APPELLATE JURISDICTION (*a*)

Special Appeal No. 378 *of* 1866.

V. SANKARAPPA and 3 others.....*Appellants.*

D. KÁMAYYA and 2 others.....*Respondents.*

Plaintiffs sued for certain lands under an agreement executed to their elder brother, Sundarappa, by defendants in the following terms —"You have this day received a loan of Rupees 1,345-14-4 from Devarapalli Venkappa and from me, Brahmanna, for the purpose of remitting to the Court in satisfaction of the warrant amount in the matter of the Suit No. 26 of 1835 on the file of the Provincial Court, between your father the late Umá pati, appellant, and Merala Agasti, respondent. You have, owing to the incumbrances consequent on a few more suits against you, caused all the property which you own in Vegnyammapetta to be attached for the said (warrant) amount, and caused 6 Putties of land, houses, backyards and certain moveable property out of the same to be knocked down in auction in our names, and some other personal property in the names of some others: and have therefore proposed to us to execute a Karárnáma (to you), engaging (ourselves) to carry and pay the afore-mentioned Rupees (1,345-14-4) into the Court; to obtain receipts for the amount and certificates in our names for the real property; to allow the tiled house, backyard having fruit trees and moveable property to be held by you as hitherto; Venkappa and myself, Brahmanna, to enjoy the produce of the said 6 Putties of land for 20 years from Sarvari (1840) to Sitrádri (1859) on account of the said loan and interest thereon; and to restore the land together with the certificates (to be) issued by the Court in our names. We have accordingly agreed to your proposal and we, the bidders, with the permission of Venkappa, do execute this Karárnáma. We shall hold the land till the expiration of the term and put it in your possession without any incumbrances whatever, and return the said certificates to you, etc....."

The Principal Sadr Amin considered that the agreement was invalid, on the ground that it appeared to have been executed with a view to defraud the other creditors of Sundarappa.

Held, on appeal, that the real nature of the transaction was that Sundarappa borrowed money from defendants to enable him to buy in his own land. That defendants purchased only for and on behalf of Sundarappa, taking from him an assignment of part of the property for 20 years in order to repay themselves the money lent. That there was, therefore, abundant consideration for the defendants' promise to give up possession at the end of 20 years.

Held also, following the English Law, that where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution.

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THIS was a special appeal from the decision of S. Venkatádri, Principal Sadr Amin of Rajahmundry, in Regular Appeal No. 221 of 1865, reversing the decree of the District

(*a*) Present: Bittleston, Ag. C. J. and Ellis, J.

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Munsif of Georgepeta, in Original Suit No. 674 of 1863.

Miller, for the appellants, the plaintiffs.

Sloan, for the respondents, the first and 2nd defendants.

The facts of the case sufficiently appear from the following.

JUDGMENT :—This was a suit for 3 plots of mányam lands which the plaintiffs, as the brothers of one Sundarappa deceased, claimed under an agreement executed by 2nd and 3rd defendants and attested by the father of the 1st defendant. The plaintiffs also claimed a sum of Rupees 633, the value of the produce of the land from the time when the plaintiffs became entitled to the possession.

The agreement on which the plaintiffs sued was in these terms.

"You have this day received a loan of Rupees 1,345-14-4 from Devarapalli Venkappa and from me, Bráhmanna, for the purpose of remitting to the Court in satisfaction of the warrant amount in the matter of the Suit No. 26 of 1835, on the file of the Provincial Court, between your father the late U'mápati, appellant, and Merala Agasti, respondent. You have, owing to the encumbrances consequent on a few more suits against you, caused all the property which you own in Vegayammapetta to be attached for the said (warrant) amount, and caused 6 Putties of land, houses, backyards and certain moveable property out of the same to be knocked down in auction in our names, and some other personal property in the names of some others ; and have therefore proposed to us to execute a karárnáma (to you) engaging (ourselves) to carry and pay the aforementioned Rupees (1,345 -14-4) into the Court; to obtain receipts for the amount and certificates in our names for the real property ; to allow the tiled house, backyard having fruit trees and moveable property to be held by you as hitherto; Venkappa and myself, Bráhmanna, to enjoy the produce of the said 6 Putties of land for 20 years from Sarvari (1840) to Sittádri (1859) on account of the said loan and interest thereon, and to restore the land together with the certificates (to be) issued by the Court in our

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names. We have accordingly agreed to your proposal and we, the bidders, with the permission of Venkappa, do execute this karárnáma. We shall hold the land till the expiration of the term and put it in your possession without any encumbrances whatever on them, and return the said certificates or Kavilas to you, endorsing thereon such particulars as you may require. If any claims are preferred by any one respecting the said property before the expiration of the said term, we shall defend the same, receiving from you the costs thereof. Should there occur impediments to the same, you alone would be responsible for the balance left after deducting payments, *i. e.*, the balance due after deducting the amount realised by us up to that time at the rate of the proper sist of the said land, to which effect we have obtained a document from you and do execute this karárnáma to you. This karárnáma is executed of our free will."

(Signed) VENCATARÁMANNA.
(„) BRÁHMANNA.

Witnesses.

(Signed) Abbirázu, son of Bhávarázu Ellam Rázu Kulakarámi.
(„) Devarapalli Venkappa.
(„) P. Bhogerázu,
residing at Velatur.
(„ Gumsetti Tammanna.

With the knowledge of these (witnesses) this is drawn by (Signed) Thátáparti Buchi Rázu Kulakarám of Vegayammapetta.

In the Court of the District Munsif, the defendants pleaded that the document sued on was a fabrication, that they were the purchasers of the land in question at the auction sale under the decree referred to in the agreement; and also that if the agreement had been executed by them it would have been invalid, under Section 260 of the Code of Civil Procedure.

The District Munsif found the agreement to be genuine, and held, properly as we think, that it was not invalidated by Sec. 260 of the Civil Procedure Code, which was not in operation at the time of the sale in question.

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Upon appeal the Principal Sadr Amin also found that the agreement was genuine ; but he held that it was invalid, on the ground that it appeared to have been executed with a view to defraud the other creditors of Sundarappa ; and he dismissed the plaintiffs' suit with costs.

Before us Mr. Sloan, on behalf of the special respondent, argued that the agreement was void, 1st, because it was executed with a view to defraud creditors, and 2ndly, because there was no consideration for the agreement ; but he mainly relied on the latter ground.

We think however that the decision of the Principal Sadr Amin cannot be supported on either ground.

With respect to the second ground the fallacy of Mr. Sloan's argument lay in this, that he assumed the defendants to have been the real purchasers of the property at the auction sale and then argued that they, being the owners by purchase, received no consideration from Sundarappa for transferring the property to him upon the terms mentioned in the agreement ; whereas the Lower Courts have found, and the document itself supports the finding, that the real nature of the transaction was this, that Sundarappa borrowed from the defendants money enough to enable him to buy in his own land at the sale under the decree, and though the defendants appeared to be the purchasers at the sale, they were not really so, but purchased only for and on behalf of Sundarappa, taking from him an assignment of part of the property for 20 years in order to repay themselves the money lent. Now this suit is brought at the end of the 20 years to recover back the possession of the land so mortgaged ; and certainly, regarding the transaction in this light, there was abundant consideration for the defendants' promise to give up possession at the end of 20 years.

As regards the other ground, viz , that this agreement was a fraud upon the creditors of Sundarappa, the first observation is that there is no creditor complaining of it, and that it would be a great violation of equity and good conscience to hold that upon that ground the defendants are entitled to retain possession contrary to their own agreement, and thereby

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to the extent of the property in question defeat any creditor, if any there be, who has a claim against Sundarappa's estate. But, in truth, according to English law this defence could not be sustained—for it has been held in several cases that where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution.

In *Wood v. Dixie*, 7 Q. B 896, this is distinctly laid down. The plaintiff in that suit claimed, under a conveyance from one Phillips, certain goods which had been seized by the defendant, the Sheriff, as the goods of Phillips ; and at the trial the Judge told the Jury that although the conveyance was made *bona fide* and with a full intention that the property should be parted with, it would yet be fraudulent if made with intent to defeat the execution. But this direction was held wrong by the Court. Lord Denman, C. J., saying, "we are clearly safe in going so far as to say that a mere intent to defeat a particular creditor does not constitute a fraud ;" and Williams, J. adding, "I think Mr, Humfrey has not overstated the law when he said it had been long settled that the mere intention to defeat an execution creditor did not in itself constitute a fraud." This view of the law has been upheld in the Court of Chancery in *Hate* v. *The Metropolitan Saloon Omnibus Co.*, 28 L. J. Ch. 777, and in the Court of Exchequer in *Darvill* v. *Terry*, 30 L. J. Exch. 355, both of which cases are quoted by Mr. Mayne in his commentary on Sec. 208 of the Indian Penal Code. In the latter case, the question arose upon an Interpleader Issue as to the validity of a bill of sale by way of mortgage as against an execution creditor, and it was held that the Judge had properly left it to the Jury to say whether the bill of sale was a real security or a mere sham, though the purpose had been to avoid an execution. We may observe that in *S. A.* 447 of 1863, II H. M. C. Reps. 249, this Court, in a somewhat similar case, sent down issues to the Lower Court to try whether the transaction was merely colorable.

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In the cases above alluded to the transactions were supported as against creditors, but in this case, as already observed, it is not a creditor who is impeaching the transaction ; and it is not now the interest of any creditor of Sundarappa that the plaintiff's claim should be defeated. Further, we would add that, even as regards transactions which might be impeached by creditors as fraudulent against them, it has always been held that they cannot on that ground be impeached by the parties to them. Thus in *Coleman* v. *Croker* (1 Ves. Jun. 161) where a bill was filed by the Committee of the settlor, who had become lunatic, to set aside a voluntary settlement as a fraud upon creditors, Lord Chancellor Thurlow said, " as to the fraud there must be some creditor to complain of that, and he must put himself into a situation to complain by getting judgment for his debt, and stating that by the settlement he is defrauded." So in *Curtis* v. *Price* (12 Ves. 103) Lord Erskine said, " a settlement of this kind is void only as against creditors ; but only to the extent to which it may be necessary to deal with the estate for their satisfaction, it is as if it had never been made. To every other purpose it is good. Satisfy the creditors and the settlement stands."

This is the principle which runs through the cases as to dispositions of property fraudulent and void against creditors ; and it is the principle which should, we think, at all events govern Courts whose rule of decision is equity and good conscience. We therefore reverse the decision of the Principal Sadr Amin and affirm the decree of the District Munsif in favor of the plaintiffs with costs.

Appeal allowed.