

could lead to a failure of justice being occasioned by it, I hold that the District Magistrate's error does not vitiate the proceedings and is a mere irregularity which is cured by the provisions of section 537 of the Criminal Procedure Code.

The only other question for consideration is whether on the evidence on the record the conviction of the appellant is justified.

[His Lordship held that it was justified and dismissed the appeal.]

1929
K. M.
SUBBAYA
NAIDU
P.
KING-
EMPEROR.
CARR. J.

APPELLATE CIVIL.

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

MA SEIN

v.

P.L.S.K. FIRM AND ANOTHER.*

1929
Apl. 8.

Specific Relief Act (I of 1877), s. 42, proviso—Judgment-debtor's fictitious transfer—Creditors' suit for bare declaration to declare transfer void—Consequential relief of setting aside deed unnecessary.

Where under the provisions of s. 42 of the Specific Relief Act the creditors of a judgment-debtor choose to file a suit against him and the transferee of his property for a bare declaration that such transfer was void and ineffective as against them and that they were entitled to proceed in execution or otherwise against the property, such a suit would lie without the necessity of asking for the consequential relief of setting aside the deed of transfer.

Ganga Ghulameq v. J. Prasad, 26 All. 606—referred to.

Kyaw Din for the appellant.

Chari for the 1st respondent.

RUTLEDGE, C.J., and BROWN, J.—The 1st respondent P.L.S.K. Chettyar firm sued the appellant, Ma

* Civil First Appeal No. 230 of 1928 from the judgment of the District Court of Hanthawaddy in Civil Regular No. 57 of 1927.

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v.
P.L.S.K.
FIRM.

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C.J., AND
BROWN, J.

Sein, and the 2nd respondent, Maung Saw Maung on behalf of themselves and other Chettyar firms, who were the creditors of Maung Saw Maung, for a declaration that the deed of release by Maung Saw Maung in favour of Ma Sein was void and ineffective as against the creditors and that the creditors were entitled to proceed in execution or otherwise against the property.

The trial Court gave the plaintiffs a decree in terms of the prayer in the plaint. Ma Sein appeals against this decree on two grounds. The first ground is that the trial Judge ought to have held that the suit for a mere declaration was not maintainable without a request for the consequential relief of setting aside the deed of transfer. The second ground is that on the merits the plaintiffs have not established their case.

As regards the first ground, the court-fees in the trial Court were paid as on a suit for declaration, that is to say, to the value of Rs. 10 only. The appellant has paid a similar court-fee in this appeal and it is not contended that the court-fee paid is insufficient. What is contended is that the Chettys could have sued to have the deed of transfer delivered up and cancelled and that, as they did not do so, the suit being a suit under section 42 of the Specific Relief Act was not maintainable. Had the Chettyar firm first attached the property and had the attachment been removed under the provisions of rule 58 and the following rules of Order XXI of the Code of Civil Procedure, there can be no question but that a suit would lie under the provisions of rule 63. There has, however, been no removal of attachment in the present case and it is argued, that that being so, the Chettyar firm were bound to ask for the cancellation of the document. In accordance with

the provisions of section 42 of the Specific Relief Act the right to bring a suit under that section is subject to the proviso that "no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." It is contended that under this proviso the plaintiffs might have sought the relief of having the document delivered up and cancelled. It does not seem to us in any way necessary for the obtaining by the plaintiffs of their legal rights that they should have made any such prayer. On the transfer being declared void, the only further action that the plaintiffs could take would be to attach and sell the property in execution of their decree. That clearly could not be done by the trial Court in the suit under appeal. The plaintiffs are not in possession of the property but they have no right to possession and certainly could not ask for consequential relief of that nature.

In the case of *Ganga Ghulam v. Tapeshri Prasad* (1), the plaintiff had filed a suit asking for a declaration that a certain house was not liable to sale in execution of a decree obtained by the 1st defendant. The 2nd defendant had executed a mortgage deed with regard to that house in favour of the first defendant. The plaintiff's claim was that he was the owner of the house and that the 2nd defendant had no right to mortgage it. It was contended that the plaintiff might have sued for cancellation of the mortgage deed and to have the decree based on the mortgage deed set aside, and that therefore the suit was not maintainable under the proviso to section 42 of the Specific Relief Act. It was held that there was no obligation on the plaintiff, even under the proviso to section 42, to

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have sued to set aside either the mortgage or the decree. All that the plaintiff wanted, and all that the law compelled him to ask for, was to have the cloud on his title, which was caused by his property being proclaimed for sale, removed, and to achieve that it was not necessary to ask for any further relief.

The present case is the converse of *Ganga Ghulam's* case. But it seems to us that the same considerations apply. It has been held that a creditor in defence to a suit by a transferee of a judgment-debtor, claiming the property that belonged to the judgment-debtor as his, can plead in defence that the transfer was a fraudulent one and was intended to defeat or delay the transferor's creditors, and that it is not necessary for the creditor in such a case to have the transfer formally set aside. The creditor is entitled to ask the Court, in whatever form the matter may be brought before the Court, to hold that so far as he is concerned the transfer is void. Under section 39 of the Specific Relief Act any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it, and order it to be delivered up and cancelled.

The contention on behalf of the appellant is that the present suit should have been brought under this section. It seems to us, however, open to considerable doubt whether the Chettyar firm could have brought a suit under section 39 of the Specific Relief Act. They have no apprehension that the instrument, if left outstanding, would cause them serious injury. If they obtain the declaration they ask for in this case, they will then be able

to proceed to attach the property and the instrument would clearly not be able to cause them any injury. It is not necessary in the present case for the plaintiff to ask to have the document cancelled and it does not seem to us that their plaint establishes any good cause for such relief. That being so, we are of opinion that the suit in its present form was not barred by the proviso to section 42 of the Specific Relief Act. We would note that this objection was not taken in the trial Court but was raised for the first time in this appeal.

On the merits of the case their Lordships agreed with the trial judge and dismissed the appeal with costs.

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MA SEEN
v.
P.L.S.K
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RUTLEDGE,
C.J., AND
BROWN, J.

APPELLATE CIVIL.

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

AH KWAY

v.

ADMINISTRATOR-GENERAL, BURMA AND
ANOTHER.*

1929
Apl. 8.

Letters Patent, Clause 13—Refusal to stay proceedings under s. 19 of the Arbitration Act (IX of 1899) not a judgment—No appeal lies against the order.

Held, that an order of the Original Side refusing to stay proceedings under the provisions of s. 19 of the Arbitration Act is not a 'judgment' within the meaning of clause 13 of the Letters Patent, and consequently no appeal lies against such order.

P.K.P.V.E. Chidambaram Chettyar v. N.A. Chettyar Firm, 6 Ran. 703—*followed*.

Sooniram v. R. D. Tata & Co., 5 Ran. 451 (P.C.)—*distinguished*.

Joylall v. Gopiram, 47 Cal. 611—*dissented from*.

* Civil Miscellaneous Appeal No. 51 of 1929 from the order of the Original Side in Civil Regular No. 663 of 1928.