APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

VARADARAJULU NAIDU (PLAINTIFF), APPELLANT,

v.

SRINIVASULU NAIDU (DEFENDANT), RESPONDENT.*

1897. February 2, 25.

Collusive decree to defeat rights of a third party—Suit to set aside decree.

The plaintiff was a Hindu, who, in order to prevent his undivided son from obtaining his share of the family property, made and delivered to the defendant certain promissory notes unsupported by consideration, the agreement between them being that the defendant should obtain a decree on the notes and in execution attach and bring to sale and himself purchase the lands of the family and should hold them at the disposal of the present plaintiff. The suit and the subsequent proceedings in Court were carried on by them collusively, the present plaintiff supplying the necessary funds. The son then sued for his share of the property, and having, with the aid of his father (who had meanwhile lost his confidence in the defendant) successfully impeached the sale as collusive, obtained a decree which was executed. It had been agreed that the defendant should hold the land at the disposal of the plaintiff, but he now refused to surrender to him his share. The plaintiff accordingly sued to recover his share of the property and for a declaration that the collusive decree against him and the subsequent proceedings in execution thereof were not binding on him:

Held, that it is not competent to a party to a collusive decree to seek to have it set aside, and that the plaintiff accordingly was not entitled to relief.

APPEAL against the decree of Davies, J., on the Original Side of the High Court in Civil Suit No. 90 of 1895.

This was a suit to declare that a promissory note for Rs. 6,050, executed by the plaintiff in favour of the defendant, was collusive, and not supported by consideration, and that a decree obtained by defendant thereon and execution proceedings taken under that decree were collusive, and that the defendant acquired no right in the properties, belonging to the plaintiff, which were sold in execution of the decree and purchased by the defendant. The facts on which the plaintiff relied were set forth in paragraphs 1—9 of his plaint, which were as follows:—

"That the plaintiff's son, N. Venkatasami Nayudu, a young "man, was unruly and disobedient to the plaintiff and became "impertinent owing to the chance of his being able, as plaintiff's "only son, to acquire the family properties.

* Original Side Appeal No. 32 of 1896.

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"That for the purpose of his (plaintiff's son) being brought to "submission to the plaintiff and to be dutiful to him, it was thought "necessary to devise some means or contrivance.

"That the defendant was in 1891 living with the plaintiff and "in his house and the plaintiff had confidence in him. It was "agreed between the plaintiff and the defendant in Madras in "1891 that the plaintiff should execute a promissory note in defend-"ant's favour for a large sum of money, that the defendant was to "file a suit against plaintiff thereon and obtain a decree and execute "same by attachment and sale of plaintiff's properties, unless in "the meanwhile the plaintiff's said son was reclaimed and became "submissive, or plaintiff thought fit to stop same or at any time "to deal with the properties, that the plaintiff was to supply funds "for litigation, that the defendant was not to benefit at all by these "various transactions and that the properties or their sale proceeds "were always to be the plaintiff's, and that the defendant, at "plaintiff's request, was to do everything that the plaintiff might "at any time require to deal with the properties as his own, that "the defendant was not to do anything prejudicially to the plaintiff "or to his interest, the sole object of those transactions being to "reduce the plaintiff's son to submission to plaintiff.

"That in pursuance of the said arrangement and for no con-"sideration whatever, five promissory notes were executed on the "same date for Rs. 1,500, Rs. 1,200, Rs. 1,600 and Rs. 875, and "Rs. 6,050, respectively, but the first four were made respectively "to bear different dates, viz., 10th February 1890, 18th October "1890, 2nd January 1891, and 6th March 1891, to give a colour of "truth to the transactions and to make it appear that the last was "executed in renewal of the earlier ones.

"That, upon the promissory note of Rs. 6,050 bearing date "the 1st of August 1891, a suit was filed with funds supplied by "plaintiff in this Honorable Court, being Civil Suit No. 241 of "1891, by defendant against plaintiff on or about 5th September "1891, and the defendant admitted execution and claim, and the "decree was passed in or about 27th October 1891 for Rs. 6,689-8-7 "inclusive of costs or thereabouts.

"That the decree was not executed for some time thereafter to "see whether the plaintiff's son would become obedient; that there "being no hope of same, the defendant executed the decree with "funds supplied by plaintiff against properties more particularly

"described in the schedule hereto and the same were sold in execu-
"tion and purchased by defendant.

"That the said promissory note and the decree and the execu-
"tion proceedings were all show transactions not supported by
"consideration and brought about for the purposes above men-
"tioned, and defendant acquired no rights thereunder for himself
"or his benefit, but that he is a trustee for the plaintiff in respect
"of any property or rights he may have acquired.

"That the plaintiff attempted in or about August 1893 to sell
"the said properties and asked the defendant to join him and
"enable him so to do, but he evaded to comply with plaintiff's
"request and illegally refused to do so, unless the plaintiff paid him
"some money and thus broke the agreements with the plaintiff and
"acted fraudulently and dishonestly.

"That the plaintiff's said son filed a suit against the defendant,
"being Civil Suit No. 174 of 1893, in this Honorable Court,
"setting out these facts and claiming the properties, and obtained
"a decree against the defendant to the extent of his interest therein,
"and the plaintiff supported his son in making out the true state
"of things as the defendant became fraudulent and deceitful.

"The defendant asserted that the promissory note for Rs. 6,050
"was executed for consideration and denied that the decree and
"execution proceedings were collusive.

"In the suit brought by plaintiff's son, Civil Suit No. 174 of
"1893, both the plaintiff and the defendant were made parties, and
"a decree was passed declaring that the proceedings in execution
"and the sale were void and had no effect whatever against the
"interest of the plaintiff's son in the property."

The suit was tried by Davies, J., who delivered the following judgment :—

DAVIES, J.—The plaintiff entered into an agreement with the defendant by which the defendant first sued the plaintiff on a promissory note for Rs. 6,050 executed by plaintiff and having got a decree (exhibit B) by consent thereon (exhibit III), then executed it against plaintiff's property selling up and buying his lands in discharge thereof. The plaintiff now alleges that these were all sham transactions gone through for the purpose of reducing his son to obedience, and he prays for a decree setting aside the decree B passed on the promissory note, and the execution proceedings taken thereupon as null and void, and for a declaration that the defendant has acquired no right or interest in the plaint properties, or in lieu of these reliefs a decree, for Rs. 6,689 odd, as damages

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for defendant's breach of contract in not re-conveying to him the plaint lands as was originally agreed to between the parties, after the object of the transactions had been served.

Now the plaintiff's son has had his right declared to half the plaint properties in Original Suit No. 174 of 1893 on the file of this Court in which he sued his father, the present plaintiff, and the present defendant as first and second defendants for the fraud that had been practised on him and the findings in that suit are admittedly binding on the parties to this suit. It was then found that the transactions, the subject of the present suit, were merely colourable, and there was no consideration for the promissory note and also that the properties in question were not the self-acquired property of the present plaintiff as was alleged, but family property in which the plaintiff's son, had a half share (*vide* issues and judgment in that suit marked C and D). The real question I have to determine in this suit is whether the plaintiff acted as he did with a fraudulent intent upon his son's rights, and I think there can be no doubt about it on the facts shown. Not only did the plaintiff claim the plaint properties or at least some of them as his self-acquisition (see his affidavit, exhibit I), but he placed those properties by the action he took beyond the reach of his son, who was compelled to bring a suit to recover his rights thereon. It is all very well for the plaintiff to say it was done with the object of bringing his son to submission, but as it appears that the son was claiming his rights against his father at the time, the father's intention clearly was to defraud his son of his rights by divesting himself of the whole of the family property. The steps taken by the plaintiff went far beyond the necessities of the case, if it was only to bring a recalcitrant son to order. The fact was there was a dispute between father and son as to the family property, and the father thought to settle the matter by depriving the son entirely of his half share, by disposing of the whole property as if it was his self-acquisition with the power to get it back for himself when it suited his convenience. This was clearly a fraud upon the son, and it has been so found in the suit brought by the son (exhibit D). Finding, then, that there was not only a fraudulent intent on the part of the plaintiff against his son, but that the fraud was actually effected in so much as it necessitated the bringing of a suit by the son to get the fraud done away with, the question remains whether the plaintiff is now entitled to relief against the other conspirator in the fraud. Considering that the arrangement between them culminated in a decree of Court and execution proceedings solemnly

conducted thereafter, the law is clear that the plaintiff is entitled to no relief—*vide Venkatramanna* v. *Viramma*(1), *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*(2), *Chenvirappa* v. *Puttappa*(3), and *Rangammal* v. *Venkatachari*(4), the case of *Param Singh* v. *Lalji Mal*(5) on which plaintiff relies—notwithstanding. This latter case was relied on by plaintiff, perhaps, more to support his claim for damages under the agreement of defendant marked A to recover the property, but that letter does not contain any fresh agreement made by defendant after the fraud was completed. It is only an acknowledgment of the original and collateral agreement made when the fraud was contemplated. Having its inception in fraud it is not valid, but even treating it as a new agreement it would be void under section 23 of the Contract Act as its object would be to defeat a provision of law, namely, the incapacity of the plaintiff to obtaining any relief by giving him indirectly the relief that he cannot obtain directly. The plaintiff's prayer for setting aside the decree on his promissory note and for a declaration against defendant's interest in the property, cannot be granted on the ground that he was a party to the fraud by which those things were brought about and his prayer for damages in lieu of those reliefs, must also be refused on the ground that it is based on the breach of an agreement which is invalid, as being part and parcel of the fraudulent scheme. The plaintiff has joined another cause of action in this case, namely, a claim for damages for his being arrested and imprisoned by the defendant under warrant—(exhibit II) for a balance due under the fraudulent decree. That cause of action arises clearly in tort and not in breach of contract, and must be rejected as a misjoinder, as it was not permissible to combine it in a suit to obtain a declaration of title to immovable property (section 44, Code of Civil Procedure).

The result is that the plaintiff's suit is dismissed with costs.

Plaintiff appealed.

Mr. *K. Brown* for appellant.

Srinivasulu Naidu for respondent.

JUDGMENT.—We agree with the learned Judge in holding that the plaintiff must have intended to defeat his son's claim to the property and that, therefore, the arrangement made between him and the defendant was contrived in fraud of his son. But it was

(1) I.L.R., 10 Mad., 17. (2) I.L.R., 6 Bom., 703. (3) 11 Bom., 708.
(4) I.L.R., 18 Mad., 378. (5) I.L.R., 1 All., 403.

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argued that since the plaintiff had repented of his conduct before any harm was done to his son or any effect given to the transaction, it was competent to him to repudiate it and have the property restored to him.

The case of *Symes* v. *Hughes*(1) cited by the appellant's counsel does not really support the proposition for which it was cited, for there, as the Master of the Rolls observes, the suit was prosecuted for the purpose of enabling the creditors to recover something. Here it is the party himself who, in his own interest, seeks to have the transaction annulled. It is very doubtful whether, in a case in which the maxim *in pari delicto* would otherwise apply, any exception arises by reason that the illegal purpose has not been carried out (*Kearley* v. *Thomson*(2) and *Sham Lall Mitra* v. *Amarendro Nath Bose*(3)). In the present case the transfer of the property to the defendant had been completed, nothing remained to be done by the plaintiff, and it was only by means of a suit that his son vindicated his rights. Under these circumstances, we do not think it is possible to say that the plaintiff's fraudulent purpose had not been carried into effect.

There is, however, another ground on which we may base our judgment and that is that it is not competent to a party to a collusive decree to seek to have it set aside. Strangers, no doubt, may falsify a decree by charging collusion, but a party to a decree not complaining of any fraud practised upon himself cannot be allowed to question it.

There is ample authority for his proposition beginning with the *dictum* in *Prudham* v. *Phillips*(4) (cited in argument in the Duchess of Kingston Case(5)).

The distinction between fraud and collusion lies in this that a party alleging fraud in the obtaining of a decree against him is alleging matter which he could not have alleged in answer to the suit, whereas a party charging collusion is not alleging new matter. He is endeavouring to set up a defence which might have been used in answer to the suit, and that he cannot be allowed to do consistently with the principle of *res judicata*.

The appeal is dismissed.

Rencontre, attorney, for appellant.

(1) L.R., 9 Eq., 475. (2) 24 Q.B.D., 742. (3) I.L.R., 23 Calc., 460.
(4) 2 Ambler, 763. (5) 20 State Trials, 479.