

(1921) 09 MAD CK 0015
In the Madras High Court

A.T.K.P.L.M. Muthiah Chetti		APPELLANT
	Vs	
Palaniappa Chetty and Others		RESPONDENT

Date of Decision : 01-09-1921

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 1922 Mad 447 : (1922) ILR (Mad) 90 : (1922) 15 LW 190 : (1921) 41 MLJ 594

Hon'ble Judges : Ramesam, J;Oldfield, J

Bench : Full Bench

Judgement

Oldfield, J.—On the merits the question in this appeal is whether Ex. E, an hypothecation bond in favour of plaintiff appellant by the widows

of two partners, Muthu and Raman Chetty, as guardians of 1st to 4th defendants, their minor sons, is without consideration and merely colourable

or was executed in the words of Section 53 Transfer of Property Act with intent to defeat or delay creditors.

2. The undisputed circumstances are that Ex. E hypothecates for its full value all the Immovable property of 1st to 4th defendants; that plaintiff is

the brother of one executant the widow of Muthiah Chetty; and that of the four other creditors of the firm, whose debts plaintiff was to pay as part

of the consideration, one is a dayadi of plaintiff and a cousin of the widow of Raman Chetty and another is plaintiff's partner and nephew. Plaintiff

had been an agent of the firm and knew that it had been declining in prosperity since the death of Raman. Chetty in 1909. Ex. E moreover was

executed just after 5th to 15th defendants, the contesting respondents, other creditors of the firm, who eventually obtained a decree against it for a

little over Rs. 30,000, interest, and costs had at an earlier stage in their suit

obtained a conditional order of attachment before judgment, of which plaintiff and the creditors may be supposed to have been aware, although the attachment was never actually made and, it may be added, is not relied on as invalidating this alienation. On these facts there is no doubt that the lower court was justified in imposing the burden of proof of the substantial character and good faith of Ex. E. on plaintiff.

3. That however did not entitle the lower court to require him, as it has done in respect of the greater part of the case, to discharge that burden with unreasonable strictness or to criticise his attempts to do so perversely. When for instance he had

produced in support of Rs. 14, 300 which he was to pay to four creditors of the firm, entries in the firm's accounts, it was not justified in saying

that, although these entries show that plaintiff and the others were entitled to money from the firm, it did not. follow that they were so on the date of

Ex. E. For in the absence of evidence of discharge the proved indebtedness at a comparatively recent date would presumably still be existing. Nor,

when plaintiff admitted that his father had transactions with himself and 1-4th defendant's firm, was it reasonable, when no specific suggestion was

made to him, to assume that the debt due to him might have been adjusted by transactions with his father and to refuse to reach a conclusion in his

favour, because the possibility of such adjustment was not excluded by his evidence.

4. The accounts relied on by plaintiff were those of 1st to 4th defendants and the different debts were proved by them and by plaintiff and 1st to

4th P. Ws. Comment was made on the fact that the day books from 13-4-1904 to 13-1-1906 (Exh. J.) were missing. But no reason shown for

attaching any special significance to this and after the latter date the account was continued on the footing that the debts were still outstanding. Item

2 due to V.E.S. Subramaniam Chetty is supported by numerous entries ; but there is none relating to it between 1906 and 1910, although there is

none indicating its discharge in the interval. Item 5 due to K.S.S. Kasi Ramana Chetty was subject to interest at quarterly rests ; but no such

rests are entered and there are in fact no entries of interest from fasli 1308 to 1310. No attempt however was made in cross examination to see

whether any explanation was available on these points and they therefore cannot be considered now. The last named creditor accounted rather

indistinctly for the manner, in which his debt was transferred in the accounts from the name of his wife and mother to his own ; but that goes no way towards showing that it was not due at all. No more serious objections have been made to this part of the case and we must therefore hold that these debts were due.

5. Next as to the evidence that plaintiffs actually made the payments directed by Ex. E, it is to be noted that, whatever the importance of his having done so as guaranteeing the substantial character and good faith of the transaction, his promise to pay in the absence of reasons for doubting his ability and intention to do so would be sufficient consideration to support it. Ex. F series however are the hundies, by which the payments are alleged to have been made ; and they are produced by plaintiff and are, except Ex. F-1 for the amount due to V.E.S. Subramania Chetty, duly discharged. As regards Ex. F1 plaintiff deposed that its amount had been left with him in deposit by the Chetty's widow, and similarly he adopted the statement in evidence of 5th P. W, that the, amount of his hundi also, Ex. F3 had been deposited. It is not possible to follow the lower Court's suggestion that these or any of the payments can be collusive, when plaintiff's evidence constitutes a clear acknowledgment that he holds these two payee's money for them and the endorsements on the other hundis, the genuineness of which is proved and is not disputed clearly discharge the debts due by 1st to 4th defendants' firm, its Vilasam being specified in their body. The lower court's objections that three of these hundis are not in plaintiff's usual printed forms and their covering letters and plaintiff's accounts are not produced are merely captious, when their discharge, and in the case of Ex. F-1 and F-3, plaintiff's acknowledgement that he holds the money due for those concerned are considered. Here again the conclusion must be in plaintiff's favour that the payments relied on are established.

6. The remaining item of consideration is Rs. 1,800, described in Ex. E. as advanced in cash for family expenses. There is only the general evidence of plaintiff and 3rd PT W. that part of it was spent on Raman Chetty's funeral and as regards necessity that the assets of the firm were all realized and spent in Rangoon. No accounts for the details of this expenditure have been produced. In these circumstances it is not possible to find

that it has been established. The conclusion must therefore be that consideration passed for Ex. E, except this small item of Rs. 1800 ; and 5th to

10th defendants" case that the document was a mere pretence and that there was. no intention to create rights by means of it, must fail.

7. To turn to the application of Section 53 Transfer of Property Act, there is no doubt no definite evidence of the existence of any creditor besides

5th to 10th defendants and those, who have been paid by Ex. E. The suspicions of the lower court, based on the date of the purchase of stamp

papers and the 12 per cent, rate of interest, which it thought oppressive but which is in fact high, but not exceptional, have not been, shown to be

well founded. We have then no doubt a transaction, which exhausted the executant's assets for the sole benefit of some only of their creditors

including, it is true, three close relatives, of whom one brought it about at a time of pressure, on the estate. But, there being no question of

insolvency, that is not sufficient. For, to follow the latest authority, *Musahar Sahu v. Lala Hakim Lal* ILR (1918) Cal. 521 although Ex. E. prefers

some creditors to others, it is not an instrument which removes property from the creditors to the benefit of the debtor and, after the foregoing

finding, there is no ground for impeaching it in the fact that the 5th to 10th defendants" creditors were losers by payment being made to a preferred

creditor, the plaintiff. On the merits therefore plaintiff is entitled to succeed.

8. 5th to 10th defendants have however resisted his claim on another ground. Reference has already been, made to the fact that, although a

conditional attachment before judgment was ordered, none was actually made. This is said to have been due to delay in payment of fees. But

neither plaintiff nor 5th to 10th defendants were, so far as appears, aware of the fact ; and the latter proceeded, as though there had been an

attachment, to. obtain issue of a sale proclamation whilst the former in Ex. VI claimed under Order XXI, Rule 62, C.P.C, a declaration that the

sale should be subject to Ex. E. Thereon, without reference by the court or the parties to the absence of an attachment, plaintiff's claim was

disallowed under Ex. VI (a) on 15-4-1912. A sale was held and delivery was given, as Ex. VII shows, on 2-1-1913. As to plaintiffs next step the

only information before us is given by his present plaint, that he brought O. S. No. 56 of 1913 for a declaration that the sale should be subject to

his mortgage right. Whether this suit was brought within one year of Ex. VI (a) and whether plaintiff would have been well advised to ask for leave

to amend and include a prayer for other reliefs in it is not clear. But in any case he withdrew it, obtaining leave in Ex. AA to sue again, and he then

brought the present suit for recover by sale on his mortgage on 7-10-1915. 5th to 10th defendants contend that as this suit is brought one year

after Ex VI (a) it is barred under Art 11, Schuld 1, Limitation Act the rejection of the claim having become final under Order XXI, Rule 63.

9. The suggestion that Ex. AA is a recognition, binding on the lower, or this Court of plaintiff's right to bring his present, suit can be dismissed

shortly, because such recognition is not entailed by the wording of that order, and would not have been within the power of the court, which

passed it. So also the lower court's ground of decision that with reference to Bhiku v. Shaujah Ali ILR (1901) Cal. 25 and Ganesh Krishna

Kulkarni Vs. Damoo Nathu Shimpi, Article 11 is not applicable to plaintiff's suit, brought to recover a debt on the security of the property, not to

establish any right in it. For in the first of these cases the question was not of an ordinary claim petition, based like Ex. VI on a mortgage, but of a

petition to remove obstruction to delivery under, Section 335 of the Code then in force corresponding with Order XXI, Rules. 100, 101 and there

was nothing to bar the subsequent suit so far as it related to a different relief, the recovery of the sums due, which was asked for in the alternative

and which the court considered. The second authority relied on proceeded on the grounds first, that the order in question was not on a claim, but

was passed u/s 287, corresponding with Order XXI, Rule 66, and next that an order refusing to recognise a mortgage and continuing an

attachment free from it is not one, which must be displaced by the suit contemplated in Art, 11. But the latter conclusion is opposed to Nemaganda

v. Paresha ILR (1898) Bom. 640 which with all deference is not susceptible of the explanation proposed in the decision under consideration ; and

it is impossible to understand how an order disallowing in toto the mortgage right claimed is not as essentially an adverse order of the kind

contemplated in O. XXI R. 63 as one continuing the attachment subject to the mortgage instead of releasing it altogether.

10. The more serious argument for plaintiff is however that as there was in fact no attachment, the claim proceedings were founded on a mistake of

the court and both parties and therefore had no legal effect or resulted at most in an order, which may have been a nullity, since it was not one contemplated by the Code, and was in any case not subject to Order XXI, Rule 63 or Article 11 ; and it is suggested further that as plaintiff was induced by 5th to 10th to defendant's misrepresentation, even if it was unintentional, to embark on this course of procedure, the latter cannot benefit by the prejudice which results from their own conduct. This suggestion however is untenable. Plaintiff, no doubt, may have inferred from the sale proclamation issued at 5th to 10th defendant's instance, which he mentioned in Ex. VI. that there had been an attachment in the ordinary course. But there is no question of fraud on their part and, when it was opened to him to verify his inference by enquiry and he failed to do so, the fault was his own. In consequence of this failure he thought himself entitled to choose the cheap and speedy remedy afforded by the claim procedure in preference to the ordinary suit, subject to no special limitation, by which alone he could otherwise have proceeded; and he presumably had regard to his own advantage in his choice. 5th to 10th defendants' subsequent omission to plead that there was no attachment, was not an invitation to plaintiff to continue in the course he was taking, but merely an acquiescence in his doing so, by the consequences of which they would equally with him have been bound, if the result on the merits had been against them. The fact is simply that, plaintiff having submitted his claim to the court in circumstances, which did not strictly authorize his doing so, and 5th to 10th defendants having waived an objection, on which they might have relied, both gave an implied consent to the investigation proceedings.

11. The principle applicable to such cases was stated generally by Bowen L.J. in *Ex parte Pratt* (XII Q.B.D. 334), as being that no one has a right so to conduct himself before a tribunal, as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him to turn round and say "" you have no jurisdiction."" This no doubt is subject to exceptions, those with which we are at present concerned being, to adopt the description of them in *Pisani v Attorney General for Gibraltar* L.R. 5 P.C. 516 that departures from ordinary practice by consent will not nullify the proceedings or divorce them from the ordinary incidents of procedure (in that case a right of appeal)"" unless there is an attempt to give the court a

jurisdiction, which it does not possess, or something occurs, which is such a violent strain on its procedure that it puts it entirely out of its course.¹"

It was held accordingly in *Toronto Railway v. Toronto Corporation* (1904) A.C. 809 and *Deno Nath Batabyal v. Nohor Chander Seth* (1901) 4

C.W.N. 470 that the parties consent did not enable the court to deal with issues outside the scope of its statutory powers ; and in *Exparte Przt*

already referred to, *Exparte May* (XII Q.B.D. page 497) and *Vishnu Lakharau Nagarkar v. Krishnarao Malhar* I.L.R(1896) . 11 Bom. 153 that,

the opposite case, where jurisdiction over the subject matter exists, requiring only to be invoked in the right way, the party who invited or allowed

the court to exercise it in the wrong way cannot afterwards challenge the legality of the proceedings, due to his own invitation or neglect. One

instance of entire diversion of the court's procedure from its course may be given, because it is significant in the present connection. In *Joy Prokas*

Singh v. Abhoy Kumar Chand (1897) 1 C.W.N. 701 claim proceedings without a preceding attachment were treated as a nullity, not on any

ground such as plaintiff here relies on, but because the decree under execution for sale, on a mortgage and recognition of a claim would pro tanto

have deprived the mortgage decree of its effect otherwise than in the regular suit contemplated by the law.

12. It is clear that plaintiff's resort to the claim procedure in the present case is within neither of these classes of exceptions. For it did not result in

any entire diversion of the course of procedure, but only in the selection of one of two procedures, which were available instead of the other, and

there has been no attempt to give the court a jurisdiction, which it did not possess since its general power to deal with claims is not disputed. It is

urged on the latter, point that reference to its general power is an insufficient ground of decision because that power is not general or inherent, but

derived only from statutory provisions and must be exercised only in accordance with them; that is, in the event specified in Order 21, Rule 58(1)

of an attachment having been made. But a similar objection was, it is to be observed, available in *exparte Pratt*, *Exparte May* and *Vishnu Satharatn*

v. Krishna Rao Malhar I.L.R(1896). 11 Bom. 153 already referred to and the fact that statutory powers were in question was not considered. In

Angan Lal v. Gudarmal ILR (1818) All. 479 an order appropriate to a claim petition was no doubt set aside on the ground among others, that

there had been no attachment. But the facts there were peculiar, since there had been no submission by both parties to the court following the claim

procedure and the court entered on it in disregard of the petitioners' averments. In fact, cases of mistake and acquiescence such as plaintiff's must

be rare, since the absence of an attachment will seldom be overlooked, in the first instance or when evidence is adduced under Rule 59. But in

dealing with them it must be remembered that in accordance with *Sheodhyan v. Bholanath* ILR (1899) All. 311 and *Sivakolandu Pillai v.*

Ganapathy Iyer (1917) M.W.N. 89 the absence of an attachment will not make a court sale illegal as between the parties to it and persons like

plaintiff, whose interest is affected by it, but is merely an irregularity, on account of which the sale can under Order 21, Rule 90 on proof of

substantial injury be set aside on their application and the reason is, as the former decision explains, that the object of attachment is only to bring

the property under the control of the court in order to prevent its alienation, the actual proclamation being the notice to the public that the sale is to

take place. This is so in spite of the explicit reference to attachment on Order 21, Rule 64 and it is not necessary or possible to regard attachment

where it is similarly referred to in Order XXI Rule 58, as essential to the jurisdiction of the court. For there also the existence or absence of a

previous prohibition against alienation by the judgment-debtor cannot affect the court's power to deal with the claim of those who, like plaintiff,

have notice from the proclamation that their rights are in peril ; and accordingly, whether or no there has been an attachment, they are, if they

submit the merits of their claims to the court for investigation, equally persons against whom an order is passed which under Order 21 Rule 63 will

become final, if it is not displaced.

13. In these circumstances the conclusions must be that Article 11 Schduld 1 Limitation Act and Order 21, Rule 63 apply. The appeal must

therefore be dismissed with costs of 10th to 13th Respondents.

Ramesam, J.

14. I agree and have nothing to add.