attached as belonging to the partnership or any of its partners.

Broadly stated, the defence of the 1st defendant - the only contesting defendant, the others either remaining ex parte or supporting the plaintiff, was that the sale in favour of the plaintiff was either a sham and nominal transaction or in fraud of creditors of whom he was one. The trial court upheld the plaintiff's claim that the sale was real and was fully supported by consideration. It also negatived the contention raised by the first defendant that the sale was fraudulent as intended to defeat or delay creditors under s. 53(1) of the Transfer of Property Act. The 1st defendant filed an appeal to the High Court and the learned Judges reversed the decision of the trial-Judge and directed the dismissal of the plaintiff's suit. It is the correctness of this decision that is challenged in this appeal.

Learned counsel for the appellant raised four principal points in support of the appeal : (1) that on a proper construction of the written statement the only real and effective defence that was raised was that the sale in favour of the appellant was sham and nominal and that the Courts below were in error in proceeding on the basis that the sale was in the alternative impugned as brought about to defeat or delay creditors within s. 53(1) of the Transfer of Property Act; (2) that on the facts and circumstances of the case it had not been established that the sale in favour of the appellant was vitiated by fraud against creditors falling within s. 53(1) of the Transfer of Property Act; (3) that in any event, the plaintiff was a purchaser in good faith and for valuable consideration and was therefore protected even on the basis that the transferor intended, by the alienation, to defraud his creditors; (4) that on a proper construction of s. 53(1) of the Transfer of Property Act, as it now stands, read in the light of the provisions of the Code of Civil Procedure particularly those relating to claim petitions under O. XXI, rr. 58 to 63, a transfer which was voidable under s. 53(1) could be avoided only by a representative suit on behalf of creditors and not by an individual creditor who may be defeated or delayed, by way of defence to a suit to set aside a summary order under O. XXI, r. 63, Code of Civil Procedure.

We shall deal with each of those points and in that order. There is no doubt that the written Statement has not been artistically drafted, keeping in view the real distinction between a sham an nominal sale which is not intended to pass title and a sale which is real but which is voidable at the instance of creditors because the transfer is intended in the language of s. 53(1) of the Transfer of Property Act "to defeat and delay creditors". In paragraph 2 of the Written Statement the 1st defendant stated :-

> "The said sale deed is sham, nominal and collusive document not intended to pass any title but brought about to screen the suit properties from the creditors of defendants 2 to 5. No consideration passed under the sale deed and the recitals thereof in the document are fictitious and make-believe."

The paragraph however, further went on to add :

> "It is further submitted that even if the sale deed is true, it is fraud of creditors including the plaintiff and not binding on them."

In paragraph 3 the allegation was made that the plaintiff was the relative of defendants 2 to 5, that the plaintiff and the vendors were natives of the same place and that the sale deed was clandestinely brought into existence at Madras at a time when defendants 2 to 5 were hard-pressed by the plaintiff and other creditors and unable to pay their debts at Vizianagaram and that in order to put the properties beyond the reach of the creditors, defendants 2 to 4 seem to have hit upon the fraudulent device of the alleged sale to the plaintiff". In the light of these averments it cannot be said that the defendants did not raise two distinct pleas (1) that the sale was a sham, a pretended sale without any consideration and not intended to pass any title to the nominal purchaser and in the alternative (2) that even if it were a real transaction supported by consideration and intended to pass title to the plaintiff, still the same was, having regard to the circumstances stated, a fraud upon the creditors and therefore voidable at his instance. Though the pleading in the Written Statement was in this form, the issues struck did not raise the two defences as distinct pleas but rolled both of them into a single plea raising the question "whether the plaintiff had title to the suit property and whether the claim order was liable to be set aside."

Notwithstanding the indefiniteness in the frame of the issues it could not be said that when the parties proceeded to adduce evidence the same was not directed to both the above defences. As we have necessarily to consider this evidence in dealing with the submissions made to us regarding the correctness of the dismissal of the plaintiff's suit by the High Court it is unnecessary to set out the details of the evidence which indicates that the defence based upon s. 53 of the Transfer of Property Act was borne in mind. At the stage of the arguments before the trial Judge it was the subject of keen contest between the parties. The learned trial Judge first dealt with the question as to whether the sale was real as pleaded by the plaintiff or whether it was without consideration and sham and nominal not intended to pass any title, and recorded a clear finding in favour of the plaintiff. After having done so he considered in detail the various circumstances which were relied on by the first defendant in support of the plea that the sale was in fraud of creditors so as to be voidable under s. 53(1) of the Transfer of Property Act. He negatived this plea and upheld the plaintiff's claim to the Property and passed a decree in his favour. In these circumstances we consider that there is no force in the objection that there has not been a sufficient plea of a defence based upon s. 53 of the Transfer of Property Act as to justify or entitle the court to afford relief if satisfied that the same was proved.

Before dealing with the second point it is necessary to make a few observations in relation to certain submissions made by learned Counsel for the appellant. This was in relation to the manner in which the learned Judges of the High Court had approached this question and arrived at a conclusion adverse to his client. The learned Judges had formulated the questions to be considered in the appeal as follows :-

> "The main point that falls to be considered in this appeal is whether the sale deed in favour of the plaintiff, Exhibit A-2, is a genuine transaction supported by consideration; and, if on this point the finding is in favour of the plaintiff, the further question that falls to be determined is whether the suit sale-deed was executed in fraud of creditors and as such not binding on the first defendant and other creditors of defendants 2 to 5. If the finding on this issue is that the transaction was in fact in the fraud of creditors, the further question that would arise for consideration is whether the plaintiff could claim to be the transferee in good faith and for

consideration so as to claim the benefit of the exemption contained in section 53 of the Transfer of Property Act."

Learned Counsel had no quarrel with the proposition as here set out or the mode of approach, but his complaint was that in dealing with the appeal these were not kept in view. He urged that they did not consider either initially or even later the question as to whether the sale to the plaintiff was real or was sham and nominal unsupported by consideration and though they stated in one portion of the judgment that they did not propose to consider this question because they were satisfied that the decision on the other points might be sufficient to dispose of the appeal, yet they made passing observation which appeared to throw doubt on the reality of the sale. Again, learned Counsel pointed out that though they had formulated the two questions viz., (1) assuming the sale to be real whether the sale was intended by the transferor to defeat or delay creditors, and (2) assuming the sale was voidable under s. 53(1) of the Transfer of Property Act whether the plaintiff was a bone fide purchaser in good faith, as distinct and separate questions, in the discussion which followed they did not keep these two points separate. Besides, it was urged that there were some statements of assumptions made in the judgment which were entirely not warranted by the facts. We cannot say that there is not same force in these submissions. In view of this, the course which we intimated to the learned Counsel that we would adopt was that we would ourselves consider the entire evidence on the record and arrive at our own conclusions on such evidence in regard to the two issues : (a) whether the sale was in fraud of creditors, and (b) whether the plaintiff was a bone fide purchaser for value and that if it became necessary to arrive at any finding as regards the reality of the sale, we would remand the appeal to the High Court for the matter being considered since the learned Judges had expressly reserved the consideration of that question.

We shall now proceed to consider the facts and circumstances of the case which are relevent to the issue as to whether the sale was to defeat or delay creditors. There was some argument before us about the burden of proof in such cases but learned Counsel for the appellant submitted that he would assume for the purpose of argument that the onus was upon the plaintiff-purchaser and that he would satisfy us that that burden had been discharged. This apart, we consider that the question of onus of proof is merely academic at this stage because the entire evidence is before us and except in a rare case where the considerations are evenly balanced, it would have little significance. The circumstances which are relevant for the consideration of this question are these : The second defendant-firm was in financial embarrassment at the time of the sale. The deed of dissolution dated March 31, 1949 recites that the business carried on by the firm was resulting in losses and that the debts amounted to about 2 1/2 lakhs of rupees. No doubt, it is there stated that the assets of the firm were by consent of the parties estimated of the value of Rs. 2,90,000/-. This estimate however included the value of the goodwill, which would not be of any real value in the case of a losing business of this sort and we do not know how mush was attributed to this item. This apart, the assets were said to be made up of book-debts, stock in trade, immovable property etc. There is however, no indication as to the relative value of these several components to judge whether or not the alienation of the suit property would have the effect of delaying, if not defeating the creditors. It can however be asserted that the picture presented by the deed of dissolution is certainly of a firm whose financial position was far from satisfactory. There is no evidence on the record whether the partners or either of them had any property of their own besides the assets of the partnership for discharging the debts due to the firm's creditors. Though the 4th defendant filed a written Statement supporting the plaintiff, the plaintiff did not choose to examine him as a witness in order to elucidate this matter or otherwise explain the circumstances in which the impugned sale was effected.

The next feature to be noticed is that the plaintiff and the 4th defendant were both members of the

same community - labbais of North Arcot district, a fairly small and well-knit community several of whom are engaged in the hides and skins business. The learned Judges of the High Court have referred to the plaintiff and the 4th defendant as natives of the same place and as relatives. Learned Counsel for the appellant pointed out that whereas the 4th defendant was a native of Vaniyambadi, the plaintiff was native of Parnambet and the suggestion made that they were relatives had been denied in the evidence. Learned Counsel might be right on these matters but we consider that not much turns on them. Both of them were conducting business in Madras and the plaintiff had also a business in Vizianagaram though it was in bidis and not in hides and skins. In these circumstances we consider that it matters little whether they were relatives or not. The significance of the plaintiff and his vendors being members of the same community and well-known to each other consists in this, that the plaintiff might have been chosen because of his willingness to take the sale without any searching enquiry as to the circumstances necessitating it, and because there would be less publicity in the transaction being put through between them-such as for instance inspection of the property or enquiries in the locality as regards value etc., which would take place if the sale was to be to a total stranger which would attract the attention of the firm's creditors.

The next circumstance is as regards the pressure exerted on the 3rd and 4th defendants by the creditors immediately prior to the impugned sale and which, in the normal course of events, would be relevant as providing that the sale was effected in order to put the property beyond the reach of creditors by converting it into cash. On April 20, 1948, O.S. 162 of 1948 on the file of the District Munsiff's Court, Vizianagaram was filed for the recovery of Rs. 1,016/- on a promissory note for Rs. 1,000/- executed by the firm. On September 8, 1948, it was reported as adjusted out of court. Besides this some other suit were filed for the recovery of amounts from the partnership but they were defended and were ultimately dismissed. Then we come to O.S. 191 of 1949 in which the plaint was presented on April 4, 1949, for recovery of a sum of Rs. 1,385/- and odd which was decreed with interest and costs on November 22, 1949. The date on which this last mentioned suit was filed is of some significance because of another suit which was filed at about the same time. One Damayanti presented a plaint on March 9, 1949, against the firm for the recovery of Rs. 3,000/- being the principal and interest due on a promissory note. The date fixed for the appearance by the defendant was April 4, 1949. It will be noticed that the deed of dissolution was executed on March 31, 1949. The defendant did not enter appearance on the day fixed and the Court passed an ex parte decree on April 5, 1949; for the amount claimed. She filed an application for execution on April 18, 1949, and obtained an order on April 21, 1949, for the attachment of the suit property though the attachment was actually effected on June 8, 1949, because the court was closed for the summer vacation. Long before these dates the 4th defendant had made up his mind to alienate the suit property and we have a latter from the 4th defendant to the Plaintiff as early as February 5, 1949, which evidences negotiations for the sale of the property. There was apparently some higgling about the price which caused some delay and a few days after the attachment was ordered, on April 27, 1949, a formal agreement of sale was entered into between the plaintiff and the 4th defendant under which he agreed to purchase the property for a sum of Rs. 19,000/- and the agreement recited that the purchaser, i.e., the plaintiff had paid a sum of Rs. 10,000/- in advance as earnest money and the sale deed itself was executed on May 20, 1949. In pursuance of the order dated April 21, 1949, Damayanti attached the suit property as already stated on June 8, 1949 and thereupon the plaintiff filed a claim under O. XXI, r. 59, Code of Civil Procedure, for raising the attachment but this, however, was dismissed on November 16, 1950, and thereafter the amount of the decree was paid up by the judgment-debtor just a few days before the expiry of the one year period of limitation for filing the suit under O. XXI, r. 63, Code of Civil Procedure. A suggestion was made to the plaintiff while he was examined in the case that it was he who had paid up the decree debt of Damayanti but

he denied it and we shall proceed on the basis that debt was discharged by the judgment-debtors themselves. For the purpose of establishing that the firm was hard pressed by its creditors at the time of the negotiations which resulted in the sale impugned in these proceedings and at the time of the sale, it matters little who paid this decree-debt.

Next we have the circumstance that though the properties were at Vizianagaram, the document was registered at Madras and the suggestion made to the plaintiff was that this was meant as a measure of secrecy to keep this alienation from the knowledge of the firm's creditors. The explanation offered by the plaintiff was that having regard to the distance between the native places of the two parties from Vizianagaram and the proximity of these to Madras and the fact that both the Plaintiff as well as the executants were at Madras it was found more convenient to have the document presented for registration at Madras instead of incurring the expenses of a journey to Vizianagaram for having it registered there. The learned trial Judge accepted this explanation and held that the registration of the sale deed at Madras was not a suspicious circumstance indicating an intention to keep the transaction secret. The learned Judges of the High Court, however, considered it otherwise and expressed the view that this was done in order to keep the transaction secret. We are inclined to agree with the learned Judges of the High Court in their appreciation of this piece of conduct. Admittedly, the 4th defendant had his agents at Vizianagaram and similarly the plaintiff himself had his men there to look after his bidi business. There was no impediment in these circumstances and no expenses of travelling involved if only the 4th defendant had executed a power of attorney in favour of some one at Vizianagaram to present the document for registration and admit its execution. In fact, it may be mentioned that even the sale deed now impugned was executed not by the 3rd and 4th defendants but by the 4th defendant's son - K.L. Abdulla in whose favour a general power of attorney was executed on April 26, 1949, apparently immediately the agreement for sale was concluded. It is in the light of this feature that we are not disposed to dismiss as irrelevant the circumstance that the document was registered at Madras.

The next feature of the case to which we must direct attention relates to the purpose for which the sale was executed. As regards this, there is no evidence led to indicate why exactly the 4th defendant desired with some urgency to dispose of the property at that juncture. The relevant circumstance in the present case is that there was a great deal of pressure from creditors, who not having been paid the amounts due to them as and when they became due, were forced to file suits and those which were decreed were those which were not defended and the firm was mulcted with costs under each of these decrees. In the circumstances one would expect an explanation as to why the sale was being effected. Ordinarily in circumstances such as in this case there could only be two alternatives : (1) a sale in order to pay the creditors out of the proceeds obtained; and (2) a sale in order to convert immovable property which was capable of being attached and brought to sale for the realisation of the amounts due to the creditors into cash, which could either be secreted or used for the vendor's own proposes. If the purpose was as that indicated in the first of the above alternatives the proceeds of the sale would have been earmarked for the payment of particular debts for which pressure was the greatest. It is needless to add that if this were the case and if creditors who were not so provided were defeated or delayed it would merely be a case of a fraudulent preference which could be impugned only under the law relating to insolvency and not as a fraud on creditors for which s. 53 of the Transfer of Property Act makes provision. It is, however, common ground that apart from the sale deed not making any provision that the consideration was to be utilised for the discharge of any particular debts, it is not the case of the plaintiff that there was any such stipulation as to the application of the money or that without any stipulation therefor the money was so utilised. It would therefore not be an unreasonable inference to drew from the circumstances of the sale at the juncture at which it took place that the vendor's object was merely to

convert this immovable property into cash, so that it may not be available to the creditors.

Before leaving this point it is necessity to advert to one matter which was suggested by learned Counsel for the appellant. He submitted that the property sold was only a part of the assets of the partners and that unless there was evidence to show that nothing was left available for the creditors after the impugned sale, its validity could not be impugned under s. 53 of the Transfer of Property Act. We consider that there is no force in this submission. As a matter of fact, there is no evidence as to what other properties the partners had beyond what is contained in the deep of dissolution on March 31, 1949. But that apart, the terms of s. 53(1) are satisfied even if the transfer does not "defeat" but only "delays" the creditors. The fact therefore that the entirety of the debtors' property was not sold cannot by itself negative the applicability of s. 53(1) unless there is cogent proof that there is other property left, sufficient in value and of easy availability to tender the alienation in question immaterial for the creditors. In the present case, as already pointed out, we have no definite evidence as to the nature and quality of the property left as available to the creditors after the impugned alienation, and though light on this could have been thrown by the 4th defendant being called as a witness, the plaintiff did not choose to take the step, nor indeed did he even summon the production of the accounts of the firm which might have disclosed the true state of affairs.

Each of these circumstances might be capable of some explanation consistent with the case that the transfer now impugned was effected in the normal and ordinary course of business by the 4th defendant for some purpose which did not involve an intention to defeat or delay his creditors, but the question we have to consider is their cumulative effect and so viewed the conclusion appears irresistible that the object of the transaction was to put the property out of the reach of the creditor. The transfer was therefore plainly within the terms of the 1st paragraph of s. 53(1) of the Transfer of Property Act and was voidable at the instance of the 1st defendant who was a decree-creditor.

The next question is whether the plaintiff is a bona fide purchaser for value so as to be protected by the second paragraph of s. 53(1) reading :

> "Nothing in this section impairs the rights of the transferee in good faith and for consideration."

As stated earlier, the learned trial Judge held that the Rs. 19,000/-, the sale price was the full value of the property and that the consideration as recited in the document was paid by the purchaser. This finding has not been set aside by the High Court. We are, therefore, proceeding on the basis that the Transfer was real and supported by consideration. The narrow question is whether the plaintiff was a transferee in good faith. It was submitted on behalf of the appellant that the learned Judges of the High Court had directed the dismissal of the plaintiff's suit even without a definite finding that the plaintiff was a party to the fraud on the part of the transferor to defeat or delay the creditors. There might be some force in this submission that these is no specific finding to that effect but that does not in any way assist the appellant. Where fraud on the part of the transferor is established i.e. by the terms of paragraph (1) of s. 53(1) being satisfied, the burden of proving that the transferee fell within the exception is upon him and in order to succeed he must establish that he was not a party to the design of the transferor and that he did hot share the intention with which the transfer had been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. When once the conclusion is reached that the transfer was effected with the intent on the part of the transferor to convert the property into cash so as to defeat or delay his creditors, there cannot be any doubt on the evidence on record that the plaintiff shared that intent. For this purpose the following circumstances may be points out :

(1) The plaintiff and the vendor belong to the same community, a small, compact and well-knit one and they must obviously have known each other having been in trade for several years in several places in common and must therefore have been well-acquainted with the financial and business affairs of each other.

(2) This general inference apart, the plaintiff admittedly had with him a copy of the deed of dissolution dated March 31, 1949, which disclosed that the firms's business had resulted in losses and that it was greatly indebted, the debts amounting to Rs. 2 1/2 lakhs.

(3) If as we have held that registration of the sale deed at Madras was with a view to keep the transaction secret from the creditors, the plaintiff was as much a party to the secrecy as the transferor.

(4) One matter which would be of considerable relevance and significance in this connection would be the enquiries that the plaintiff made before he look the transfer. He no doubt led evidence to show that he consulted his lawyers about the title of the vendor; but any attempt at an enquiry of the 4th defendant as to why he was effecting the sale of the only immovable property of the firm which was alloted to him under the deed of dissolution is significantly absent.

In the circumstances, it stands to reason that the plaintiff must be fixed with notice of the design in pursuance of which the transfer was effected. If the object of a transferor who is heavily indebted was to convert his immovable property into cash for keeping it away from his creditors and knowing it the transferor helped him to achieve that purpose it has naturally to be held that he shared that intention and was himself a party to the fraud. In this connection, there is one circumstance which is rather significant. Even when the plaintiff was fixed with notice that the firm's business had been running at a loss and had accumulated a very large volume of debts as disclosed by the recitals in the deed of dissolution which was placed in his hands, the purchaser did not insist that the consideration which he was paying should be utilised for the discharge of at least some of the debts. We are therefore satisfied that the plaintiff was not a transferee in good faith and that the transfer itself was a scheme by the transferor with the knowledge and concurrence of the transferee to put the property out of the reach of the creditors. The result therefore would be that the plaintiff's suit was liable to be dismissed for the reason that the defence plea invoking s. 53(1) of the Transfer of Property Act was made out.

What remains for consideration is a point of law that was raised on behalf of the appellant that a transfer which is voidable under s. 53(1) of the Transfer of Property Act can be avoided only by a suit filed by a creditor impugning the transfer on behalf of himself and the other creditors and not by way of defence to a suit under O. 21, r. 63, Code of Civil Procedure by a claimant whose application has been rejected in summary proceedings under O. 21, rr. 58 to 61, Code of Civil Procedure.

Section 53(1) of the Transfer of Property Act, as it stands at present, is as amended by the Transfer of Property (Amendment) Act (Act 20 of 1929). As part of the argument on this head was based on a comparison of the provisions of the section before and after the same was amended, we shall set out in parallel columns s. 53(1) as it stood before it was amended in 1929 and as it stands as amended :

#_____
____ |S. 53(1) as it stood before | S. 53(1) as it standsthe Amending Act, 1929. | after the Amending Act,
1929._____|_____
_____"Every transfer of immovable "Every transfer of immovableproperty made with intent to property made with intent todefraud prior or subsequent defeat or delay the creditorstransferees thereof for of the transferor shall beconsideration or co-owners or voidable at the option of anyother persons having an creditor so defeated orinterest in such property or delayed.to defeat or delay thecreditors of the transferor, is Nothing in this sub-sectionvoidable at the option of shall impair the rights ofany person so defrauded or a transferee in good faithdelayed. and for consideration.Where the effect of any Nothing in this sub-sectiontransfer of immovable property is shall affect any law forto defraud, defeat or delay the time being in forceany such person, and such relating to insolvency.transfer is made gratuitouslyor for a grossly inadequate A suit instituted by aconsideration, the transfer may creditor (which term includesbe presumed to have been made a decree-holder whetherwith such intent as aforesaid. he has or has not applied for execution of his decreeNothing contained in this to avoid a transfersection shall impair the rights on the ground that itof any transferee in good faith has been made with intentand for consideration." to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors."##

Two points were made by the learned Counsel in support of this submission; the first being independent of the amendment effected by the Act of 1929 and the other based on the provision as amended. The former was based on the impact of the nature of the proceedings under O. 21, rr. 58 to 61, Code of Civil Procedure, and of the order that would be passed therein and particularly of the questions that would arise in a suit under O. 21, r. 63 Code of Civil Procedure, to set aside summary orders; while the latter was based on the amendment by which a creditor's suit was required to be in a representative capacity.

It would be seen that so far as the first point was concerned, the amendment made no change and that if the learned Counsel were right the position would have been the same even on the section as it stood before it was amended. It was conceded that on the section as it stood prior to the amendment, there was a direct decision against this argument, of a Full Bench of five Judges of the Madras High Court as early as 1920 (Ramaswami Chettiar v. Mallappa Reddiar ((1920) I.L.R. 43 Mad. 760.)) which had been consistently followed by every other High Court in India up to this date without any doubt or dissent. Learned Counsel however urged that this Court was not precluded from considering the correctness of this decision notwithstanding its having held the field for over forty years without question. As a legal proposition, Counsel is undoubtedly right, but the question is whether any reasons have been adduced before us to consider that that decision was wrong.

We shall be presently setting out the reasoning on which it is contended that an attaching creditor who has succeeded in the summary proceedings under O. XXI, rr. 58 to 61, cannot, in a suit to set aside the summary order under O. XXI, r. 63, raise by way of defence the plea that the sale in favour of the plaintiff - the transferee-claimant is vitiated by fraud under s. 53(1) of the Transfer of Property Act, but before doing so it is necessary to point out that this very argument was urged before the Full Bench referred to and after elaborate consideration, rejected by them.

Now the argument as regards the inference to be drawn from the nature of the enquiry in the

summary proceedings for investigating claims to property which has been attached is briefly as follows : s. 53 of the Transfer of Property Act assumes that there is a real transfer intended to pass title to the transferee but that the transfer is vitiated by fraud which renders it voidable. In the summary proceedings under O. XXI, rr. 58 to 61, having regard to the terms of r. 61, the Court is concerned only with the question as to whether the transferee is in possession of the property in his own right and not on behalf of the judgment-debtor. When a transfer is real, though it is liable to be impeached as a fraud on creditors, and the transferee has entered into possession, he would succeed in the summary proceedings, with the result that it is the defeated attaching creditor who would have to figure as a plaintiff. If he figures as a plaintiff the suit would have to be in a representative capacity, that is, under O. I, r. 8, Code of Civil Procedure. In every case, therefore, when a transfer is real but is liable to be set aside under s. 53(1) on the provisions of O. XXI, rr. 58 to 61, Code of Civil Procedure, the transferee is bound to succeed in the summary proceedings and the attaching decree holder would have to figure as a plaintiff and the suit would be a representative suit. From this it is said that it follows that in no case can an attaching creditor who defends a suit to set aside a summary order in his favour resist it on the plea of fraud under s. 53(1).

It would however be seen that this last step which is vital for the argument to have force does not follow for the argument does not proceed on any construction of the terms of s. 53(1) nor on any legal theory as to the mode or procedure by which the intention to avoid the transaction which the attaching creditor claims is voidable at his instance may be expressed or enforced. The argument would only establish that if the Court investigating claims under O. XXI, r. 58 etc., conformed strictly to the terms of those provisions the transferee under a real sale would succeed in those proceedings and he would be a defendant and need not be a plaintiff in suits to set aside the summary order under O. XXI, r. 63. This line of reasoning does not take into account at least the following possibilities : (1) The claim or objection by the transferee may be rejected, not on the merits but because it has been designedly or unnecessarily delayed (vide O. XXI, r. 58, Code of Civil Procedure). It is certainly not the contention of learned Counsel that when there is a rejection of a transferee's claim under this provision the order of rejection is any the less final and has not to be set aside by a suit contemplated by O. XXI, r. 63, Code of Civil Procedure, in order to overcome the effect of that finality. (2) The Court making the summary enquiry might come to an erroneous conclusion that the transfer is sham and not real or that the transferee is in possession for the benefit of the judgment-debtor. In the suit filed by the transferee to set aside this erroneous order, the plaintiff would have to establish his title and even if he succeeds in showing that the sale to him was real and effective, still the question would remain whether, having regard to the circumstances of the transfer, the same is not voidable under s. 53(1). Thus there would be occasions when a defeated transferee whose transfer is real might have to figure as a plaintiff in a suit to set aside a summary order under O. 21, r. 63, Code of Civil Procedure. (3) The attaching decree-holder might raise in the summary proceedings two alternative defences to a transferee's claim (a) that the sale was sham and nominal and therefore the possession of the transferee was really on behalf of the judgment-debtor, and (b) that even if the sale be real and intended to pass title it was voidable as a fraud on creditors. It is, no doubt, true that the second or the alternative defence is not open in the claim proceedings, but if however the same were erroneously entertained and an order passed, rejecting the claim of the transferee, the same would nevertheless be an order which would have to be set aside by a suit by the defeated transferee and he cannot ignore it.

It would thus be seen that the entire argument as regards the impact of the nature of the enquiry under O. 21, r. 59, on the defences which would be open in a suit under O. 21, r. 63, depends on two factors : (1) the summary order being passed on the merits and not because the making of the claim was designedly or unnecessarily delayed, and (2) the summary order being right on the merits and

strictly in conformity to the provisions of the Code.

As we have already pointed out, the points urged before us as regards the scope of the enquiry into claim petitions was also the subject of elaborate argument and consideration by the learned Judges of the Madras High Court in the Full Bench. Sadasiva Ayyar, J., classified the cases of transferees who failed in their claim petitions and had to file suits to set aside summary orders under O. 21, r. 63, under three heads : (a) Where the transferee was a mere benamidar; (b) Where he was a fraudulent transferee in possession; and (c) Where he was a fraudulent transferee not in possession. The learned Judge said:

> "A creditor decree-holder, who is in most cases a stranger, cannot reasonably be expected to know of his own knowledge whether a transfer by his judgment-debtor is only fraudulent or is wholly nominal or partly nominal and partly fraudulent, and whether the transferee is in possession and if in possession, whether he is so for himself or for the judgment-debtor. He would therefore, usually both in the claim-petition and in the suit which afterwards arises out of the order against the claimant, be obliged to raise and be justified in raising alternatively all the pleas open to him, and the Court which decided the claim against the claimant might, in its conclusions on each of the three points, be either right or wrong."

He further pertinently pointed out that to hold that a plea based on the transfer being voidable under s. 53(1) could not be raised in defence to a suit to set aside a summary order would mean that "The creditor decree-holder would be in a much worse position for his success in the summary claim proceedings than if he had lost in those proceedings".

Section 53(1) of the Transfer of Property Act rendered the transaction voidable at the instance of the creditors if the transfer was effected with the particular intent specified and the statute does not prescribe any particular method of avoidance. Referring to this the learned Judges observed :

> "If the creditor knowing of the transfer applies for attachment; the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under O. 21, r. 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid and entitles him to succeed in the subsequent suit under r. 63".

They further pointed out that

> "the suit under r. 63 is by the unsuccessful party to the claim-petition 'to establish the right which he claims to the property in dispute'. Whether this suit be instituted by the attaching decree-holder or by the transferee claimant, it must equally be decided in favour of the former if the transfer is shown to have been fraudulent; because, in consequence of the fraudulent character of the transfer and its avoidance by the judgment-creditor, the result is that the transferee has not the right which he claims, namely, to hold the property free from attachment in execution by the judgment-creditor."

The learned Judges based their conclusion on this and on several other lines of reasons which we consider unnecessary to set out, but it is sufficient to say that we are in entire agreement with all of them. There is therefore no substance in the point that there is anything in s. 53(1) as it originally

stood which precluded a defence by an attaching-creditor to a suit to set aside a summary order under O. 21, r. 63, that the sale in favour of the plaintiff is vitiated by fraud of the type specified in the earlier quoted provision and the amendment has admittedly made no change in this matter.

It was next urged that the third paragraph of the amended s. 53(1) has effected a change in the law and that thereafter transfers voidable under 1st paragraph of s. 53(1) could be avoided only in suits filed by a defeated or delayed creditor as plaintiff suing on behalf of himself and other creditors. We consider that there is no substance in this objection either.

We shall first refer to the purpose of the amendment. In decisions rendered prior to the amendment, there were a large number in which it was held, following certain English cases decided with reference to 13 Eliz., Ch. 5, on which s. 53(1) was based, that suits by creditors for avoiding a transfer under s. 53(1) was a representative action. To that general rule however, an exception was recognised in a number of decisions when the suit was to set aside a summary order under O. 21, r. 63, and was brought by an attaching decree-holder against whom an adverse order had been made in the summary proceedings, it being held that such a suit need not be in a representative capacity. The decisions on this point were however not uniform. It was merely to have a uniform rule and to avoid these conflicting decisions that the third paragraph was inserted so that after the amendment the rule that a suit by a creditor should be brought in a representative capacity would apply as much to a suit set aside a summary order under O. 21, r. 63, as to other suits. It was not suggested that there was anything in the terms of the amended s. 53(1) which referred to a defence to a suit and, in fact, learned Counsel did not contend that if a defence under s. 53(1) could be raised by defeated attaching-creditor such a defence had to be in a representative capacity, and we consider that learned Counsel was correct in this submission. From a provision as to how a plaintiff, if he filed a suit, should frame it, we can see no logical process by which it could be held that a defendant cannot impugn the validity of the sale which is voidable at his instance. We have, therefore, no hesitation in rejecting the legal point urged on behalf of the appellant.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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