

RENSON AND  
WALLIS, J.J.

OFFICIAL  
ASSIGNER OF  
MADRAS  
v.  
SMITH.

amount in fixed deposit together with Rs. 573 which I shall remit no sooner I receive an acknowledgment for the enclosed." Under these circumstances, we are constrained with great respect to differ from the conclusions arrived at by the learned Commissioner that the money in question were held by Messrs. Arbutnot & Co. in a fiduciary capacity and we must set aside the learned Commissioner's order and dismiss the application. We also set aside the order as to costs but do not consider it necessary to make any fresh order.

Messrs. *King Josselyn & Waller*—Attorneys for appellant.

*C. Vijayaragavulu Naidu*—Attorney for respondent.

## APPELLATE CIVIL.

*Before Mr. Justice Miller and Mr. Justice Pinhey.*

GOVINDASAMY PILLAI (THIRD DEFENDANT), APPELLANT,

v.

RAMASAWMY PILLAI AND OTHERS (PLAINTIFF AND DEFENDANTS  
Nos. 1 AND 2), RESPONDENTS.\*

1908.  
September  
10, 11.

*Limitation Act XV of 1877, s. II, art. 91—Where sale tainted by fraud, property not recoverable if sale not avoided within period—Such sale, if intended to be operative not void ab initio.*

A sale of property for consideration, intended to be operative between the parties, is not void *ab initio*, even though the transaction is brought about by fraud. Subsequent failure of consideration, in consequence of the purchaser refusing to perform his part of the promise, will only make the sale voidable. The title passes to the purchaser by such sale, and the vendor or those claiming to recover on his title must get the sale avoided within the period prescribed by article 91, schedule II of the Limitation Act, before they can recover.

*Sundaram v. Sithammal*, (1893, I.L.R., 16 Mad., 311), distinguished.

*Janki Kunwar v. Ajit Singh*, (1888, I.L.R., 15 Calc., 53 at page 65), followed.

*Nabab Mir Sayad Alam Khan v. Yasin Khan*, (1893, I.L.R., 17 Bom., 755), not followed.

SECOND APPEAL against the decree of I. L. Narayana Row, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 59 of 1905, presented against the decree of T. S. Gnaniyar Nadar, District Munsif of Tanjore, in Original Suit No. 559 of 1903, Suit for a declaration. The house mentioned in the plaint

\* Second Appeal No. 1322 of 1905.

belonged to one Sampuranathammal. She executed a sale-deed with reference to it, on 25th August 1897, in favour of the first defendant. The plaintiff alleged that Sampuranathammal executed the sale-deed, and also gave some money and moveables to the first defendant in consideration of the first defendant's undertaking to maintain her till her death, and that she did not give up possession of the house. As he failed to maintain her, Sampuranathammal instituted a suit regarding all the properties but withdrew that portion of the claim which related to the plaintiff house with liberty to bring a fresh suit; that she obtained a decree in her favour regarding the moveables and the money; and that she then executed a will in favour of the second defendant, her sister's daughter to whom she gave all her properties. The plaintiff obtained a Small Cause decree in the Tanjore Sub-Court against the assets of Sampuranathammal, and, in execution of it, attached the plaintiff house. The first defendant claimed the house and his claim was allowed. The plaintiff in this suit sought to set aside that order and obtain a declaration that the house was liable to be sold in execution of his decree. It was alleged by the plaintiff that the sale in the first defendant's favor was without consideration as the first defendant failed to maintain Sampuranathammal and that the first defendant was not entitled to the house. The third defendant who purchased the house from the first defendant was subsequently made a party.

MILLER AND  
PINNEY, JJ.  
GOVINDA-  
SAMY PILLAI  
v.  
RAMASAWMY  
PILLAI.

The District Munsif held that the suit was barred by limitation under article 91, schedule II of the Limitation Act. The material portion of his judgment is as follows:—

“It is stated that Sampuranam's right to the house is time-barred, as she did not bring a suit for the cancellation of the sale-deed within three years, and therefore the plaintiff is not entitled to proceed against the house. The plaintiff states that her right is not time-barred as she could have instituted a suit for the recovery of the house within twelve years. He relies on *Sundaram v. Sithammal*(1). This suit was brought more than six years after the execution of the sale-deed. In *Sundaram v. Sithammal*(1) a sale-deed was fraudulently obtained without consideration from a weak minded person, and it was held that as the sale was void, there

(1) (1893) I.L.R., 16 Mad., 311.

MILLER AND PINNEY, J.J. WAS NO NECESSITY for getting the sale set aside, and a suit could be brought within twelve years for the recovery of the property sold.

GOVINDA-SAMY PILLAI v. RAMASAWMY PILLAI. Here, the sale was not void, and there was no fraud on the part of the first defendant. Even if he failed to maintain Sampuranam as he promised to do, the sale was not void; and very likely Sampuranam was not quite satisfied with the treatment she received in the first defendant's house and she returned to Tanjore. I do not think the first defendant failed to maintain her. She should have brought a suit to cancel the sale-deed but she did not do so within six years. In my opinion, Sampuranam's right to the house is barred by limitation and the plaintiff's suit fails in consequence."

The Subordinate Judge on appeal reversed the decree holding that the sale to the first defendant was void *ab initio*. The material portion of his judgment is as follows:—

"There was grave fraud of the worst possible type underlying the transaction of which the execution of the sale-deed for the plaintiff house formed a part. There was no payment in cash for the sale as observed by the District Munsif, and no possession was given to the first defendant as admitted by himself. Under such state of things the sale-deed was a nullity from its inception and void *ab initio*."

"It is contended on behalf of the third respondent that as Samparana did not obtain the cancelment of the sale-deed, Exhibit I, the vendee—first defendant's right remained unaffected. No doubt the period allowed by law to launch a claim to set aside Exhibit I has long passed and gone, the time being three years, and running from the date of the execution of the sale-deed itself. But as Sampuranam was admittedly in the possession of the house, she would hardly care much whether the sale-deed was cancelled for fraud or not. In a suit for possession it was held, in 16 Madras at page 314, that article 91 simply describes the suit to which it is applicable as one in which the relief claimed is the cancellation of the impeached document and does not in terms apply to a suit for possession "in which an averment "regarding an outstanding instrument is made by way of confession and avoidance in order to prevent the defendant from "setting it up as an answer to the claim." It will be thus seen that the cancellation of the instrument, Exhibit I, under the circumstances of this case is not an essential part of the relief now

claimed. The cases where fraud and undue influence have been set up to vitiate an instrument, and where no consideration was paid and no possession given are exceptions to the general rule that when a person seeks to recover property against an instrument executed by himself, he must first obtain the cancellation of the instrument."

MILLER AND  
PINNEY, JJ.  
.....  
GOVINDA-  
SAM Y PILLAI  
v.  
RAMASAWMY  
PILLAI.

The third defendant appealed to the High Court.

*T. R. Venkatarama Sastri* for appellant.

*G. S. Ramachendra Ayyar* for first respondent.

JUDGMENT. — Although in paragraph 3 (g) of the plaint the plaintiff alleges that the sale by Sampuranam was without consideration, yet in clause (b) of the same paragraph he sets out consideration. It is contended on his behalf that he is a stranger, but we must take his allegation in the plaint as the basis of the suit. The District Munsif finds that there was consideration for the sale though not the consideration recited in the deed, and though the Subordinate Judge holds the deed to be void *ab initio* he does not anywhere find that the parties to it did not at its date intend it to be operative. Nor does he find that it was without consideration but only as we understand him that the first defendant subsequently repudiated his agreement. In these circumstances his finding that the deed is void *ab initio* is wrong in law.

It may be that the widow was entitled to set aside the sale, and that was her view of the matter for she instituted a suit for that purpose, but, to meet an objection as to misjoinder of cause of action, withdrew that part of it which related to the sale of the house with liberty to sue again. She died before she could sue again, and no suit was filed within the period of limitation.

The present suit is to declare the property liable to attachment by the plaintiff, but the property is not liable to attachment if the title passed to the first defendant by the sale by Sampuranam. On the findings of the District Munsif and the statement of facts by the Subordinate Judge we must hold that the title did pass. Reliance was placed for the respondent on *Sundaram v. Sitham-mal*(1) but the judgment of Sir Muttusami Ayyar, J., in that case proceeds on the ground that the vendor had not lost his title. We can see no reason why when the sale is voidable for

(1) (1893) I.L.R., 16 Mad., 311.

MILLER AND fraud article 91 of the Limitation Act should not be applied. If  
PINNEY, J.J. the sale is not avoided it stands good and the title passes by it. It

GOVIN DA- is necessary therefore for any one seeking to recover the property  
SAMY PILLAI on the vendor's title to get the sale avoided before he can recover.  
v.

RAMASAWMY Compare *Janki Kunwar v. Ayt Singh*(1).  
PILLAI.

The only case of all those cited for the respondent which supports him seems to be, *Nabab Mir Sayad Alam Khan v. Yasin Khan*(2) which followed the case of *Bhagwant Govind v. Kandi Valad Mahadu*(3). The latter case was however practically overruled by the Privy Council in *Malkarjun v. Narhari*(4). A suit to set aside the sale in the present case is now barred by limitation.

The decree of the Subordinate Judge is reversed and that of the District Munsif restored with costs here and in the lower Appellate Court.

## APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice  
Abdur Rahim.*

KARRI VENKATA REDDI (PLAINTIFF), APPELLANT,

v.

KOLLU NARASAYYA (DEFENDANT), RESPONDENT.\*

1908.  
September  
14, 18.  
October 8.

*Partners—Suit by one partner against another, without asking for general account when maintainable—Suit for specific performance of one term of partnership or for partial account—Waiver of grounds in lower Appellate Court.*

Where under the terms of a partnership, terminable at will, between *A* and *B*, *A* is bound to hand over to *B* who furnished all the capital, all moneys or cheques received by him in the course of the partnership business, irrespective of the state of the general accounts and *A* omits to deliver to *B* one of the cheques so received, *B* can maintain a suit against *A* to compel *A* to deliver such cheque or to pay him the amount of such cheque, whether such payment be regarded as a claim for damages or for partial account.

In regard to suits by one partner against another for a partial account, the general rule, as applied in India, is that if the account is sought in

(1) (1883) I.L.R., 15 Calc., 58 at p. 65. (2) (1893) I.L.R., 17 Bom., 755.  
(3) (1890) I.L.R., 14 Bom., 279. (4) (1901) I.L.R., 25 Bom., 337.

\* Second Appeal No. 1262 of 1905.