

Sumathi Vs. Kunjupennu Bhargavi

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Court : Kerala

Decided On : Jan-24-1974

Reported in : AIR1974Ker214

Judge : K. Sadasivan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 1, Rule 8 - Order 21, Rule 63;
[Transfer of Property Act, 1882](#) - Sections 53

Appeal No. : Second Appeal No. 350 of 1971

Appellant : Sumathi

Respondent : Kunjupennu Bhargavi

Advocate for Def. : K.C. John, Adv.

Advocate for Pet/Ap. : V. Harihara Iyer, Adv.

Disposition : Appeal allowed

Judgement :

K. Sadasivan, J.

1. The plaintiff is the appellant in this second appeal. She sued her husband and his second wife for setting aside a claim order and for declaration that she is entitled to execute the decree in 1195/54 against the property which was assigned

away by her husband the 2nd defendant in favour of his second wife the 1st defendant. O. S. 1195/54 was filed by her against the 2nd defendant for certain amounts due to her from him. That suit was decreed on 16-7-1960. In order to defeat her right and to obstruct the execution of her decree the second defendant effected a transfer of his property in favour of his 2nd wife. That was done during the pendency of O. S. 1195/ 54. The transfer was a mere sham without any consideration or bona fides. When attachment was taken out in execution of the decree the 1st defendant filed a claim petition and that was dismissed on 27-6-1964. From that order a revision (C. R. P. 972/64) was preferred to this court, and this court allowed the C. R. P. and set aside the order of the lower court dismissing the claim petition. It is to set asidethat order passed in the C. R. P. that the present suit was filed. According to the plaintiff the transfer effected by the second defendant is a colourable transaction not intended to take effect and the property before and after the transfer continued to be in the possession and enjoyment of the 2nd defendant.

2. The suit was contested by the 1st defendant alone. She stated that the decree in O. S. 1195/54 happened to be passed against the 2nd defendant since the suit was not conducted properly by the 2nd defendant. The decree was passed in September. 1960. The plaint schedule property with the buildings thereon were gifted to the 1st defendant on 20-10-55 and the document was executed by the 1st defendant in lieu of the money and movables given to the 1st defendant by her people at the time of her marriage. Even though the document is styled a gift deed it is in fact supported by consideration. On the date of the document itself possession was given to the 1st defendant. She is paying tax and enjoying the property. It is not liable to be attached for the second defendant's debts. The High Court order passed in the C. R. P. is correct and is not liable to be set aside. At the time the document was executed the 2nd defendant had no debts and so it cannot be treated as a fraudulent transfer to defeat the creditors as alleged in the plaint. The land acquisition money for the portion of the property acquired by the Government was received exclusively by the 1st defendant.

3. The learned Munsif on a consideration of the evidence and circumstances of the case came to the conclusion that the plaint allegations are true and set aside the

claim order. But on appeal the learned District Judge took the view that the suit ought to have been framed as a representative suit under Order 1, Rule 8, C.P.C., in that the gift deed having been treated by the plaintiff as a transaction coming under Section 53 of the Transfer of Property Act; the plaintiff has proceeded as if the gift deed Ex. D-1 is a fraudulent transfer to defeat the 2nd defendant's creditors including the plaintiff. Being the creditor's suit to avoid a transfer, the suit ought to be one for the whole body of creditors. Therefore, according to the learned Judge the suit is not maintainable. He has also dealt with the other aspects of the case centering round Ex. D-1 transaction. Finally the learned Judge has accepted the case of the 1st respondent and set aside the decree of the trial court.

4. Learned counsel for the appellant stated before me that even though in the plaint Ex. D-1 transaction is referred to as a fraudulent transfer intended to defeat the creditors of the 2nd defendant including the plaintiff, what was really intended was that the transfer is a sham transaction not intended to take effect. He stated that the plaintiff is the sole creditor of the 2nd defendant and there was no question of any other creditors' claim being defeated by a fraudulent transfer. It was, therefore, quite unnecessary and it was not so intended also to file a representative suit under Section 53 of the T. P. Act. The plaintiff's counsel in the trial court made mistaken and inadvertent statements lending colour to the plea that the suit is one under Section 53 of the T. P. Act and that the impugned gift deed is fraudulent transfer. Under these circumstances he prayed for permission to amend the plaint and delete the prayer centering round fraudulent transfer and make the suit one, solely under Order 21, Rule 63, C.P.C. Objections on this amendment application were heard and the prayer was granted. Accordingly the suit was amended as one under Order 21, Rule 63, C.P.C. In view of the amendment the question of maintainability of the suit is no longer available and the suit is perfectly maintainable.

5. Learned counsel for the respondents contended relying on *Abdul Shukoor Saheb v. Arji Papa Rao*, 1963 Supp (2) SCR 55 = (AIR 1963 SC 1150) that even if the suit is one under O. 21. Rule 63 it has to be brought in a representative capacity. I may extract here the relevant portion of the judgment in that case. It

was observed :

'In decisions rendered prior to the amendment there were a large number in which it was held, following certain English cases decided with reference to 13 Eliz Ch 5, on which Section 53(1) was based, that suits by creditors for avoiding a transfer under Section 53(1) was a representative action. To that general rule however, an exception was recognised in a number of decisions when the suit was to set aside a summary order under Order 21, Rule 63 and was brought by an attaching decree-holder against whom an adverse order had been made in the summary proceedings, it being held that such a suit need not be in a representative capacity. The decisions on this point were however not uniform. It was merely to have a uniform rule and to avoid these conflicting decisions that the third paragraph was inserted so that after the amendment the rule that a suit by a creditor should be brought in a representative capacity would apply as much to a suit to set aside a summary order under Order 21, Rule 63, as to other suits. It was not suggested that there was anything in the terms of the amended Section 53(1) which referred to a defence to a suit and, in fact, learned counsel did not contend that if a defence under Section 53(1) could be raised by defeated attaching-creditor such a defence had to be in a representative capacity, and we consider that learned counsel was correct in this submission. From a provision as to how a plaintiff, if he filed a suit, should frame it, we can see no logical process by which it could be held that a defendant cannot impugn the validity of the sale which is voidable at his instance. We have, therefore, no hesitation in rejecting the legal point urged on behalf of the appellant.'

The question posed before the Supreme Court was to this effect:

'It was next urged that the third paragraph of the amended Section 53(1) has effected a change in the law and that thereafter transfers voidable under 1st paragraph of Section 53(1) could be avoided only in suits filed by a defeated or delayed creditor as plaintiff suing on behalf of himself and other creditors. We consider that there is no substance in this objection either.'

Reading the decision as a whole I am of the opinion that the decision does not support the view that a suit under Order 21, Rule 63 brought by a defeated

attaching-creditor should be one in a representative capacity. The Supreme Court was considering in that case the defence available to a defeated attaching-creditor in an action brought under Section 53(1) of the Transfer of Property Act and whether such a defence could also be brought in a representative capacity. The position as I see it is that where the suit is based on the allegation that the transfer is a sham, bogus or fictitious transaction, the case does not come under Section 53 of the Transfer of Property Act and the suit need not be brought in a representative character. The transferee and the judgment-debtor, as transferor, will be necessary defendants in a suit under this rule by a decree-holder attacking an alienation of property by the judgment-debtor in favour of the successful claimant. This view is seen to have been taken by the Rajasthan High Court in *Ganesh Mal v. Meghraj*, (AIR 1967 Raj 283). The learned Judge in that case held that :

'where a decree-holder seeks to enforce his own individual right, as a result of an order made against him in a claim proceeding, on the ground that the transaction by which his right stands affected is sham and colourable one and it adversely affects his own individual or personal rights, then it is open to him in law to bring a suit under the provisions of Order 21, Rule 63 of Civil P. C. and he cannot be compelled necessarily to frame his suit so as to satisfy the requirements of Section 53 of the Act.'

In such a suit what the plaintiff is called upon to establish is that on the date of the attachment the judgment-debtor had a subsisting right to the property. Such a suit is not hit by Section 53 of the T. P. Act though the decree-holder pleads that the transaction of sale in favour of the objector is sham and without consideration so long as his main prayer is not to set aside the sale on the ground of fraud. The suit as it stands now after the amendment of the plaint is purely one to set aside the transfer by the 2nd defendant in favour of the 1st defendant on the ground that it is sham and nominal and therefore the possession of the transferee was actually on behalf of the judgment-debtor.

6. Examining the evidence and circumstances of the case bearing in mind the above principle it could easily be seen that Ex. D-1 the transfer made by the 2nd

defendant in favour of the 1st defendant is a sham transaction not intended to pass any title. The learned Munsiff has made a careful analysis of the evidence and recorded a clear finding in favour of the plaintiff. The learned appellate Judge, however, has chosen a short-cut and dismissed the suit stating that in the light of the averments in the plaint the suit ought to have been brought under Section 53 of the T. P. Act for and on behalf of the general body of creditors. Of course, the learned appellate Judge has dealt with the other question also; but his approach to the other questions is patently wrong and the conclusions drawn are unsustainable on the facts proved in the case.

7. The plaintiff was the 2nd defendant's first wife (of course her status as wife was denied by him; but in the prior proceedings she was able to secure a clear finding of the court that she is his lawfully wedded wife). O. S. 1195/54 is a suit filed by the present plaintiff-appellant in forma pauperis for certain monies due to her from her husband the 2nd defendant. Due to a variety of other reasons the relationship between the husband and wife was very much strained at the time and seeing that a suit was filed by her for money, he hurried to the Sub-Registrar's Office and got Ex. D-1 gift deed executed in favour of his 2nd wife the 1st defendant, giving away the one and only property possessed by him. The property covered by the document was itself obtained by him under a gift from his father Ex. P-8 in the year 1954. A reading of Ex. P-8 would show that the 2nd defendant was a spendthrift and squanderer and that he was pestering every time for financial help and it was to get rid of his worry that the document was executed by him. Ex. D-1 purports to be a gift for consideration of his love and affection for the donee. But the donee (1st defendant) has an absolutely different story to tell about the document. She deposed before court that the property was, in fact, assigned to her by the 2nd defendant on receipt of a money consideration of Rs. 7,000. This amount was raised by her by selling away the properties which she got by way of streedhanam. Ex. P-3 is the certified copy of her deposition given in the summary enquiry and there her statement was that the consideration paid was Rs. 5,000 and that the said amount was gifted to her by her brother and father; but it is interesting that even according to her both her mother and father had died before her marriage. She also stated that the shop buildings found in the property were those constructed by her with her own funds. Some of the properties she got from her

parents were sold and with that money the shop buildings were erected. Here also she has no consistent version to give. At another stage she stated that the buildings were erected with the money she got from the land acquisition proceedings in respect of the property covered by the gift deed acquired by the State. The version regarding the construction of the shop buildings is absolutely false, because even when the 2nd defendant's father gifted the property to him under Ex. P-8 these shop buildings were there in the property. The 1st defendant has thus no scruples or compunction in making the unfounded and reckless statement to support her claim.

8. It is not possible to say that the 2nd defendant had any intention to transfer his rights in the property under Ex. D-1. All that is stated in the document is subject to the limitation that whenever the donee wanted to create encumbrances on the property she should get his written consent. In other words, without his junction it was not possible for her to deal with the property in any manner. Ex. D-5 is a mortgage executed subsequent to Ex. D-1 in respect of the property and therein the 2nd defendant was also a co-executant. The money thereunder was received by them both. Learned counsel tried to explain away the circumstance by saying that since there was a condition like that in Ex. D-1 the mortgagee might have insisted that the second defendant should join in the mortgage document also and just to satisfy the demand of the mortgagee his signature was also obtained. This is not correct. Because in the body of the document in the indemnity clause also the 2nd defendant figures along with the 1st defendant. That mortgage was released under Ex. D-7 and then also the consideration was paid by both of them jointly. Over and above these features there is also the patent fact that the 2nd defendant is still residing in the property and for all practical purposes he is in enjoyment of the usufructs from the property. It is difficult in the circumstances to treat Ex. D-1 as an outright gift. It is only a colourable transaction to throw dust into the eyes of the public and make them believe that the 2nd defendant has washed his hands free of all rights in the property. The only purpose was to spite the decree-holder and see that she does not realise her amount by proceeding against the property. The fact is not disputed that this is the only item of property owned by the 2nd defendant and it is also not disputed that the plaintiff is his only creditor. In the circumstances the conclusion is inescapable that even though the document

like Ex. D-1 was executed it was not intended to take effect and that the 2nd defendant never wanted the property to pass on to the 1st defendant. Of course, the tax is being paid by the 1st defendant and that when portions of the property were acquired by the State the land acquisition money was also received by her. I do not think these circumstances would be of any consequence in deciding whether the 2nd defendant had parted with his rights in the property. The compensation money might have been disbursed to her by the State since there was such a document in her name; but in fact the money must have been received by her for and on behalf of her husband the 2nd defendant. The very fact that the 2nd defendant remained ex parte would show that he had not the courage to dispute any of the plaint allegations. Learned counsel for the respondents made a rather faint attempt at the fag-end of his argument to build up a case that the decree in O. S. 1195/54 obtained by the plaintiff was obtained in collusion with the 2nd defendant and as such she is not the real creditor and, therefore, her prayer for execution is itself unsustainable. He cited *Gurajada Vijaya Lakshamma v. Yarlagadda Pad-manabham* (AIR 1955 Andh 112) where it was held that :

'Where a claim preferred under Order 21, Rule 58 is upheld by the executing court and the decree-holder files a suit under Order 21, Rule 63 to set aside that order, the decree-holder has to establish that the properties sought to be attached belong to the judgment-debtor and it is certainly open to the defendant to raise all defences to non-suit the plaintiff, if the defendant is in a position to prove that the plaintiff is not at all a creditor or that the decree obtained by him was one obtained by fraud or collusion, the suit will have to fail.'

I am constrained to observe that this is a desperate plea, unsustainable on the very face of it. Neither the 1st defendant nor the 2nd defendant had so far made any such plea and the validity of the decree was not questioned by either of them. In the circumstances, the plea has to be summarily rejected.

9. No other point arises. The judgment and decree of the lower appellate court are set aside and that of the trial court are restored. The appeal is allowed with costs throughout.

