to her real title; and if he put a wrong construction on the deed of gift, on which the plea of *bonâ fides* is sought to be maintained, he must take the consequence. We must dismiss both the Second Appeals with costs.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

PONNUSAMI NADAR AND TEN OTHERS (JUDGMENT-DEBTORS), APPELLANTS,

v.

LETCHMANAN CHETTIAR AND THREE OTHERS (DECREE-HOLDERS), RESPONDENTS *

1911. September 21.

Civil Procedure code (Act V of 1908), Order XXI, Rule 2—Assignment of decree for benefit of judgment-debtor—Execution by assignee—Civil Procedure Code (Act XIV of 1882), s. 258.

A held a decree against *C*. It was arranged between *C* and *B* that *B* should advance the decree amount to *C* as a loan and that an assignment of the decree should be obtained in the name of *B* for the benefit of *C*. The decree was accordingly assigned to *B* who applied for execution. *C* set up the above arrangement as a bar to execution. B contended that such arrangement amounted to an adjustment of the decree and not bging certified to the Court it could not be given effect to under Order XXI, Rule 2 of the Civil Procedure Code. *Held* (their Lordships differing):

Per ABDUR RAHIM, J.—That the arrangement amounted to an adjustment of the decree and not being certified, could not be pleaded as a bar to execution. The prohibition contained in Order XXI, Rule 2, is not confined to cases where the parties to the transaction adjusting the decree stood at the date of such transaction in the relation of judgment-creditor and judgment-debtor.

Per SUNDARA AYYAR, J.—Order XXI, Rule 2, does not make uncertified adjustment invalid but merely forbids effect being given to such an adjustment when it is set up as a defence to the execution of a decree by one entitled to do so. The section will not disentitle the judgment-debtor to prove facts which will show that the applicant is not the real transferee, even if the facts he relies on show that the decree has been adjusted.

The prohibition regarding an uncertified adjustment will not apply where the adjustment is made with a third party.

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* Appeal against Order No. 239 of 1909.

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PONNUSAMI NADAR v. LETCHMANAN CHETTIAR.

APPEAL against the order of V. K. Desikachari, Subordinate Judge of Nagapatam in execution Petition No. 33 of 1909 in Original Suit No. 18 of 1904.

S. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for appellants.

K. Srinivasa Ayyangar and *T. Rangaramanujachariar* for respondents.

The facts for the purpose of this case sufficiently appear in the judgments.

ABDUR RAHIM, J.—This appeal raises a question of some nicety with reference to the construction of Order XXI, Rule 2, corresponding to section 258 of the old Civil Procedure Code, 1882.

The first respondent applied for execution of a decree which he alleged had been assigned to his father by the original decree-holders. Objection is made to execution by the second appellant who is one of the judgment-debtors, on the ground that the assignment which is in the name of the first respondent's father was made under an arrangement by which the first respondent's father was to be a mere benamidar for the judgment-debtors. On the date of the assignment the amount due under the decree was Rs. 60,000, and the allegation of the judgment-detors is that Rs. 15,000 out of this sum was actually paid to the original decree-holders, and that an assignment of the decree was obtained in the name of the first respondent's father on the understanding that he was to hold it for the appellants' benefit, the appellants agreeing to pay the balance of Rs. 45,000 due under the decree.

The Subordinate Judge has held, by way of demurrer, that accepting the facts as stated by the appellants, he as the Court executing the decree is precluded from giving effect to the arrangement inasmuch as admittedly it was not certified as required by Order XXI, Rule 2. He regards the arrangement as an adjustment or satisfaction of the decree.

It is now contended by the learned vakil who appeared for the appellants that here there are two questions. The first is whether the assignee has a good title. The next question, which would only arise if the first question is answered in the affirmative, is whether there has been any adjustment or satisfaction within the meaning of the law. It seems to me that on the allegations of thea ppellants themselves it is impossible to accept this contention

as sound. The first respondent is *primâ facie* an assignee of the decree, and he applies to the Court to give effect to his assignment by executing the decree. The judgment-debtors' objection is that the assignment was intended for their own benefit and that the first respondent was a mere benamidar.

The question, therefore, which this court has to decide is whether any effect can be given to this objection of the appellants. Suppose the judgment-debtors had obtained the assignment in their own name from the decree-holders, it could hardly be contended that such assignment would not amount to an adjustment or satisfaction of the decree. And I did not understand Mr. S. Srinivasa Ayyangar to contend that it would not. If such assignment was not certified as required by Order XXI, Rule 2, it seems to me clear that the judgment-debtors could not rely upon the assignment as a bar to execution. Should the assignment be any the less an adjustment or satisfaction of the decree because it was obtained in the name of another person as a mere benamidar or *alias* for the judgment-debtors themselves? Speaking for myself, I am unable to see any reason why it should be. The language of Rule 2, paragraph 3, is "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree." If the arrangement alleged amounts to an adjustment,—and there can be no doubt that it does—the language of the section is imperative that the court executing the decree shall not recognize it at all. But it is contended that the adjustment referred to in the Code is what purports to be an adjustment and not what has the effect of adjustment by the operation of law. There is no reason why the meaning of the word "adjustment" should be limited in that way when there is nothing in the section itself to suggest such a limitation. It is not the name by which a party calls a transaction but its legal character with which the court is concerned. The very object of the arrangement relied on by the appellant was that the decree should be assigned to him, only that it should stand in the name of another person as a sort of *alias* for him. It is not the case of the appellants, and their learned pleader does not seek to make out any such case before us, that the object of the arrangement was that the decree should be capable of execution by the assignee under certain circumstances, and that it should not be capable of execution under other circumstances,

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and that the decree cannot be executed because such latter circumstances have happened. The appellants' case is that by the arrangement in question the title to the decree passed to them and not to the first respondent.

It was also argued on the strength of the words "shall not be recognized as a payment or adjustment of the decree" which occurred in section 258 of the old Code that the adjustment in this case may be given effect to as showing want of title in the plaintiffs. The words "as a payment or adjustment of the decree" have been omitted from the new Code, and it is the new Code that governs the application for execution in this case, which was made on the 2nd February 1909. It is therfore not necessary to decide whether the words "as a payment or adjustment of the decree" could in any way help the appellants. But I may say that, having regard to the nature of the transaction alleged in the case, I do not see how, if it cannot be pleaded as an adjustment, it can be relied on as showing want of title in the plaintiffs. The language of the legislature is that an adjustment which is not certified shall not be recognized by the court executing the decree and I find no reason for limiting the prohibition to cases where the decree is sought to be executed by the decree-holder himself. Reliance has been placed on the decision of Sir S. SUBRAMANIA AYYAR, J., in *Rama Ayyan* v. *Srinivasa Patter*(1). The judgment in that case is really based on the finding of fraud committed by the transferee of the decree against the judgment-debtor. But the learned Judge goes on to observe, with reference to certain suggestions that occurred to him as regards the scope of section 258 of the Code of 1882, it is only when the parties to the transaction adjusting a decree stood at the date of such transaction in the relation of judgment-creditor and judgment-debtor that the provisions of section 258 would apply. In other words, they would not apply if the transferee of the decree seeks to execute it and the adjustment sought to be pleaded is one which was entered into before the date of the transfer. With all respect to the learned Judge, I am unable to accept this *dictum* as a correct exposition of section 258. 'Decree-holder' includes the transferee of the decree by virtue of section 2 and there is certainly nothing in section 258 itself which would support the conclusion of the

(1) (1896) I. L. R., 19 Mad., 280.

learned Judge. Reference has also been made to a *dictum* of TURNER, C.J., in *Agra Bank* v. *Cripps*(1). But the general observation of the learned Chief Justice that, if the Bank, which in that case obtained an assignment of the decree against one Pinsent, was merely a benami holder, the decree could not be executed, is made without any reference to section 258 of the Civil Procedure Code. There is a similar *dictum* in *Monmohan Karmokar* v. *Dwarka Nath Karmokar*(2). There would be force in such observations where the assignee of a decree is a benamidar for a person other than the judgment-debtor, for in such a case no question under Order XXI, Rule 2, would arise.

I would confirm the judgment of the Subordinate Judge and dismiss the appeal with costs.

SUNDARA AYYAR, J.—This appeal is against an order of the Subordinate Court of Negapatam disallowing certain objections raised by the judgment-debtors in Original Suit No. 18 of 1904, to an application for execution made by the transferee of the decree-holders' rights. The decree was one passed for sale on a hypothecation bond. The applicant's father, Ramanathan Chettiar, obtained a transfer-deed from the orginal decree-holders on the 11th of April, 1908. The objections raised were :—(1) that the real transferees under the deed of assignment relied on by the petitioner were the judgment-debtors themselves, and that the applicant was not therefore entitled to execute the decree; (2) that out of Rs. 60,000, the total amount due under the decree on the 10th of April, 1908, as per settlement of accounts between the original-decree.holders and the judgment-debtors, the latter paid Rs. 15,000 to the former, and the applicant was not therefore entitled to execution, at any rate for the amount so paid; and (3) that the execution application was bad for non-joinder of certain other persons who, according to the judgment-debtors, were jointly entitled with the applicant in case the latter should be the real transferee of the decree. The Subordinate Judge overruled these contentions. The argument at the hearing of the appeal was confined to the first contention. It was decided by the Subordinate Judge on demurrer without taking evidence. It is therefore necessary to set out the defendants' case on the point precisely. The second defendant alleged that after payment of Rs. 15,000 out of

(1) (1885) I.L.R., 8 Mad., 455 at p. 463. (2) (1910) 12 C.L.J., 312.

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the Rs. 60,000 due to the original decree-holders Rs. 45,000 remained to be paid and that the applicant's father, Ramanathan Chetti, agreed to advance that amount as a loan for the judgment-debtors. He then goes on to say; "the said assignment-deed was got up in the name of the said Ramanathan Chettiar (that is, applicant's father) *benami* for the benefit of myself and others (the others being his co-judgment-debtors). The said Ramanathan Chettiar conducted no proceedings whatever on the said assignment-deed during his life-time. In these circumstances, the petition presented by the petitioner is unsustainable, according to law.

"And there was an arrangement to the effect that for the amount of Rs. 45,000 undertaken to be paid by the said Ramanathan Chettiar as abovementioned and for a further sum of Rs. 5,000 required by me and others, in all for Rs. 50,000, I and the others should execute a mortgage by conditional sale or a usufructuary mortgage-deed in the name of the said Ramanathan Chettiar in respect of the properties mentioned in the decree in question, that the same should be got back after paying the said amount in five years' time, and that the said Ramanathan Chettiar should get executed the documents in respect of the same within some time at his convenience."

The agreement between Ramanathan Chettiar and the judgment-debtors was admitted before the Subordinate Judge to have taken place before the 10th of April, 1908. The deed of assignment of the decree was executed subsequently on the 11th of April. The Subordinate Judge was of opinion that, on the construction of the judgment-debtors' plea set out above, Ramanathan Chettiar was not a mere benamidar for the judgment-debtors. He says: "The assignment of the decree might have been intended to be a sort of help to the defendants, but it can in no sense be regarded as obtained for their benefit. It was admittedly not obtained with the funds of the defendants. Defendants had entered into an agreement with the assignee for effecting a sale or mortgage in satisfaction of the decree." This finding of the Subordinate Judge cannot be supported. The fact that the amount due to the original decree-holders was paid by the assignee may be good reason for holding that he was not a mere benamidar, but this is not a necessary inference from the fact of his paying the consideration which passed to those transferors. The question, for whose benefit the decree was infact transferred, is one of the intention of the parties. The judgment-debtors' case is that

it was intended for their benefit and that the sum of Rs. 45,000 which the assignee paid to the transferors was advanced merely as a loan for the judgment-debtors' benefit. Such an arrangement is not impossible. It is not impossible that the applicant's name was entered as the nominal transferee on account of his advancing the mortgage amount as a loan for the judgment-debtors, and that it was intended that the right to the decree should at once vest in the judgment-debtors and not in the transferee. The applicant's plea that a mortgage-deed was to be executed by him as security for the loan would, if true, probabilise his contention. The Subordinate Judge was wrong in holding that in the circumstances the right to the decree must necessarily vest in the applicant. He was bound to decide the question after taking the evidence which the parties wished to adduce. But the respondents' vakil, Mr. K. Srinivasa Ayyangar, contends that the plea that the appellants were themselves the real transferees of the decree cannot be given effect to, as the plea really amounts to this, that the decree debt due to the original decree-holders was discharged by an adjustment made by means of the stipulations with the first respondent's father referred to above, and that, as the adjustment was never certified to the court section 258 of the Civil Procedure Code (Act XIV of 1882) would operate as a bar to the plea. Mr. S. Srinivasa Ayyangar, the learned vakil for the appellants, urges in reply, firstly, that section 258 has no application to a contention that the first respondent obtained no title under the transfer relied on by him and that he is not therefore the decree-holder and is not entitled to apply for execution, the section being applicable only where it is contended that the decree is not any further executable at all without and question as to whether the applicant is the decree-holder or not, and, secondly, that the section applies only where the contract of adjustment is made with the decree-holder and not with a third person, and that in this case the adjustment was made with the first respondent's father, Ramanathan Chettiar, before the transfer to him. I am of opinion that the respondents' contention is not entitled to succeed. I am not sure that the case has not to be decided under the provisions of Act XIV of 1882, as the adjustment and the transfer-deed were in April, 1908, and the time within which the judgment-debtors could have obtained a compulsory record of the adjustment also elapsed in 1908, before the new Civil Procedure Code (Act V of 1908) came into operation. There is

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however, in my opinion no material difference between the last clause of section 258 of Act XIV of 1882 and the same clause in Order XXI, Rule 2, of Act V of 1908. In the former Act the clause ran as follows :—"Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by any court executing the decree." In Act V of 1908 the clause runs in these terms : "a payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree." It will be noticed that in the later Act the words "as a payment or adjustment of the decree" have been omitted. But I am of opinion that the meaning of both clauses is the same, the word 'recognized' itself implying 'as an adjustment.' Now the question to be decided is whether the clause prevents the appellants from proving that the assignment was not intended for the benefit of the first respondent, because the fact showing that it was not for his benefit would also show that the original decree-holders' decree was adjusted by means of the agreement between the appellants and the first respondent. In my opinion, the clause does not prevent it. The object of the clause, as I understand it, is to provide that everything preventing the execution of the decree should be made a record of the court so as to give the court complete control over its decree and the execution thereof. It is not a part of its object to restrain the transfer of decrees by the decree-holder to any one he chooses. It does not make payments or adjustments which are not recorded or certified to the court invalid and the court will give effect to such adjustments in proceedings other than the execution of the decree. Neither is the clause a rule of evidence forbidding the proof of uncertified adjustments. It merely forbids effect being given to such adjustments when they are set up as a defence to the execution of the decree by one entitled to do so. As put by Mr. S. Srinivasa Ayyangar, the question of adjustment comes in only after a person who claims to execute the decree as a transferee has proved his right under the transfer. It is only then that the question arises whether the decree of which he has obtained a transfer is a subsisting one capable of execution. When the applicant's right as transferee is denied by the judgment-debtor he has to bear the onus of proving it. Assuming that the fact that he has a deed of transfer purporting to be in his

favour would be *primâ facie* proof of his right and that the judgment-debtor would then have to rebut the presumption, I can see nothing in the section to disentitle him to prove any facts which would show that the applicant is not the transferee but some one else, and this would be equally so even if the facts he relies on, must necessarily show that the decree has been adjusted, for he does not adduce them to prove that there is no subsisting decree, but to disprove the allegation that the applicant is the transferee. A provision of law like the one in question should not be stretched beyond its express words and beyond the object which the words were intended to serve. As a matter of fact, however, I do not think that in strictness it is necessary for the appellant for rebutting the plaintiff's case to go further than to allege that the plaintiff is not the real transferee. If he goes further to say that he is himself the real transferee, it is only to induce the court to believe his assertion that the transferee is not the applicant.

The appellants' second argument also has, in my opinion, much force. As already observed, the adjustment in this case, except with regard to the payment of Rs, 15,000, was made with the first respondent's father and before the 10th of April, 1908, and also before he obtained the transfer-deed on the 11th April. He was not then the decree-holder. Section 258 has no application to an adjustment made with a third party. The judgment-debtors could not compel such a person to certify the adjustment to the court. This was the view held by SUBRAMANIA AYYAR, J., in *Rama Ayyan* v. *Srinivasa Patter* (1) the facts of which case were similar to those in the present one. The circumstance that the first respondent afterwards obtained a transfer of the decree cannot alter the position and would not, I believe, entitle the appellants to compel the first respondent to certify an adjustment which the former did not enter into with the latter as a decree-holder. As put by SUBRAMANIA AYYAR, J., the transfer "can have no retrospective effect so as to deprive the judgment-debtor of his right to establish that the transferee is by the anterior contract precluded from releasing the judgment-debtor." It may perhaps be contended that the anterior contract is no reason for depriving the assignee of his rights under his transfer, that he is entitled to all the rights of

(1) (1896) I. L. R., 19 Mad., 230

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his transferor and therefore has the right to execute the decree which has not been satisfied on the record of the court. But to such an argument it may well be replied that, after entering into the contract, he should not be allowed to set up any right in opposition to that contract by virtue of an assignment, and, to my mind, the argument would apply *a fortiori* where the contract is that he should obtain a transfer for the benefit of the judgment-debtor himself.

The appellants relied on another case, *Agra Bank* v. *Cripps* (1). In that case there is a *dictum* of TURNER, C. J., that if a decree has been adjusted a subsequent transferee could not be allowed to execute it although the discharge has not been certified to the court. It might be alleged in opposition to this *dictum* that in consequence of the adjustment not being certified, the transferor had still an executable right in the decree, and that the transferee was entitled to exercise that right. The answer to this argument no doubt would be that notwithstanding the non-certifying of the adjustment the discharge is valid in law and that the transferee would obtain nothing under the transfer. I do not feel, however, quite satisfied that this answer is conclusive, and I therefore hesitate to rest my judgment on this ground. The view propounded by TURNER, C. J., was, however, taken also by the Calcutta High Court in *Monmohan Karmokar* v. *Dwarka Nath Karmokar*(2). In that case a mortgagor-judgment-debtor, against whom a decree for sale had been passed, obtained in order to defraud a subsequent purchaser of the equity of redemption a transfer of the rights of the mortgagee-decree-holder, whose debts he discharged in the name of a third person who sought to bring the property to sale in execution. The purchaser of the equity of redemption resisted the sale. MOOKERJEE, J., delivering the judgment of the court observes: "in our opinion, he is not entitled to proceed with execution, under such circumstances, because as laid down in section 233 of the Civil Procedure Code of 1882, now section 49 of the Code of 1908, the transferee of the decree holds the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder. In substance, the assignee stands in no better position than the assignor, as regards equities existing between the original

(1) (1885) I. L. R., 8 Mad., 455. (2) (1910) 12 C. L. J., 312 at p. 321.

parties to the judgment, and takes it subject to all the equities and defences, subsisting at the time of the assignment, which the judgment-debtor could have asserted against it in the hands of the judgment-creditor, notwithstanding the assignee may have had no notice thereof. Hence, as well put in the case of *Sutton* v. *Sutton*(1), if the assignor has no title to the judgment he can convey none to the assignee, and, where a judgment, once paid, though not satisfied of record, is assigned by the judgment-creditor, the assignee takes it subject to all defences and equities which were available to the judgment-debtor again the assignor—*Black* of Judgments, Vol. II, section 95; *Freeman* on Judgments, Vol. II, section 427." The further observations made by the learned Judge are applicable to the present case: "If again it is proved that the decree has not been formally satisfied, but that the assignee is a benamidar for the judgment-debtor, he ought not to be allowed to execute the decree as against the representative of the latter, because the assignment in substance operates merely as a satisfaction of the decree." In that case no doubt the assignee and the judgment-debtor acted in collusion against a third party, namely, the purchaser of the equity of redemption. But that fact in my opinion makes no difference with respect to the principle involved in the judgment, namely, that an assignment which operates as a satisfaction of the decree may be relied on to prove that the assignee obtained no valid title under his assignment. It will be noticed that in the Calcutta case the plea that the applicant for execution was not the real assignee was raised by one who claimed to be the representative of the judgment-debtor. In my view, the judgment-debtor is equally entitled to raise the same contention against the transferor in this case.

On the whole my conclusion is that the Subordinate Judge's decision that section 258 is a bar to the defendant's plea of no title in the first respondent is untenable. I would therefore reverse the order of the lower court and remand the application to the lower court for disposal according to law.

Under section 98, Civil Procedure Code, 1908, the appeal is dismissed with costs.

1 1886 26 S.C., 33.