APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Chief Justice, and Mr. Justice Srinivasa Ayyangar.

PALANIAPPA CHETTIAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SUBRAMANIA CHETTIAR (PETITIONER) AND ANOTHER (ASSIGNEE OF DECREE), RESPONDENTS.*

1924, November 21.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Decree—Execution—Transfer of decree—Assignment in writing—Transfer to a particular person in his own name—Transferee being benamidar—Application for execution by real owner—Application, whether competent—Construction of Statute (Order XXI, rule 16).

Where a decree has been transferred to a particular person under an instrument in writing, no other person, claiming that he was the real owner under the transfer and that the transferee named therein was a mere benamidar for him, can apply for execution of the decree, under the terms of Order XXI, rule 16, Civil Procedure Code.

Manikkam v. *Tatayya*, (1898) I.L.R., 21 Mad., 388, and *Abdul Kareem* v. *Chukkun*, (1879) 5 C.L.R., 253, dissented from.

APPEAL from the order of KUMARASWAMI SASTRI, J., dated 2nd April 1924, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court on an application for execution filed by S. N. Subramania Chetti in Civil Suit No. 98 of 1911.

In this case a decree for a sum of money was passed on 17th January 1912 in favour of the original decree-holder against the appellants. The decree was transferred under an instrument in writing by the

* Original Side Appeal No. 36 of 1924.

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original decree-holder in favour of one R. M. M. Subramania Chetti personally to his name. One S. N. Subramania Chetti, alleging that he was the principal of the transferee, who was only an agent with a general power from him, that the said assignment of the decree was taken on his behalf with the funds of himself who was the principal, and that R. M. M. Subramania Chetti was only a benamidar for himself, took out a Judge's summons and applied that he should be brought on the record as transferee decree-holder in the place of R. M. M. Subramania Chettiar, that he (appellant) should be given leave to execute the decree, and that the decree should be transmitted to the District Munsif's Court of Devakottah with the usual certificate for execution. Notices were issued to the judgment-debtors and the transferee (R. M. M. Subramania Chetti). The applicant produced a letter signed by the latter, admitting that the transfer of the decree was obtained with the funds of the applicant and that he (R. M. M. Subramania Chetti) would give his signature, etc., to enable the latter to execute the decree. The assignment of the decree was taken in the name of R. M. M. Subramania Chetti and not with the vilasam of the principal prefixed to the former's name. The judgment-debtors disputed the right of the appellant to take out execution as the real transferee and contended that the provisions of Order XXI, rule 16, did not permit an application by the alleged real transferee. The learned Judge allowed the application and granted the prayers in his petition. The judgment-debtors preferred this appeal.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellants.—The real owner, whether he is principal of the transferee or the latter is only a benamidar for the former, cannot apply for execution of the decree,

The decision in *Manikkam* v. *Tatayya*(1) is erroneous. Reference was made to *Jasoda Deye* v. *Kirtibash Das*(2), *Khettur Mohun Chuttopadhya* v. *Ishur Chunder Surma*(3), *Sitla Pedda Yelligadu* v. *Raja of Pittapur*(4), *Mathurapore Zamindary Co., Ltd.* v. *Bhasaram Mandal*(5).

E. Vinayaka Rao for respondent.—The system of benami is long established in India and is recognized in Indian Law and must be given effect to, unless there is express statutory prohibition. Under Order XXI, rule 16, the expression "transferee" includes real transferee as well as the person named in the transfer. The decision in *Manikkam* v. *Tatayya*(1) is right. It is cited with approval in *Krishnama Chariar* v. *Appasami Mudali*(6). Here the benamidar is a party to the proceedings as a respondent and notice has been served on him. He has further executed a varthamanam (Exhibit B) admitting that the transfer was taken with the funds of the applicant (S. N. Subramania Chetti); the decree itself was not obtained benami, but only the assignment was taken in the agent's name. The petitioner is either himself the legal owner as the principal or a beneficial owner, the person named in the transfer being only a benimadar. In either case he is entitled to apply for execution.

JUDGMENT.

COUTTS TROTTER, C.J.—The rule of law that, where a person's name appears on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless he comes within the words of Order XXI.

(1) (1898) I.L.R., 21 Mad., 388.
(2) (1891) I.L.R., 18 Calc., 639.
(3) (1869) 11 W.R., 271.
(4) (1915) 29 M.L.J., 623.
(5) (1924) 28 C.W.N., 626.
(6) (1902) I.L.R., 25 Mad., 545.

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rule 16, of the Code of Civil Procedure and there has been an assignment in his favour either in writing or by operation of law, seems to me to be no ground for holding that a person otherwise a stranger to the Court can come forward and allege that the decree was not his (the transferee's) and that the latter was only a benamidar for himself. The learned Judge probably felt himself bound by *Manikkam* v. *Tatayya*(1), but I entertain no doubt whatever that that case was wrongly decided and was an unwarranted departure from, and an extension of the words of, the statute. I accordingly come to the conclusion that this appeal must be allowed with costs in this Court as well as in the Court below.

I may add that the circumstances of the case which was allowed to crawl on to the very last day of a long period of limitation are extremely suspicious. But all that we are concerned with is the simple point of law. I ought to add, I think, that it follows from this expression of opinion that we must also dissent from the decision reported in *Abdul Kareem* v. *Chukkun*(2).

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—I agree that the appeal should be allowed with costs. The petitioner applied in the Original Side not only for execution of the decree under Order XXI, rule 16, but also by an independent Judge's summons for bringing his name on the record as a transferee decree-holder. There is no provision in the Procedure Code for any such application. I am not at all sure whether what is called "bringing on the record the transferee decree-holder" is not really a survival from times previous to the Procedure Code. The scheme of the Code is that the transferee by assignment in writing or by operation of law merely

(1) (1898) I.L.R., 21 Mad., 388. (2) (1879) 5 C.L.R., 253.

files his application for execution of the decree setting out, either in it or in an affidavit he has filed in support thereof, that he is the transferee either by operation of law or by any particular instrument in writing and thereupon the Court orders the application for execution or rejects it. Therefore we must treat the present application really as an application under Order XXI, rule 16. The contention of the respondent is that he was entitled to such execution because he was the real owner under the transfer executed to R. M. M. Subramania Chetti who was his agent and who had obtained an instrument in writing transferring the decree to his name. If the case of the petitioner were that the transfer was obtained by the agent in his name but in the *Vilasam* of the firm of which he was the agent then there could have been no objection whatever to execution being granted on the application of the petitioner, because the appearance of the *Vilasam* in the name of the transferee would really be to the firm or person bearing the *Vilasam*, even apart from serving to secure the benefit of the transfer to the firm represented by the *Vilasam*. But in this case the transfer was to the agent personally. The question therefore is whether, if there has been a transfer to a particular person under an instrument in writing, any other person is entitled to come to the Court and say that that transferee was a mere benamidar and that he, the applicant, is the real owner of the benefit secured by the transfer. It seems to me that Order XXI, rule 16, is perfectly clear on the point. It speaks of the decree being transferred by assignment in writing or by operation of law and provides that in such cases the transferee may apply for execution. When the statute speaks of "an assignment in writing" and "the transferee" the proper construction of the words would

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necessitate our holding that the transferee referred to is the transferee named as such in the assignment in writing. To hold otherwise would be not to give proper effect to the words of the statute. The learned vakil for the respondent has drawn our attention to *Manikkam* v. *Tatayya*(1). We are constrained to hold that it is a wrong decision. I am not able to understand what the learned Judge who delivered the main judgment in the case could have meant when he referred to the word "representative" in section 244 of the old Procedure Code as comprising the real owner under the transfer of a decree. If such a person was the representative of the decree-holder or his transferee, then it follows that, under the express terms of section 244, he could have no right of separate suit but in another sentence in the same judgment the learned Judge speaks of two remedies being open to such a person, that is, the real owner under the transfer of a decree, namely, one by way of application to the executing Court and another by way of separate suit, which is obviously opposed to section 244, Civil Procedure Code. However that may be, we have no hesitation in holding that that case was wrongly decided. It is also clear that the Code of Civil Procedure did really intend to prevent *benamidars* coming in and making applications to the Court on the general basis of the law relating to *benami* transactions. In section 66 of the Code express provision is made for Courts not recognizing the benami character of purchases made at execution sales held by Court.

We have also no doubt whatever that the express terms of Order XXI, rule 16, exclude any such contention. The earlier case referred to in the argument,

(1) (1898) I.L.R., 21 Mad., 388.

Abdul Kareem v. *Chukkun*(1), having proceeded on the same basis as the judgment in *Manikkam* v. *Tatayya*(2), should also be held to have been wrongly decided and we therefore refuse to follow it. It would lead to very serious consequences if we should allow the law of *benami* to have any operation with regard to suits and proceedings and records of Court and if only on that ground, it would be desirable to disallow any such contention. We are, however, fortified in that view by the actual terms of the statute; and therefore it follows that the applicant for execution in this case was wrongly granted execution of the decree.

This appeal should be allowed, and the respondent's petition for execution as well as that for bringing himself on the record as transferee decree-holder should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Srinivasa Ayyangar.

1924, October 22.

R. ARUNACHALA NAIDU, PETITIONER

v.

BALAKRISHNA & Co., RESPONDENTS. *

Civil Procedure Code (V of 1903), O. XLV, r. 7, provisos 1 and 2—Order to furnish security other than cash or Government bonds, when to be made—"Grant of certificate" in rule 7, meaning of.

An order to furnish security for the costs of the respondent in an appeal to the Privy Council, in a form other than cash or

(1) (1879) 5 C.L.R., 253. (2) (1898) I.L.R., 21 Mad., 388.

* Civil Miscellaneous Petition No. 337 of 1924.