

mean that in addition to the rights of appeal against an order amounting to a sentence under the Code of Criminal Procedure the accused shall have the right of appeal against any order affecting him except non-final orders as to age, or directing the submission of the case to a Magistrate empowered.

It appears to me, therefore, that the appellants have a right of appeal, and this appeal lies to the Court of Session. It will be directed, therefore, that these appeals be forwarded to the Court of Session, Myaungmya, for disposal.

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APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Bagtley.

ASGAR ALI v. C.V.R.M. FIRM.*

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 Nov. 25.

Suit by creditor to establish right to attach and sell property—Avoidance of fraudulent transfer—Representative suit necessary—Civil Procedure Code (Act V of 1908), O. 21, r. 63—Omission to sue in proper form not fatal—Trial Court's function—Objection as to form of suit taken only on appeal—Appellate Court cannot entertain objection nor can remand suit—Inherent jurisdiction—Irregular exercise of jurisdiction—Transferee from debtor—Objection to form of suit when to be taken.

Where a suit is brought by a creditor under Order XXI, r. 63 of the Civil Procedure Code 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 as a representative suit.

A.K.A.C.T.V. Chettyar v. R.M.A.R.S. Firm, I.L.R. 12 Ran. 666—approved.

The omission to file the suit in a representative form is not fatal to the maintenance of the suit, and the trial Court can and should permit the plaintiff to take proper steps to set matters right. But if no objection is taken to the form of the suit in the trial Court, and is only raised for the first time in the appeal, the objection cannot be allowed in the appellate Court, and the appellate Court should not remand the case to the trial Court to remedy the defect.

* Civil 2nd Appeal No. 198 of 1935 from the judgment of the District Court of Toungoo in Civil Appeal No. 20 of 1935.

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Where a Court has inherent jurisdiction to try a particular suit but its jurisdiction is irregularly invoked, a litigant by his conduct may be precluded from maintaining in the circumstances of the case that the suit was not maintainable as framed.

The provisions of s. 53 of the Transfer of Property Act are for the benefit of transferees from judgment-debtors, and if such a transferee does not raise the objection as to the form of the suit in the trial Court he is precluded from raising it in the appellate Court.

Amir Khatoon v. Abdul Jabber, Civil 2nd App. No. 244 of 1932, H.C. Ran.—*followed*.

Bimalanandan Prasad v. The United Refineries, Ltd., I.L.R. 11 Ran. 79; *Soral Bibi v. N.S.A.R. Chettyar Firm*, Civil 2nd App. No. 344 of 1936, H.C. Ran.—*referred to*.

Maung Tun Thein v. Maung Sin, I.L.R. 12 Ran. 670—*pro tanto dissented from*.

N. N. Sen for the appellant.

P. K. Basu for the respondent.

MYA BU and BAGULEY, JJ.—This appeal arises out of a suit brought for a declaration under Order XXI, rule 63. The C.V.R.M. Firm had a decree passed in its favour against Budi Rahman, and in execution of that decree attached four pieces of land. Asgar Ali, the present appellant, applied for removal of attachment, and got the attachment removed. The C.V.R.M. Firm then filed a regular suit for a declaration that the lands attached belonged to Budi Rahman, and that the transfer from Budi Rahman to Asgar Ali, which Asgar Ali had used in order to get the attachment removed, was “ a bogus and collusive one without consideration made between judgment-debtor and the defendant (who is his relative and friend) in order to defraud the creditor of money due by the judgment-debtor and that it is void.”

Asgar Ali filed a written statement in which he denied that the transfer was bogus and collusive, and he attacked the status of the agent of the firm who had filed the plaint. The latter issue was

answered in favour of the plaintiff firm, and the suit went to trial on two issues :

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" 1. To whom do the lands in dispute belong ?

2. Is the sale deed, exhibit 1, a sham one made without consideration, in order to defraud the creditors of the judgment-debtor Budi Rahman ?

MYA BU and
BAGULEY. JJ.

The trial Court went into the evidence at some length and came to the conclusion that the sale deed was a fraudulent one. It passed a decree declaring that the land in suit belonged to the judgment-debtor, Budi Rahman, and was liable to attachment and sale by the plaintiff firm under their decree. Asgar Ali filed an appeal to the District Court entirely on the facts. The appellate Court agreed with the view of the facts taken by the trial Court and dismissed the appeal. From the appellate Court's decree the present appeal has been filed.

The appeal, of course, can only be on points of law, and the point of law argued is that a suit of this nature could not be brought by one single creditor ; it must be regarded as a suit to set aside a deed of transfer under section 53 of the Transfer of Property Act, and it should, therefore, have been brought by the attaching creditor in his representative capacity. The authorities relied upon by the learned counsel were two single-Judge rulings of this Court : *A.K.A.C.T.V. Chettyar v. R.M.A.R.S. Firm* (1), and *Maung Tun Thein v. Maung Sin* (2). In the first of these it is laid down that when a suit is brought under 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

(1) (1934) I.L.R. 12 Ran. 666.

(2) (1934) I.L.R. 12 Ran. 670.

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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; and in the second it was pointed out that the omission to file the suit originally in a representative form is not fatal to the maintenance of the suit and the Court can at any time take steps to have the nature of the suit altered, and even the appellate Court may remand the case for the omission to be repaired.

With the correctness of the first of these rulings, so far as it applies to Courts of original jurisdiction, there can be no question. A trial Court should see that a suit of this nature is brought in a representative capacity, and, if necessary, can direct the plaintiff to take proper steps to put matters right if he has brought a suit in the way in which it is brought in the present case. The case of *Maung Tun Thein v. Maung Sin* (1), however, so far as it suggests that an appellate Court, under these circumstances, should remand the case to have the defects remedied when these defects are pointed out for the first time in appeal, seems to run counter to a Bench decision of this Court, which was never officially reported; [*Amir Khatoon v. Abdul Jabber* (2)]. The appeal then under consideration arose out of a case of this nature, in which the suit was not brought in a representative capacity although it should have been so framed, and no exception to the form of the suit was taken in the trial Court. Objection was first raised in first appeal, but the objection was overruled, and on second appeal to this Court it was held that in such a case if objection was not taken to the form of the suit in the trial

(1) (1934) I.L.R. 12 Ran. 670.

(2) Civil 2nd Appeal No. 244 of 1932.

Court but was only raised for the first time in the appeal, the objection could not be allowed in the appellate Court. It was pointed out that the Court had inherent jurisdiction to try a case of this nature, and that the provisions of section 53 of the Transfer of Property Act, as amended, were enacted primarily for the benefit of transferees from judgment-debtors, and not for the benefit of judgment-debtors themselves. The judgment of the learned Chief Justice goes on :

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"It is not pretended that the trial Court had not inherent jurisdiction to try this question, but it was contended that its jurisdiction could only be invoked in a representative suit lodged on behalf of the creditors generally, and not in a suit by one or more creditors in their individual capacity.

In my opinion it is well settled law that where a Court has inherent jurisdiction to try a particular suit but its jurisdiction is irregularly invoked, a litigant by his conduct may be precluded from maintaining in the circumstances of the case that the suit was not maintainable as framed, *a fortiori* in a case where the irregular institution of the suit was due to a failure on the part of the plaintiff to conform to an enactment passed for the benefit of a particular class of persons such as the provision now under consideration.

In the present case the appellant elected to go to trial without alleging in her written statement, or raising by way of an issue, that the suit as framed was not maintainable by reason of section 53 of the Transfer of Property Act. The appellant only contended that the particular creditor who is the plaintiff in the suit had no interest in the subject matter of the decree, which was incapable of assignment, and further that the transfer was executed *bonâ fide* and for value."

This ruling was followed by another single Judge in *Soral Bibi v. N.S.A.R. Chettyar Firm* (1), and we are quite satisfied that it is correct. The same

(1) Civil 2nd Appeal No. 344 of 1934.

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principle has been affirmed in *Bimalanandan Prasad v. The United Refineries, Limited, and others* (1).

In the present case both Courts have found that as a matter of fact the transfer of the land in question was fraudulent, and against this finding of fact no second appeal lies. The appeal is, therefore, dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Nov. 28

SEIN HTAUNG

v.

V.E.A. CHETTYAR FIRM.*

Appeal to His Majesty in Council—Civil Procedure Code (Act V of 1908), s. 109 (c)—Point of law of general public importance—Accession to mortgaged property—Accession made by mortgagor or any other person—Prima facie meaning—Imperilling mortgagee's security—Transfer of Property Act (IV of 1882 and XX of 1929), s. 70.

A Court ought not to grant a certificate under s. 109 (c) of the Civil Procedure Code unless a point of law is involved in the appeal which is not only substantial as between the parties, but one of general public importance or of such a nature that the decision upon it may govern numerous cases.

It is a matter of general importance that persons concerned in mortgaging property in India generally should be informed whether the words "any accession is made to the mortgaged property" in s. 70 of the Transfer of Property Act mean any accession made to the mortgaged property by the mortgagor and/or his representatives in title, or any accession to the mortgaged property by whomsoever the accession may have been made.

Prima facie the words would include any accession to the property, and if any building erected upon the property or any other accession thereto by a stranger "under a colour of title" or "under a *bona fide* title or claim of title" is excluded from the ambit of the section the result will be that a fraudulent mortgagor by allowing some innocent third person to erect a building will be able to imperil, if he does not destroy, the value of the security to the mortgagee.

Thakoor Chander v. Bhattacharjee, 6 W.R. 228; *Vallabhdas v. Development Officer, Bandra*, 56. I.A. 259—referred to.

(1) (1933) I.L.R. 11 Ran. 79.

* Civil Misc. Application No. 70 of 1935 arising out of Civil First Appeal No. 14 of 1935 of this Court.