APPELLATE CIVIL

Before Mr. Justice A. H. deB. Hamilton

SHEO MAHEEP BIKRAM SINGH AND OTHERS (DEFENDANTS APPELLANTS) *v.* MAHANT THAKUR DAS DISCIPLE OF MAHANT RAM KUMAR DAS (PLAINTIFF-RESPONDENT)* 1940 *February*, 9

Hindu Law—Joint Hindu family—Undivided interest of a member attached—Death of the member—Attached property, whether can be sold after his death—Decree—Execution of decree against undivided share of Hindu co-parcener—Execution, whether can be sought against part of the share of the co-parcener—Civil Procedure Code (Act V of 1908), order I, rule 8, and order XXI, rule 63—Transfer of Property Act (IV of 1882), section 53—Representative suit—Creditor proceeding under order XXI, rule 63, whether bound to bring representative suit—Creditor proceeding under order XXI, rule 63, whether bound to bring representative suit.

Where the undivided interest of a member of a joint Hindu family is attached during his lifetime in execution of a decree against him, it may be sold after his death whether the order for sale was made in his lifetime or after his death.

There is no rule which forces a decree-holder to ask for execution against the whole of the undivided share of a Hindu co-parcener when the sale of only a part of it would be sufficient.

Order I, rule 8, Civil Procedure Code, deals with persons in existence at the time the suit is brought and is to prevent the actual existing danger, namely, the bringing of suits by such persons and not a possible future danger which may never mature, namely, the coming into existence at some unknown period of persons who become creditors of the defendant in that suit. *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (1), *R. R. O. O. Chettyar Firm* v. *Ma Sein Yin* (2), *China Mal* v. *Gul Ahmad* (3), and *Shrimal Kasturchand Marwadi* v. *Hiralal Hansraj Marwadi* (4), referred to.

A creditor proceeding under order XXI, rule 63, Civil Procedure Code, who does not know of the existence of other creditors is not bound to bring a representative suit to

*Second Civil Appeal No. 179 of 1937, against the order of Mr. S. Abid Raza, Civil Judge of Gonda, dated the 25th January, 1937.

(1) (1918) I.L.R., 42 Mad., 143. (2) (1928) A.I.R., Ran., 1.
(3) (1923) A.I.R., Lah., 478. (4) (1938) I.L.R., Bom., 445.

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represent persons of whose existence he is not aware. It is for the defendant, who as debtor knows whether he has other creditors, to object that there are other creditors and that a representative suit should be filed. If he does not raise such objection, the court is entitled to hold that there are no other creditors and the plaintiff therefore can sue for himself alone. *Girraj* v. *Sankata Prasad* (1), and *A. K. A. C. T. V. Chettiyar* v. *R. M. A. R. S. Firm* (2), referred to.

Messrs. *L. S. Misra*, and *Sri Ram*, for the appellants.

Mr. *Har Dhian Chandra*, for the respondent.

HAMILTON, J.:—This is a second appeal by defendants.

The plaintiff Mahant Thakur Das held a decree for money against Mahabir Singh and when he applied for execution by sale of certain property, defendants 1 to 3 who are nephews of Mahabir Singh, filed an objection on the basis of a sale-deed which purported to have been executed in their favour by Mahabir Singh and the property was released from attachment. The plaintiff then filed this suit for a declaration that the sale-deed was fictitious and fraudulent and was executed with the object of defeating the plaintiff's claim against Mahabir Singh.

It was found that Mahabir Singh and these nephews formed a joint Hindu family and the deed of sale was fictitious and invalid.

Two points have been raised in this appeal—one, that the plaintiff should have brought a representative suit and as he has not done so his suit must be dismissed and the other that Mahabir Singh died during the pendency of the suit in the original court and when he died, as he was a member of a joint Hindu family, there was no longer any property against which the plaintiff could proceed.

This second contention can be disposed of quickly. The contention would have been sound if the undivided interest of Mahabir Singh had not been attached in his lifetime in the execution of a decree against him for his

(1) (1937) O.W.N., 1169. (2) (1934) I.L.R., 12 Rang., 666.

personal debt. After his death then it could not be attached as against his nephews as it ceased to be his interest and passed to the other coparceners by survivorship. If, however, as here, the undivided interest is attached during his lifetime it may be sold after his death whether the order for sale was made in his lifetime or after his death, *vide* paragraph 289 of Mulla's Hindu Law.

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It has been urged here that the execution application was against a share of about five pies as if it was a separate share and not against the undivided interest of Mahabir Singh. Had partition been simultaneous with the attachment, the share of Mahabir Singh on partition would have been found to be about 8 pies so that the decree-holder was really seeking execution against part of the undivided share of Mahabir Singh. I know of no rule which forces a decree-holder to ask for execution against the whole of the undivided share of a Hindu coparcener when the sale of only a part of it would be sufficient. The decree-holder would have been more correct had he applied for sale of a fraction of the undivided share of Mahabir Singh which would have worked out at about five-eighths but as at the time of attachment the share would have worked out at about 8 pies and what was attached, which was about five pies, can be sold after the death of Mahabir Singh, there is no practical difficulty.

Taking now the first point the learned counsel for the appellant says that under section 53 of the Transfer of Property Act a decree-holder being a creditor suing to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor must sue on behalf of, or for the benefit of, all the creditors. There are certain cases which deal with the point before the amendment of section 53 of the Transfer of Property Act which came into force in April,

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1930, such as *Kottarathil Puthiyapuravil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (1), *R. R. O. O. Chettyar Firm* v. *Ma Sein Yin* (2), *and China Mal* v. *Gul Ahmad* (3). The one decision after the amendment to which my attention has been called is *Shrimai Kasturchand Marwadi* v. *Hiralal Hansraj Marwadi* (4). It was there held that a suit brought under order XXI rule 63 of the Code of Civil Procedure by a judgment-creditor, who has been defeated at the instance of an intervener in proceedings taken in execution of his decree, need not necessarily be a representative suit under section 53 of the Transfer of Property Act, on behalf of the general body of creditors. A number of earlier decisions have been referred to and there is a relevant passage on page 451. Reference has here been made to order I, rule 8 of the Code of Civil Procedure, which deals with procedure in a representative suit. This order I, rule 8 states that where there are numerous persons having the same interest in one suit, one or more of such persons may sue on behalf of or for benefit of all and notice has to be given to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement as the court in each case may direct, and any of such persons may then apply to be made a party to such suit. The principle of a representative suit is to prevent a defendant from being vexed and molested by other similar suits by other persons of the body. Personal service can obviously not be made on non-existing persons and it is only when such existing persons are numerous that there may be another form of service such as public advertisement. No such service, personal or otherwise, can be of any use whatsoever when there are no persons in existence on whom service can be made. It appears to me, therefore, that order I, rule 8 deals with persons in existence at the time the suit is brought and is to prevent

(1) (1918) I.L.R., 42 Mad., 143.
(2) (1928) A.I.R., Ran., 1.
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the actual existing danger, namely, the bringing of suits by such persons and not a possible future danger which may never mature, namely, the coming into existence at some unknown period of persons who become creditors of the defendant in that suit.

If we consider section 53 of the Transfer of Property Act it is not easy to imagine a transfer made with intent to defeat or delay creditors who are not in existence at the time of the transfer. The wording of section 53 indicates that it applies to cases where there are more than one creditor but only one brings a suit. To safeguard the defendant the plaintiff should name other creditors and other creditors are safeguarded against possible damage to their interest by order I, rule 8 because they are allowed to join in the suit if they are not prepared to rely on the creditor who is actually suing. The learned counsel for the appellant says that a creditor, even if he thinks he is the only one, must bring a representative suit or, at any rate, he must say that he is not bringing a representative suit because he does not know of the existence of other creditors. If he brings a representative suit believing that he has no other creditor I do not see how he can comply with the requirements of order I, rule 8 as he cannot take steps for serving persons whose existence he does not know of. It seems to me that he is entitled, at any rate if he does not know that there are other creditors, to bring a suit for himself alone and it is for the defendant then to object that a representative suit is required because there are in fact other creditors. In the present case there is no evidence that there are any other creditors. *Girraj* v. *Sankata Prasad* (1), expressed a doubt as to whether a plaintiff instituting a suit according to the provisions of order XXI, rule 63 was not bound by the provisions of section 53(1) of the Transfer of Property Act. The point did not have to be decided and in any case there was no consideration of the point whether a

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(1) (1937) O.W.N., 1169.

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representative suit should be brought when there was no evidence of the existence of any creditor other than the plaintiff. In *A. K. A. C. T. V. Chettiyar* v. *R. M. A. R. S. Firm* (1), the suit brought was properly brought as a representative suit so that the remark that a creditor must bring a representative suit in view of the amendment of section 53 was *obiter dictum* and anyhow it did not consider whether a representative suit must be brought when there is nothing to show that there are other creditors besides the one that brings the suit.

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In my opinion a creditor proceeding under order XXI, rule 63 who does not know of the existence of other creditors is not bound to bring a representative suit to represent persons of whose existence he is not aware. It is for the defendant who as debtor knows whether he has other creditors to object that there are other creditors and that a representative suit should be filed. If he does not raise such objection, the court is entitled to hold that there are no other creditors and the plaintiff therefore can sue for himself alone.

I do not think it necessary to go further into the question whether a plaintiff suing under order XXI, rule 63 must bring a representative suit if there are other creditors in existence.

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) (1934) I.L.R., 12 Rang., 666.