

SURYA-
NARAYANA
v.
RAMADOSS,
—
SESHAGIRI
AYYAR, J.

which is taken as a self-acquisition. *Mussumat Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry*(1) related to property which vested in the widow of the adopted son. In this present case, the first adopted son died unmarried. We must therefore overrule this contention.

For the above reasons the decision of the District Judge in so far as it dismissed the suit of the first plaintiff must be reversed and his decree should be modified by declaring that the first plaintiff as adopted son is entitled to the share decreed to the second plaintiff. The memorandum of objections must be dismissed with costs. The appellants are entitled to their costs in this and in the Court below and the costs will be taxed on the value of the property decreed to the first plaintiff.

AYLING, J.

AYLING, J.—I agree.

K.R.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Ayling, Mr. Justice Seshagiri Ayyar and
Mr. Justice Bakewell.*

1917,
September,
18.

SUBRAMANIA AYYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

A. L. V. R. R. M. MUTHIA CHETTIAR (DECEASED) AND OTHERS
(DEFENDANTS AND LEGAL REPRESENTATIVES OF THE FIRST DEFENDANT),
RESPONDENTS.*

Fraudulent alienation to defeat or delay creditors, whether binding, until set aside by suit—Transfer of Property Act (IV of 1882), sec. 53, nature of suit under—Attachment of alienated property—Claim by alienee—Suit by unsuccessful claimant—Plea of attaching decree-holder of fraudulent nature of alienation validity of.

An alienation which is not a sham transaction but is only a fraudulent one intended to defeat or delay creditors of the alienor, is only voidable and continues in force until set aside in proceedings properly instituted for the purpose; and in a suit by the alienee to set aside an adverse order passed against him in claim proceedings, it is not open to an attaching decree-holder against the alienor to plead in defence the fraudulent character of the alienation.

(1) (1865) 10 M.I.A., 209.

* Second Appeal No. 691 of 1916 (F.B.).

Palaniandi Chettiv. Appavu Chettiar (1916) 30 M.L.J., 565, approved.

Abdul Kadir v. Ali Mia (1912) 14 I.C., 715; s.c. 15 C.L.J., 649, not followed.

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Quære: Whether a suit by a creditor to avoid an alienation as infringing section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of all the creditors?

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Subordinate Judge of Coimbatore, in Appeal No. 14 of 1916, preferred against the decree of S. P. SUBRAHMANYA AYYAR, the Additional District Munsif of Erode, in Original Suit No. 203 of 1915.

The facts are given in the first two paragraphs of the judgment of AYLING, J.

This second appeal having been originally posted for admission before SADASIVA AYYAR and NAPIER, JJ., the following ORDER was delivered by

SADASIVA AYYAR, J:—Post before a Full Bench as we think that the correctness of the judgments in *Palaniandi Chetti v. Appavu Chettiar* (1) ought to be considered by a Full Bench on the questions whether a suit ought to be brought by creditors to set aside a deed voidable as against creditors before it could be declared void and whether such a suit could be brought by a single creditor in his own interest or ought to be brought on behalf of all the creditors.

The case accordingly came on for hearing before AYLING, SESHAGIRI AYYAR and BAKWELL, JJ.

A. Krishnaswami Ayyar for *L. S. Viraraghava Ayyar* for the appellants. A transfer though fraudulent within section 53 of the Transfer of Property Act is good until avoided; and the way in which this could be done is by having it avoided by an action whether on behalf of all the creditors or otherwise: see form 13 of forms of decrees in Civil Procedure Code, Appendix B; *Palaniandi Chetti v. Appavu Chettiar* (1), *Hakim Lal v. Mooshahar Sahu* (2), *Iswar Timappa v. Devar Venkappa* (3), *Chatterput Singh v. Maharaj Bahadur* (4), Order of BAKWELL, J., in Civil Suit No. 113 of 1911. *Subramania Pillay v. Dakshinamoorthy Mudaliyar* (5), which is the other way, is the decision of a single Judge (SUNDARA AYYAR, J.): see *Phul Kumari v. Ghanshyam Misra* (6).

(1) (1916) 30 M.L.J., 565. (2) (1907) I.L.R., 34 Calc., 999 at p. 1007.

(3) (1903) I.L.R., 27 Bom., 146.

(4) (1905) I.L.R., 32 Calc., 198 (P.C.) at p. 217. (5) (1912) M.W.N., 369.

(6) (1908) I.L.R., 35 Calc., 202 (P.C.).

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V. C. Seshachariar for the respondents. The matter is governed by section 53 of the Transfer of Property Act. No action need be brought to set aside the alienation; for any result that could be achieved by bringing a suit could also be achieved by a plea in defence impeaching the alienation: *Abdul Kadir v. Ali Mia*(1), a case exactly on all fours. *Subramania Pillay v. Dakshinamoorthy Mudaliar*(2) shows that the settled practice of this Presidency is to attach without bringing any such suit. Reference was made to *Hem Chandra Sarkar v. Lalit Mohan Kar*(3), *Sinaya Pillai v. Munisami Aiyar*(4), *Babaji v. Krishna*(5), and *Ramu Aiyar v. Palaniappa Chetty*(6).

AYLING, J.

AYLING J.—In this case the appellants (plaintiffs) are purchasers of the suit property from second defendant by a sale-deed, Exhibit A, dated 20th June 1904. The first defendant, subsequent to this sale, obtained a decree against second defendant in Small Cause Suit No. 1960 of 1905, and in 1913 attached the suit properties in execution. Plaintiffs preferred a claim; on the dismissal of which they filed the present suit for declaration of their title, and for cancellation of the summary order on their claim.

The suit failed in both the lower Courts, the Subordinate Judge holding in first appeal that the sale was a fraudulent transaction intended to defeat or delay second defendant's creditors, though not a mere sham transaction.

It is now argued in second appeal that it is not open to the first defendant to set up such a defence in the present suit; and that the sale must be held good against him unless and until he obtained a decree setting it aside in proceedings suitably instituted for that purpose. Mr. A. Krishnaswami Ayyar relies on a recent ruling of this Court, *Palaniandi Chetti v. Appavu Chettiar*(7), and the second appeal appears to have been specially ordered to be heard by us with a view to the correctness of this ruling being considered by a Bench of three Judges.

Speaking for myself I have carefully considered the judgment in the case referred to and the arguments of Mr. Seshachariyar who has endeavoured to show us that the decision is wrong. The facts are absolutely analogous to those in the present case. It

(1) (1912) 14 I.C., 715; s.c., 15 C.L.J., 649. (2) (1912) M.W.N., 363.
 (3) (1912) 16 C.W.N., 715, 717. (4) (1899) I.L.R., 22 Mad., 289.
 (5) (1894) I.L.R., 18 Bom., 372. (6) (1912) I.L.R., 35 Mad., 35.
 (7) (1916) 30 M.L.J., 565.

is unnecessary for us in the present case to consider whether a suit by a creditor to avoid an alienation as infringing against section 53 of the Transfer of Property Act must be brought in a representative capacity on behalf of the body of creditors, but apart from this I have no hesitation in concurring in the views expressed by COUTTS TROTTER and SESHAGIRI AYYAR, J.J., in that case. The only case quoted by Mr. Seshachariyar which has not been dealt with in their judgment and which appears to have any bearing on the question is a Calcutta case not reported in the regular series, *Abdul Kadir v. Ali Mia*(1). With all respect I cannot agree with the decision. I do not find in it sufficient authority for the proposition advanced by Mr. Seshachariyar that anything which can be made the basis of a suit can be pleaded as a bar in action: and I agree with my learned brother SESHAGIRI AYYAR, J., in *Palaniandi Chetti v. Appavu Chettiar*(2) that a sale such as the one we are considering must be held to continue in force until it is set aside in proceedings properly instituted for the purpose.

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 —
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It follows that the decree of the lower Courts in the present suit should be set aside and plaintiffs be given a decree as sued for with costs throughout.

SESHAGIRI AYYAR, J.—I agree. The further arguments addressed to us by Mr. Seshachariyar have not convinced me that my view in *Palaniandi Chetti v. Appavu Chettiar*(2) is wrong and that an attaching creditor as defendant can obtain a declaration that the sale by his judgment-debtor which he has not sued to set aside is in fraud of his and other claims against the common judgment-debtor and that on that ground the suit should be dismissed.

SESHAGIRI
 AYYAR, J.

BAKEWELL, J.—I agree.

BAKEWELL, J.

N.R.

(1) (1912) 14 I.C., 715; s.c., 15 C.L.J., 649. (2) (1916) 30 M.L.J., 565.