

The petition came on for final hearing before (Sir S. Subrahmaniam Ayyar, Officiating Chief Justice, and Miller, J.) when the Court delivered the following

RAMU
AIYAR
v.
SANKARA
AIYAR.

JUDGMENT. — Following the decision of the Full Bench, we dismiss the revision petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran Nair.

MUNISAMI MUDALIAR (PLAINTIFF), APPELLANT,

1907
December
11, 18.

v.

SUBBARAYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Trust Act. Act VI of 1882, s. 84 — Benami sale to defraud creditors — Where no creditor defrauded, vendee holds property for the benefit of vendor.

Where a benami sale is effected to defraud creditors but no creditor is actually defrauded thereby, the transferee, under section 84 of the Trust Act, holds the property for the benefit of the transferor. A suit for the specific performance of a contract to sell made by the transferee can be successfully resisted by the transferor.

Section 84 of the Trust Act embodies the principles recognized by English Courts at the time the Act was passed; and the fact that English Courts subsequently doubted the soundness of these principles will not justify the Courts in India in departing from the rule of law laid down by the section. Judgement of Benson, J., in *Yaramati Krishnayya v. Chundru Papayya*, (I.L.R., 20 Mad., 326), not followed

Lidlingappa v. Hirasu, (I.L.R., 31 Bom., 405), distinguished.

Suit by plaintiff for specific performance of a contract to sell executed by first defendant.

The first defendant and the deceased husband of third defendant were the sons of second defendant. In 1890, the second defendant executed a deed of release in favour of his sons, whereby he relinquished all his rights in the family properties in favour of his sons. In 1901, the first defendant entered into an agreement with the plaintiff to sell some of the properties so relinquished, and the sale not having been completed, the plaintiff now sued for specific performance of the agreement.

*Appeal No. 72 of 1904, presented against the decree of M.R. Ry. K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Original Suit No. 9 of 1902.

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The second defendant contended that the release was nominal and made with a view to induce the creditors to accept a composition ; that he was all long enjoying the lands and that the first defendant had no interest in them. On the evidence the Subordinate Judge found that the sale-deed was *benami* as alleged by second defendant. He also found that first defendant was not absolute owner and that second defendant's co-parcenary rights were not effected. There was, however, no evidence of any creditors having been defrauded.

The Subordinate Judge decreed that the first defendant should sell the properties to plaintiffs, which sale was not to prejudice the rights of second or third defendant.

The plaintiff appealed to the High Court.

The sixth and seventh grounds of appeal were as follows :—

“ Assuming that the finding of the lower Court as to the nature of exhibit G is correct, still the second defendant should not be allowed to take advantage of his own wrong and plead his own fraud in defence.

The lower Court ought to have held that, as the second defendant effectually defrauded his creditors by means of exhibit G, he should not be allowed to set up his own fraud as a defence to this suit.”

P. R. Sundara Ayyar and T. Narasimha Ayyangar for appellant.

T. V. Seshagiri Ayyar for third and fourth respondents.

JUDGMENT (WALLIS, J.).—I agree with the conclusion arrived at on the evidence by the Subordinate Judge that the deed exhibit G executed by the second defendant in favour of his son the first defendant and of his other son, the deceased husband of the third defendant, was a *benami* transaction entered into with a view to defraud the creditors of the second defendant, but it does not appear that any of the creditors were in fact defrauded, and, under these circumstances, the question before us is, whether a suit for specific performance of a contract by the first defendant to sell the lands included in exhibit G to the plaintiff can be successfully resisted by the second defendant so far as regards his share in the lands is concerned on the ground that exhibit G was a mere *benami* transaction? If any creditor had been defrauded, he would, it is well settled, have been debarred from going behind exhibit G. [*Rangammal v. Venkatochari* (1) and *Yaramati Krishnayya*

v. *Ghundru Papayya*(1)], but where the fraud has not been carried into effect he is not so debarred according to the decision of Lord Romilly, M. R., in *Symes v. Hughes*(2), and of the Court of Appeal in *Taylor v. Bowers*(3). Following these decisions, section 84 of the Indian Trusts Act provides that where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution the transferee must hold the property for the benefit of the transferor. In my opinion this section sufficiently declares the law and policy which ought to guide us in India, and it is therefore, immaterial that subsequently to the passing of the Act doubts have been expressed by the Court of Appeal in *Kearley v. Thomson*(4) as to the soundness of the rule of law embodied in the section. This rule was recognized by Subrahmaniam, Ayyar, J., in *Ringammal v. Venkatchari*(5). The provisions of section 84 of the Indian Trusts Act are not referred to in the judgment of Benson, J., in *Yaramati Krishnayya v. Ghundru Papayya*(1), and in so far as that judgment lays down a stricter rule than is embodied in the section I am unable to agree with it. That case, it should further be observed, was disposed of by Subrahmaniam Ayyar, J., the other Judge, on other grounds. The Indian decisions on this question have been reviewed in great detail in *Jadu Nath Poddar v. Rup Lal Poddar*(6), and it is unnecessary to go over them again. The recent case of *Lidligappa v. Hirasa* (7), relied on for the appellant, does not come within the rule, as there the illegal purpose had been carried into execution and at decree-holder, it was found had been cheated out of his just rights. The question argued and decided in that case was whether in such case the rule which debars a plaintiff from obtaining relief on the ground of his own fraud equally debars a defendant from pleading it in answer to a suit against him. The answer which was in the affirmative does not effect the present question, and it is to be observed that the learned Chief Justice who delivered the judgment of the Court was one of the Judges who decided *Goberdhan Singh v. Ritu Roy*(8), in which the distinction between cases in which the fraud has or has not been

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(1) I. L. R., 20 Mad., 326

(3) 1 Q. B. D., 291.

(5) I.L.R. 18 Mad., 378.

(7) I.L.R., 31 Bom., 405.

(2) L. R., 9 Eq., 475.

(4) 24 Q.B.D., 742

(6) I.L.R., 33 Calc., 976.

(8) I.L.R., 23 Calc., 962.

MUNISAMI carried into effect was recognized. For these reasons I am of
 MUDALIAR opinion that the appeal must be dismissed with costs.
 v.
 SUBBARAYAR. SANKARAN NAIR, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran Nair.

1907.
 December 2,
 3, 12.

VEDAMMAL (DEFENDANT), APPELLANT,

v.

VEDANAYAGA MUDALIAR (PLAINTIFF),

RESPONDENT.*

Hindu Law—Mother party to murder of her son cannot succeed as heir to such son—Unchastity of mother of no bar to her succeeding as heir to her son—degradation does not involve loss of proprietary rights.

A mother who has been a party to the murder of her son, cannot succeed by inheritance to the property of such son.

Under the Mitakshara Law, female heirs other than the widow are not precluded from inheriting by reason of unchastity.

Kojiyadu v. Lakshmi, (I. L. R., 5 Mad., 149), followed

. Degradation, without exclusion from caste does not involve loss of proprietary rights; neither has aggravated unchastity that effect.

Per WALLIS, J.—The unchastity of the widow is expressly laid down as a ground of exclusion in numerous texts, but there is no such authority in favour of excluding other females.

Degradation does not affect proprietary right of the degraded person since the passing of Act XXI of 1850.

Per SANKARAN NAIR, J.—The mother's claim to succession rests on consanguinity and not on religious merit, and incapacity to inherit due to inability to perform sacrifices cannot therefore be presumed.

Texts of Hindu Law considered.

Suit for a perpetual injunction to restrain the defendant from interfering with the plaintiff's possession and enjoyment of the plaint properties.

The last full-owner of the properties was the late Sankaramurthi Mudaliar. The defendant was his mother and the plaintiff was his father's sisters' son.

* Appeal No. 298 of 1905, presented against the revised decree of M.R.Ey. T. V. Anantan Nayar, Subordinate Judge of Tinnevely, dated the 21st September 1905, in Original Suit No. 28 of 1904.