1902.

COLLECTOR OF AHMEDABAD v. SAVCHAND.

reasons above given, to follow the ruling of the Calcutta High Court in the case of *In the goods of Pokurmull.*(1)

We think that in this case the District Judge has assumed jurisdiction under section 19 D of the Court Fees Act which that section does not give, and we must, therefore, allow the appeal to be converted into an application under section 622 of the Civil Procedure Code. Under our Extraordinary Jurisdiction we set aside the order of the District Judge. Respondent to pay the costs of this application and of the application to the lower Court.

Order reversed.

(1) (1896) 23 Cal. 980.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

1902. *December 2.*

ISHVAR TIMAPPA HEGDE (ORIGINAL DEFENDANT 2), APPELLANT, *v.* DEVAR VENKAPPA SHANBOG AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 1), RESPONDENTS.*

Fraudulent conveyance—Suit by one creditor to set aside deed—Creditor not a judgment creditor—Transfer of Property Act (IV of 1882), section 53—Meaning of the word "creditor"—Statute 13 Eliz., c. 5.

Under section 53 of the Transfer of Property Act (IV of 1882), a creditor may sue to set aside a deed executed by his debtor by which he (the creditor) is defrauded, defeated or delayed, although he has not obtained a decree for the debt in respect of which he is a creditor. But such a creditor can only sue on behalf of himself and all other creditors.

APPEAL from an order of remand passed under section 562 of the Civil Procedure Code (Act XIV of 1882) by Mr. E. H. Leggatt, District Judge of Kánara, reversing the decree of Mr. E. H. Rego, Subordinate Judge of Kumta, and remanding the case for decision on the merits.

The plaintiff alleged that the first defendant owed him Rs. 600, and that in order to defeat this claim and the claims of other

* Appeal from Order No. 24 of 1902.

1902.

ISHVAR TIMAPPA v. DEVAR VENKAPPA.

lawful creditors the first defendant, on the 27th April, 1900, had, without consideration, transferred all his property to the second defendant by a deed of sale of that date, which stated the consideration for the transfer to be Rs. 2,500. The plaintiff alleged that the property was worth Rs. 4,000. He prayed that the deed should be cancelled and the sale set aside.

The Subordinate Judge raised a preliminary issue whether the suit was maintainable. This issue he found in the negative and he dismissed the suit. He was of opinion that the plaintiff not being a judgment-creditor of the first defendant was not entitled to sue to have the deed in question set aside. In his judgment he said:

> From the illustrations to section 39 of the Specific Relief Act it is clear that plaintiff has no interest in the sale-deed to ask for its cancellation.
>
> Section 53 of the Transfer of Property Act presumes that plaintiff has been actually defeated, delayed or defrauded, while here the plaintiff holds neither a decree nor a bond: he simply alleges that defendant 1 owes to him about Rs. 600. * * * * * * *
>
> If such suits be tenable, then any person imagining himself to be a creditor may try to question any alienation made by his supposed debtor, while the law is explicit that a debtor may give preference to any of his lawful creditors.

On appeal by the plaintiff, the Judge reversed the decree and remanded the case for decision on the merits. He was of opinion that the word "creditor" in section 53 of the Transfer of Property Act (IV of 1882) did not necessarily mean "a judgment-creditor," and that any creditor might sue under that section. In his judgment he said:

> The issue for decision is, can plaintiff maintain the suit?
>
> The above issue was read over to the pleaders of the parties and no further issue was sought.
>
> I find in the affirmative for the following reasons:
>
> Plaintiff alleges that defendant owes him some money; defendant denies this. Defendant 1 has sold some property to defendant 2, and plaintiff says this will defraud him and sues to have the sale set aside. The Subordinate Judge found that as plaintiff had not obtained a decree against defendant 1, he had no *locus standi*.
>
> Section 53 of the Transfer of Property Act lays down that a transfer of immoveable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed. The question is whether "creditor" means a person who alleges that money is due to him from the transferer or a person holding a decree against the transferer.

1902.

ISHVAR TIMAPPA v. DEVAR VENKAPPA.

I am referred to the case of *Gopal* v. *Bank of Madras*,(1) but in that case it is not stated whether the creditors held decrees or not. Probably if they had held, then it would have been so stated.

In the Civil Procedure Code a person whose claim has been adjudicated and who has obtained a decree is called a decree-holder: and I do not think that the word "creditor" used in that Code can ever be intended to mean a decree-holder.

In section 91 of the Transfer of Property Act reference is made to a judgment-creditor and also to a creditor who has obtained a decree for sale. I think this shows that when the word "creditor" is used by itself its meaning is not limited to that of the word "judgment-creditor." It must mean a person who is, as a matter of fact, a creditor, *i.e.*, one to whom money is actually due, whether the fact is denied or not by the defendant.

I therefore think the plaintiff can maintain the suit, though of course the question whether or no he is a creditor of defendant 1 must be settled in the suit. If he is found not to be, he will have no *locus standi*, and the suit will have to be dismissed. There is further no need to decide on the amount, if any, due from defendant 1 to plaintiff. It is sufficient if plaintiff prove that defendant 1 owes him anything. I therefore reverse the decision of the Subordinate Judge and remand the case for fresh decision upon the merits. Costs to be costs in the suit.

The second defendant appealed against the order of remand.

Shamrao Vithal for the appellant (defendant 2):—The point is whether any person alleging himself to be the creditor of another can sue to have a deed of conveyance executed by the latter to a third person set aside under section 53 of the Transfer of Property Act. We submit that unless a creditor has established his right, that is, unless he has previously obtained a decree for his debt, he cannot sue under section 53. The debt must be either a proved debt or an admitted debt. Here it is neither the one nor the other, for the first defendant distinctly denies that he owes any money to the plaintiff: *Rajan Harji* v. *Ardeshir Hormusji*.(2)

Nilkanth A. Shiveshvarkar for the respondent (plaintiff):—The contention that the debt must either be a proved debt or an admitted debt is not warranted by the terms of section 53 of the Transfer of Property Act. Section 91 of the Act distinguishes a "judgment-creditor" from a "creditor." It is clear, therefore,

(1) (1893) 16 Mad. 397. (2) (1879) 4 Bom. 70.

that if the framers of the Act intended that in section 53 the word "creditor" should only mean judgment-creditor, it would be so stated. We admit that unless the plaintiff proves himself to be the creditor of the first defendant he is not entitled to the relief prayed for, but he is prepared to prove that fact in the present suit. Even if he had previously obtained a judgment against the first defendant, it would be necessary for him to adduce evidence to prove the debt in the present suit in order to get relief. Therefore the contention that in order to file this suit he must be the proved or admitted creditor cannot be sound.

The law as to fraudulent conveyance is laid down in Statute 13 Eliz., c. 5. Under that statute it was not necessary for a creditor to obtain a judgment for the debt previously to his filing a suit for setting aside a transfer: *Reese River Silver Mining Company* v. *Atwell*.[1] The same principle is laid down in section 53 of the Transfer of Property Act.

JENKINS, C.J.:—This appeal raises the point whether a person can sue under section 53 of the Transfer of Property Act before he has obtained a decree on the debt by virtue of which he claims to be a creditor of the transferer.

Under the Statute 13 Eliz., c. 5, on which this section is in part based, a creditor can sue before recovering judgment on his debt, but the words of that statute are no doubt different. The difficulty here is created by the provision in section 53 that the transfer is voidable *at the option of any person so defrauded, defeated or delayed*, for it may be argued that a creditor whose debt is not established by a decree does not fall within this description. But it appears to us that this is a question to be determined by reference to the facts of each case. The decree is evidence—and valuable evidence—that he who complains is a creditor; but it is not the only evidence. The plaintiff's position may be proved otherwise, and proved as against the debtor, where, as here, he is a party to the suit. The absence, then, of a decree is not fatal: though it may have the result that the proof required of the creditor becomes more complicated, and the standard more exacting to prove the conditions requisite to success.

(1) (1869) L. R. 7 Eq. 347.

1902.

ISHVAR TIMAPPA v. DEVAR VENKAPPA.

But while a creditor in the position of the present plaintiff is entitled to sue, he can only do so on behalf of all other creditors of the transferer, so that when the case goes back to be dealt with on the merits, it will be necessary for the Court to bear this in mind, and require such amendments as may be necessary to bring the suit into conformity with this rule of law.

As far as this appeal is concerned the order of the District Judge is confirmed. Costs to be costs in suit.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar, Mr Justice Batty and Mr. Justice Aston.

1902. December 4

NANDUBAI AYAL MANGALDAS BHANJI (PLAINTIFF) *v.* GAU BIN HALIA BAGAL (DEFENDANT).*

Stamp—Indian Stamp Act (II of 1899), schedule I, articles 23, 24—Conveyance—Havala(1)*—Letter by a debtor authorising payment to his creditor of money due to him (the debtor) by a third person.*

The defendant authorized the plaintiff, his creditor, to receive a sum of money on his behalf, due to him by the Panjrapol authorities at Bhiwandi, by a letter which ran as follows:

To—The DAROGA OF THE PANJRAPOL, Bhiwandi.

I, Gau bin Halia of Khoni, beg to apply that I have completely fulfilled the agreement to supply fodder for Samvat year 1956, and that the sum of Rs. 22, due to me on account, should be made over on my behalf to Shet Mangaldas Bhanji. He will sign on my behalf, and I consent to his doing so. This application for the *havala* is given in writing. It is requested you will accept it.—6th March 1900.

(Signed) GAU HALIA.

This letter was written on an unstamped paper. On a reference by the Subordinate Judge to ascertain the requisite stamp upon it,

Held, that as the document in question effected a transfer of property by defendant to his creditor (plaintiff) in consideration of a debt due to the

* Civil Reference No. 17 of 1902.

(1) *Havala* means an order or draft for money drawn by a ryot on the banker or grain-dealer to whom he has sold his crop or entrusted it for sale. (Wilson's Glossary of Judicial and Revenue Terms, p. 204.)