APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Krishnaswami Ayyangar.

1938, September 2.

MINOR MINAKSHI IYER BY NEXT FRIENDS, (1) MANICKA GOPALA AYYAR AND (2) S.R.M. SITARAMA AYYAR, (PETITIONER), APPELLANT,

v.

NOOR MUHAMMAD ROWTHER AND NINE OTHERS (RESPONDENTS NOS. 1, 2 AND 6 TO 12 AND PARTY NEWLY ADDED), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 52—Fund in custody of Court—Dispute as to title to, between decree-holder in suit in which fund realised and attaching decree-holder in another suit decree in which transmitted to custody Court for execution—Determination by custody Court of, if must be in suit in which fund realised—Determination of dispute by it in suit decree in which is transmitted to it for execution—Permissibility—Attaching decree-holder under transmitted decree aggrieved by determination—Appeal by, under section 47, Civil Procedure Code, against adverse order—Right of—Execution—Questions of benami in—Power of Court to go into.

In Original Suit No. 33 of 1924 on the file of the Sub-Court of Kumbakonam in which a decree had been passed in favour of K, a sum of Rs. 2,983-2-6 was deposited into Court to the credit of that suit by the judgment-debtors therein. The appellant, who held a decree for money against the heirs of A passed by the Sub-Court of Ramnad in Original Suit No. 32 of 1925 and transmitted for execution to the Sub-Court of Kumbakonam, filed an execution petition in the latter Court for the attachment of the said sum of Rs. 2,983-2-6, alleging that it was an asset of A and that it really belonged to his heirs and K was only a benamidar for the latter, and an attachment was made. The legal representatives of K, who had died in the interval, filed an execution application contesting the attachment on the ground that the sum in question

* Appeals Against Orders Nos. 420 and 421 of 1935.

belonged to them and not to A's heirs. The Subordinate Judge who heard both the petitions together dismissed the appellant's petition and allowed the application of the legal representatives of K, the respondents, holding that the amount in question belonged to K and not to A's heirs and that in any event he could not, as an executing Court, go into the question whether the fund in Court belonged to A's heirs and only stood benami in the name of K. The orders were made in Original Suit No. 32 of 1925 and the appellant appealed to the High Court against the same. A preliminary objection was taken to the maintainability of the appeals on the ground that the Sub-Court of Kumbakonam was the custody Court only in respect of Original Suit No. 33 of 1924 and had jurisdiction to determine the question in dispute only in that suit and not in Original Suit No. 32 of 1925 in which the appellant was seeking execution, that even if the Sub-Court purported to deal with the question in the latter suit it must be deemed to have done so only in the former and the orders under appeal must be deemed to have been made therein, and that the appellant not being a party to Suit No. 33 of 1924 had no right of appeal from the said orders.

Held that section 47, Civil Procedure Code, was applicable to the case and the appellant had a right of appeal.

The orders were made in Suit No. 32 of 1925 and were allowed to be so made without any objection by the respondents. It is now too late to permit the preliminary objection, which is a purely technical one. Further, all that Order XXI, rule 52, Civil Procedure Code, directs is that the custody Court should be the Court to determine the dispute and the lower Court had sufficient jurisdiction as it had the fund in its custody. There is no warrant in the Code for holding that the dispute must be or must be deemed to have been dealt with and determined only in the one suit rather than in the other, so long as it is the custody Court that has enquired into it.

Held further that it was open to the Court below to go into the question whether the fund in Court really belonged to A's heirs and only stood benami in the name of K.

Observations in *Palaniappa Chettiar* v. *Subramania Chettiar*(1) dissented from, if by them it was intended to lay

(1) (1924) I.L.R. 48 Mad. 553, 558, 559.

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down as a universal rule that it is not open to the Court in execution to enquire into questions of benami and adjust the rights of parties according to its findings.

APPEALS against the orders of the Court of the Subordinate Judge of Kumbakonam dated 8th August 1935 and made respectively in Execution Petition No. 172 of 1929 and Execution Application No. 163 of 1930 in Original Suit No. 32 of 1925 (Sub-Court, Ramnad).

S. Panchapagesa Sastri and *R. Krishnaswami Ayyangar* for appellant.

A. Viswanatha Ayyar for *A. Sundaresan* for tenth respondent.

S. Hanumantha Rao, Court guardian for respondents 2, 5, 6, 7 and 9.

Other respondents were unrepresented.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—The disputes which have given rise to these appeals relate to a fund in Court standing to the credit of Original Suit No. 33 of 1924 on the file of the Sub-Court, Kumbakonam. It is a sum of Rs. 2,983–2–6 representing the value of the share of one Adamsa Rowther in a rice mill situated in Pandaravadai village. Adamsa died in 1919 involved in debts, but he had left considerable properties in and round Pandaravadai. He appears to have carried on a business in Saramban in the Federated Malay States which was after his death taken over by his son-in-law, Abdul Rahiman, and continued by him. Kadir Bacha was a brother of Adamsa who has figured prominently in the arrangements made by Adamsa's heirs for the discharge of his debts. These heirs were Noor Mahomed and Mahomed Ibrahim his sons, Mohideen Bivi a daughter, and Zuleka Bivi

his second wife. A major portion of his properties was transferred by them to their uncle Kadir Bacha on 28th May 1922 by a deed which shows that, except for a comparatively small amount, the consideration of Rs. 35,000 was the undertaking by the transferee to pay and discharge the debts of the deceased. There were also certain other transfers by the heirs, but for the purpose of these appeals it will be sufficient if we refer in particular to the one on 5th August 1923 of Adamsa's interest in the rice mill to his son-in-law Abdul Rahiman. It may at once be mentioned that this transfer is attacked by the appellant in Civil Miscellaneous Appeal No. 420 of 1935 as a nominal one, not intended to pass title to the property but brought about solely for the purpose of screening it from the creditors and for the secret benefit of the heirs.

At the time of this transfer there were admittedly disputes regarding the rice mill, Adamsa's heirs claiming his half share, his partner Mandia Esumsa vigorously denying it. After his purchase, steps were apparently taken by Abdul Rahiman to assert his rights against Esumsa, and they resulted in criminal proceedings between the parties which were finally settled by a reference to arbitration. An award was made on 9th December 1923 by which Esumsa and his son were directed to pay a sum of Rs. 3,000 and odd to Abdul Rahiman. This amount was however not paid, and it therefore became necessary for Abdul Rahiman to institute Original Suit No. 33 of 1924 for the recovery of the money. While the suit was pending, Mohideen Bivi, his wife, died and thereafter the feelings between him and her brothers became strained, so much so that Noor Mahomed felt it necessary to institute criminal proceedings against Abdul Rahiman. These proceedings, it is clear from the complaint Ex. QQ,

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had reference to a claim against Abdul Rahiman due to a withholding by him of certain valuable securities appertaining to Adamsa's estate including a business letter relating to a rice mill in India which was obviously none other than the mill at Pandaravadai. A settlement was ultimately arrived at on 16th March 1927 evidenced by a writing Exhibit PP signed by Abdul Rahiman, Noor Mahomed and Kadir Bacha. By it Abdul Rahiman undertook to pay Rs. 1,000 and $50 to Noor Mahomed in full settlement of the promissory note and dealings of Adamsa and to give a transfer of the rice mill in favour of Kadir Bacha, who was at this date on terms of cordiality with Noor Mahomed. In pursuance of this compromise, Abdul Rahiman executed the transfer on 17th March 1927 conveying his interest in the rice mill then under litigation in Original Suit No. 33 of 1924 for an alleged consideration of Rs. 3,000. Thereupon, Kadir Bacha brought himself on the record in place of Abdul Rahiman, and finally obtained a decree by consent for a sum of Rs. 2,900, against which a sum of Rs. 2,983-2-6 was deposited into Court on 29th October 1929 by the judgment-debtors but not before the issue of process in execution. As we have said the true ownership of this fund is the question that has to be decided in the appeals. Kadir Bacha having died on 29th November 1929 his heirs claimed payment to themselves. This claim is opposed by Minakshi Ayyar who is the appellant in Civil Miscellaneous Appeal No. 420 of 1925.

Minakshi Ayyar's claim arises out of an attachment of the identical fund in execution of the decree obtained by him in Original Suit No. 32 of 1925 on the file of the Sub-Court at Ramnad. This suit was one filed by his father Ayyavu Ayyar for the recovery

of a sum of Rs. 16,000 or thereabouts due on dealings between him and the deceased Adamsa. The heirs of Adamsa as also his brother Kadir Bacha were joined as defendants, the claim so far as the latter was concerned being based on his undertaking to pay a sum of Rs. 5,500 to Ayyavu Ayyar contained in the sale deed of 28th May 1922 already referred to. On the death of Ayyavu Ayyar pending the suit, Minakshi Ayyar, his minor son, was substituted in his place. On 10th September 1927 a decree for Rs. 16,369–5–6 was passed against the heirs of Adamsa, and for a portion of it, viz., for Rs. 7,788–14–0, Kadir Bacha was made liable. Kadir Bacha discharged his liability by payment of a sum of Rs. 9,945–14–0 into Court, part of the sale proceeds of a property which he had purchased from Adamsa's heirs as already mentioned. There still remained a balance of over Rs. 11,000 to be realized, and execution of the decree had therefore to be taken out. There was first a transmission of the decree to the Tanjore Sub-Court, and later the decree was transferred to the Sub-Court, Kumbakonam, the very Court which held in its custody, though to the credit of a different suit, namely, Original Suit No. 33 of 1924, the sum of Rs. 2,983–2–6 referred to above. Execution Petition No. 172 of 1929 is the execution petition of Minakshi Ayyar, seeking attachment and payment out of the money as being an asset of Adamsa on the allegation that the transfer first to Abdul Rahiman and afterwards to Kadir Bacha was not supported by consideration and was but an attempt by Noor Muhammad and the other heirs of Adamsa to keep the property in the names of relations, so as to evade the creditors and secure it for themselves after the disputes were over. An attachment was accordingly made on 9th October 1929. The opposing

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claimants were the legal representatives of Kadir Bacha—he seems to have died on 29th November 1929—who filed Execution Application No. 163 of 1930 contesting the attachment on the ground that the fund in Court absolutely belonged to them and not to Adamsa's heirs who had according to them no interest whatever in it. The Subordinate Judge who heard both the petitions together has dismissed Execution Petition No. 172 of 1929 and allowed Execution Application No. 163 of 1930, holding that both the transfers, the first to Abdul Rahiman and the second in favour of Kadir Bacha, were real and not merely colourable transactions, and that the money truly belonged to Kadir Bacha and, after his death, to his heirs who have since sold their right to one Dawood Mohideen. Minakshi Ayyar, the decree-holder, has preferred these appeals, Civil Miscellaneous Appeals Nos. 420 and 421 of 1935, against the said order.

This is a somewhat long narrative, but it is necessary to set it out in order to understand the nature of the disputes. It will be seen that the lower Court as the custody Court held the fund to the credit of Original Suit No. 33 of 1924 and was at the same time moved to execute the decree in Original Suit No. 32 of 1925 passed by the Ramnad Sub-Court but transmitted to it for execution. A preliminary objection to the maintainability of these appeals was taken by the respondents' learned Advocate. The argument, if we followed it rightly, was this. Under Order XXI, rule 52, Civil Procedure Code, any question of title or priority between the decree-holder and any other person not being the judgment-debtor claiming to be interested in the attached property by virtue of any assignment, attachment or otherwise has to be determined by the custody Court. It was said that the

Kumbakonam Sub-Court which was the custody Court had no doubt jurisdiction to determine the question but it could do so only in Original Suit No. 33 of 1924 in which the money was realized and brought into Court, and not in Original Suit No. 32 of 1925 in which the appellant was seeking execution. Even if the Court purports to have dealt with it in Original Suit No. 32 of 1925 it must be deemed to have done so only in Original Suit No. 33 of 1924 as it is in respect of that suit alone the Court can be regarded as the custody Court. Proceeding on this footing it was next urged that the order under appeal must be deemed to have been made in Original Suit No. 33 of 1924, a suit to which neither Minakshi Ayyar nor his father, Ayyavu Ayyar, was a party, for the purpose of section 47, Civil Procedure Code, and, not being a party, he had no right of appeal under that section, nor under Order XLIII, rule 1, which contains no provision for an appeal in favour of a stranger such as Minakshi Ayyar was. We are clear that there is no substance in this objection. The order in question was one undoubtedly made in Original Suit No. 32 of 1925 as the cause-title to it plainly shows, and was at any rate allowed to be so made without any objection by the respondents. It is now too late to permit such a purely technical objection to be raised. We may also observe that all that the rule directs is that the custody Court should be the Court to determine the dispute and the lower Court had, in our opinion, sufficient jurisdiction as it had the fund in its custody. We see no warrant in the Code for holding that the dispute must be or must be deemed to have been dealt with and determined only in the one suit rather in the other, so long as it is the custody Court that has enquired into it. We are accordingly of opinion that

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under section 47, Civil Procedure Code, which we hold is applicable to this case, the appellant has a right of appeal, and overrule the preliminary objection.

Coming now to the merits, it is necessary before entering on a discussion of the facts to advert to a point of law which has found favour with the learned Subordinate Judge. He has held that an executing Court cannot, having regard to the ruling in *Palaniappa Chettiar* v. *Subramania Chettiar*(1), go into the question whether the fund in Court really belonged to Adamsa's heirs and only stood benami in the name of Kadir Bacha. According to him the person whose name appears as the decree-holder must be held to be the person really entitled to the fruits of the decree and whatever claims Adamsa's heirs or creditors may have against Kadir Bacha in other proceedings, in execution proceedings the plea of benami cannot be accepted. He therefore came to the conclusion that it was Kadir Bacha's heirs who were entitled to draw the amount in Court. After carefully considering the decision in *Palaniappa Chettiar* v. *Subramania Chettiar*(1) and Order XXI, rule 16, of the Civil Procedure Code on a construction of which it is based, we are unable to agree with the view taken by the learned Subordinate Judge. It may be sound policy to discourage benami transactions in general tending, as they very often do, to the effective concealment of fraud to the embarrassment of Courts. But unless statutorily bound, the Court must continue to do its duty of unravelling the truth however cleverly hidden by false or fictitious trappings, and administer justice according to the true rights of parties such as they may be found to be on enquiry. It may again be

(1) (1924) I.L.R. 48 Mad. 553.

a desirable end to thwart the attempt frequently made by unscrupulous debtors to throw obstacles in the way of a successful litigant realizing the fruits of his decree, and prevent the Court from being side-tracked into a long and tedious enquiry having the effect of delaying or defeating a *bona fide* decree-holder. Even if such were the obvious purpose of the obstruction, the Court must still do its duty by holding the enquiry and get at the truth, subject no doubt to such rules of procedure as the Legislature has laid down. In the present instance, we find nothing in the language of Order XXI, rule 16, lending support to the view that the Subordinate Judge has taken. By that rule the transferee of a decree by assignment in writing or by operation of law is entitled to apply for execution of the decree subject to the conditions mentioned in the rule. The question may arise by way of a corollary, and did arise in *Palaniappa Chettiar* v. *Subramania Chettiar*(1), whether any person other than the transferee can apply under the rule. In that case, a person who claimed to be the real owner of a decree which had been, it was found, at his instance, transferred to his agent, made the application, and it was held that he had no right to make it, as Order XXI, rule 16, did not give him the right. SRINIVASA AYYANGAR J. observed:

"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 necessitate our holding that the transferee referred to is the transferee named as such in the assignment in writing.

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To hold otherwise would be not to give proper effect to the words of the Statute."

As explained by the learned Judge, the decision purports merely to give effect to a principle implicit in the language of the rule which in terms recognises a right in the transferee only to apply for execution and it was held that he alone and none other, whatever his true position or right may be, could take advantage of the rule for the purposes of execution. With that proposition we are inclined respectfully to agree, but we must however express our dissent from certain other observations which occur at pages 558 and 559 of the report if by them the learned Judge intended to lay down as a universal rule that it is not open to the Court in execution to enquire into questions of benami and adjust the rights of parties according to its findings. The observations are these :

"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. . . 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."

The language here employed is very wide, suggesting as it does that it would be proper to ignore a plea of benami if it tends to affect suits, proceedings and records of Court. The facts of the case itself did not, so far as we can see, call for such a sweeping observation and we are unable, with the utmost respect, to treat it as any better than an *obiter dictum*. The learned Judge himself in this connection refers in support of the proposition only to section 66, Civil Procedure Code, which in terms limits the prohibition to an attack on the title of the person claiming title under a purchase certified by the Court, and expressly saves the right of

a third person to proceed against the property ostensibly sold to the certified purchaser *if in fact and in truth* it is liable to satisfy a claim of such third person against the real owner. We cannot see any warrant in the provisions of the Code for enlarging the prohibition so as to cover suits and proceedings or the records of Court in general. To do so would result in many cases in the promotion and not in the suppression of fraud. Provisions of this character, restrictive as they are of the rights of parties and the jurisdiction of the Courts, should, we think, be strictly construed, and ought not to be extended beyond the plain language of the rule. In this connection it would be apposite to quote the observations of the Privy Council in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall*(1):

> "It is well known that benami purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore, they must still be recognised and effect given to them by the Courts except so far as positive enactment stands in the way, and directs a contrary course."

After referring to the enactment contained in section 260 of the Code of 1859 corresponding to section 66 of the present Code, and stating that it was clear and definite and was confined to a suit against the certified purchaser, their Lordships went on to say:

> "The present suit, which is the converse of that pointed at in the section, is not within the words or scope of it . . . it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments which would exclude any inquiry into the truth in any suit between the parties."

Though their Lordships were dealing with a suit, we think there can be no difference in the principle to be applied whether it is a suit, or an execution

(1) (1872) 14 M.I.A. 496.

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proceeding and we accordingly hold that there is no legally valid objection to an enquiry into the merits of the present case.

[His Lordship then discussed the evidence in, and the circumstances of, the case and proceeded :—]

Differing from the learned Subordinate Judge we hold that both Exhibits A and III represent benami transactions brought about for the purpose of helping Noor Muhammad and the other heirs to retain for themselves the value of the property seemingly conveyed under them and that the decree-holder in Original Suit No. 32 of 1925 is entitled to obtain satisfaction out of the fund in Court standing to the credit of Original Suit No. 33 of 1924. We accordingly accept both the appeals, allowing Execution Petition No. 172 of 1929 and dismissing Execution Application No. 163 of 1930 with costs here and in the Court below, one set in Civil Miscellaneous Appeal No. 420 of 1935. The amount paid by the appellant to the Court guardian for fees and purchase of printed papers will be included

A.S.V.