it would in my view not be an order passed on an application made in accordance with law. If the application, on the other hand, were not defective, it would necessarily be admitted and a final order would be passed on it in due course. When it is defective and no order can be passed on it except an order—if order it can be called—that the defect can be remedied in a certain time, it seems to me that it falls altogether outside the provisions of article 182 (5).

I agree that this appeal must be dismissed with COSTS.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

VELLAYA KONAR (DIED) AND ANOTHER (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

1939, April 3.

v.

RAMASWAMI KONAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Court Fees Act (VII of 1870), sec. 7 (iv-A) as amended by the Madras Act (V of 1922) and art. 17-A (i) of schedule II of the Act—Suit by creditor under sec. 53 of the Transfer of Property Act (IV of 1882) for a declaration that an alienation by a debtor is void against creditors—Proper prayer—Article applicable in such a case.

A suit brought by a creditor under section 53 of the Transfer of Property Act for a declaration that an alienation by the debtor is void against the creditors is not a suit for cancellation of a document securing money or property falling under section 7 (iv-A) of the Court Fees Act as amended in Madras,

* Second Appeal No. 959 of 1935.

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but is a suit to obtain a declaration where no consequential relief is prayed, falling under article 17-A (i) of Schedule II of the same Act. The proper prayer in such a suit 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.

Case-law reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 115 of 1934 preferred against the decree of the Court of the District Munsif of Koilpatti in Original Suit No. 60 of 1934.

A. Swaminatha Ayyar and *S. Thyagaraja Ayyar* for appellants.

S. Ramaswami Ayyar for first respondent.

Second respondent was not represented.

JUDGMENT.

WADSWORTH J.

WADSWORTH J.—The question raised in this appeal is whether a suit brought by a creditor under section 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 under section 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 under section 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 realization 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 seem 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

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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*(1) which is followed in *Chathu Kutty Nair* v. *Chathu Kutty Nair*(2) 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 Numbudiri*(3) 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 criticized by the Bench which decided the case of *Venkatasiva Rao* v. *Satyanarayanamurty*(4). 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 transaction 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.

(1) (1890) I.L.R. 14 Mad. 26.
(2) (1923) 19 L.W. 249.
(3) 1930 M.W.N. 509.
(4) (1932) I.L.R. 56 Mad. 212.

The respondent has quoted a decision of mine reported as *Venkatakrishniah* v. *Alli Sahib*(1), which on the facts falls clearly within the rule laid down in the decisions which I have quoted. 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 under section 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 of the second defendant. It seems to me however that the same rule must be applied to suits under section 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 under section 53 of the Transfer of Property Act are entitled or required to pray for the

(1) A.I.R. 1938 Mad. 921.

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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 under section 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.

In this view, I hold that the suit falls in substance under article 17-A (*i*) of Schedule II 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.

V.V.C.

APPELLATE CIVIL

Before Mr. Justice Burn and Mr. Justice Stodart.

NARAYANAN CHETTI AND ANOTHER, MINORS, BY THEIR MOTHER AND GUARDIAN UMAYAL ACHI (PETITIONERS), APPELLANTS,

1939, September 1.

v.

PANCHANATHAN CHETTIAR AND EIGHT OTHERS (RESPONDENTS 1 AND 4 TO 11), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 16—Applicability—Hindu father—Decree in favour solely of—Execution of, by his sons after his death—Recognition by Court which passed the decree, of the devolution on the sons, of the decree—Necessity—Sons entitled to the benefits of the decree along with father.

A decree passed solely in favour of a Hindu father cannot after his death be executed by his sons without recognition by the Court which passed the decree of the devolution upon them of the decree, even though the sons may be entitled along with their father to the benefits of the decree.

The sons are not "decree-holders" as defined in section 2 of the Code of Civil Procedure. The decree having been transferred to them by operation of law on the death of their father, Order XXI, rule 16, of the Code is applicable.

Ramsewakprasad v. *Saran Singh*(1) disapproved.

APPEAL against the order of the District Court of West Tanjore dated 14th April 1937 and passed in

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*Appeal Against Order No. 31 of 1938.

(1) A.I.R. 1937 Pat. 607.