

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

1905
August 10, 11.

MUTHURAMAN CHETTY (PLAINTIFF), APPELLANT,

v.

KRISHNA PILLAI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Trust Act II of 1882, s. 84—No right to recover even where unlawful agreement only partly carried out—Decision not bad although no distinct issue when parties not taken by surprise.

The rule that a person *in pari delicto* cannot recover, is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character of such agreement. This is the construction which ought to be placed on the words 'not carried into execution' in section 84 of the Indian Trusts Act.

Where a point, on which there is no distinct issue, is present to the minds of the parties, the decision on such point cannot be impeached on the ground that there was no issue raised.

THE facts necessary for this report are fully set out in the judgment.

S. Srinivasa Ayyar for V. Krishnaswami Ayyar for appellant.

T. Subrahmania Ayyar for the Hon. Mr. P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—The plaintiff-appellant sues for the recovery of the price alleged to have been paid by him to the first defendant on account of the sale of land (exhibit A) executed by that defendant to the plaintiff on the ground that he has been deprived of the land in consequence of the judgment in Original Suit No. 496 of 1901 on the file of the Court of the District Munsif of Chidambaram brought by one Shanmugam Pillai. That suit was on the ground that the property belonged to Shanmugam Pillai, having been orally sold to his father by the then admitted owner one Ponnusami Pillai, the sale being followed by possession, and further, subsequently supported by an unregistered instrument of sale. The present plaintiff who was a party to that suit set up

* Second Appeal No. 733 of 1903, presented against the decree of R. D. Broadfoot, Esq., District Judge of South Arcot, in Appeal Suit No. 229 of 1902, presented against the decree of M.R. Ry. C. Krishnasami Row, District Munsif of Chidambaram, in Original Suit No. 157 of 1902.

an alleged title under exhibit A, a registered document. The then plaintiff Shanmugam Pillai's answer to the defence thus set up was that *exhibit A* was brought about by fraud, the present plaintiff being the prime mover in it. Shanmugam alleged that the father of the present plaintiff while in possession of the land as his (Shanmugam's) tenant wanted to purchase the land, but that Shanmugam refused to sell; and that the conveyance (exhibit A) was thereupon obtained from the first defendant to whom Ponnusami Pillai's son was made to execute a sale-deed in pursuance of a conspiracy to deprive the plaintiff of the land with reference to the provisions of the Registration Act which give priority to registered transfers over oral or unregistered transfers in certain circumstances. The Court after trial decreed possession to Shanmugam and, in doing so, came to the conclusion that the sale deeds relied on by the present plaintiff were not *bona fide* but executed in the circumstances set up by Shanmugam Pillai. This, however, is not a finding on which the actual decree given is to be taken as necessarily resting, for it was also found that the oral sale to Shanmugam was accompanied with possession and therefore was unaffected by the registered instruments relied on by the plaintiff. In answer to the claim here for the refund of the purchase-money, the first defendant *inter alia* pleaded that the plaintiff as one concerned in the fraud, of which the execution of *exhibit A* formed a part, was not entitled to seek the relief claimed, and further alleged that though the amount stated as the price was paid to him it was merely for the purpose of the amount being passed on to Ponnusami Pillai's son who executed the deed purporting to be a sale to the first defendant on the understanding that the first defendant should execute exhibit A later on. This answer was set up not in so many words but by reference to the conclusions of the Court expressed in the judgment in Original Suit No. 496 of 1901 (exhibit C) already referred to. No oral evidence was called on either side, the parties contenting themselves with filing a few exhibits of which the copy of the judgment in that suit was one. We are unable to accept the suggestion on behalf of the plaintiff that the question of fraud was not in the present case relied on before the District Munsif. The explanation which the District Munsif attempts to give in his present judgment with reference to his conclusions in the matter in the previous judgment shows that the point was raised before

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him this time also. On appeal the District Judge has taken a different view from the District Munsif and has arrived at the finding that the first defendant's defence under consideration is made out by the evidence in the case, and that the plaintiff as a person *in pari delicto* is not entitled to the relief prayed for. Though no express issue was framed with reference to this contention it is clear from what has been said that the point was present to the minds of the parties and if further materials which may have a bearing on the question were not placed before the Court, it was not due to the absence of a distinct issue in connection with it, nor are we able to agree with the suggestion, that the evidence on the record establishes nothing more than a mere knowledge on the part of the plaintiff of an infirmity in his vendor's right to convey. The District Munsif's judgment in Original Suit No. 496 of 1901 filed by the plaintiff himself refers to circumstances which point almost irresistibly to the conclusion that the execution of the conveyances by Ponnusami Pillai's son to the first defendant and by the latter to the plaintiff were solely for the purpose of defeating, if possible, the right of Shanmugam Pillai to the land. It follows therefore that the transaction which the plaintiff relies on as giving him the right to sue in the present case was part of a fraud in which the plaintiff was concerned.

It was next urged that even in the above view the plaintiff is not debarred from seeking relief, as Shanmugam Pillai was not in fact defrauded and our attention was drawn to section 84, Indian Trusts Act. The cases of *Kearley v. Thomson*(1) and *Herman v. Jeuchner*(2) are clear authorities that under the English Law the unlawful agreement need not be fully carried out, to warrant the application of the rule as to persons *in pari delicto*. Part performance of a substantial character would according to the decision in *Kearley v. Thomson*(1) suffice to prevent the plaintiff from recovering. In our opinion this is also the construction to be placed upon the words 'not carried into execution' in section 84, Indian Trusts Act.

Turning to the facts here, we do not find a case when a party to a fraudulent transaction relented before anything was done in pursuance of the intended fraud and the unlawful compact was in no way carried out. On the contrary the plaintiff when he

(1) L.R., 24 Q.B.D., 742.

(2) L.R., 15 Q.B.D., 561.

contested Shanmugam's claim did all he could to effectuate the fraud, and failed, only because Shanmugam was, fortunately for him, able to frustrate the attempt to injure him. For these reasons we dismiss the second appeal with costs.

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APPELLATE CIVIL.

*Before Sir. S. Subrahmaniam Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

VAMA DAVA DESIKAR (DEFENDANT), APPELLANT,
v.
MURUGESA MUDALI (PLAINTIFF), RESPONDENT.*

1905
July 11.

Rent Recovery Act (Madras) VIII of 1865.-Limitation for suits under s. 40.-Right of attachment when rent is payable in kind.-Validity of attachment for arrears due under patta altered subsequently.

Section 40 of the Madras Rent Recovery Act must be read with section 51. The word "month" in the former was intended to be equivalent to the 30 days in the latter and suits under section 40 are within time if presented within 30 days.

Attachment proceedings under the Act may be taken when rent is payable in kind.

Where a patta under which an attachment was made, is altered on appeal subsequently, the attachment cannot be upheld even to the extent of the rent in arrears under the altered patta.

Ramachandra v. Narayanasami, (I.L.R., 10 Mad., 229), not followed.

THE plaintiffs in these suits were tenants of the defendant. The defendant filed summary suits against the plaintiffs and obtained decrees directing the plaintiffs to accept varam pattas. On appeal by the plaintiffs it was held that the defendant was entitled only to money rent. Before the appeals were decided, the defendant, under the decrees directing varam pattas, instituted attachment proceedings under the Rent Recovery Act and notice of such attachment was served on the plaintiffs on 31st January 1903 according to the defendant and on 1st February 1903 according to the plaintiffs. The present suits were presented by the plaintiffs

*Second Appeals Nos. 2435 to 2441 of 1903, presented against the decrees of A. C. Tate, Esq., District Judge of Chingleput, in Appeal Suits Nos. 128 to 134 of 1903, presented against the decision of H. L. Braidwood, Esq., Sub-Collector of Chingleput, in Summary Suit Nos. 10 to 12, 14, 15, 18 and 20 of 1903 respectively,