

# **Fazal-UI Rahim Khan vs Nawal Kishore And Ors. on 9 November, 1951**

**Equivalent citations: AIR1952ALL226, AIR 1952 ALLAHABAD 226**

**Author: V. Bhargava**

**Bench: V. Bhargava**

## **JUDGMENT**

Malik, C.J.

1. One Abdul Bashir Khan was indebted to two persons, Girdhari Lal and Fazal-ul Rahim Khan. Both of them had obtained decree against Abdul Bashir Khan. On 9th September 1942, Abdul Bashir Khan applied for permission to sell his property to pay off his two creditors. This application was under the U. P. Regulation of Agricultural Credit Act (Act No. XIV of 1940). On 21st September 1942, Girdhari Lal put his decree under execution and applied for attachment and sale of the property in dispute. On 28th September 1942, Fazal-ul Rahim Khan, the other creditor also applied for execution of his decree and claimed rateable distribution under Section 73, Civil P. C. On 27th November 1942, an order was passed under Order 21, Rule 54, Civil P. C. to the effect that the property be attached and directing the judgment debtor not to transfer the property. On 30th November 1942, the permission sought for by the application, dated 9th September 1942, was granted. On 2nd December 1942, Abdul Bashir Khan sold the property to Fazal-ul Rahim Khan for Rs. 1,700. The amount due to Fazal-ul Rahim Khan was only Rs. 273-1-9. The details of the sale consideration were as follows :

"Rs. 272 Due to Fazal-ul Rahim Khan under the decree in his favour.

Rs. 128 Paid as earnest money.

Rs. 40 Paid in cash for the execution and registration of the deed.

Rs. 1,260 Paid in cash at the registration.

Fazal-ul Rahim Khan is a cousin of Abdul Bashir Khan and both Fazal-ul Rahim Khan as well as Abdul Bashir Khan knew that there were decrees in favour of Girdhari Lal under which Rs. 899-2-9 were due to him. No provision was, however, made in the sale deed for payment of the amount due to Girdhari Lal. On the date of the sale, the property had not been attached. The attachment was made on 14th February 1943, Fazal-ul Rahim Khan, the vendee, thereupon filed objections under

Order 21, Rule 58, Civil P. C. which were allowed on 10th July 1943. On 30th July 1943, the present plaintiff Girdhari Lal being dead, filed a suit under Order 21, Rule 63, Civil P. C., out of which this appeal has arisen. The suit was dismissed by Shri Isharat Husain Munsif on 24th April 1944. No plea was taken in clear terms in the written statement that the suit was not framed in accordance with the provisions of Section 53, T. P. Act and was, therefore, not maintainable. The learned Munsif allowed that point to be raised and decided it in favour of the defendants. On 11th April 1945, the learned Civil Judge, Shri Y. S. Gahlaut, set aside the decree of the trial Court and decreed the plaintiffs' suit. He held that "the sale deed was executed with a view to defeat and defraud the plaintiffs and for keeping a major portion of the sale price with defendant 2, the vendor, his own cousin."

On the other point, he held that as the plaintiffs had a right to file a suit for declaration under Order 21, Rule 63, Civil P. C. after the defendant's objection was allowed under Order 21, Rule 58 of the Code, the provisions of Section 53, T. P. Act did not apply. There was a second appeal filed in this Court and on 30th September 1947, a learned Single Judge remitted the following two issues for finding :

"Issues

(a) What was the extent of Abdul Bashir Khan's indebtedness ?

(b) Whether the property still in his hand is enough for the discharge of his debt ?"

The learned civil Judge, Shri M. S. Saxena, who decided these two issues, held that, besides Fazal-ul Rahim Khan and Girdhari Lal, there were no other creditors of Abdul Bashir Khan and that on the date of the sale, the property was not sufficient to discharge the debt due to Girdhari Lal but, due to the value of the property having increased in the meantime, the debt could be discharged from the other properties left. On return of the findings, the case came up before another Single Judge of this Court who referred it to a Division Bench which, in its turn, referred it to us for deciding the point whether a suit under Order 21, Rule 63, Civil P. C. would lie under the circumstances mentioned above, or the suit must be filed in a representative capacity for the benefit of all the creditors, as required by the fourth clause of Section 53, T. P. Act. As the learned Judges, who had referred this point for decision by a larger Bench, were no longer available, the whole case has been put up before us for decision.

2. In our view, the lower Court having re-corded the clear finding of fact that, besides the plaintiffs who were the legal representatives of Girdhari Lal deceased, there were no other creditors of Abdul Bashir Khan, Fazal-ul Rahim Khan having been paid off by the execution of the sale deed, the question of law referred to us for decision becomes of academic interest. The appellant was examined as a witness by the learned civil Judge after the issues were remitted to him. The appellant stated in clear terms that ;

"Abdul Bashir Khan was not indebted to anybody except for the decrees in my favour and the plaintiffs' favour."

Even if it be considered that a suit to set aside a sale deed under Section 53, T. P. Act, was necessary before the declaration under Order 21, Rule 63, Civil P. C. could be granted, the present suit would satisfy the requirements of the fourth clause of Section 53, T. P. Act as the plaintiffs are the sole creditors of Abdul Bashir Khan and the suit is consequently on behalf of all the creditors. We do not, therefore, think that it is necessary to consider the question that has been referred to us for decision and the appeal should be dismissed on the ground that there being no other creditors of Abdul Bashir Khan, the suit under Order 21, Rule 63, Civil P. C., as framed, was competent. The other finding recorded by the lower Court was a finding of fact that the sale deed was to defeat the claim of Girdhari Lal and was fraudulent and is not challenged.

3. As a result, the appeal fails and is dismissed with costs.