RAMANUJA AYYANGAR v. NARAYANA AYYANGAR.

"is no proof that there was any agreement as to division of spoil. "What we have is a sale (consideration for which probably passed) of "property for only about one-ninth or one-tenth of its market value "to an out-sider, who would have to try his luck in a very doubtful "litigation thereon. The purchase was, therefore, of a very specu- "lative kind though not champertous. On the further question "whether such a transaction is opposed to public policy, I have not "been asked for an opinion, and I therefore refrain from expressing "any opinion."

This appeal again coming for final hearing, the Court delivered judgment as follows:—

JUDGMENT.—The Judge's finding is that the purchase by plaintiff from first defendant was a speculative transaction though not champertous. It has been held by the Bombay High Court in *Gopal Ramchandra* v. *Gangaram Anandishet*(1) that a similar transaction was not bad on the ground of being against public policy. Following that decision, we set aside the decree of the Court below and remand the appeal for disposal according to law.

The costs in this Court will abide and follow the eve.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

1895. August 14.

RANGAMMAL (PLAINTIFF)

v.

VENKATACHARI (DEFENDANT).*

Fraudulent conveyance—Collusive decree—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment-debtor to set aside conveyance and restrain execution of decree.

A, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to B without consideration, and collusively allowed a decree to be obtained against him on the promissory note, and conveyed to B a house in part satisfaction of the decree: and it appeared that certain of A's creditors were consequently induced to remit parts of their claims. A having died, his widow and legal representative under Hindu law, now sued B to have the

(1) I.L.R., 14 Bom., 72.

* Civil Suit No. 69 of 1894.

promissory note and the conveyance set aside and to have the defendant restrained by injunction from executing the decree:

Held, (1) that the plaintiff was not entitled to relief in respect of the promissory note and the decree, although she was not personally a party to the fraud, inasmuch as she claimed through A by whose contrivance and collusion the defendant was enabled to obtain the decree.

(2) that the plaintiff was not entitled to have the sale set aside inasmuch as there had been at least a partial carrying into effect of the illegal purpose in a substantial manner.

SUIT to declare invalid as against the plaintiff a mortgage, a sale-deed and a decree on a promissory note. The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Sundaram Sastri for plaintiff.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and Mr. *J. G. Smith* for defendant.

JUDGMENT.—The plaintiff, who is the widow and legal representative of one Virasami Ayyangar, deceased, sues to set aside (1) the mortgage of certain lands, dated the 3rd June 1891, executed by Virasami to the defendant, (2) the decree in civil suit No. 319 of 1891 on the file of this Court obtained by the defendant against Virasami in 1892 on a promissory note, also dated the 3rd June 1891, and (3) the deed of sale of a house, dated the 14th March 1893, executed by the latter to the former and for an injunction restraining him from enforcing the said mortgage and the sale and from executing the decree.

The material allegations of the plaintiff are that the late Virasami, who traded and carried on business in Madras and in the mofussil, having got into debt about the year 1891, in collusion with the defendant, for the purpose of defrauding his creditors, executed the mortgage and the promissory note for Rs. 5,442 of the 3rd June 1891, without receiving consideration for either of them, and allowed the defendant to bring suit No. 319 of 1891 referred to above on the latter document, and obtain a decree therein, and executed the sale-deed of the 14th March 1893 in part satisfaction of the amount alleged to be due under the said decree.

The defence is that the mortgage, the promissory note, the decree, and the sale-deed were all obtained *bonâ fide*.

The questions to be decided are whether the said allegations of the plaintiff or any of them are true, and, if so, whether she is entitled to any and what relief.

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On behalf of the plaintiff nine witnesses were called and exhibits A to H produced, and on behalf of the defendant he himself was examined and twelve documents filed.

The first witness for the plaintiff Rajagopalachari stated that he was a gumastah under Virasami Ayyangar up to 1891; that about the middle of that year Virasami communicated to him his intention to get up certain documents in the name of the defendant for the purpose of making it appear that his debts amounted to a larger sum than it was in reality, and thereby inducing his creditors to accept from him in full satisfaction of the amount due to them less than they were justly entitled to, that the witness objected to Virasami attempting to commit any such fraud and that in consequence misunderstandings arose between Virasami and himself which led to his quitting the service of the former. It appears that Virasami brought in 1891 a charge of embezzlement against the witness and also that subsequent to Virasami's death there have been quarrels and criminal complaints between the defendant on the one hand and the witness and his father on the other. Moreover the witness is the plaintiff's brother and his father is managing the suit for her. In these circumstances I am unable to attach any weight to the evidence of this witness.

The second, the fourth, and the ninth witnesses for the plaintiff said nothing in support of her case.

The fifth and the seventh witnesses were called to prove that the defendant is not possessed of much property. They spoke to the extent of the lands alone, held by him in two or three villages, which do not appear to be very valuable.

The third and the sixth witnesses gave material evidence. Virayya Naidu, the third, stated that Virasami and his son-in-law Narasimmachari who traded together owed him in October 1891 Rs. 9,600 and odd; that in that month Virasami and Narasimmachari came and represented to him that they could pay only Rs. 5,000, and that he accepted that amount in full discharge of his claim, as he was unwilling to undertake the trouble and expense of litigating with them in connection with certain fraudulent acts, which he had come to know Virasami had committed for the purpose of defeating the rights of his creditors. The entry in his account book, dated the 9th October 1891 (exhibit C) supports his statement that he gave up Rs. 4,000 and odd out of the amount due to him.

The sixth witness Thiruvengadathan Chetti who is a partner in a firm carrying on business under the style of King & Co., stated that Virasami and Narasimmachari owed the firm in 1891 over Rs. 6,000, that suit No. 339 of 1891 on the file of this Court was brought against them by the firm for the amount so due, and a decree obtained for the same, that when steps were taken to execute the decree, Virasami stated that he was unable to pay the whole amount, and that consequently in August 1893, the firm received Rs. 2,750 in full satisfaction of the decree.

The remaining witness Narasimmachari, the partner and son-in-law of Virasami and undivided nephew of defendant, was called for the plaintiff. But he entirely supported the case of the defendant, who himself gave evidence in his own favour.

In dealing with the transactions impeached by the plaintiff, it will be convenient to take up the mortgage first, as it is to some extent a distinct transaction from the promissory note of the same date. By the said instrument of mortgage, the lands and houses, which belonged to Virasami in certain villages in the Karvetnagar zamindari, were mortgaged for Rs 3,740 made up of six items. The largest of these is Rs. 2,000, which the defendant stated he undertook to pay to Narasimmachari's mother at the request of Virasami, on account of the amount that Narasimmachari had borrowed on the security of his house, and paid to Virasami a short time before the mortgage to the defendant. The remaining Rs. 1,740 consists of moneys said to have been paid on five different occasions by the defendant to or on account of Virasami to enable the latter to redeem certain jewels which he had pledged, and which belonged to his wife and his daughters who insisted that the properties should be got back and returned to them. There is no doubt that Narasimmachari's house was mortgaged to the plaintiff's second witness for Rs. 2,000 as alleged by the defendant, and it is probable that Virasami wanted to repay the amount to his son-in-law, and requested the defendant to undertake to pay the same to his mother as stated in the instrument of mortgage. This item therefore appears not to be fictitious. As to the remainder Rs. 1,740 there is nothing to contradict the statements of the defendant and Narasimmachari that the several amounts making up the said sum were paid to or on account of Virasami as alleged on behalf of the defendant. There is other evidence than that of the said persons to show that, as a matter of fact, Virasami

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had pledged the jewels referred to above, and that they were redeemed about the time the mortgage to the defendant was executed. The testimony adduced on behalf of the plaintiff to prove that the defendant did not possess sufficient property to enable him to advance the Rs. 1,740, which he says he actually paid to Virasami, or on his account does not satisfy me that he was too poor to raise that sum. I am therefore of opinion that the plaintiff has failed to establish that the mortgage in question was executed fraudulently without consideration.

The next question is as to the promissory note exhibit H., the decree thereon and the sale of March 1893. The promissory note purports to have been executed for Rs. 5,442; of this amount it is stated that all but Rs. 600 were found due upon a settlement of accounts evidenced by exhibit IV, dated 6th May 1891. The first item mentioned in this exhibit is Rs. 700 stated to be the value of the produce of the defendant's own lands in Punimangadu village, and alleged to have been delivered by the defendant to Virasami from 1877 to 1891 annually. The next item of Rs. 1,600 is said to be the value of the defendant's share of the produce derived from the lands which belonged to Virasami in the village of Mamandur, and which were cultivated by the defendant under an agreement that he was to take the kudivaram share, and pay Virasami the melvaram. The defendant's case is that he handed over every year from 1877 to 1891, not only the melvaram, but his own kudivaram also. Now it is admitted that Virasami never interfered with the cultivation of either the defendant's lands to which the first item relates, or his own to which the second item relates, and that the defendants alone attended to the business. Why in these circumstances the defendant gave to Virasami the produce of his own lands and his kudivaram share out of the produce of Virasami's lands, is not satisfactorily explained. And it is curious that though the lands were not let out for a fixed money rent, yet the annual yield therefrom turned out, throughout 14 years, to be worth exactly Rs. 170 each year as exhibit IV states. The third item consists of Rs. 600 principal and Rs. 1,008 interest thereon. And the principal is alleged to have been the sum that the defendant got in 1877 when his daughter was married, from her husband's family, partly for the expenses connected with the marriage ceremonies, and partly for jewels to be made for her. It is stated however that no portion of the Rs. 600 was spent during the

marriage or in making the jewels, but that the whole was lent to Virasami and remained in his hands up to 1891. This appears to be highly improbable. The fourth and the last item consists of Rs. 350 and of Rs. 504 interest thereon. The former is said to be the sale proceeds of the defendant's deceased wife's jewels alleged to have been handed over by the defendant to Virasami in 1880 and sold by the latter. If the different sums of money referred to above had been really lent, it is likely that the defendant would have secured some written evidence contemporaneous with the loans, but no such writing is produced. Again it is unlikely that the interest would have been allowed to accumulate for such long periods as eleven and fourteen years as stated in exhibit IV. I am therefore constrained to say that the items set out in exhibit IV appear to me to be altogether fictitious and the settlement therein alleged a sham.

The sum of Rs. 600, which, with the Rs. 4,842 specified in exhibit IV, makes up the amount for which the promissory note was executed, is said to have been paid by the defendant to Virasami between the date of exhibit IV and that of the promissory note. To establish this payment there is no evidence beyond the statement of the defendant, and exhibit III, which was produced to support it. It is an agreement executed by Virasami to the defendant, wherein the former promised to repay the said Rs. 600 with interest on demand when this amount had already been included in the promissory note, dated the 3rd June. What necessity there was for executing a further document about it nine days later, is not properly explained. Exhibits IV, H and III all seem to me to have been collusively got up to support an untrue claim.

This view is confirmed when I consider the circumstances in which Virasami was placed at the time the said documents came into existence, and the subsequent conduct of the parties in connection with suit No. 319 of 1891, the proceedings in which, as I shall presently show, synchronises with those of No. 339 of 1891 in a very remarkable manner.

From the evidence of the plaintiff's first, third and fifth witnesses, it is quite clear that Virasami was greatly indebted in 1891, and was exerting himself to get his creditors to take in full satisfaction of their claims much less than what they were entitled to Exhibit C shows as already stated that in October of that year the plaintiff's third witness actually gave up more than Rs. 4,000 out of a debt of Rs. 9,000 and odd. On the 18th November 1891

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Messrs. King and Company instituted suit No. 339 of 1891 against Virasami and Narasimmachari for the recovery of Rs. 6,000 and odd obtained a decree on the 2nd February 1892 and applied for execution in February 1893. The defendant's suit No. 319 was also instituted in November 1891, the decree was passed in March 1892, and an application for execution was put in March 1893. At the instance of Messrs. King and Company notice was issued in their suit to Virasami and Narasimmachari to show cause why the decree should not be executed and it was served on them on the 22nd February 1893. On the 14th March 1893 Virasami executed exhibit G conveying his house to the defendant in part satisfaction of the decree in suit No. 339 of 1891; and two days afterwards the defendant presented the application for execution referred to before asking for a warrant for the arrest of Virasami (exhibit XI). Narasimmachari admitted that he assisted the defendant in getting this application filed and was actually present when it was verified by the defendant in Court. It is also admitted that at this time the defendant and Narasimmachari on the one hand and Virasami on the other were friendly to each other, as they afterwards continued to be up to Virasami's death in December 1893. It seems, therefore, extremely unlikely that the defendant really wanted to arrest Virasami who was his sister's son. Nor would Narasimmachari have taken an active part in seeing exhibit XI filed if he believed that it was seriously intended to proceed against his father-in-law. Again if the sale-deed of the 14th March were a *bonâ fide* transaction, would it have been followed, within 48 hours of the execution of the document evidencing it, by an application for the arrest of the vendor by the vendee who were close blood relations of each other? Would the nephew not have been able to persuade his uncle to refrain from proceeding against his own person? At all events would some reasonable time not have been given to a judgment-debtor placed in circumstances in which Virasami was then placed to enable him to arrange for the payment of the balance of the decree amount? The execution of the sale-deed on the 14th and the presentation of exhibit XI on the 16th appear to me to have been clearly intended to put pressure upon King and Company who were then trying to execute their decree to come to terms, which they did five months afterwards by accepting in satisfaction of the whole claim Rs. 2,750 which was less than half of the decree amount. As to possession of the house after the alleged sale, it is

admitted that Virasami resided there till his death without paying any rent, though he agreed to do so under exhibit V executed by him on the 16th March the very day on which the application for a warrant for his arrest was filed by the defendant — exhibit VIII, dated the 16th March and exhibits VI and VII, dated the 17th of the same month and exhibit IX, dated the 1st May 1893, are rent agreements executed by certain tenants who occupied portions of the house other than those in Virasami's possession and yet the stamp papers on which they are written were sold to Virasami. This circumstance also shows that he was getting up evidence to support the sale. I hold therefore that the decree in suit No. 319 of 1891 was collusively obtained on the promissory note exhibit H, executed without consideration, for the purpose of defeating the rights of Virasami's creditors and that the sale-deed exhibit G executed in part satisfaction of that decree is fraudulent.

The next question is whether the plaintiff is entitled to set aside the decree and the sale, as to both of which my finding upon the facts is in her favour.

First as to the decree, the authorities are distinctly against the proposition that the plaintiff is entitled to impeach it, *Venkatramanna* v. *Viramma*(1), *Chenvirappa* v. *Puttappa*(2). In the former case A had obtained a decree against B in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants. A subsequently sued B and the tenants to recover possession of the same land. B pleaded that the decree obtained by A was the result of collusion between himself and A in fraud of B's creditors. It was held that it was not open to B to raise this plea. Parker, J., there said, "although when "a contract or deed is made for an illegal or immoral purpose, a "defendant against whom it is sought to be enforced may not for "his own sake but on grounds of general policy (Per Lord Mans-"field in *Holman* v. *Johnson*(3) and *Luckmidas Khimji* v. *Muljii* "*Canji*(4)) show the turpitude of both himself and the plaintiff, it "is otherwise when a decree has been obtained by the fraud and "collusion of both the parties. In such a case it is binding upon "both, *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*(5) and "*Prudham* v. *Phillips*(6)."

(1) I.L.R., 10 Mad., 17.
(2) I.L.R., 11 Bom., 708.
(3) Cowper, 343.
(4) I.L.R., 5 Bom., 295.
(5) I.L.R., 6 Bom., 703.
(6) 2 Ambler, 763.

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In the other case cited by me above, the party who sought to get rid of the fraudulent decree was the plaintiff, and the facts and the decision there were, so far as the point I am now dealing with is concerned, these. In 1874 the plaintiff Puttappa bought a house from G, but caused the conveyance to be executed by G in the defendant Chenvirappa's name. This was done with the object of protecting the property against the claims of the plaintiff's creditors. The plaintiff occupied the house, ostensibly as tenant of the defendant, for a nominal rent. In 1880 the defendant brought a suit against the plaintiff to recover possession of the house, and obtained an *ex-parte* decree. He applied for execution of the decree, but allowed the execution proceedings to drop. In 1883 he made a fresh application for execution. Thereupon the plaintiff filed a suit for a declaration of his title to the house in question and of his right to retain possession alleging that the defendant was a mere *benamidar*; that the sale-deed and *ex-parte* decree were sham and collusive transactions in fraud of the plaintiff's creditors. It was held that the plaintiff was bound by the decree passed in 1880 in the defendant's favour though it was a collusive decree, and that the plaintiff could not get the judgment set aside which the defendant had obtained against him by his own contrivance. After an elaborate examination of the authorities on the point, West and Birdwood, JJ., who decided the case just cited, conclude with the observation that "a party to a collusive decree is bound by it, "unless possibly when some other interest is concerned that can be "made good only through his." No such interest being at stake in the case before me, I must hold that the plaintiff is not entitled to set aside the decree, even though she was not personally a party to the fraud, inasmuch as she stands in the shoes of Virasami, through whom she claims and by whose contrivance and collusion the defendant was enabled to obtain the decree sought to be set aside. The dictum in *Mathew* v. *Hanbury*(1) in favour of the proposition that in such cases the legal personal representative of a party committing the fraud stands in a better position than the latter has been held to be erroneous by Lord Selborne, L.C., in *Ayerst* v. *Jenkins*(2).

With reference also to the sale of the 14th March 1893, it seems to me that the plaintiff is in law not entitled to any relief. Before

(1) 2 Vern., 187. (2) L.R., 16 Eq., 281.

stating the specific ground which disentitles her to relief it is necessary to notice briefly the state of the law on the point. The result of the authorities may be summed up thus. The mere fact that an assignment has been made for an illegal purpose does not of itself, prevent the Court, at the instance of the assignor from interfering. Where the purpose, for which the assignment is made is not carried into execution and nothing is done under it, the *mere intention* to effect an illegal object when the assignment is executed, does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. But it is otherwise where the illegal purpose or any material part of it is carried out (May on Fraudulent and Voluntary Dispositions, second edition, pages 471 and 472; *Chenvirappa* v. *Puttappa*(1) already cited, and *Kearley* v. *Thomson*(2). In stating the law thus, I have not omitted to consider the cases of *Sreemutty Debia* v. *Bimola Soonduree*(3) and *Bykunt Nath Sen* v. *Goboollah Sikdar*(4). If they were intended to lay down a rule differing from that enunciated above, those decisions cannot be accepted as correct The unqualified language used by Sir R. Couch, C.J., in the former case and by Markby, J., in the latter, has been commented upon in *Chenvirappa* v. *Puttappa* (1), already referred to and where the question under consideration is discussed in all its bearings. Referring to those cases, West and Birdwood, JJ., observe.—"These decisions go a long way towards enabling a party to a dis-"honest trick, by which his creditors may have been defrauded "to get himself reinstated when his purpose has been served," and again, "amongst the English cases, from which the prin-"ciples stated in the Calcutta decisions have been drawn, it "would not be easy to find any in which a plaintiff seeking to "have his own solemn act set aside simply and solely in his own "interest, has succeeded in getting the formal act to be replaced by "the real intention when that intention involved a fraud on third "parties." Nearly all the reported English cases up to 1887 when *Chenvirappa* v. *Puttappa*(1) was decided are noticed by West and Birdwood, JJ., but *Kearley* v. *Thomson*(2) which lays down a more qualified rule than that apparently adopted by the said learned Judges had not been decided then and may be considered here. Then Fry, L.J. who delivered the judgment of the Court said,

(1) I.L.R., 11 Bom., 708.
(2) L.R., 24 Q.B.D., 742.
(3) 21 W.R., (C.R.), 422, 424
(4) 24 W.R., (C.R.), 391.

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"I hold, therefore, that where there has been a partial carrying "into effect of an illegal purpose in a substantial manner, it is im- "possible, though there remains something not performed, that the "money paid under that illegal contract can be recovered back;" and he made the following remarks which seem to show that the tendency of judicial opinion is in favour of making the rule ever stricter, "there is suggested to us a third exception, "which is relied on in the present case, and the authority for "which is to be found in the judgment of the Court of Appeal "in the case of *Taylor* v. *Bowers*(1). In that case Mellish, L.J., in "delivering judgment says at page 300:—'if money is paid, or "'goods delivered for an illegal purpose, the person who has so "'paid the money or delivered the goods may recover them back "'before the illegal purpose is carried out.' It is remarkable that "this proposition is, as I believe, to be found in no earlier case "than *Taylor* v. *Bowers*(1), which occurred in 1867, and notwith- "standing the very high authority of the learned Judge who "expressed the law in the terms which I have read, I cannot help "saying for myself that I think the extent of the application of "that principle, and even the principle itself, may, at some time "hereafter, require consideration, if not in this Court, yet in a "higher tribunal: I am glad to find that in expressing that view I "have the entire concurrence of the Lord Chief Justice." It is clear, therefore, that the terms, in which the Calcutta decisions referred to above are expressed, are too wide to be accepted as containing a strictly accurate exposition of the law on the question under consideration.

The only plausible argument in favour of the contention that the Courts ought not to decline to grant relief, even if the illegal purpose has been completely or partially carried out is that otherwise "they would be assisting in a fraud for they would be giving "an estate to a person when it was never intended that he should "have it," (*Sreemutty Debia* v. *Bimola Soonduree*(2). The answer is that this objection is allowed not for the sake of the defendant, but on grounds of general policy which the defendant has the advantage of contrary to the real justice as between him and the person seeking the relief by accident as it were, (*Holman* v. *Johnson*(3). In such cases the Court (to borrow the language of

(1) L.R., 1 Q.B.D., 291. (2) 21 W.R., (C.R.), 422, 424.
(3) Cowper, 341, 343.

Story,) "cannot but leave the guilty plaintiff to the consequences "of his own iniquity and decline to assist him to escape from "the toils which he had studiously prepared to entangle others." (Equity Jurisprudence, page 697). The remarks of Fry, L.J., quoted above, would seem to throw a doubt even upon the proposition that the formal act may be relieved against by reference to the real intention of the parties in cases in which the transaction is still inchoate and the transferor still retains a *locus pœnitentiæ*.

But to lay down that when that stage has passed and the illegal purpose has been fully or partially carried out, the transferor is nevertheless entitled to claim relief would not only remove the risk of the sham transferor loosing his property which operates as pointed out by West and Birdwood, JJ., in *Chenvirappa* v. *Puttappa*(1) as a check upon knavery, but also stain the administration of justice and make the Courts active instruments for securing to the guilty plaintiff the fruits of his successful fraud—a position which it is hardly necessary to say, is absolutely indefensible. It is clear therefore that assuming that the first part of the statement of the law made by me above is still open to reconsideration as suggested in *Kearley* v. *Thomson*(2) the second part of it is not only supported by authority, but is also sound in principle.

I hold that the sale of the 14th March 1893 falls within the second part of rule in as much as the fraudulent object of Virasami was gained with reference to two of his creditors as proved by the plaintiff's third and fifth witnesses, and there has been at least a partial carrying into effect of an illegal purpose in a substantial manner within the meaning of *Kearley* v. *Thomson*(2).

The suit fails and is dismissed, but, under the circumstances, without costs.

Branson & Branson, attorneys for defendant.

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(1) I.L.R., 11 Bom., 708. (2) L.R., 24 Q.B.D., 742.