

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, and Mr. Justice Brown.

1927

June 15.

R.R.O.O. CHETTYAR FIRM

v.

MA SEIN YIN.*

Transfer of Property Act (IV of 1882), s. 53—Intention to defeat all creditors, when to be inferred—Attaching creditor whether can sue on his own behalf only.

Defendant's sister transferred all her landed property to defendant, with whom she was living. The alleged consideration was only about half the value of the property. The alleged object of the sale was to pay off the sale proceeds to some creditor who had made no demands, and for whose debt the defendant's sister was said to be only liable jointly with her two sisters. The sale was effected during the pendency of a monetary suit by the appellants against defendant's sister and her husband who was living separately from his wife. She got the suit postponed on the ground of illness, but really to gain time to to effect the transfer of land, and then allowed the suit to go *ex parte*. An antedated agreement between the sisters was also effected to make the sale appear genuine. Appellants attached the property in execution of their decree, but the respondent caused the attachment to be removed on the strength of the sale deed. Appellants filed a declaratory suit against her under the provisions of Order 21, Rule 63 of the Civil Procedure Code.

Held, that under the circumstances of the case, the debtor's intention must be taken to defeat and delay not only the appellants, but all other creditors as well, and that the respondent being not a *bona fide* purchaser, the sale must be set aside.

Held, also, that a creditor whose attachment has been raised and who avails himself of the right given by Order 21, Rule 63 of the Code can sue on his own behalf alone for having the alienation declared void, without mention of any other creditors or their debts.

K. P. Pokker v. B. P. Kunhamad, 42 Mad. 143—*followed*.

Naidu—for Appellants.

Paw Tun—for Respondent.

RUTLEDGE, C.J., AND BROWN, J.—The appellants brought a suit in the Township Court of Thongwa under Order 21, Rule 63, Civil Procedure Code praying

* Letters Patent Appeal No. 77 of 1926.

that a certain transfer to the respondent-defendant dated 4th March 1924 may be declared null and void and that an attachment by the appellant in Civil Execution No. 23 of 1924 may be restored. The Township Judge dismissed appellant's suit finding that the transfer was a genuine one and not fraudulent or *benami*.

On appeal, the District Court found that the transaction was void under section 53 of the Transfer of Property Act, being made with intent to defraud and delay the transferor's creditors.

On appeal to this Court, the decision of the District Court was reversed and that of the Township Judge restored, but the learned Judge gave a certificate under the Letters Patent, one of the questions for further consideration being whether he was right in holding that the plaint was merely one to avoid a sham transaction. Clause 5 of the plaint runs as follows: "That the alleged sale was a fraudulent and *benami* transaction deliberately made up by 1st and 2nd defendants with a view to defraud the creditors and to defeat the execution of the said decree by rendering the attachment of the said land ineffective."

It cannot be alleged that this paragraph is artistic, but, in dealing with pleadings in this country and especially in the districts, we must bear in mind the advice on more than one occasion given by their Lordships of the Privy Council that pleadings should not be construed too strictly, and construing this paragraph in its broad general meaning, we are of opinion that two claims are made in it: (a) that the transaction was fraudulent and without consideration; and (b) that it was entered into with the view of defrauding and defeating the creditors and is thus void under section 53 of the Transfer of Property Act.

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The Township Judge did not direct his attention to the second ground and we consider that the District Judge was perfectly justified in going into this question. Section 53 runs as follows: "Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners, or other persons having an interest in such property or to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded, defeated or delayed.

"Where the effect of any transfer of immoveable property is to defraud, defeat, or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

"Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration."

One Ma Ko, together with her sister, Ma Sein Yin the respondent, and another sister and brother were the surviving co-heirs of their parents, the estate consisting of certain paddy land at Thongwa in the Hanthawaddy district. Ma Ko was the wife of a village headman Maung Ba Sein and it is clear that at the time of this transaction, Ba Sein was jointly interested with his wife in the land in question, which accrued to them partly by inheritance during coverture and partly by purchase of the shares of other co-heirs. At or before the dates material to this case they had separated but were not divorced and Ma Ko was living with her unmarried sister, the respondent Ma Sein Yin.

The appellants sued Ba Sein and Ma Ko in the Township Court for a debt of Rs. 580 with interest. Ma Ko obtained an adjournment on the plea of

illness, but did not defend the suit which was decreed *ex parte* and in execution the land in question was attached. Ma Sein Yin applied for removal of the attachment and produced a registered sale deed dated the 4th March 1924 purporting to be a conveyance by Ma Ko to her of the attached property for Rs. 2,000. On the strength of this, the attachment was raised, hence the present suit.

We may here mention that the husband Ba Sein filed a suit in the Subdivisional Court of Kyauktan, Civil Regular No. 31 of 1924, attacking this transfer as collusive and claiming in any case that his interest in the suit land had not been affected thereby. This suit was finally determined in his favour and a certain portion of the land was partitioned and handed over to him.

It is not alleged that after the conveyance of this property, Ma Ko had any other assets with which to pay her debts and it is not alleged that she was in any way indebted to her sister, Ma Sein Yin. So far as this transaction is concerned, Ma Sein Yin was a mere volunteer. The sister's case is that Ma Ko sold this land to pay her debts to one Yan Nga. The sisters are evidently very interested witnesses and a perusal of their evidence does not favourably impress us.

Yan Nga is the only outside witness that they have called and he does not corroborate them. He states that he lent Rs. 1,500 to the three sisters, Ma Ko, Sein Yin and Ma Su. They did not tell him for whom the money was borrowed. "Sein Yin, Ma Ko and Ma Su came and repaid the money." The learned Judge in second appeal concludes that the sisters Sein Yin and Ma Su were merely sureties for Ma Ko. We do not consider that Yan Nga's evidence gives any basis for this presumption.

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We may also note that this witness, who is a large land-owner, values the land sold at Rs. 200 at Rs. 250 an acre. This for 18 acres would indicate the value as from Rs. 3,600 to Rs. 4,500. He is not likely, being a witness for the respondent, to over-value the land and if we take the mean figure, it will indicate that the land was sold at half its value. No satisfactory explanation has been given why Ma Ko should discharge a debt which her sisters, who are apparently much better off, were equally responsible for. We are in agreement with the District Judge when he says: "Consequently, even if it be held that the consideration money obtained by Ma Ko from Ma Sein Yin was used for this purpose, the facts are that Ma Ko paid off the whole of the debt for which she was only jointly responsible with two others and a debt of which there is not a tittle of evidence that any demand for payment had ever been made."

We are also in agreement when a little further on the same learned Judge remarks: "The facts therefore are that Ma Ko obtained an adjournment in the original suit which she never intended to contest and so postponed the date on which an *ex parte* decree was passed and then utilised the period of this adjournment to make a conveyance of her property to her own sister with whom she was living at the time. The inference that this transaction was entered into for the purpose of putting this property out of the reach of the appellants is very strong." Ma Ko's object may not have been solely to defeat and delay the appellant's claim. She was at the time on bad terms with her husband and living apart from him and the second motive may have been and probably was to deprive him of his rightful share in the joint property. This, in our opinion, does not affect the

question. When we find a person without pressure conveying all her property away to a sister with whom she was living under circumstances like the present, the intention must be taken to defeat and delay not only the creditor who has taken proceedings against her, but all other creditors as well. The learned District Judge comments with regard to Ma Sein Yin's knowledge as follows: "Ma Sein Yin and Ma Ko were living together. She must have known of the suit against Ma Ko and she must have known of the application for an adjournment, for her own brother (it ought to have been 'cousin') San Nyun made the application. She must also have known that Ma Ko did not intend to defend the suit, yet between the date of adjournment and the date fixed for hearing she purchased Ma Ko's property. The agreement Exh. A written on old stamp paper shows the *mala fides* of Ma Ko and Ma Sein Yin. It alleges to be dated in January, yet Maung Po Yu, from whom the stamp paper was purchased, says it was not purchased from him until April. Peria Pillay has also given evidence that an attempt was made to purchase an old stamp sheet from him. It therefore appears that this agreement was not executed until after the deed of sale had been executed and that the agreement was purposely ante-dated in order to make the sale appear genuine."

On the evidence, we consider that these observations of the District Judge are justified. For these reasons we consider that the transfer of the 4th of March by Ma Ko to the respondent was made with intend to defeat and delay Ma Ko's creditors.

A point is mentioned in the reasons for the certificate of the learned Judge that in this case the intention proved was merely to defeat the appellants and that according to certain decisions of this Court

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and its predecessor, this is not sufficient. As we have already remarked, however, the only inference that we can draw from the transfer by a debtor of all her property in such circumstances is that she did it not merely to defeat the creditor who has taken proceedings, but to defeat all creditors in general.

A further point was urged that a creditor must sue not merely on his own behalf but on behalf of all other creditors. There is no doubt a considerable body of legal authority to that effect. This may well be in the case of a creditor who has not obtained a decree or effected execution by attachment, but, in our opinion, it cannot apply to a case of a creditor whose attachment has been raised and who avails himself of the right given by Order 21, Rule 63 [see *K. P. Pokker v. B. P. Kunhamad* (1)]. The English rule on which the contention that a creditor must sue in a representative capacity rests is set out in Halsbury's *Laws of England*, Volume XV, at page 89: "In an action to set aside an alienation under the Statute 13 Eliz. C. 5, a creditor could sue on behalf of himself and all other creditors of the grantor, except where he has recovered judgment for his debt, in which case he could obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone without mention of any other creditors on their debts."

For these reasons, we set aside the judgment appealed from and restore the judgment of the District Court. Appellants are entitled to costs throughout.

(1) (1918) 42 Mad. 143.