

APPELLATE CIVIL

Before Mr. Justice Ismail

MUHAMMAD ASGHAR ALI AND OTHERS (DEFENDANTS) v.
 . MUHAMMAD ISHAQ ALI AND ANOTHER (PLAINTIFFS)*

1939
 September,
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Civil Procedure Code, order XXI, rule 63—Objection by purchaser from judgment-debtor to attachment allowed—Decree-holder's suit for declaration that the property belonged to judgment-debtor and was saleable in execution and that the sale by the judgment-debtor was void as it was a fraudulent transfer—Maintainability of suit—Whether suit must be a representative suit for the benefit of all the creditors—Transfer of Property Act (IV of 1882), section 53.

Where, upon attachment of property in execution of a decree, an objection by the judgment-debtor's vendee that the property belongs to him is allowed and the decree-holder brings a suit under the provisions of order XXI, rule 63 of the Civil Procedure Code for a declaration that the property is attachable and saleable in execution of the decree and that the transfer by the judgment-debtor is void as against him as it was a fraudulent transfer, the suit is maintainable and he is not compelled under section 53 of the Transfer of Property Act to bring a representative suit on behalf of or for the benefit of all the creditors of the transferor.

In such a suit under order XXI, rule 63 the plaintiff can sue on his own behalf alone for having the alienation declared void, without mention of any other creditors or their debts, and there is no reason why he should be compelled to allege or prove that the transfer was made with intent to defeat or delay creditors generally if he only wants a declaration in a limited form that the transfer is void as against him.

Mr. *Baleshwari Prasad*, for the appellants.

Mr. *Inam-ullah*, for the respondents.

ISMAIL, J.:—This is a defendant's appeal arising out of a suit brought for a declaration that the property described in the plaint was attachable and saleable in execution of decree No. 252 of 1928 and that the plaintiff was entitled to get rateable distribution out of the sale proceeds under other decrees in his favour. A

*First Appeal No. 129 of 1938, from an order of Sheo Harakh Lal, Civil Judge of Budaun, dated 21st of January, 1938.

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further declaration was prayed for that the two sale deeds of 22nd February, 1934, executed by Hamid Ali in favour of Asghar Ali and others were ineffectual and void as far as the decrees in favour of the plaintiff were concerned. The suit was resisted by the defendant *inter alia* on the ground that the suit as framed was not maintainable inasmuch as it was not a representative suit on behalf of or for the benefit of all the creditors. The trial court dismissed the suit on the preliminary ground that the suit as framed was not maintainable. The lower appellate court, however, took a contrary view and held that this was a suit under order XXI, rule 63 of the Civil Procedure Code and the reliefs claimed could be given in the present suit. Learned counsel for the appellant has reiterated the objection taken on behalf of his client in the courts below. It is contended that if the suit were limited to the relief that the sale deeds in question were fictitious the plaintiff alone could bring the suit on his own behalf. On the other hand, if the plaintiff pleaded that the sale deed was fraudulent and was executed with the intention to defeat and delay the creditors it would come within the purview of section 53 of the Transfer of Property Act and a representative suit would have to be instituted. It is contended that on the allegations in the plaint the present suit comes within the purview of section 53 of the Transfer of Property Act and was rightly dismissed by the trial court. In the body of the plaint the plaintiff has set out the facts on which the suit is founded. In paragraph 6 it is stated that the plaintiff had warned defendants 1—8 (vendees) that the defendant No. 9 (vendor) was liable under several decrees in favour of the plaintiff; that the defendants vendees dishonestly and with full knowledge of facts obtained two sale deeds in their favour. There is no mention whatsoever in the plaint that the transfers are null and void as against other creditors.

Rule 63, order XXI of the Code provides that "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute . . ." This suit, as the plaint discloses, is instituted merely to establish the right of the plaintiff and has no concern whatsoever with the possible claims which other creditors may have against the judgment-debtor. I fail to see why the suit as framed is not maintainable. In my judgment it was not necessary for the plaintiff on the facts alleged to bring a representative suit on behalf of or for the benefit of all the creditors. Learned counsel has referred to the case of *A. K. A. Chidambaram Chettyar v. R.M.A.R.S. Firm* (1) in which DUNKLEY, J., held: "When a suit is brought under the provisions of order XXI, rule 63 by an attaching creditor to establish his right to attach and bring to sale certain property, and in order to succeed it is necessary to avoid a transfer of the property on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be brought in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor as provided for in section 53 of the Transfer of Property Act." A similar view was expressed by the same learned Judge in *Maung Tun Thein v. Maung Sin* (2). In an earlier case, *U. Maung Nge v. P. L. S. P. Chettiar Firm* (3), a Bench of that Court, of which DUNKLEY, J., was a member, held: "A creditor whose attachment has been raised and who avails himself of the right given by order XXI, rule 63 can sue on his own behalf alone for having the alienation declared void, without mention of any other creditors of their debts." In that case the plaintiff alleged that the deed of transfer was a bogus one and was brought about for the purpose of defeating or delaying the creditors. In that case an earlier ruling in *R. R. O. O. Chettyar Firm v. Ma Sein Yin* (4) was followed.

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(1) A.I.R. 1934 Rang. 302.

(2) A.I.R. 1934 Rang. 332.

(3) A.I.R. 1934 Rang. 200.

(4) A.I.R. 1928 Rang. 1.

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The same question came up for consideration before the Bombay High Court in *Guljarkhan Abdul Gafurkhan v. Husenkhan* (1). The learned CHIEF JUSTICE held: "A suit brought under order XXI, rule 63 of the Civil Procedure Code by a judgment creditor need not in all cases be filed on behalf of the plaintiff and all other creditors. There is no reason why the creditor should be compelled to prove that the document was made with intent to defeat and delay creditors generally if he only wants a declaration in a limited form that the transfer is void as against him." In *Shrimal Kasturchand v. Hiralal Hansraj* (2) it was held: "A judgment creditor who has been defeated at the instance of an intervenor in proceedings taken in execution of his decree need not necessarily file a representative suit under section 53 of the Transfer of Property Act." This question was lately considered in two unreported cases in this Court. In *Kulsoom Bibi v. Ram Das Pathak* (3) the plaintiff prayed for a declaration that the suit property was attachable and saleable for the recovery of amounts due under the decrees in his favour. The plaintiff's case was that the sale deed set up by the defendant was a mere paper transaction and that no money had passed from the transferor to the transferee and that the sale deed was entirely fictitious. It was further stated that the plaintiff was entitled to bring a suit for his own benefit and for the benefit of other creditors. The learned Judges quoted with approval the case of *Guljarkhan Abdul Ghafurkhan v. Husenkhan* (1) and held that in the circumstances of the case the suit was maintainable. This case was followed in *Sharbati Devi v. Kanwal Koer* (4).

In my judgment there is no statutory provision to prevent the plaintiff from instituting the present suit on his own behalf. In the result I affirm the order of the court below and dismiss this appeal with costs.

(1) A.I.R. 1937 Bom. 476.

(2) A.I.R. 1938 Bom. 289.

(3) S.A. No. 1178 of 1935, decided on 1st December, 1938.

(4) S.A. No. 1980 of 1936, decided on 11th January, 1939.