

BENSON,
OFFG. C.J.,
AND
KRISHNA-
SWAMI
AYYAR, J.
—
ESA ABBAS
SAIT
v.
JACOB
HARON
SAIT.

rights is small, in which case damages might be the more appropriate relief. In *Higgins v. Betts*(1), Farwell, J., held it to be a proper case for injunction notwithstanding the decision in *Colls's Case*. And in *Chotalal Mohanlal v. Lallubhai Surchand*(2), Jenkins, C.J., granted an injunction even after hearing *Colls's Case* cited. The facts of *Anath Nath Deb v. Galustawn*(3) were very different. We think it will be sufficient to give the plaintiff a decree in the following terms, that the defendants be directed to remove so much of the wall already raised by them as interferes with the free passage of light and air through the plaintiff's window to the extent of the old dimensions, $1\frac{1}{4} \times 1$ ft., and that the defendants be further directed not to build any wall so as to obstruct the passage of light and air through the said window to the extent of its old dimensions. The rest of the plaintiff's claim will stand dismissed. Each party will bear his costs throughout.

Messrs. Branson and Branson—attorneys for respondents.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1909.
September
22, 29, 30.
December 1.

PALAMALAI MUDALIYAR *alias* PALAMALAI PILLAI
(DEFENDANT), APPELLANT,

v.

THE SOUTH INDIAN EXPORT COMPANY, LIMITED
(PLAINTIFFS), RESPONDENTS.*

Fraudulent conveyance—Transfer of Property Act, s. 53—Conveyance void if intended to convert land into cash and place it beyond reach of creditors—Equity on setting aside transfer—Transferee entitled to a charge for amount spent in discharging valid prior mortgage.

A transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into cash which can be easily concealed and thus to defeat or delay his creditors cannot be treated as a transferee in good faith within the meaning of section 53 of the transfer of Property Act.

Ishan Chunder Das Sarkar v. Bishu Sirdar, [(1897) I.L.R., 24 Calc., 825], followed.

(1) (1905) 2 Ch., 210.

(2) (1905) I.L.R., 29 Bom., 157.

(3) (1908) I.L.R., 35 Calc., 661.

* Appal No. 45 of 1907.

In such cases it lies on the transferee to prove good faith and valuable consideration; and where the latter is proved the Court will be slow in ordinary circumstances to hold that there was an absence of good faith.

Amarchand v. Gokul, [(1903) 5 Bom. L.R., 142], referred to.

Where the transferee has discharged a valid prior mortgage on the property sold, the transfer will be set aside only on his being given a charge for the amount spent by him in discharging such mortgage.

Chithambaram Chettiar v. Sami Iyar, [(1907) I.L.R., 30 Mad., 6], distinguished.

APPEAL against the decree of M. Visvanatha Aiyar, Subordinate Judge of Negapatam, in Original Suit No. 25 of 1905.

The facts are sufficiently stated in judgment.

P. R. Sundara Ayyar and *K. Srinivasa Ayyangar* for appellants

The Hon. The Advocate-General and *S. Varadachariar* for respondents.

JUDGMENTS (WALLIS, J.)—The question whether the sale in favour of the defendant (exhibit II) is voidable at the instance of the vendor's creditors depends on the inference to be drawn from a number of circumstances attending the sale. The plaintiffs had obtained a decree in the High Court against Madarsa Rowthar and Sheik Davood on the 21st October 1902. On the 22nd January 1903 a petition was put in for transfer of the decree to the Subordinate Judge's Court of Negapatam for execution, and on the 25th March 1903 and the 26th March 1903 two execution petitions were put in in the Subordinate Judge's Court for execution (exhibits B and B1) praying for the arrest of the defendants in the suit and for the attachment of their properties including the property which is the subject of the present suit. In support of these petitions an affidavit (exhibit B2) was sworn by the plaintiff's agent on the 20th March 1903 and filed on the 28th March 1903 in which it was alleged that some of the properties were mortgaged and that the defendants in the suit were trying to sell the scheduled properties, to discharge only the mortgage debt and to appropriate the balance. The Court ordered the attachment of certain houses but not of the lands, as the Revenue registers had not been filed; and on the 2nd April the plaintiff's agent swore another affidavit (exhibit B4) stating that the defendants having come to know of the execution proceedings were, with a view of defrauding the decree-holders, selling the lands in Ottathattai village to the present defendant, that the stamp paper had been purchased, and that the sale-deed

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was being written. The affidavit was filed on the 3rd April 1903. As to the fact of the sale the deponent's information was correct. The sale-deed (exhibit II) was executed on the 2nd April at Negapatam and presented for registration at Tirupundi, ten miles off, next day by Madarsa Rowthar, the senior vendor, and execution was admitted by the other vendors on the 5th April.

Now the defendant's story is that he had been in treaty for the purchase of these lands as far back as October 1902 before the date of the plaintiffs' decree.

The question before the Court is, was the sale under exhibit II on the 2nd April intended to defeat and delay creditors, and, if so, is it voidable against the defendant? Now if, as found by the Subordinate Judge, the intention of the vendors was to put their property beyond the reach of the creditors by converting it from land into cash, that would, I think, bring the case within section 53 of the Transfer of Property Act. In this country at any rate that is the most obvious and effective method of defeating and delaying creditors. We have of course been referred to *Wood v. Dixie*(1) which, as observed in Smith's Leading Cases, Volume I, page 18 (11th edition), has been followed as good law in *Hale v. Saloon Omnibus Company*(2), and *Darvill v. Terry*(3). The first two cases were cited in *Ishan Chunder Das Sarkar v. Bishu Sirdar*(4) but none the less the learned Judges observed, and I agree with them, that "It would be almost a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him should be upheld, though section 53 says that a transfer made with such intention is voidable at the option of creditors." The same view has been taken in *Hakim Lal v. Mooshahar Sahu*(5) in the exhaustive judgment of Mookerjee and Holmwood, JJ., in which it is shown to be supported by the great authority of Lord Mansfield and by decisions of the Irish and American Courts.

The question therefore is, was the sale under exhibit II effected for the purpose of defeating and delaying creditors by enabling

(1) (1845) 7 Q.B., 892.

(3) (1861) 6 H. & N., 807.

(5) (1907) I.L.R., 34 Cal., 999.

(2) (1859) 4 Drew, 492.

(4) (1897) I.L.R., 24 Cal., 825.

the judgment-debtors to convert their land into cash? Now if the sale was, what it purports to be on the face of the document, a sale for Rs 15,000, of which Rs. 7,500 was paid to Annamalai in discharge of his mortgage decree and the balance Rs. 7,500 to the vendors, then I think the embarrassed circumstances of the vendors, the fact that the sale was hurried on after their houses had been attached and when the attachment of their lands was imminent, the hurried registration, the sale of other lands the same day to Annamalai for a suspicious consideration, all these things go to show that it was effected for the purpose of defeating and delaying creditors, and that is the finding of the lower Court. It is said, however, that the sale was effected with the intention of paying the balance to two secured creditors of the vendors Rs. 3,500 to Annamalai himself on account of a mortgage (exhibit XVI) for Rs. 5,000 effected in 1893 and Rs. 3,000 to another mortgagee, one Ramachendra Naidu, under a mortgage (exhibit IX) for Rs. 18,000 effected in 1898. Now if the sale was effected with the object of preferring these two creditors to the plaintiffs and the other creditors, it is clear and is admitted that the sale would not be voidable under section 53 of the Transfer of Property Act, but the burden of proving this where the sale appears otherwise to be voidable is on the defendant (*Narayana Pattar v. Viraraghavan Pattar*(1)) and should be established by satisfactory evidence. The finding of the lower Court is that the judgment-debtors apprehending that they could not conceal the intention with which they had sold the property to the defendant and escape from liability for arrest without accounting for the Rs. 7,500 in question subsequently gave Rs. 3,000 to Ramachendra Naik and Rs. 3,500 to Annamalai Chetty. Unless we can say that this finding is wrong, the defence fails. Now the evidence put forward by the defence as to the dates and circumstances in which these two payments were made is of a most unsatisfactory character and fails in my opinion to show that there was any idea of making these payments when exhibit II was executed.

I am unable to differ from the conclusion arrived at by the Subordinate Judge that it was intended by the judgment-debtors to defeat and delay their creditors.

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(1) (1900) I.L.R., 23 Mad., 184.

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The next question is, is the sale voidable against the defendant as transferee? In these cases it has been held by Jenkins, C.J., and Aston, J., in *Amarchand v. Gokul*(1), that it lies on the transferee to prove good faith on his part and consideration: "If, however, it be proved that there was a valuable consideration adequate to the occasion, the Court will be slow in ordinary circumstances to hold that there was no good faith." Bearing this last consideration in mind, I am still unable to hold that there was good faith in Annamalai who advanced part at least of the purchase money and acquired a preponderating interest under the mortgage (exhibit XV) in the lands conveyed by exhibit II. As regards the defendant also, I am unable, on the best consideration I can give to the case, to hold that he has shown himself to be a transferee in good faith. For reasons already given I cannot regard him as a purchaser in the ordinary course of business, and I am even constrained to question whether the real nature of the transaction as between him and Annamalai is before the Court. If not, this is a strong indicium of fraud. The hasty manner in which the price was fixed without any valuation of the arrears, ploughing cattle and other things he was taking over in addition to the land, and the hurried registration also indicate that he knew all the facts and prevent me from differing from the Subordinate Judge on this point.

The Subordinate Judge has held that the properties conveyed by exhibit II were the exclusive property of Madarsa, but he gives no reasons for his finding. The contentions of the parties are set out in paragraphs 93 to 95 of the judgment, and the conclusion I have come to is that both the suit properties belonged to the family and not to Madarsa Rowthar alone as did the business in which they were engaged. The decree which the plaintiffs were seeking to execute was only against Mahomed Rowthar and Sheik Davood but the present plaint states that the business was being carried on by them on behalf of the family, and the family were heavily indebted to the plaintiffs as well under other bonds in respect of which debts, decrees have been obtained, and this is borne out by Sheik Davood's evidence, as defence witness No. 5. In these circumstances, I have come to the conclusion that exhibit II was executed by the other parties also for the purpose

of defeating and delaying their creditors including the plaintiffs though not of course in respect of the pending execution on which they were not liable.

The next question is as to whether the defendant is entitled to a charge upon the property for the amount of Rs. 7,500 which he paid in discharge of Annamalai's mortgage decree. In *Chidambaram Chettiar v. Sami Aiyar*(1) it was held that a transfer of a decree intended to defeat and delay creditors was wholly void and that the transferee was not entitled to execute it jointly with the transferor on the ground that the consideration for the transfer was the discharge by the transferee of some debts actually due by the transferor. In that case the transferee had merely paid off certain debts due by the transferor. Here he has discharged a valid mortgage previously binding on the property and I do not think it would be equitable to give the plaintiffs the relief they ask for except upon the terms of giving the defendant a charge for the Rs. 7,500 which he has expended in discharging the mortgage decree against the suit property, but this again must be conditional on the payment of Rs. 7,500 being certified by Annamalai if he has not already done so within one month of the receipt of this decree by the Subordinate Court. The decree of the lower Court must also admittedly be modified with regard to the defendant's purchase under exhibit VI which has, by mistake, been included in the decree. The parties will pay and receive proportionate costs throughout.

MILLER, J.—I agree that, if it be found that the vendee assisted the vendors to convert their land into cash to enable them to keep it out of the hands of their creditors, the sale will be voidable under section 53 of the Transfer of Property Act: and I agree also that in the present case the vendee ought to be allowed a charge on the land sold to the amount of Rs. 7,500, and as to the terms on which the charge should be allowed.

I have had greater difficulty in accepting the evidence as sufficient to establish a case under section 53 of the Transfer of Property Act, but I am not prepared to dissent from my learned brother's conclusion. I therefore agree in the modification of the decree proposed by him.

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(1) (1937) I.L.R., 30 Mad., 6.