discuss the arguments forcefully advanced by Mr. Buckley on behalf of M. T. Limited in defence of their right to interest.

Their Lordships will humbly advise His Majesty that both appeals should be dismissed. The Sassoon company will pay half of the costs of Pratts in this consolidated appeal and Pratts will pay the costs of M. T. Limited.

Solicitors for T. R. Pratt, Ltd.: Messrs *T. L. Wilson & Co.*

Solicitors for M. T., Ltd., and E. D. Sassoon & Co., Ltd.: Messrs. *Linklaters & Paines.*

C. S. S.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

SHRIMAL KASTURCHAND MARWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* HIRALAL HANSRAJ MARWADI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1937 *September* 16

Transfer of Property Act (IV of 1882), s. 53—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Judgment creditor—Execution—Attachment of property—Attachment raised at the instance of intervener—Suit to establish right to property—Suit not necessary on behalf of general body of creditors.

A suit brought under O. XXI, r. 63 of the Civil Procedure Code, 1908, 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 s. 53 of the Transfer of Property Act, on behalf of the general body of creditors.

Guljarkhan v. *Husenkhan*,[1] followed.

Shantilal Mewaram v. *Munshilal Kewalram*,[2] commented on.

SECOND APPEAL against the decision of K. B. Wassoodew, District Judge at Nasik, confirming the decree passed by D. T. Chaubal, First Class Subordinate Judge of Nasik.

Suit for declaration.

*Second Appeal No. 79 of 1934.

(1) (1937) 39 Bom. L. R. 917. (2) (1932) 56 Bom. 595 at p. 613.

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Shrimal Kasturchand (plaintiff) obtained money decrees against Yesu Nana and Murlidhar Nana (defendants Nos. 3 and 4). In execution of one of the decrees the lands in suit were attached. Hiralal and Manormal (defendants Nos. 1 and 2) filed application No. 140 of 1930 to raise the attachment and got it removed by an order passed on January 10, 1931.

On February 20, 1931, the plaintiff brought a suit under O. XXI, r. 63, of the Civil Procedure Code, 1908, for a declaration that the sale-deed passed by defendants Nos. 3 and 4's guardian to defendants Nos. 1 and 2 was unauthorised and without any legal necessity; that it was without adequate consideration and was obtained by defendants Nos. 1 and 2 with intent to defraud plaintiff's claims under several decrees; that it was illegal and not binding on defendants Nos. 3 and 4 and that, therefore, the suit lands were liable to attachment and sale in execution of his decree in suit No. 710 of 1929.

Defendants Nos. 1 and 2 contended that they were creditors of the transferors; that the transfers were not fraudulent and were for consideration and that the suit at the instance of only one of the creditors of the judgment debtors was not maintainable under s. 53 of the Transfer of Property Act, 1882.

The Subordinate Judge held that defendants Nos. 1 and 2 were *bona fide* transferees for consideration and the sale transaction in their favour was not effected with a view to defeat the claim of the plaintiff. It could not, therefore, be avoided under s. 53 of the Transfer of Property Act. The suit was accordingly dismissed.

On appeal, the District Judge held that it was not proved that the transfer was without consideration and intended to defeat and delay the creditors of the transferors. Further it was held that the suit not being a representative suit in form under O. I, r. 8, Civil Procedure Code, it could not be

instituted to enforce a decree against the property of the judgment-debtor transferred to defendants Nos. 1 and 2 on the ground that the transfer was fraudulent. His reasons were as follows :—

" The first important question which is decisive of this case is whether a creditor, who has recovered judgment for his debt must sue not merely on his own behalf, but on behalf of all other creditors ? There was considerable body of legal authority prior to the amendment of s. 53 of the Transfer of Property Act, that the creditors' suit to avoid the transfer must be a representative one on behalf of the whole body of creditors. Some of the cases on the point have been referred to by Mr. Justice Mirza in *Shantilal* v. *Munshilal* (34 Bom. L. R. 862, 875). The reasoning underlying that decision was to prevent multiplicity of suits against the transferee. An exception had been recognised in several Indian cases that where attachment of property has been discharged at the instance of a fraudulent transferee and the decree holder has been driven to a suit on that account under O. XXI, r. 63, to enforce his decree against the property attached the suit need not be representative [See *Pokker* v. *Kunhamad* (I. L. R. 42, Madras 143), and *R. R. O. O. Chettyar* v. *Ma Sein Yin* (I. L. R. 5, Rangoon 588)]. In the last mentioned case the ground of decision was based on the English rule enunciated and reproduced from statute 13, Eliz. c. 5 (Halsbury's Laws of England, Vol. XV, page 89). ' Where the creditor 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 or their debts.'

The point was not directly considered in *Shantilal's* case. But Mirza J. alluded to the amendment introduced in s. 53 of the Transfer of Property Act and stated generally that it effected a change in the law. *Shantilal's* case was not a case of creditor enforcing his decree against property discharged from attachment. It seems to me that all cases after 1929 must be considered with reference to the express provisions contained in the 4th para. of s. 53 of the Transfer of Property Act. That paragraph states that—

' A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.'

The remarks in *Bhimraj* v. *Laxman* (22 Bom. L. R. 743), in my view, must be regarded as overruled by necessary implication. In all such cases the decree may be in terms of Sch. I, appendix D, form No. 13 declaring the transfer as void against the plaintiff and against all the creditors of the defendant [See remarks in *Chatterput Singh* v. *Maharaj Bahadur* (I. L. R. 32, Calcutta 198)]. The learned trial Judge in relying upon the remarks in Gour's Transfer of Property Act, Vol. I, 6th Edition, page 638, para. 1062, has apparently misread it ; for the view expressed is to the contrary. The passage is as follows : ' The conflict between these views has now been settled by the amendment which enacts that such a suit might be instituted either on behalf of or for the benefit of all the creditors.' That is a clear statement

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that the amendment overrules the previous rulings. I do not see any difficulty in instituting such a representative suit even if the alleged fraudulent transferee was no other than one of the creditors of the judgment-debtor. On account of the said defect the suit will fail, if there were other creditors besides the plaintiff."

Plaintiff appealed to the High Court.

D. R. Patwardhan, for the appellant.

B. G. Rao, for respondents Nos. 1 and 2.

RANGNEKAR J. The short question which arises for determination in this appeal is, whether a judgment-creditor who has been defeated at the instance of an intervenor in proceedings taken in execution of his decree must necessarily file a suit under s. 53 of the Transfer of Property Act.

The facts are, that the appellant obtained a decree against respondents Nos. 3 and 4 and in execution of the decree he attached two pieces of land. Respondents Nos. 1 and 2 intervened and claimed to be the purchasers, *inter alia*, of these lands. Their objection was upheld by the Court and the attachment was removed. Under O. XXI, r. 63, it is clear that in these circumstances the judgment-creditor was entitled to bring a suit for a declaration that the intervenors had no title and that the judgment-creditor had the right to attach the property and bring it to sale in execution of his decrees. It seems that in the trial Court defendant No. 2 raised the contention that the suit not being in a representative capacity under s. 53 of the Transfer of Property Act, and not being brought on behalf of the general body of creditors, was not maintainable. That contention was negatived by the trial Court, but, accepted by the appellate Court; and the question is, whether the view taken by the appellate Court is correct. In my opinion, it is not.

The right to bring a suit to establish his right to attach the property after the intervenor has succeeded is a right which every judgment-creditor has under the provisions of the Civil Procedure Code. There is no rule of law or any

principle that such a creditor should take upon himself the burden of bringing a representative suit under s. 53 of the Transfer of Property Act on behalf of the general body of creditors. Order XXI, r. 63, is in these words :—

"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, but, subject to the result of such suit, if any, the order shall be conclusive."

It is clear from this that r. 63 does not say that such a suit must be a representative suit and must be brought by the judgment-creditor for and on behalf of the general body of creditors.

The question then is whether this rule is subject to the provisions of s. 53. That section was amended by Act XX of 1929, by, *inter alia*, introducing the third and fourth paragraphs in sub-s. (*1*) of s. 53. The fourth paragraph is only material in this case, and it is in these words :—

"A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors."

The amended section is modelled on ss. 172 and 173 of the English Law of Property Act, 1925, and it is at least noteworthy that the English statute does not contain anything corresponding to the fourth paragraph of sub-s. (*1*) of s. 53. Under the English law a creditor can sue on his own behalf alone and the suit need not be a representative suit. Now, what is the meaning of the fourth paragraph ? All that it says is that if a creditor, which term would include a decree-holder, whether he has or has not applied for execution of his decree, *wants* to avoid a transfer on the ground that it has been made with intent to defeat or delay the *creditors* of the transferor, then he must sue on behalf of, or for the benefit of, all the creditors. But it does not say

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that a creditor who wants to enforce his own right to a property as against another creditor or a transferee *must* bring a representative suit. A creditor is not bound to set aside a transfer on the ground that it was made with intent to defeat or delay the creditors of the transferor. When the suit is to set aside a transfer made with that intent, then, of course, the suit would fall under the fourth paragraph. But when the suit is not to set aside the transfer on the ground that it was made with intent to defeat or delay the creditors, but to establish a creditor's priority, it is difficult to see why the suit should be a representative suit. Under s. 53, the intention must be to defeat or delay the creditors generally. The section says " creditors, " not " creditor. " If the intention is to prefer one creditor to another, the case will not come under this section. The section does not refer to the question of priority or preference among the creditors of the transferor or the debtor. This is clear from the observations of Jessel M. R. upon the corresponding English statute in *Middleton* v. *Pollock : Ex parte Elliott.*[1] This case was followed by the Privy Council in *Musahar Sahu* v. *Hakim Lal,*[2] in which Lord Wrenbury observed (p. 106) :—

" As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles C. B. in *In re Moroney,*[3] where he says (p. 62) : 'The right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. Now it follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property (although the effect of it, or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor) is not a fraud within the statute ; because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected '."

[1] (1876) 2 Ch. D. 104 at p. 108. [2] (1915) L. R. 43 I. A. 104, s. c. 43 Cal. 521.
[3] (1887) L. R. 21 Ir. 27.

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton* v. *Pollock: Ex parte Elliott*.[1] So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy."

Any number of instances can be given in support of the view which I am taking. A common instance is, where to defeat a decree-holder a judgment-debtor sells his property to someone else. Suppose A obtained a money decree against B. A month thereafter the judgment-debtor transfers his property to C for good consideration. This cannot be set aside under s. 53. Suppose in this case he transfers the property to another creditor of his in payment of a debt due to the latter. The case is one of preference and not voidable under the section. In *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*,[2] the facts were that X obtained a decree for his debt against B. In execution of the decree, B's property was attached on August 23 and sold to C. Before the attachment on July 13, B had sold the property to a relation D in part satisfaction of a debt due to her. It was held that it was not voidable under the section, for a debtor may pay his debts in any order he chooses, if no question of insolvency is involved.

What would be the position if in addition to the judgment-creditor a person has only one creditor or even two or three creditors? Must the defeated execution-creditor bring a representative suit, and if so, can he bring such a suit? It is clear that a suit under the fourth paragraph must be brought under O. I, r. 8, of the Civil Procedure Code. The plaintiff must sue on behalf of himself and all other creditors of the debtor. But a suit under this provision can only be brought if there are *numerous* persons having the

[1] (1876) 2 Ch. D. 104 at p. 108. [2] (1916) L. R. 44 I. A. 72, s.c. 44 Cal. 662.

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same interest in the suit. That is to say, the creditors must be numerous. Then only one creditor can sue with the permission of the Court. Then further, the procedure laid down in the rule must be followed. No Court would, I apprehend, give the necessary permission where, as stated above, the creditors are only three or four. What then would be the position? If the argument which appealed to the learned Judge below is correct, the creditor would be helpless. Then again a creditor bringing a representative suit has to take upon himself the burden of finding out how many creditors the debtor has and what is the extent of the debtor's liability; he has moreover to apply for permission to be allowed to sue for himself and on behalf of other creditors. Why should a single creditor, whose object is to establish his right to attach a property of his debtor and to bring it to sale in execution of his decree, be compelled to take upon himself a greater burden than is necessary?

It was thought by the learned Judge in appeal that prior to the recent amendment of s. 53 of the Transfer of Property Act, it was not necessary for a creditor to sue in a representative capacity, but, after referring to a judgment by Mr. Justice Mirza in *Shantilal Mewaram* v. *Munshilal Kewalram*[1] he held that since the amendment of the Transfer of Property Act, as in the section now a decree-holder is included in the definition of the term "creditor," a creditor must of necessity bring a representative suit under that section. In my opinion, there is no authority for the proposition. In the first place, the point, as the learned Judge himself points out, was not directly considered in *Shantilal's* case[1], and, therefore, that case is no authority for this proposition. I am unable to see any principle by which this view can be supported.

It is said on behalf of the respondent that the pleading in the case does show that the suit was brought by the creditor to set aside a transfer on behalf of the general body of creditors,

[1] (1932) 56 Bom. 595 at p. 613.

and paragraph 2 of the plaint was relied upon. But, in that paragraph, all that the plaintiff alleges is that the defendants were acting in collusion with the judgment-debtor and the transfer was made in order to defeat the claim of the plaintiff himself. I am unable to see why such an allegation means—and must necessarily mean—that the transfer was made with intent to defeat or delay the general body of creditors. A person may enter into a transfer with intent to defeat or delay one particular creditor, and at the same time may be possessed of sufficient property to satisfy the needs of other creditors. It is clear from the paragraph that there was no allegation made that the transfer was made with intent to defeat or delay the creditors generally of the transferor.

The view I am taking is supported by the observations of the learned Chief Justice in *Guljarkhan* v. *Husenkhan*.[1] The learned Chief Justice observes as follows (p. 919) :—

"Now, in the first place, the point that this is a suit under s. 53 of the Transfer of Property Act, and should therefore have been by the plaintiff on behalf of himself and all other creditors was not pleaded, as it ought to have been, under Order VIII, r. 2, and that being so, I think that the lower Appellate Court ought not to have allowed the point to be raised. I may say, however, that I am by no means satisfied that a suit brought under Order XXI, r. 63, by the judgment-creditor, must in all cases be filed on behalf of the plaintiff and all other creditors, notwithstanding a note to that effect in Sir Dinshah Mulla's book on the Transfer of Property Act."

I entirely agree with this view. Section 53 merely confers a privilege upon a judgment-creditor to impeach a transaction of his debtor in the interest of other creditors, but there is nothing in that section which necessarily compels a judgment-creditor, who wants to establish his own rights and defeat the rights of a transferee in order to realize the fruits of the decree which he has obtained, to bring a representative suit under s. 53 of the Transfer of Property Act. That being so, the appeal must be allowed.

[1] (1937) 39 Bom. L. R. 917.

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I find from the judgment of the trial Court that that Court has recorded its findings on other questions of fact, but the appellate Court disposed of the appeal only having regard to s. 53 of the Transfer of Property Act, and, as that decision is wrong, the case must be remanded to the lower Appellate Court for disposal on merits after raising proper issues.

The respondents must pay the costs of the appeal.

Decree reversed : case remanded.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Divatia.

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* AHALYABAI BHRATAR NARAYAN KULKARNI (ORIGINAL PLAINTIFF No. 2), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), s. 88—Offender absconding—Attachment of property—Offender a co-parcener in a joint Hindu family—Property vesting in offender by survivorship—Brother's widow claiming maintenance—Widow's maintenance a charge on property—Widow entitled to maintenance from property in the hands of Government.

When property belonging to an absconder charged with a criminal offence is attached by Government under s. 88, Criminal Procedure Code, 1898, it would be open to any party claiming an interest in the property to obtain a decree in a Civil Court declaring his right to the property so long as the property continues to remain in possession of Government and is not sold or otherwise disposed of by Government.

Government acting under s. 88 of the Criminal Procedure Code, 1898, are not in the same position as a purchaser for value and the fact that sub-s. 7 provides that the property under attachment, although at the disposal of Government, shall not be sold, until the claim preferred is disposed of, would suggest that the rights of persons who claim interest in the property are to be respected ; the rights need not be fixed in the form of a formal charge ; it is sufficient if they are such that they should be so fixed under the Hindu law and could not be extinguished till the property is sold for value.

*Second Appeal No. 392 of 1934.