1911.
May, 6.

APPELLATE CIVIL.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

BALDEO SAHAI (PLAINTIFF) *v.* HARBANS AND ANOTHER (DEFENDANTS).*

Champerty and maintenance—Agreements contrary to public policy—Assignment—Right of party to impeach.

Held that there may be a valid transfer of property for the purpose of financing a suit upon the terms that the property or the proceeds realized from the litigation shall be divided between the transferor and transferee irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and does not purport to have been made so as to be inequitable or for improper objects, as for the purpose of gambling in litigation or of injuring others by encouraging unrighteous suits. *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) followed.

Held also that, although as a general rule where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, the rule is not invariable and would not apply where the transferor being a party to the litigation had never admitted the assignment, but on the contrary had pleaded that it was fictitious and without consideration. *Manishankar Pranjivan* v. *Bai Muli* (2) followed.

THIS was a suit for sale on a mortgage of the 7th of December 1894, executed by one Musammat Dhapa in favour of Kashmiri Das and Paras Ram. The interest of the mortgagees became vested in one Sri Ram, and he, on the 5th of February, 1901, conveyed his mortgagee rights to the plaintiff. In 1902, the mortgagor, Musammat Dhapo, executed a deed of gift of all her property in favour of Harbans and others. Harbans and Sri Ram defended the suit of the plaintiff. Sri Ram in his defence pleaded that the sale-deed of the 5th of February, 1901, was fictitious and without consideration and that he was the real owner of the mortgagee rights. The court of first instance (Munsif of Kairana) decreed the plaintiff's claim for the sale of half the property, but upon appeal this decree was set aside by the District Judge, and the plaintiff's suit dismissed *in toto*.

The plaintiff appealed to the High Court.

Mr. *A. H. C. Hamilton*, for the appellant.

* Second Appeal No. 721 of 1910 from a decree of Landale Johnston, Additional Judge of Meerut, dated the 20th/21st of April, 1910, reversing a decree of Kameshwar Nath, Munsif of Kairana, dated the 20th of December, 1909.

(1) (1876) L. R., 4 I. A., 23 ; I. L. R., 2 Calc., 233.

(2) (1888) I. L. R., 12 Bom., 686.

Babu *Sital Prasad Ghosh*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for sale on a mortgage of the 7th of December, 1894, executed by Musammat Dhapo in favour of Kashmiri Das and Paras Ram. The interest of the mortgagees became vested in one Sri Ram, and he, on the 5th of February, 1901, conveyed his mortgagee rights to the plaintiff. In 1902, the mortgagor, Musammat Dhapo, executed a deed of gift of all her property in favour of Harbans and others. Harbans and Sri Ram defended the suit of the plaintiff. Sri Ram in his defence pleaded that the sale-deed of the 5th of February, 1901, was fictitious and without consideration and that he was the real owner of the mortgagee rights.

The court of first instance decreed the plaintiff's claim for sale of half of the property, but upon appeal this decree was set aside and the suit of the plaintiff dismissed *in toto*. The ground upon which the learned Additional District Judge dismissed the suit was, that the alleged deed of sale was fictitious and was illegal in view of the fact that there was no present consideration paid. In his judgement he observed :—"The Munsif found that no money passed and that the intention was that plaintiff should try his luck in suit." Then the learned Judge refers to the authorities to be found in Mr. Gour's work on the Transfer of Property Act and later on remarks :—

> "If the arrangement was that proceeds should be divided after suit and realization of money without any agreement as to the payment of some consideration in any case, win or lose, it seems to me that the transaction cannot be regarded as a *bonâ fide* conveyance of a right, but on the other hand must be looked on as a mere nominal and fictitious transfer having for its object simply and solely the putting of plaintiff in a position to sue."

He accordingly holding this view of the law dismissed the plaintiff's suit.

The principal question argued in this appeal is that the view of the law propounded by the learned Judge is erroneous, and this contention is in our judgement well founded. The learned Judge was of opinion that an arrangement made on a transfer of property that the property, or the proceeds of the property, after suit should be divided between the transferor and transferee would not be a binding agreement as being opposed to public policy, but

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must be regarded as a nominal and fictitious transaction, unless there was also "an agreement as to the payment of some consideration in any case, win or lose." This is not the law as it is laid down by their Lordships of the Privy Council. The law is thus stated in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1):—

"Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. Indeed cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be exhorbitante and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."

This language is clear and precise and is authority for the proposition which has been pressed before us in argument by the learned counsel for the appellant, namely, that there may be a valid transfer of property for the purpose of the financing of a suit upon the terms that the property or the proceeds realized from the litigation shall be divided between the transferor and transferee irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and is not of the nature referred to in the later portion of the remarks of their Lordships. Under these circumstances it appears to us that before we determine this appeal we should have a finding upon the following issue, namely, whether in view of the ruling of their Lordships of the Privy Council the transfer in this case was a valid transfer.

The learned counsel for the appellant objects to our referring this issue on the ground that where an assignee sues on his assignment and proves the assignment, an adverse party cannot take the objection that there was no consideration. We do

(1) (1876) L. R., 4 I A., 23.

not think that the ordinary rule applies to the circumstances of the present case. The transferor is a party to the litigation, and he pleaded that the sale-deed transferring the mortgage was fictitious and without consideration, and that he was the real owner of the mortgagee rights. This plea did not, it is true, find favour with the learned Munsif, but the lower appellate court set aside the decree of the Munsif *in toto*. In the case of *Manishankar Pranjivan* v. *Bai Muli* (1) BIRDWOOD and PARSONS, J. J., held that, although in ordinary cases it is the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, yet that, under the particular circumstances of that case that rule did not apply. One of the circumstances in that case was that there was on the record no admission of the assignment by the assignor. In the case before us, so far from there being on the record an admission of the assignment by the assignor, there was a direct denial by him that there was any valid transfer. We are supported in the view which we take by this decision, which has our approval, and we think that in the present case the court was and is bound to determine whether or not the plea set up by Sri Ram and also by Harbans, namely, that the transfer was fictitious and without consideration is true in substance and in fact. We, therefore, must remit an issue upon the question of the validity of the transfer.

There is also another question which we think ought at the same time to be determined by the lower appellate court, namely, whether Musammat Dhapo held any, and if so, what portion of the property which she purported to mortgage, by adverse possession. We refer this issue as also the following issue: Whether, having regard to the rule laid down by their Lordships of the Privy Council the assignment of the 5th of February, 1901, was fictitious and without consideration. We refer these issues to the lower appellate court under order XLI, rule 25. The court shall take such additional evidence as may be tendered, and on return of the findings the parties will have the usual ten days for filing objections.

(1) (1888) I. L. R., 12 Bom., 686.

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On return of the findings the following order was passed :—

RICHARDS, C. J. and BANERJI, J.—On the first issue referred to the court below, the finding of that court is against the plaintiff appellant. An exception has been taken to that finding, but the objection raises questions of fact which cannot be determined in second appeal. The learned counsel for the appellant asks us to reconsider the order by which we referred issues to the court below. Even if we had power to do so, we are not inclined to re-open the questions, which were fully discussed and considered, and in regard to which a decision was come to as a result of such consideration. We may also observe that we see no reason for thinking that the decision arrived at, to which one of us was a party, was incorrect. In view of the finding of the court below on the first issue referred the appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

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MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball.

CHANDHAN AND ANOTHER (PLAINTIFFS) *v.* BISHAN SINGH AND OTHERS (DEFENDANTS).

Act No. VII of 1870 *(Court Fees Act), section 7, clause v. (d)—Court fee—Suit to recover a two-thirds share in certain specific plots sold—Court fee payable on market value.*

Where a Hindu widow possessed of certain zamindari property of the total area of 17 bighas 6 biswas, assessed to a revenue of Rs. 19-7-0, sold 11 bighas and 11 biswas out of the same, which was practically two-thirds of what she possessed, and specified the actual plots sold: *Held*, in a suit by two out of three reversioners to recover two-thirds of the property thus alienated, that, the claim being for specified plots and not a definite share of the whole estate paying revenue, the court fee should be paid on the market-value of the property in suit and not five times the Government revenue.

ON the memorandum of appeal being filed, the Stamp Reporter made the following report :—

"The suit which gave rise to this appeal related to the property of Nar Singh, Fatch Singh and Bansi Singh. Musammat Dharmi, the life-estate holder, out of the entire property in her possession as such, sold specific plots of land, measuring 11

* Stamp Reference.