in holding that the compromise did not require registration and was, therefore, admissible in evidence; whereas, the lower appellate Court has gone wrong on that matter. In this view of the matter, the net result would be that Regular Second Appeal No. 1228 of 1960, will fail whereas Regular Second Appeal No. 456 of 1962 will succeed. I accordingly dismiss Regular Second Appeal 1228 of 1960 and allow Regular Second Appeal No. 456 of 1962, set aside the judgment and decree of the lower appellate Court and restore that of the trial Court. In view of the difficult nature of the question involved, I would make no order as to costs in both the appeals.

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*K.S.K.*

## APPELLATE CIVIL

*Before Daya Krishan Mahajan and R. S. Narula, JJ.*

STATE OF PUNJAB,—*Appellant.*

*versus*

GIANI BIR SINGH AND ANOTHER,—*Respondents.*

**Regular First Appeal No. 219 of 1961.**

March 13, 1967.

*Transfer of Property Act (IV of 1882)—S. 53—Suit for declaration that the gift was* non est *and in the alternative that it had been made fraudulently and dishonestly to defeat and delay the creditors—Whether maintainable—Such suit—Whether can be filed by one creditor only—Withdrawal of objection to mutation on the basis of gift deed—Whether amounts to acceptance of validity of the gift by the creditor and debars him from filing the suit.*

*Held,* that the right to attach particular property is a right as to that property within the meaning of those words in section 42 of the Specific Relief Act, 1877. A decree can be passed in favour of the plaintiff in a suit in which he challenges the gift made by a debtor in favour of his wife as *non est* and in the alternative that it had been made fraudulently and dishonestly with intent to defeat and delay his creditors. In any case, two alternative claims were made by the plaintiff and it is well known that in law, a plaintiff can, not only make alternative claims in the suit but also inconsistent claims in the suit and the relief is to be granted in accordance with the claim that he is able to make out.

In the present case, the plaintiff has clearly made out a case that the present transfer has been made with intent to defeat and delay the creditors. Therefore, there was no justification for the trial court to dismiss the plaintiff's suit on the ground that he had also, in the alternative, attacked the gift as ***non est.*** The relief that has been claimed is the relief that the plaintiff would be entitled to under section 53 of the Transfer of Property Act. Moreover, one cannot lose sight of the fact that in the Punjab the provisions of section 53 in terms are not applicable. It is the general principles underlying that section which have been applied. Therefore, the technical rules of section 53 will not stand in the way of granting relief to the plaintiff.

*Held,* that a suit for avoiding the transfer of his property by a debtor is competent at the instance of even a single creditor. The rule contained in the section would be equally applicable even when there is only a single creditor of the debtor and he has been so defeated and delayed.

*Held,* that the withdrawal of the objection by the creditor to the mutation following the gift deed does not mean that he has accepted the validity of the gift. The acceptance of the validity of the gift has to be proved by evidence and not by a mere inference drawn from the non-pressing of the objection to the mutation on the basis of the gift. Moreover the doctrine of approbation and reprobation or of estoppel is based on the principle that a party by a representation is made to change or alter his position. No such result has followed in the present case. There was no representation by the plaintiff on the basis of which the defendants were made to change or alter their position. Therefore, there is no basis for the contention that the plaintiff's suit under section 53 of the Transfer of Property Act would be barred on the principle that he accepted the validity of the gift and was debarred from challenging it.

*First Appeal from the decree of the Court of the Senior Sub-Judge, Ludhiana, dated the* 31*st day of March,* 1960, *dismissing the plaintiff's suit and leaving the parties to bear their own costs.*

K. S. KWATRA, DEPUTY ADVOCATE-GENERAL (PUNJAB) WITH R. K. CHHIBAR, ADVOCATE, for the Appellant.

S. S. SODHI AND M. M. PUNCHHI, ADVOCATES, for the Respondents.

MAHAJAN, J.—This appeal is directed against the decision of the Senior Subordinate Judge, Ludhiana, dismissing the plaintiff's suit. The plaintiff is the State of Punjab and the defendants are Giani Bir Singh and his wife Smt. Basant Kaur. In an annual excise auction regarding village Pakhowal, district Ludhiana, for the retail vend of country liquor held for the year 1944-45, Bir Singh was the highest

bidder and, accordingly, secured the licence at the annual licence fee of Rs. 10,900. The terms and conditions were those that had been promulgated at the time of the auction. The licence fee had to be deposited in instalments. Suffice it to say that the defendant paid only Rs. 2,728. This left Rs. 8,172 due on account of the licence fee. As this amount was not paid, various demands were made by the Excise Department and, ultimately, on the 5th of March, 1945, it was decided to terminate his licence and re-auction the vend. The vend was re-auctioned on that very day for a sum of Rs. 410. This resulted in a net loss of Rs. 7,762 to the plaintiff. Steps were taken to recover this amount as arrears of land revenue but with no effect. The defendant also made various representations to the Deputy Commissioner, Ludhiana, praying that he may be excused from making payment of the arrears, but those representations were rejected. Even warrants of recovery were issued against the defendant, but the arrears could not be recovered. On the 6th of June, 1947, the defendant made an oral gift to his wife (defendant No. 2), but, later on, on the 29th July, 1947, he produced a registered deed of gift in favour of his wife. On the 14th of January, 1948, when the question of sanctioning mutation on the basis of the registered gift-deed was before the Tehsilar, a report was received by him from the Assistant Excise and Taxation Officer, Ludhiana, that a sum of Rs. 7,662 was due on account of the liquor licence fee for the year 1944-45, and that so long this amount was not paid, the mutation be not sanctioned. Accordingly, the mutation proceedings were adjourned by the Tehsildar. The matter was then placed before the Tehsildar on the 3rd May, 1954 and the mutation was sanctioned on that date. While sanctioning the mutation, the Tehsildar made the following observations:—

> "The parties have already made the statements. The report of Rao Sultan Singh, Revenue Officer, to the effect that the excise case has been withdrawn is attached with the file. There is also an order dated the 18th April, 1951, passed by the Deputy Commissioner to the effect that the mutation may be decided in accordance with the order of the Revenue Officer. Hence the mutation ........... is sanctioned......"

The present suit was filed on the 9th of February, 1959, though the plaint bears the date of 2nd February, 1959. The suit is for a declaration to the effect that the gift made by defendant 1 to defendant 2 of the property in suit,—*vide* gift-deed dated the 29th July, 1947, was done by defendant 1 with a view to delay and

defeat his creditors and is, therefore, not binding on the creditors of defendant 1. In the body of the plaint—in paragraphs 9 to 12 two alternative stands were taken—(1) that the gift had been made by defendant No. 1 with intent to defeat and delay the realisation of the amount of the licence fee and he had, therefore, executed a sham, colourable gift-deed without any consideration in favour of his wife (defendant 2), and that he was still in possession of the land; and (2) that he had alienated the property in favour of defendant 2 fraudulently, dishonestly and with a view to delay and defeat the realisation of the debt due to the plaintiff from him. Put briefly, the two alternative stands taken by the plaintiff were—(1) that there was no gift and it was, more or less, a paper transaction passing no title to the donee and (2) that there was a gift which was void because it was made in order to defeat and delay the creditors of defendant 1. A joint written statement was filed by both the defendants and the stand taken was that the gift was a valid transaction and had not been made to defeat or delay the creditors. Various other pleas were raised which would be apparent from the following issues:—

(1) Whether on the date of the gift in dispute defendant No. 1 owed any debt to the plaintiff or had any other creditor on that date ?

(2) If issue No. 1 is not proved, whether the suit, as framed, is maintainable ?

(3) Whether defendant No. 1 committed any breach of contract as alleged by the plaintiff ?

(4) If issue No. 3 is proved, what loss did the plaintiff suffer ?

(5) Whether the plaintiff withdrew the case of recovery of compensation against defendant No. 1 ? If so, with what effect ?

(6) Whether the gift in dispute was effected with intent to delay and defeat the creditors ?

The trial court found all the issues, excepting issue No. 2, in favour of the plaintiff and accordingly, dismissed the suit leaving the parties to bear their own costs. The plaintiff, the State of Punjab, is dissatisfied with this decision and has come up in appeal to this Court.

The learned counsel for the State has only challenged the finding on issue No. 2, whereas the learned counsel for defendants has tried to support the finding of the trial court on issue No. 2 and has also challenged the decision of the trial court on issue No. 5. No arguments have been addressed by either side on the remaining issues and the findings of the trial court on those issues, therefore, must stay.

The contention of Mr. Kartar Singh Kwatra for the State is that the trial court has dismissed the suit on two grounds. The first is that the plaintiff's claim was that there was no gift at all and, therefore, no suit under section 53 of the Transfer of Property Act was competent. A suit under section 53 contemplates the existence of a transfer; in other words a valid transfer but which is voidable at the instance of the creditors. The second ground is that no suit under section 53 is competent by a single creditor. It is common ground that there are no other creditors of the defendant, and the only creditor is the State of Punjab. The trial Court based himself on two decisions so far as the first ground is concerned, namely, *Mahendra* v. *Suraj Prashad* (1) and *Mt. Hidayat ul Nissa* v. *Jalal-ud-Din* (2), and on a Single Bench decision of the Madras High Court in *Thaher Unnissa* v. *Sherfunnissa* (3), so far as the second ground is concerned. According to the learned counsel for the State, both these grounds are untenable. It is urged that two alternative claims were made in the plaint. The first alternative claim was that the gift was *non-est*, and, therefore, a mere declaration could have been claimed and granted under section 42 of the Specific Relief Act, and the mere fact that section 42 was not so mentioned in the plaint would not debar the court after all the facts had been ascertained, from giving the necessary relief to the plaintiff. In support of this contention, the learned counsel has placed reliance on *Chattru Mal* v. *Mt. Majidan* (4), *Jamnabai* v. *Dattatraya* (5), *Mt. Askari Begum* v. *Ballabh Das* (6) and *Mangtulal* v. *Daya Shankar* (7). All these decisions do support the contention of the learned counsel. Mr. Sodhi, who appears for the defendants respondents, had drawn our attention to the decision of the Andhra

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(1) A.I.R. 1958 Patna 568.
(2) A.I.R. 1941 Oudh. 95.
(3) A.I.R. 1955 Mad. 446.
(4) A.I.R. 1934 Lah. 460.
(5) A.I.R. 1936 Bom. 160=I.L.R. 60 Bom. 226.
(6) A.I.R. 1938 Oudh. 165.
(7) A.I.R. 1936 Patna 572.

Pradesh High Court in *Subbaraidu* v. *Satyanarayana* (8), of the Madras High Court in *Krishnavani Ammal* v. *Soundararjan* (9), and of the Rangoon High Court in *Maung Ba Maung* v. *Maung Ba Yin* (10), for the contention that in such circumstances no relief can be granted under section 42 of the Specific Relief Act. The decisions cited by Mr. Sodhi support the contention advanced by him.

In view of the conflict of authority, it will be proper to examine in detail these decisions. In *Chattru Mal's* case, a decision under clause 10 of the Letters Patent, the facts were that the plaintiff had brought a suit claiming a declaration that the decree passed by the Senior Subordinate Judge on the 20th of June, 1921 in terms of the award, by which Abdul Majid had transferred this immovable property to his wife, Mst. Majidan, in order to cause loss to his creditors, was ineffectual against the rights of the plaintiff and the other creditors, defendants 3 to 8. It was held by the learned Single Judge, who reversed the decision of the lower appellate court, that the suit was not maintainable inasmuch as the declaration asked for could not be granted under section 42 of the Specific Relief Act. While dealing with this part of the case, Tek Chand, J., spoke thus for the Court—

> "The third objection based on the proviso to section 42, Specific Relief Act, appears to be equally untenable. As stated above, the plaintiff and the other creditors had debts due to them at the time when the arbitration proceedings in question were held. The collusive award and the consent decree based thereon therefore clearly deprived the creditors of their right to recover their dues from the property of Abdul Majid. They were materially prejudiced by these proceedings and had a right to seek a declaration to this effect in the civil court. It has not been shown that they could have claimed any further relief than what actually was asked for in the plaint. The suit cannot therefore be said to be barred by the proviso to section 42, *see* in this connection *Louis Dreyius & Co.* v. *Jan Mahomed* (11) and *Chan Tat Thai* v. *Ma Lat* (12).

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(8) A.I.R. 1961 A. P. 25.
(9) A.I.R. 1945 Mad. 53.
(10) A.I.R .1939 Rangoon 332.
(11) A.I.R. 1919 Sind 42.
(12) (1916) 33 I.C. 124.

In *Jamnabai's case,* Beaumont, C.J., held that the right to attach a particular property is a right as to that property within the meaning of those words in section 42 of the Specific Relief Act. The material facts in that case were that in 1926, the wife of the defendant purchased a house. In 1927, the plaintiff obtained a decree against the defendant and in due course he filed an application to recover the amount of his decree by sale of the house which had been purchased by defendant No. 2, that is, the wife. The contention of the plaintiff was that defendant 2 purchased the house as *benamidar* for her husband (defendant No. 1). On the 21st of July, 1929, the house was attached. Objections to attachment were raised by defendant 2. The plaintiff withdrew the attachment and the application was disposed of. On the 1st of October, 1929, the plaintiff brought a suit asking for a declaration that the house was owned by defendant No. 1 and was purchased *benami* in the name of defendant No. 2 and that it was liable to attachment and sale in execution of the plaintiff's decree. An objection was taken that such a suit was not competent under section 42 of the Specific Relief Act. It was held that as there was no transfer of property from defendant 1 to defendant 2, the case did not fall under section 53 of the Transfer of Property Act. In spite of this finding, a declaration was granted and the reason why that course was adopted may best be stated in the words of the learned Chief Justice—

> "It seems to me that what the plaintiff in substance is claiming is a declaration of his right as to this property. I think the proper form of declaration to make is this : The Court being of opinion that th epurchase of the suit property in the name of defendant 2 was *benami* for defendant 1, it is declared that the plaintiff in execution of his decree against defendant 1 is entitled to attach the property. That seems to me to be a declaration which falls within section 42, Specific Relief Act."

In *Mt. Askari Begum's case*, a Division Bench of that Court in somewhat similar circumstances followed the decision of the Bombay High Court in *Jamnabai's case.* I will rest content by quoting a few paragraphs at page 168 of the report. They are as follows: —

> "In the present case we are not concerned with the proviso, and the sole contention is that because the plaintiffs have not proceeded against the property in dispute by an application in execution and an attachment of the property, followed presumably by proceedings under Order 21, Rule

58 and an order under Rule 63, they were not entitled to institute a suit under section 42, Specific Relief Act. The two cases on which reliance is placed were cases in which there had been an attachment and the Court proceeded to hold that a suit could not be filed under the provisions of Order 21, Rule 63 in the absence of an adverse order under that Rule. That is not the case here. Secondly it appears to be more than doubtful whether that view any longer holds the field and to us it appears that the view taken by the Bombay High Court in *Jamnabai's case* is the view which commends itself to us. The learned Chief Justice in that case pointed out :

The question is whether the plaintiff has any right 'as to' the property. The right which the plaintiff claims is a right to attach the property and it seems to me that a right to attach particular property is a right 'as to' that property. Later on he said:

I entirely agree that the Court ought not to encourage the filing of suits where the relief claimed can be sought expeditiously and cheaply in attachment; and if I thought that the plaintiff in this case could have obtained the relief, which he seeks, in attachment, I should not be prepared to make any declaration in his favour. But it is apparent from the judgment of the trial court that the question whether the purchase in the name of defendant 2 was *benami* for defendant 1 was a somewhat complicated one, and I doubt very much whether a Court would deal with the question in execution.
He went on to say :

It seems to me that what the plaintiff in substance is claiming is a declaration of his right as to this property. I think the proper form of declaration to make is this : The Court being of opinion that the purchase of the suit property in the name of defendant 2 was *benami* for defendant 1, it is declared that the plaintiff in execution of his decree against defendant 1 is entitled to attach the property. That seems to me to be a declaration which falls within section 42, Specific Relief Act.

Similarly, in the present case it appears to us clear that the declaration sought by the plaintiffs in the present suit was a declaration covered by section 42, Specific Relief Act and one which could properly be granted."

In *Mangtulal's case,* it was held that there was nothing in section 42, Specific Relief Act, which bars a suit for a declaration that a certain sale is void. This observation fully applies to the present case where the declaration sought is that the gift in question is void; in other words, that the gift has no existence in the eyes of law.

The contrary view in *Subbaraidu* v. *Satyanarayana* (8), to the effect that "a suit to declare that the creditor has a right to attach a property is unnecessary and unknown" cannot be accepted in face of the decisions already referred to. None of these decisions was considered by the learned Judge and with utmost respect to him, it may be said that the above quotation from his judgment does not represent the state of affairs prevailing so far as the decided cases go. I am not, therefore, prepared to follow this decision and, in my opinion, it does not lay down the correct rule of law. The decision in *Krishnavani Ammal* v. *Soundararajan* (9), proceeds on the basis that "a suit by a creditor for a declaration that certain transfers made by the debtor to his wife and daughter were *benami* and fictitious and were made for the purpose of defrauding the creditors does not come within the purview of section 42 nor is it maintainable apart from the provisions of section 42 because the plaintiff is clothed with neither any legal character nor title to the suit property". This decision has not considered the decisions referred to by me which have taken the contrary view. Beaumont, C.J., in *Jamnabai's* case had clearly taken the view that the right to attach property is a right as to any property. The principal reason given by the Madras High Court for throwing out the suit was that such suits, if permitted, would flood the courts. That may be a matter of expediency, but as a matter of law, I would rather prefer to follow the decisions of the Lahore, Bombay and Patna High Courts than the decision of the Madras High Court on this matter. The decision in *Maung Ba Maung* v. *Maung Ba Yin* (10) has proceeded on the basis that the right to attach property is not a substantive right but is purely a procedural right. This decision took the view that a creditor cannot sue under section 42 of the Specific Relief Act for a bare declaration that a transfer has been made by his judgment-debtor fraudulently with intent to defeat or delay his creditors. These observations certainly support the defendants, but, as already stated, it appears to me that the view taken by the Lahore and the Bombay Courts

is a better view to follow. Moreover, the decision of the Lahore High Court is binding so far as we are concerned and in preference to the Rangoon view I am bound to follow it. I am, therefore, clearly of the view that a decree in favour of the plaintiff could have been passed under section 42 of the Specific Relief Act. In any case, two alternative claims were made by the plaintiff, and it is well known that in law, a plaintiff can, not only make alternative claims in the suit but also inconsistent claims in the suit and the relief is to be granted in accordance with the claim that he is able to make out. In the present case the plaintiff has clearly made out a case that the present transfer has been made with intent to defeat and delay the creditors. Therefore, there was no justification for the trial court to dismiss the plaintiff's suit on the ground that he had also, in the alternative, attacked the gift as *non est.* The grounds urged in paragraphs 9 and 10 of the plaint are on totally different basis and, therefore, there could be nothing wrong in construing that in two different paragraphs claim was made for a declaration on two different basis. There is no mention in paragraph 10 about the deed of gift being a sham transaction or a mere paper transaction. This claim is only made in paragraphs 9 and 11. A claim in terms of section 53 of the Transfer of Property Act is made in paragraph 10. The relief that has been claimed is the relief that the plaintiff would be entitled to under section 53 of the Transfer of Property Act. Moreover, one cannot lose sight of the fact that in the Punjab the provisions of section 53 in terms are not applicable. It is the general principles underlying that section that have been applied. Therefore, the technical rules of section 53 will not stand in the way of granting relief to the plaintiff. The decisions that were relied upon by the trial court for holding that no decree under section 53 could be granted, namely, *Mahendra,* v. *Suraj Prasad* (1) and *Mt. Hidayat-ul-Nissa* v. *Jalal-ud-Din* (2), have no bearing on the present case because in the first case the suit was for redemption and the claim under section 53 was made in defence. In the Oudh case, the suit was for partition and again the claim was made in defence for a relief under section 53. Moreover, for the reasons which I have given for not following the Madras decision in *Krishnavani Ammal's case* (9), equally apply to both these cases. On the other hand the decision in *Shantilal* v. *Champalal* (13), clearly supports the view that I have taken of the matter. This disposes of the first ground on the basis of which the plaintiff's suit has been thrown out.

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(13) A.I.R. 1962 M.P. 363.

So far as the second ground is concerned, there is again a conflict of judicial opinion. *Thaher Unnissa's* case (3) is the solitary authority which has ruled that a single creditor cannot bring a suit under section 53 of the Transfer of Property Act. This decision has been considered by the Andhra Pradesh High Court in *Bhaskara* v. *Creditors of Piller Khasim Saheb* (14), and a Division Bench of that Court has taken a view contrary to the view taken by the Madras High Court. I have, therefore, taken the liberty to quote extensively from this decision—

"It is argued before us that the judgment-creditor being the only creditor cannot maintain the suit contemplated by section 53 of the Tansfer of Property Act. The learned counsel argued that a pre-requisite of such a suit was that at the date of institution of the suit, there should be more creditors than one and that it should be established so. The correctness or otherwise of this contention is the question for our consideration.

Sri Ramamohna Rao has relied on the language of section 53 of the Transfer of Property Act and particularly the reference to the creditors of the transferor in the first part of the section and that a suit shall be instituted on behalf of or for the benefit of all the creditors. The learned counsel has argued that from this the section has to be construed as contemplating a plurality of creditors on the date of the institution of the suit and consequently that a single creditor cannot avail of this provision.

We have, however, to notice that the representative suit contemplated was made necessary for two reasons: firstly that the debtor shall not be harassed by a multiplicity of suits, and secondly that the assets of the debtor shall be made available to the general body of creditors.

Order I, rule 8, Civil Procedure Code, which is the procedure prescribed for a representative suit, has the same purpose to achieve because it provides that—

"Where there are numerous persons having the same interests in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may

(14) A.I.R. 1965 A.P. 68.

defend in such suit, on behalf of or for the benefit of all persons so interested."

Having regard to the reasons for the representative suit, it may not lead to the necessary inference that a creditor, assuming that he is the sole creditor, cannot avail of this provision.

Sri Ramamohna Rao has relied on the observations of a single Judge of the Madras High Court in *Thaher Unnissa Begum* v. *Sherfunnissa Begum* (3).

That was a case where a wife claimed the properties as hers by virtue of a *patta* given to her by her husband, the judgment-debtor but it would appear that she did not press her prior claim petition with the consequence that it was dismissed. She did not also file any suit to set aside the dismissal of the claim petition within one year allowed by the law. The same plea raised by her later was held to be barred by *res judicata* and the decision in the case rested on that bar. It was also made clear in the judgment that the applicability of section 53 did not come up for consideration, as in that case there was no suit, but only an execution petition was filed by the decree-holder in the course of which a claim was made on the ground of an alleged transfer. The learned Judge observed thus:

'Simply because the lower court observed, in its order, that this *Patta* transfer was made with a view to defeat and delay the present decree-holder, section 53 will not be invoked. It is significant to note that the lower court itself did not say that the transfer was made with a view to defeat and delay the creditors, but only to defeat and delay the present decree-holder, one creditor of his. Section 53 will apply only when the transfer is made with intent to defeat and delay the creditors of the transferor, and not one single known creditor and that one the executing decree-holder.'

We agree with our learned brother that these observations were made by way of obiter and so it cannot be taken as laying down the proposition contended for by the learned counsel.

As against this case, the learned counsel for the respondent has referred to the observations in *Mohideen Tharagan* v. *Muhammad Mustappah Rowther* (15), wherein the learned Judge observed as follows at page 668:—

'If there be only one creditor, then the act of the debtor in transferring all his property to a stranger with a view to secrete the same and defeat the creditor would be fraudulent and the transfer would be set aside if the transferee had notice of the circumstances and of the debtor's evil design.'

Even these observations were by way of obiter. The question now placed before us did not directly arise for consideration then.

The learned counsel for the respondent has also placed reliance on a contrary view expressed in *Fakira Singh* v. *Majbo Singh* (16), where it was positively ruled that—

'The section applies with equal force and effect if a debtor disposes of his property with the intention of defeating one single creditor.'

Our learned brother agreed with this view and observed that he did not see sufficient reason for distinguishing between a case where a transferor had a single creditor and a case where a transferor had several creditors. We are inclined to agree with our learned brother and the view of the Division Bench of the Patna High Court, particularly having regard to the reasons for a representative suit."

With utmost respect I am inclined to agree entirely with the aforesaid reasoning. Moreover, the observations in *Bachan Singh* v. *Benarsi Dass* (17), to which I was a party, are in line with the aforesaid decision. At page 363 of the report, Dua, J., who spoke for the Court, observed that "this rule would perhaps be equally applicable even when there is only a single creditor of the debtor and he has been so defeated and delayed." I am, therefore, of the view that the second ground of decision, on which the plaintiff's suit has failed, is also not tenable.

(15) A.I.R. 1930 Mad. 665 (668).

(16) A.I.R. 1917 Pat. 448 (450)

(17) A.I.R. 1961 Pb. 361.

The net result of the aforesaid discussion is that the decision of the trial court on issue No. 2 is erroneous and that issue has to be decided in favour of the plaintiff.

Mr. Sodhi has raised a novel contention which is on the face of it very attractive but we are unable to accede to it. The contention is that by reason of the objection to the mutation following the deed of gift having been withdrawn, the plaintiff has accepted the gift and, therefore, he cannot now bring a suit under section 53 of the Transfer of Property Act. In support of this contention, the learned counsel has placed his reliance on *Sachitanand* v. *Radhapat* (18), and *Ram Sarup* v. *Ram Saran and another* (19), *In Sachitanand* v. *Radhapat* (18), it was held as under:—

> "Under section 53, Transfer of Property Act, a transfer with intent to defeat or delay a creditor is 'voidable at the option' of the person so defeated or delayed. When such a person becomes aware of the transaction which he has an option to avoid, he must not affirm it expressly or do any act which amounts to an affirmation of the transaction so as to destroy his right of avoiding it. He has the election of either accepting the transaction or of avoiding it. Once he has decided to do one thing he loses the other option, and cannot be allowed to reprobate what he has approbated."

In *Ram Sarup* v. *Ram Saran and another* (19), it was held as follows:—

> "Where in case of alienation a person entitled to challenge it is present at the mutation proceedings and when there is every opportunity of objecting to it does not object, he cannot challenge the alienation subsequently."

If a reference is made to the facts of both these cases, it will be found that there was positive act on the part of the person coming under section 53 of the Transfer of Property Act whereby there was a consent or acknowledgement of the disputed transaction. In the present

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(18) A.I.R. 1928 All. 234.

(19) A.I.R. 1926 Lah. 650.

case, there is no evidence of any positive consent or acknowledgement on the part of the State. At the very earliest opportunity objection was taken to the gift on the basis that it was being made to defeat and delay the State's claim to the arrears of the licence fee. This claim was later dropped not on the ground that the gift was accepted as a valid gift. No evidence has been led by the defendants to prove that the validity of the gift was at any stage accepted by the plaintiff or that the plaintiff gave up his right to avoid the gift. Only an inference is sought to be drawn from the non-pressing of the objection to the mutation on the basis of the gift. Moreover, the doctrine of approbation and reprobation or of estoppel is based on the principle that a party by a representation is made to change or alter his position. No such result has followed in the present case. There was no representation by the plaintiff on the basis of which the defendants were made to change or alter their position. Therefore, there is no basis for the contention that the plaintiff's suit under section 53 of the Transfer of Property Act would be barred on the principle laid down in the decisions on which the argument has been based. I am, therefore, of the view that the contention of the learned counsel has no merit and must fail. No attempt has been made by the learned counsel to produce the relevant orders on the basis of which the objection was dropped. The plaintiff was never called upon to produce the order of Rao Sultan Singh nor was any application made for its copy. So far as the Deputy Commissioner's order dated the 18th April, 1951, is concerned, an application was made for its copy and a report was made on that application that the copy would be available from a different department and the defendants merely contented themselves in not pursuing the matter thereafter because no application was made to the department from which they could have obtained the copy. The plaintiff was never called upon to produce this document either. In this state of affairs it canot be said that the doctrine of estoppel comes into play.

For the reasons recorded above, this appeal is allowed, the judgment and the decree of the trial Court is set aside and the plaintiff's suit is decreed. There will be no order as to costs.

R. S. NARULA, J.—I agree.

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*B.R.T*