Velama and ors. Vs. Raya Shenoy and ors.

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Court : Kerala

Decided On : Jul-04-1962

Reported in : AIR1963Ker356

Judge : P. Govindan Nair, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 100 and 101 - Order 1, Rule 8 - Order 21, Rule 63; Transfer of Property - Sections 53

Appeal No. : Second Appeal No. 1000 of 1958

Appellant : Velama and ors.

Respondent : Raya Shenoy and ors.

Advocate for Def. : T.N. Sundara Iyer, Adv. for Respondent 5

Advocate for Pet/Ap. : T.S. Venkiteswara Iyer, Adv.

Disposition : Appeal allowed

Judgement :

P. Govindan Nair, J.

1. This appeal is by the first defendant from the decrees of the Courts below setting aside a document, Ext. D-l, executed in her favour by the second defendant, her husband. The trial Court found on issue No. 2 which reads;

'Whether D1 is not a purchaser in good faith and for consideration' that the first defendant is not a purchaser in good faith and that the assignment is not supported by consideration. A point was raised before the trial Court, which is the subject-matter of Issue No. 3 that the suit is notmaintainable since it had not been brought as a, representative action on behalf of the body of creditors. The trial Court took the view that the suit being one to set aside a claim order under the specific provision, Rule 63 of Order XXI of the Code of Civil Procedure, it is unnecessary to bring the action as a representative one on behalf of all the creditors.

The lower appellate Court too negatived the contention on the view it took of the nature of the allegations in the plaint. According to that Court, the case of the plaintiff was that document impeached was a sham one not intended to take effect. The lower appellate Court also agreed with the Munsiff that the document in question is a sham one.

2. The allegations in paragraphs 3 and 6 in the plaint show that the document was impeached on the ground that it was in fraud of creditors. It is specifically so stated in the first sentence in paragraph 3 and the relief claimed was for setting aside the document. There was no declaration sought that the document was sham. The learned Munsiff had also not come to the conclusion that the document was a sham one. In these circumstances, the lower appellate Court had clearly erred in assuming that the Munsiff had held that the document was a sham one and thinking that the allegations in the plaint were that the document was a sham one.

3. The learned Judge has apparently proceeded on the basis that if the allegations in the plaint were that the document was in fraud of creditors, the action should have been brought as a representative one. He has however not considered the question. Counsel for the appellant has raised this point. again before me. I do not think that it is necessary to send the case back to the lower appellate Court for a decision on this question since the point raised is a pure question of law.

4. There is a conflict of authorities on this subject. The decision in Madina Bibi v. Ismail Durga Association, AIR 1940 Mad 789, Nanda-ramdas Atmaram v. Zulika Bibi, AIR 1943 Mad 531, Magnibai Kishorjee v. Kesrimal Sewairam, (S) AIR 1955

Madh-B. 159, Mung Tun Thein v. Maung Sin, AIR 1934 Rang 332 and the decision of the Calcutta High Court in Ekkari Ghose v. Sideshwar Ghose, AIR 1936 Cal 783 support the contention of counsel for the appellant that the suit should have been brought by the plaintiff as a representative one on behalf of all the creditors after complying with the provisions of Order 1, Rule 8 of the Code of Civil Procedure.

On the other hand, there are, perhaps, an equal number of decisions that have taken the view lhat when the suit is for setting aside a claim order and filed in accordance with the specific provisions in Rule 63 of Order XXI of the Code of Civil Procedure, the suit need not be a representative one.

These cases proceeded on the basis that a special remedy is provided by Rule 63 of Order XXI to the decree-holder to vacate an order passed, as in this case under Rule 61 of Order XXI and when such a remedy is provided by the Code of Civil Procedure, it is said, that it is unnecessary for a decree-holder against whom, an order has been so passed to implead the other creditors. More than this, I have not been able to discern, from the reasoning in these cases. This view has been taken in the following cases decided in Mahomed Asghar Ali v. Mohammed Ishaq All, AIR 1940 All 72, Radhanath Swain v. MadhusudanSenapaty, AIR 1956 Orissa 58, Chidambaram Chettyar v. R.M.A.R.S. Firm, AIR 1934 Rang 302, Guljarkhan v. Hussenkhan Vaidkhan, AIR 1937 Bom 476 and Mt. Bas Kuar v. Gaya Municipality, AIR 1939 Pat 138.

5. The reasoning adopted in the first batch of cases relied on by counsel for the appellant is that Section 53 of the Transfer of Property Act provides a specific remedy for avoiding a document which is meant to defeat or delay creditors. If the principles in that section are invoked, it is said, the action must be a representative one. Since the benefit of such an action can and must accrue to the whole body of creditors, they must be brought on record. This reasoning appeals to me.

Order XXI, Rule 63 of the Code of Civil Procedure merely provides that the order passed on the claim petition shall be final subject to the decision in a suit instituted for vacating that order. Such suits may be filed on various grounds. It may be contended that a particular document is a sham one or it may be contended, as in this case, that the document was executed for defeating the creditors of the debtor. In the latter case, I am of the view that the plaintiff seeking to set aside an order passed in execution is relying on the principle embodied in Section 53 of the Transfer of Property Act for the purposes of achieving the end of having the order vacated. If the plaintiff has to rely on the principles embodied in Section 53, it is abundantly clear and it is supported by high authority that the action must be a representative one. It has been so held by the Privy Council in the decision reported in Chutterput Singh v. Maharaj Bahadur, ILR 32 Cal 198 (PC).

In the case before me, the, allegations in the plaint indicate beyond doubt that the document was sought to be avoided on the basis of the principles embodied in Section 53 of the Transfer of Property Act. This action should, therefore, have been brought on behalf of the body of creditors and after complying with the provisions of Order 1 Rule 8. This not having been done, though objection was taken in the written statement about the frame of the suit, I am constrained to allow this appeal and dismiss the suit. I do so, but make no order as to costs in this Court and I also direct the parties to suffer their costs in the Courts below.