PRIVY COUNCIL.

PETHERPERMAL CHETTY
v.
MUNIANDY SERVAI.*

P.C.*
1908
Feb. 5.
March 18.

[On appeal from the Chief Court of Lower Burma, Rangoon.]

Benamidar - Benami transaction—Fraud—Deed—Creditor—Equitable mortgage—Suit—Limitation Act (XV of 1877), Sch. II, Articles 91, 144—Deed declared inoperative and fraudulent.

In order to defeat the claim of an equitable mortgagee of certain property, the predecessor in title of the respondent, and co-member with him of a joint Hindu family, executed on 11th June, 1895, what purported to be a deed of sale of the property in favour of the predecessor in title of the appellant.

The claim, however, was decreed, the Court finding that the vendee under the alleged deed of sale was aware of the equitable mortgage, when the deed was executed; and the decree was satisfied by money raised on the security of the property by the vendee.

In a suit by the respondent against the appellant to have it declared that the deed of 11th June, 1895 was merely a *benami* transaction, and to recover possession of the property, it was found on the facts that the deed was *benami* and fraudulent and inoperative as against the plaintiff.

Held, that the purpose of the fraud not having been effected, there was nothing to prevent the plaintiff from repudiating the transaction as being *benami*, and recovering possession of the property.

Taylor v. *Bowers*(1), *Symes* v. *Hughes*(2), and *In re Great Berlin Steamboat Co.*(3), followed.

Kearley v. *Thomson*(4), distinguished.

Held, also, that the deed being inoperative, it was unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property. The suit was therefore governed, not by article 91, but by article 144 of Schedule II of the Limitation Act (XV of 1877) and consequently was not barred by lapse of time.

APPEAL from a judgment and decree (February 2nd, 1905) of the Chief Court of Lower Burma, which affirmed a decree

* *Present:* Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1876) L. R. 1 Q. B. D. 291.
(2) (1870) L. R. 9 Eq. 475, 479.
(3) (1884) L. R. 26 Ch. D. 616.
(4) (1890) L. R. 24 Q. B. D. 742.

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(March 7th, 1904) of the Court of the District Judge of Hanthawaddy.

The defendant was the appellant to His Majesty in Council.

The principal questions raised on this appeal related to the validity and legal effect of a deed of sale dated 11th June, 1895, and of a deed of release, dated 30th July, 1897, both of which the plaintiff (the respondent) contended were void and inoperative as against him.

One Muniandy Maistry was the owner of a grant known as the Tankkyan grant. He died on 3rd October, 1890, leaving as his next heir his mother Sigappa, to whom letters of administration to his estate were granted by the Court of the Recorder of Rangoon. She died on 1st December, 1893, and on her death, the next heirs to the estate of Muniandy Maistry were his cousins, Chellum Servai and Muniandy Servai, who were brothers and members of a joint undivided family; and letters of administration of the estate of Muniandy Maistry were granted to Chellum Servai. Muniandy Maistry had during 1888 and 1889 borrowed several sums of money from one Stumpp, and had deposited with him the title deeds of the Tankkyan grant as security for the repayment of the debt.

On 28th November, 1891 Stumpp assigned this debt to one Arunachellam Chetty, who, on 18th September, 1895, instituted, in the Court of the District Judge of Hanthawaddy, a suit to recover the amount due (Rs. 14,568-12) by sale of the grant. Chellum Servai had, in the meantime, on 11th June, 1895, executed a deed purporting to be a sale of the grant to one T. P. Petherpermal Chetty (the uncle of the appellant) for a consideration stated to be Rs. 30,000 for the grant and four years' arrears of rent due from the tenants. In answer to Arunachellam Chetty's suit, it was pleaded that the sale to Petherpermal Chetty, who had no notice of the equitable mortgage, gave him a title free of the incumbrance.

On 3rd January 1896 the District Judge gave Arunachellam Chetty a decree for sale on the ground that on the evidence in the suit Petherpermal Chetty, at the time of the execution of the deed of 11th June, 1895, had full notice of the equitable mortgage: and that decree was affirmed on appeal by the Commissioner of

Pegu on 28th March, 1896, and by the Judicial Commissioner of Lower Burma on 23rd November, 1896, both the Appellate Courts in their judgments expressing doubts as to the *bonâ fides* of the deed of sale.

Chellum Servai died on 15th June, 1896, and on his death Muniandy Servai (the plaintiff in the suit, out of which the present appeal arose) became entitled to the estate. He was at that time in Madras and did not return to Burma, until about six months later. Petherpermal Chetty then asserted an absolute title in himself to the Tankkyan grant. On 4th June, 1897 Muniandy Servai applied for letters of administration to such portion of the estate of Muniandy Maistry as was unadministered. In his application he challenged the title of Petherpermal Chetty, who opposed the application; and by order dated 15th July, 1897, Muniandy Servai was referred to the Civil Court to establish his title. After giving instructions for the institution of a civil suit, he was induced to refer the dispute to the arbitration of a *punchayet* of certain elders of his class, who decided in favour of Muniandy Servai; and Petherpermal Chetty agreed to restore possession of the grant and render accounts. Muniandy Servai wished to return at once to Madras, so Rs. 1,000 was paid to him on account, and the actual delivery of possession and settlement of accounts was postponed, until he returned. He left Rangoon on 30th July, 1897, and early in the morning of that day executed a document at the house of one Maung Shwe Waing. This document purported to be a release of all claims, but at the time of the execution was fraudulently represented by Petherpermal Chetty to be a record of the arrangement for restoring the property and rendering accounts.

Muniandy Servai returned to Burma about a year afterwards, when Petherpermal Chetty declined to give up possession, and set up the document of 30th July, 1897 as a release.

Muniandy Servai thereupon, on 24th July, 1901, brought the present suit, claiming possession of the Tankkyan grant, and alleging that the deed of sale of 11th June, 1895 was a *benami* transaction and not intended to be operative; and that the deed of release dated 30th July, 1897 had been fraudulently obtained from him. The defendants were Petherpermal Chetty and two

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persons, Muthia Chetty and Chinnia Chetty, to whom he had mortgaged the grant, who were made *pro formâ* defendants; but no question arose on the present appeal as to their rights.

The defence was a denial of the plaintiff's allegations; and it was also pleaded that the plaintiff had no right to sue.

The District Judge held that, as sole surviving heir of Muniandy Maistry, the plaintiff had the right to sue; that the deed of sale of 11th June, 1895 was a fictitious transaction; and that the fact that the deed was executed to prevent a sale in execution of Arunachellam Chetty's decree did not preclude the plaintiff from asserting his rights. He also found as to the release that Petherpermal Chetty had recognized the plaintiff's claim before the *punchayet* and agreed to restore possession and render accounts on the plaintiff's return from Madras; that the release was obtained by fraud and was not binding on the plaintiff, though admissible in evidence under an order passed by his predecessor in office; and that its only legal effect was a receipt for Rs. 1,000. He also held that the suit was not barred by limitation.

In accordance with his findings the District Judge made a decree in favour of the plaintiff.

Petherpermal Chetty having died pending the suit, his nephew of the same name was substituted for him on the record, and preferred an appeal to the Chief Court, which was heard by *H. Thirkell White*, Chief Judge, and *A. R. Birks*, Judge, who affirmed all the findings of fact and law of the Court below, except that they decided that the release of 30th July, 1897 had not been duly registered and was therefore inoperative to affect immoveable property.

The appeal was therefore dismissed.

On this appeal,

Upjohn, K.C., and *Clement M. Ballache*, for the appellant, contended that the conveyance of the 11th June, 1895 was not a *benami* deed, but was intended and purported to be an absolute and *bonâ fide* transfer of the grant to the appellant: the evidence to show that it was otherwise was wrongly admitted. But on the first respondent's own case the deed was a fraudulent arrangement

by Chellum Servai to defeat the claim of his creditor, Arunachellam Chetty, and that being so, was the respondent, who was another member of the same joint family as Chellum Servai, through whom he derived title to the grant, entitled to recover possession of the property, which the deed purported to convey? It was submitted he was not, even though the object was not effected. To allow him to do that would be to allow him to take advantage of the fraud of Chellum Servai, of which he was cognizant. Chellum Servai could not have pleaded his own fraud to avoid the conveyance, nor could the first respondent do so. In such a case the maxim "*In pari delicto potior est conditio possidentis*" should be strictly applied. Reference was made to *Taylor* v. *Bowers*(1); *Kearley* v. *Thomson*(2); Mayne's Hindu Law, 6th Ed., page 571, Ch. XIII, "Benami Transactions," section 441: 7th Ed., page 588: *Govinda Kuar* v. *Lala Kishun Prosad*(3); and *Sham Lal Mitra* v. *Amarendra Nath Bose*(4).

It was also contended that the suit was barred by limitation; the article applicable was Article 91 of Schedule II of the Limitation Act (XV of 1877), for a suit to set aside a deed or other document on the ground of fraud, giving a period of "three years from the time the plaintiff became aware of the fraud." Here the first respondent became aware of the fraud on his return from Madras after the death of Chellum Servai, even if he was not cognizant of it before, and the suit was not instituted, until 24th July, 1901, so that it was barred by lapse of time.

DeGruyther, for the first respondent, was not heard.

The judgment of their Lordships was delivered by—

March 18.

LORD ATKINSON. In this case an action was originally brought by R. Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherperma Chetty, the uncle and predecessor of the appellant (hereinafter called "Petherpermal the elder"), and two formal defendants,

(1) (1876) L. R. 1 Q. B. D. 291, 294.
(2) (1890) L. R. 24 Q. B. D. 742.
(3) (1900) I. L. R. 28 Calc. 370, 379.
(4) (1895) I. L. R. 23 Calc. 460.

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R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy district, Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568-12.

On the 11th June, 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the above-mentioned lands to Petherpermal Chetty the elder, a money-lender residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September, 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry, deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12 with interest, and other relief.

Petherpermal the elder filed his defence, and the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellum Chetty for debt and costs, and as security for this loan, he executed a mortgage of the

lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June, 1895 was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation, which he successfully prosecuted, and, if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July, 1897, R. Muniandy Servai and Pether-permal, the elder, executed a deed of release, by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case that the deed of the 11th June, 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by Counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the Judge, who tried the case and saw the witnesses, approved, as it was, upon appeal, should, under the circumstances of the case be disturbed.

The only questions, therefore, for their Lordships' decision are :—

(1) Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

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(2) Is his right of action barred by the 91st Article of Schedule II, to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th Ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus:—

"446. . . . . Where a transaction is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But, if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality, which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property, which they had assigned away. . . . . where they had intended to defraud creditors, who, in fact, were never injured . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies: *In pari delicto potior est conditio possidentis.* The Court will help neither party. 'Let the estate lie where it falls'."

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced, if debtors, who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property, into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal

transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant, who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Tayor* v. *Bowlers*(1), and the authorities upon which that decision is based, clearly establish this. *Symes* v. *Hughes*(2) and *In Great Berlin Steamboat Co.*(3) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L.J., in *Kearley* v. *Thomson*(4).

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him, in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th

(1) (1876) L. R. 1 Q. B. D. 291.
(2) (1870) L. R. 9 Eq. 475, 479.
(3) (1884) L. R. 26 Ch. D. 616.
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June, 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside a as preliminary to his obtaining the relief he claims. The 144th, and not the 91st, Article in the second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant : *H. Arnould & Son.*

Solicitors for the respondent, Muniandy Servai : *Sanderson, Adkin, Lee & Eddis.*

J. V. W.