

(1922) 08 MAD CK 0021
In the Madras High Court

Gopalaswamy Iyengar and Others

APPELLANT

Vs

Nummachi Reddiar and Others
Nummachi Reddiar Vs
Alagiri Raja and Others

RESPONDENT

Date of Decision : 11-08-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Contract Act, 1872 — Section 69, 70
Limitation Act, 1963 — Article 97

Citation : AIR 1923 Mad 392 : 74 Ind. Cas. 416 : (1923) 17 LW 254

Hon'ble Judges : Spencer, J;Devadoss, J

Bench : Division Bench

Judgement

Spencer, J.

IN APPEAL NO. 239 of 1918

1. This suit was brought to recover from first defendant certain sums of money paid by the plaintiff to first defendant's creditors in pursuance of directions contained in a sale-deed of Immovable property purchased from 13th defendant who had previously purchased the same property from first defendant.

2. The sale by first defendant to 13th defendant was effected on January 20th, 1907 through a registered instrument (Exhibit A) and Was for Rs. 5,000. That by 13th defendant to the plaintiff is through another registered sale-deed (Exhibit B.) dated August 22nd, 1908.

3. When the plaintiff sued in Original Suit No. 3 of 1909 to recover possession of the lands purchased by him he was successful in the District Munsif 's Court but his suit was dismissed in the Sub-Court owing to a finding by the Subordinate Judge that his vendor's purchase under Exhibit A was a nominal sale which never took effect. There was a second appeal but the High Court declined to interfere for the obvious reason that what was decided by the lower Appellate Court was a question of fact.

4. the learned Subordinate Judge in the present suit has granted the plaintiff a charge over the suit properties for certain sums of money and a direction for sale in default of payment (the date by which they are to be paid is not specified in the decree) also a personal decree against defendants Nos. 1 and 13 and a decree against the family properties against first defendant's sons defendants Nos. 2 and 3, for the unrealised balance after sale of the suit properties also a personal decree against the 13th defendant for a sum of Sections So paid into the hands of 13th defendant on August 22nd, 1908, and interest thereon up to the date of suit. Plaintiff and 13th defendant appeal.

5. the memorandum of objections filed by respondents Nos. 1 to 3 strikes at the root of the plaintiff's case and has therefore been heard first The two main objections to the decree of the lower Court are 50 Ind. Cas. 444 : 46 C. 670 : 17 A.L.J. 514 : 36 M.L.J. 557 : 23 C.W.N. 721 : 21 Bom. L.R. 632 : (1919) M.W.N. 258 : 30 C.L.J. 71 : 26 M.L.T. 131 : L.W. 416 : 46 I.A. 52 (P.C.). that the payments made by the plaintiff were made voluntarily by him on his own account and give rise to no legal obligation for his being reimbursed 60 Ind. Cas. 235 : M.L.J. 449 : 27 M.L.T. 304 : 11 L.W. 537 that the suit is barred by limitation

6. The finding of the Subordinate Judge's Court in appeal from the Munsif's decree in Original Suit No. 3 of 1909 to which first defendant was a party that the sale to 13th defendant was a nominal transaction and never took effect binds the plaintiff in this subsequent suit as *res judicata*. Exhibit VII, which is a notice sent on May 18th 1908 by first defendant to the plaintiff warning him that the sale in favour of 13th defendant was nominal unenforceable and had not been given effect to and that he would be liable for any loss consequent on any second sale that he might take from 13th defendant was sufficient to put him on notice of the defects of 13th defendant's title. After this he cannot put forward any plea that he is a bona fide purchaser without notice. But although plaintiff's purchase was not the bona fide act of a stranger it does not follow that after he took a sale-deed from 13th defendant the payments he made to preserve the property from the clutches of the original vendor's creditors were not made bona fide, especially those which he made after his title had been established in the Court of first instance. His purchase was no doubt speculative as with his eyes open he took the risk of his sale-deed turning out to be a worthless bit of paper but having taken it he was bound by the terms of his contract with 13th defendant and by the provisions of Section 55(5)(d) of the Transfer of Property Act to make these payments. He was interested in the widest sense in which the word is used in Section 69 of the Indian Contract Act in making these payments of money which first defendant was bound by law to pay. The decision in *Radha Madhub Samanta v. Sasii Ram Sen* 26 C.826 : 13 Ind. Dec. 1129. justifies a liberal interpretation of the word "interested".

7. Whatever may be said of his determination to secure for himself by hook or by crook the first defendant's properties which adjoined those of first defendant's brother which he had previously purchased a subject on which the learned

Subordinate Judge has enlarged in his judgment the payments which plaintiff made after purchase in order to discharge encumbrances on the land cannot be characterised as meddlesome or officious. For it is well established that Section 69 and 70 of the Indian Contract Act were not designed for the benefit of persons who intermeddle with the affairs of others see *Rajah of Pittapur v. Secretary* 25 Ind. Cas. 783 : 16 M.L.T. 375.; *Damodara Mudaliar v. Secretary of State for India* 18 M. 88 : 4 M.L.J. 205 : 6 Ind. Dec. 410. and *Mohendra Ghoshal v. Bhuban Mardana* : *Suchand Ghosal v. Balaram Mardana* 6 Ind. Cas. 810 : 38 C.1 : 14 C.W.N. 945 : 12 C.L.J. 566. I agree with the learned Subordinate Judge that a man who gets a genuine sale-deed and on the strength of that sale-deed obtains a valid decree for possession from a competent Court in a contested suit cannot fairly be accused of an endeavour to manufacture evidence of title if he pays off charges upon the property in Order the preserve it from sale.

8. In *Syamahrayudu v. Subbarayudu* 21 M.146 : 7 Ind. Dec. 457.; *Chzma Swami v. Padala Anandu* 31 M. 439 : 18 M.L.J. 306 : 11 M.L.T. 395. and *Palamalai Mudaliyar v. Sautl Export Company* 5 Ind. Cas. 33 : 33 M.334 : 7 M.L.T. 167 : 20 M.L.J. 211 : (1910)M.W.N. 239. transferees for value who in good faith discharged mortgages binding on the property have been treated as entitled to equitable relief on account of the payments made by them although the transfers in their favour turned out to be void or voidable.

9. In *Janki Prasad Singh v. Baldeo Prasac* 30 A.167 : A.W.N. (1908) 58 : 5 A.L.J. 163. the plaintiff's own purchase was fictitious and inoperative. Here it is his vendor's purchase that failed.

10. In *Karuppan Ambalagaran v. Sakuth Levvai* 22 Ind. Cas. 253 : 26 M.L.J. 74 : 14 M.L.T. 478 : (1914) M.W.N. 131. it was recognised by Ayling, J. at page 77 and by Tyabji, J. at page 81 that a sale may be invalid and fraudulent but a person who pays valuable consideration for it may yet in all good faith make perfectly honest payments to discharge liabilities existing on the property. The sale in that case was collusive and without consideration and was not followed by possession and the payments were made long afterwards with the object of strengthening the colourable purchase. The learned Judges, therefore, refused the equitable relief of subrogation to a person who did not come into Court with clean hand. Here the plaintiff after due notice purchase a title which turned out to be nominal and worthless owing to his vendor's conclusion with the original owner, but until that title was tested in Court and pronounced to be bad he may have honestly believed that the only course open to him for preserving the property and saving any possible right he might be possessed of through his purchase was to stave off attachments and sales by satisfying the first defendant's creditors and when he acts thus he certainly did not intend to do gratuitously for the first defendant's benefit. I am of opinion that the first objection fails.

11. Coming now to the question of limitation the important thing is to see what is the starting point from which limitation began to run on the plaintiff's cause of action. In his plaint he puts it on February 14th, 1913, when the High Court

dismissed his second appeal. But this is not supportable in view of the Privy Council decision in *Hukum Chand Boid v. Pirthichand Lal Chowdhury* (Juscurn Boid) 50 Ind. Cas. 444 : 46 C. 670 : 17 A.L.J. 514 : 36 M.L.J. 557 : 23 C.W.N. 721 : 21 Bom. L.R. 632 : (1919) M.W.N. 258 : 30 C.L.J. 71 : 26 M.L.T. 131 : 10 L.W. 416 : 46 I.A. 52 (P.C.) which laid down the principle that when an appeal to a superior Court only results in the decree appealed against being confirmed in India there is no interruption in the running of time calculated from, the date of the original decree. For the purposes of execution Article 182 of the Limitation Act especially provides for the final decree of the Appellate Court forming a starting point and the decision in *Viswanatha Sastri v. Sitalakshmi Ammal* 61 Ind. Cas. 979 : 13 L.W. 37 : (1921) M.W.N. 181 dealt with an application for execution. The case in *Sarvathama Row v. Chinnasami Pillai* 49 Ind. Cas. 729 : 42 M. 507 : 36 M.L.J. 157 : 9 L.W. 379 : 25 M.L.T. 291 : (1919) M.W.N. 432 was decided before the Privy Council case in *Hukum Chand Boid v. Pirthichand Lal Chowdhury* (Juscurn Boid) 50 Ind. Cas. 444 : 46 C. 670 : 17 A.L.J. 514 : 36 M.L.J. 557 : 23 C.W.N. 721 : 21 Bom. L.R. 632 : (1919) M.W.N. 258 : 30 C.L.J. 71 : 26 M.L.T. 131 : 10 L.W. 416 : 46 I.A. 52 (P.C.) was published in this country and cannot be followed so far as it was based on a different principle from that propounded by the superior Tribunal. Similarly, with *Rajagopalan v. Tirupananthal Tambiran* 17 M.L.J. 149 : 30 M. 316.; *Mahamed Ali Sheriff v. Budharaju Venkatapathi Raju* 60 Ind. Cas. 235 : 39 M.L.J. 449 : 27 M.L.T. 304 : 11 L.W. 537 which was later than *Sarvithama Row v. Chinnasami Pillai* 49 Ind. Cas. 729 : 42 M. 507 : 36 M.L.J. 157 : 9 L.W. 379 : 25 M.L.T. 291 : (1919) M.W.N. 432 followed *Hukum Chand Boid v. Pirthichand Lal Chowdhury* (Juscurn Boid) 50 Ind. Cas. 444 : 46 C. 670 : 17 A.L.J. 514 : 36 M.L.J. 557 : 23 C.W.N. 721 : 21 Bom. L.R. 632 : (1919) M.W.N. 258 : 30 C.L.J. 71 : 26 M.L.T. 131 : 10 L.W. 416 : 46 I.A. 52 (P.C.) I propose to proceed as the Judicial Committee proceeded in *Hanuman Kamat v. Hanuman Mandur* 19 C. 123 : 18 I.A. 158 : 6 Sar. P.C.J. 91 : 9 Ind. Dec. 527 (P.C.) and take either of two alternative Articles when it is doubtful which of the two is more appropriate to the facts of the case.

12. Now, whether the appropriate Article in the present suit is Article 97, which applies to suits for money paid upon a consideration which afterwards fails or whether Article 62 applies, the period of limitation in either case is only three years and the starting point in the first alternative is the Subordinate Court's judgment (Exhibit P) dated July 12th, 1911, which dismissed the plaintiff's suit for possession with the observation that his claim to be reimbursed for the debts he paid for the defendant must be separately adjusted, and in the other alternative is the date of payment of each of the debts. The last payment was on November 26th, 1912, and this suit which, was instituted on February 17th, 1916, is time-barred whether three years are reckoned from July 12th, 1911, or November 26th 1912.

13. It appears from *Arunahala v. Ramasami* 25 Ind. Cas. 618 : 38 M. 117 : 1 L.W. 849 : 27 M.L.J. 5171 : 16 M.L.T. 397 and the *Secretary of State for India v. Venkayya* 35 Ind. Cas. 254 : 40 M. 910 : 19 M.L.T. 318 : 3 L.W. 443 : (1916) 1

W.M.N. 342 : 30 M.L.J. 575 that a lessee or purchaser who gets possession on the strength of a registered contract and is subsequently evicted for want of title in his lessor or vendor has six years from the date of his dispossession under Article II to sue for damages for breach of the title for quiet enjoyment: but if, from the inception, the vendor had no title to convey and the vendee never gets possession, the starting point of limitation, in the opinion of Seshagiri Iyer. J. in Subbaraya v. Rajagopala 23 Ind. Cas. 570 : 38 M. 887 : 15 M.L.T. 240 : (1914) M.W.N. 376, is the date of the sale. The present suit was brought within six years of the plaintiffs losing possession on 31st August 1911 in consequence of the First Court's decree being reversed on appeal.

14. But this suit is not one for damages or for return of the purchase-money, so far as first defendant is concerned, and there is no property of contract between the plaintiff and first defendant for such a suit to lie.

15. Lastly, an attempt has been made to bring the plaintiff's case within Article 132 which gives a period of 12 years from the date of money charged upon Immovable property becoming due. But the plaintiff is not the holder of a charge upon the suit property. If he was in possession and was about to be evicted on the suit of the real owner, the Court might as an equitable relief direct in its decree that on the decree-holder first paying, him the cost incurred by him in redeeming the mortgages that existed on the land, delivery of possession should be given. There would be no limitation against an equitable claim of this sort being set up as a defence to a suit for possession. That, however, is not the plaintiff's position in this suit. Again, the plaintiff has no rights u/s 95 of the Transfer of Property Act as a purchaser of the equity of redemption, as it has been found that what he purchased was a sham title, and thus he does not stand on the footing of a mortgagor.

16. The case of Rajha of Vizianagaram v. Rajah Setrucherla Somasekhararaz 26 M. 686 (F.B.) must be distinguished on the ground that there the plaintiff was a co-sharer with those whose revenue charges he paid off and could take advantage of Section 82 of the Transfer of Property Act and of the fact that under Sections 2 and 44 of Act II of 1864 statutory charge was created upon every portion of the land in the joint estate. In Narayana Kutti Goundan v. Pechiammal 15 Ind. Cas. 206 : 36 M. 426 : 11 M.L.T. 174 : (1912) M.W.N. 5531 : 22 M.L.J. 364 no question of limitation arose.

17. When one person pays off a debt which another is bound to pay the ordinary relief that the Courts can give is a personal decree against the defendant for money had said received as Section 69 of the Contract Act does not provide any higher remedy. If that remedy is barred owing to the plaintiff's delay, he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property. In the cases above quoted where equitable charges were given, that in Syamalarayudu v. Subbarayudu 21 M. 143 : 7 Ind. Dec. 457 was probably u/s 82, Transfer of Property Act, but no provision of law is cited. Ckama Swami v. Padala Anandu 31 M. 439 : 18 M.L.J.

306 : 3 M.L.T. 174 speaks of an equity to re-payment, not an equitable right to a charge. In *Palamalai Mudaliyar v. South Indian Export Company* 5 Ind. Cas. 33 : 33 M. 334 : 7 M.L.T. 167 : 20 M.L.J. 211 : (1910) M.W.N. 239 the defendant was the transferee and it was made conditional on plaintiff's getting a decree setting aside the mortgage that he should reimburse the defendant. Apart from the legal position, the plaintiff's case has little or no merits. In spite of warning lie wade a speculative purchase from a person who, as it turned out, had no legal title. When plaintiff's case failed in the appeal to the Court which had the final determination of question of fact, he had three years to recover the money he had wasted in paying the debts of another. He chose to await the issue of an appeal to the High Court on a point of law which did not exist. After that appeal failed, one year and five months still remained within which he might have brought this suit. But he waited till three years all but three days had elapsed from the High Court's decree and now finds he is too late.

18. In the result, the memorandum of objections of respondents Nos. I to 3 is allowed with costs, and the suit (Original Suit No. 49 of 1916) is dismissed with the costs of first, second, third and fourth, seventh and 14th defendants (one set but) the decree will stand as against 13th defendant's legal representative as he had not appeal. Appeal Nos. 239 of 1918 is dismissed with costs of respondents Nos. 1 to 4. No order is necessary on fourth respondent's memorandum of objections.

IN APPEAL NO. 166 of 1918.

19. This is an appeal by 13th defendant against the direction in the decree for the recovery from him of the sum of Rs. 800 paid to him at the date of his sale by the plaintiff and interest thereon. Assuming that upon valid sales of Immovable property there is an implied covenant for quiet enjoyment between the vendor and the vendee in this case we have found that the sale-deed (Exhibit B) conveyed no title and that the vendee was aware of its defects. There was, therefore, no lawful and enforceable contract of sale and further no implied covenant attached to such an agreement. The plaintiff is only entitled to a return of the money paid by him on a consideration that failed and even if he had six years under Act. 116 as the contract was registered, this suit having been instituted more than six years after Exhibit B must fail. The appeal is allowed. The plaintiff will pay the costs of 13th defendant. The 13th defendant will pay the costs of first defendant.

Devadoss, J.

20. In Appeal No. 166, 13th defendant is, the appellant. In. Appeal No. 239 the plaiutif.fi is the appellant.

21. The first defendant has filed a memorandum of objections in Appeal No. 239.

22. The facts are: the first defendant executed a sale-deed in favour of the 13th defendant, Exhibit A, on 20th January 1907 in respect of the plaint properties.

The 13th defendant sold the plaintiff properties to the plaintiff by Exhibit B on 22nd August 1908. The plaintiff filed a suit, Appeal Suit No. 3 of 1909, for possession, alleging that the first defendant harvested the crops in February 1907 and that he should be given possession of the property sold to him by the 13th defendant under Exhibit B and prayed for an injunction restraining the defendant from committing waste or interfering with his possession. The plaintiff was filed on 22nd December 1908 and is marked as Exhibit 11 in this case. The defendant in the said suit, who is the first defendant herein, pleaded that the sale in favour of Gopala Iyengar, the 13th defendant herein, was a normal sale, that it was not given effect to and that Gopala Iyengar was not entitled to sell the property to the plaintiff and the plaintiff purchased it with the knowledge that Exhibit A, the sale-deed, evidenced a transaction not intended to be given effect to and was only intended as a shield against the creditors of the first defendant. The District Munsif of Srirangam decreed the plaintiff's suit holding that Exhibit A was a real transaction and that the plaintiff acquired a good title under Exhibit B and that possession should be handed over to the plaintiff. His judgment is marked Exhibit O. On appeal the Subordinate Judge of Trichinopoly held that Exhibit A was a nominal transaction not intended to be given effect to and it had not been given effect to and that the plaintiff purchased the plaintiff properties under Exhibit B in spite of notice to him seven or eight months previous to the date of Exhibit B of the fact that Exhibit A was a nominal sale. His judgment is marked Exhibit P. Against the judgment the plaintiff preferred a second appeal to the High Court which was dismissed on 14th February 1913.

23. The plaintiff in this suit sues for the recovery of certain sums of money said to have been paid by him to discharge encumbrances on the property and he asks for a charge on the plaintiff property in respect of those items.

24. The Subordinate Judge has given a decree in favour of the plaintiff as regards the major portion of his claim and has dismissed the suit as regards the rest. Appeal No. 166 is by the 13th defendant who objects to a certain item being decreed against him. Appeal No. 239 is by the plaintiff who appeals against that portion of the decree of the Subordinate Judge which disallows a portion of his claim.

25. The memorandum of objections by the first defendant is against the decree passed against him in respect of the sums alleged to have been paid by the plaintiff accordance with the sale-deed, Exhibit B.

26. As the main question in these appeals is the liability of the plaintiff property for the amounts said to have been paid by the plaintiff in order to discharge the encumbrances on it, the memorandum of objections was heard first. Upon the decision in the affirmative of the question whether the plaintiff is entitled to claim the amounts paid by him in order to discharge the encumbrances on it depend the other questions, namely, the amount that he would be entitled to and the persons who would be liable to pay the amount. A few facts are necessary in order to make the contentions clear. Exhibit A was executed on 23rd January

1907 and Exhibit Bon 22nd August 1908. The suit by the plaintiff in Original Suit No. 3 of 1909 (plaint marked Exhibit II) was filed on 22nd December 1908. The judgment of the District Munsif was on 20th January 1910. The judgment in appeal was on 12th July 1911. The judgment of the High Court in second appeal was on 14th February 1913 and the plaint in the present case was filed on 17th February 1916.

27. Mr. Srinivasa Gopala Chariar on behalf of the first defendant contends that the claim is barred under Article 97 of the Limitation Act and that even if Article 62 is held applicable the claim would likewise be barred. The payments were made by the plaintiff as follows: Rs. 1,000 at 7 A.M. on 26th January 1910 (Vide Exhibit F), Rs. 830 was paid on the same date Vide Exhibit C(I), Rs. 300 on 18th February 1910 vide Exhibit M, Rs. 188 on 23rd March 1910 Vide Exhibit G, Rs. 350 on 10th February 1910 Vide Exhibit H and Rs. 399 on 26th November 1912 Vide Exhibit E.

28. The Subordinate Judge has held that the plaintiff's claim is not barred by limitation on the ground that time began to run only from the date of the judgment of the High Court in second appeal. This is clearly wrong. In *Hukum Chand Boid v. Pirthichand Lal Choudhury* (Juscurn Boid) 50 Ind. Cas. 444 : 46 C. 670 : 17 A.L.J. 514 : 36 M.L.J. 557 : 23 C.W.N. 721 : 21 Bom. L.R. 632 : (1919) M.W.N. 258 : 30 C.L.J. 71 : 26 M.L.T. 131 : 10 L.W. 416 : 46 I.A. 52 (P.C.) their Lordships of the Privy Council have held that time began to run from the date of the decree which deprived the plaintiff of the consideration given or paid by him. To quote their Lordships' words: "Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal." Time, therefore, began to run in this case from the date of Exhibit P, the judgment in appeal reversing the decree of the District Munsif, and in order to claim money paid upon an existing consideration which afterwards failed the suit should have been brought within three years of that date. The payments having been made more than three years before the date of the present suit, the claim is barred. It is unnecessary to pursue this question further as Article 97 has no application to the facts of the present case. There is no privity of contract between the plaintiff and the first defendant. The plaintiff did not give any consideration to the first defendant for any sale. Mr. Rangaswamy Iyengar, who appears for the plaintiff, has conceded that his case did not fall within Article 97 of the Limitation Act. Article 62 cannot have any application to the present case as the plaintiff does not pretend that the defendant received any amount for the use of the plaintiff, and Article 61 can have no application as the plaintiff did not pay any money for the defendant.

29. Mr. Rangaswamy Iyengar for the plaintiff contends that his client has paid off

certain encumbrances on the property which had been created by the first defendant and he, therefore, in equity is entitled to be paid those" sums on the security of the plaintiff property burden on which he relieved. His case is that though "Exhibit A was a nominal sale not intended to be given effect to, yet Exhibit B was a real transaction, though with the knowledge of the nature of Exhibit A, and the plaintiff wanted to support his title by paying off encumbrances as he was anxious to get a, good title to the plaintiff property. He further contends that in any event the payments being made by him after he obtained the decree of a Civil Court in his favour he was entitled to discharge the burden on the property inasmuch as his title was declared by a Court of Law, and that even though that title was negatived in appeal he is entitled to be, reimbursed the amounts which he paid during the time that decree was in force, He further contends that in respect of those sums he should be treated as having a charge on the property, and the period of limitation being 12 years for enforcing a charge no question of limitation arises in this case. The learned Subordinate Judge held in appeal-Vide Exhibit P that Exhibit A was a nominal transaction and that the plaintiff was aware of the nature of the transaction evidenced by Exhibit A and, therefore he was not entitled to an} relief. Exhibit VII is? very important.1 document which is a letter sent by the first defendant by registered post to the plaintiff on 18th May 1908. Therein he distinctly told the plaintiff that on account of the misunderstandings between him and the plaintiff he was trying to cause loss to him by getting a re-sale from Srirangam Ammanji Gopala Iyengar of his lands mentioned in the sale-deed which he had executed to the aforesaid person and which was not enforceable and had not been given effect to and that it was not at all proper to try to cause loss thereby and he intimated to the plaintiff that in case either he or any other person through him got a sale-deed executed he should not be bound thereby and that he should be liable for the loss and expense the sale-deed, Exhibit, A, was a sham transaction; and by his taking conveyance from the 13th defendant he cannot be said to have acquired any right to the property when his own vendor had not the shadow of a title to it. If the plaintiff had a voidable or defensible title he might bring Himself within the principle of the decisions in *Syamalarayudu v. Subbarayudu* 21 M. 143 : 7 Ind. Dec. 457 and *Chama Swami v. Padata Anandu* 31 M. 439 : 18 M.L.J. 306 : 3 M.L.T. 174. The Courts do not always make a distinction between a void and a voidable sale and a transaction which is only a sham one. A void sale can never be made good. A voidable sale is good till it is avoided. But a sham or nominal transaction is no transaction at all and is a mere waste paper. In *Palamalai Mudaliyar v. South Indian Export Co.* 5 Ind. Cas. 33 : 33 M. 334 : 7 M.L.T. 167 : 20 M.L.J. 211 : (1910) M.W.N. 239 the transferee was a bona fide transferee and though the sale was avoided u/s 53 of the Transfer of Property Act yet he was entitled to a charge for the amount spent by him in discharging the mortgage. In that case the transferee had a voidable title which is a good title till it was avoided and the payment by him to discharge any incumbrance on the property during the time he was in possession if it was a pro tanto relief of the burden existing on the property and as such the person who defeats his title

should in equity pay or make good the amount paid by the transferee during the time his title was considered good. The same principle is applicable to cases of conveyances which are voidable under Sections 55 and 56 of the Presidency Towns Insolvency Act. Where a person has paid off certain encumbrances during the time when his title was unchallenged he could in equity claim to stand in the position of the creditor whom he has paid. In *Karuppan Ambalagan v. Sakuth Levvai* 22 Ind. Cas. 253 : 26 M.L.J. 74 : 14 M.L.T. 478 :. Ayling, J., after referring to *Syamarayudu v. Subbarayudu* 62 Ind. Cas. 291 : 40 M.L.J. 1141 and *Pilamai Mudaliyar v. South Indian Export Co.* 5 Ind. Cas. 33 : 33 M. 334 : says: "But a perusal of the judgments in these cases shows that in each the person claiming subrogation was at the time of making payment a transferee of the property for valuable consideration. He may have been guilty of fraud or misconduct in connection with the transfer such might render it voidable at the instance of another party; but he had paid consideration for the transfer and was possessed at the time he discharged the mortgage of a substantial interest in the property. The payments for which subrogation was claimed were necessary to protect that interest. This, as it seems to me, is a very real distinction between those cases and the present one." In the case before him and Tyabji, J. the transferee under a nominal sale was held not to be entitled to be subrogated to the rights of the mortgagee as against the purchaser in execution of the decree against the transferor.

30. The next contention that the plaintiff is entitled to be paid the amounts which he paid for the discharge of encumbrances between the dates of Exhibit C and Exhibit P requires careful consideration. By Exhibit the plaintiff's title to the property was recognised by a Court of Law and till that decree was upset it was good and could not be questioned by anybody. The question whether payments made subsequent to this for relieving the burden on the property could be considered as payments by persons interested in the property is not free from difficulty. It is urged with some show of reason that when a person gets a decree in his favour from a Civil Court the payments made by him subsequent to the decree must be considered bona fide, for he has an interest to support and protect and if there is no appeal the plaintiff would be entitled to the property. This contention cannot hold good for the reason that a Civil Court does not confer a right to property which the person does not possess but only declares or enforces a right which he has. Except in a few cases where decrees themselves are a source of title, the decrees of Civil Courts cannot confer a title to Immovable property which a person does not possess and, therefore, when the plaintiff, had no title at all to the plaint property the mere fact that a Civil Court considered or held that he had title would not confer an interest which he did not possess before, and he must have known that the District Munsif's decree in his favour dated 26th January 1910 was liable to be appealed against and that any payments made by him before the decree was upset were made by him with the knowledge that the decree might be upset on appeal. Therefore, I do not consider that the plaintiff paid the amounts detailed above bona fide with a view

to protect the property. It is urged that there was an execution taken out by the mortgagee against the mortgaged property and the plaintiff paid the execution creditor to save the property from execution. It must be remembered that the plaintiff was a mere volunteer and could not claim to have done it by virtue of an interest in the property. In *Nadhamuni Iyyan v. Appu Odayan* 48 Ind. Cas. 799 my learned brother (Mr. Justice Spencer) has laid down that a person who claims an equitable relief ought to come into Court with clean hands; and the plaintiff cannot be said to have come into Court with clean hands. *Rajah of Vizianagaram v. Rajah Setrucherla Somasekhararaz* 26 M. 686 (F.B.) is relied upon by the plaintiff for the contention that he had an interest in the property and that the payment made by him to protect that interest is a bona fide payment." The case at the foot-note does not help the plaintiff as there is clear finding that the plaintiff could not be regarded as having paid Krishana Bathan's debt off closely or as a mere volunteer. In *Bhagwati Prasad v. Radha Kishen Sewak Pande* 15 A. 304 : . the Privy Council held that by the acts of the parties and their relations to one another the money borrowed by an agent for a principal for the purchase of property was rendered a charge upon the latter in the principal's hands he being the real purchaser, and the lender of money, which he advanced to the nominal purchaser of property who was the agent of the real purchaser, was entitled to a declaration that the advance of money for the purchase formed an equitable charge upon the property against the real purchaser. In that case the transactions were all real transactions and there was no contention that the payments were not made bona fide. In *Ammani Ammal v. Ramaswami Naidu* 51 Ind. Cas. 57 *Sadasiva Aiyar and Napier, JJ.*, held that a purchaser in good faith who buys from the guardian of a minor the property which he considers to be the property of the guardian and not that of the minor was entitled to be paid back the amounts which he paid for discharging the encumbrances on the minor's property when the sale was set aside. It was held that the principle of subrogation did not apply to the case of volunteer or stranger. This equitable principle of subrogation need not be considered in this case for the plaintiff does not contend that he is entitled to stand in the shoes of the mortgagee. All that he claims is, to be entitled to be paid back the sums he paid and to have a charge on the property for those sums, *fn Radha Madhub Samonta v. Sasti Ram Sen* : 13 Ind. Dec. 1129, it was held that the payment of rent made by a purchaser of a putni taluk after the decision of the first Court in a suit brought by the defaulting putnidars for the setting aside of the putni sale by which it was held that the sale was invalid, and during the pendency of an appeal preferred not by the plaintiff, the auction-purchaser, but by the zemindar at whose instance the said sale had been brought about, is not a voluntary payment, inasmuch as he (the plaintiff) is a person interested in the payment of the money, within the meaning of Section 69 of the Contract Act. Here, again, there was a real sale and the purchaser was bound to protect or rather was entitled to protect his interest in the property by payment of the amount due to the zemindar; otherwise the holding might have been lost, and the person who had the real title to the property was in equity bound to reimburse the person who had only voidable title

the amount which he paid for preserving the property from sale for arrears of rent. In the present case the plaintiff does not seek to defend his title against an attack but wants a decree against the property for money paid by him to discharge certain encumbrances. He cannot be said to have acquired a charge by reason of payments made by him when he had no title to the property. He was a mere adventurer who was trying to make out a claim for property to which he knew he had absolutely no title. A man cannot create a charge by paying off an encumbrance on a property when he had not any subsisting interest in the property. The law in certain cases creates a charge when payments are made by persons who are either bound or entitled to pay off certain amounts, but the law does not favour an adventurer who makes payments only for the purpose of creating a title to property. The case in *Janki Prasad Singh v. Baldeo Prasad* 5 A.L.J. 163 is very similar to the present. There the plaintiffs alleging themselves to be the purchasers of the mortgagee's rights in certain land, paid the amount of a decree against the mortgagee in order to save the property from sale. But it had already been found in a suit u/s 283 of the CPC that the sale to the plaintiffs was fictitious and inoperative. It was held that the plaintiffs were not entitled to recover the amount paid from their vendors. The learned Judges quote with approval a passage from the judgment of Straight, J., in *Chedi Lal v. Bhagwan Das* 11 A. 234 : : "If plaintiffs, as mere volunteers, chose to put their hands into their pockets and to pay a sum of money not for the defendants but for themselves, that was their own look-out, and they cannot now claim the benefits of Section 70. The plaintiff in the present case has made the payments as a mere speculator-and in the gamble for the title he must lose what he has paid because he was a mere volunteer and made the payments officiously in order to make out a title to property when he had absolutely no title to it.

31. I therefore, hold that the plaintiff cannot claim any amount alleged to have been paid by him for relieving the burden on the plaintiff's property from the first defendant either personally or on the security of the plaintiff's property. The plaintiff's suit so far as the first defendant is concerned must be dismissed with costs.

32. The memorandum of objections by respondents Nos. 1 to 3 is allowed with costs. The appeal of the plaintiff (No. 239 of 1918) is also dismissed with costs of defendants Nos. 1 to 4. In the result the plaintiff's suit is dismissed with costs against all but the legal representatives of the 13th defendant.

33. I concur in allowing Appeal No. 166 of 1918 with costs against the plaintiff. The appellant will pay the costs of the first defendant.

34. These appeals having been set down to be spoken to this day on the minutes of the decree and respondents Nos. 18 and 19 in Appeal No. 239 of 1918 having filed Civil Miscellaneous Petition No. 1442 of 1912 under Order XXVII, Rule 1, Civil Procedure Code, praying for a review of the judgment of this Court dated the 30th March 1922 in the said Appeal No. 239 of 1918, the Court delivered the following

35. Although the 13th defendant did not appeal or join in the memorandum of objections filed by respondents Nos. 1 to 3, the decree for sale of properties under Order XXXIV, Rule 4 was a common decree against all the defendants: and the personal decree for any surplus that might remain due after the sale of the properties was a common decree against defendants Nos. 1 and 13.

36. Having held that the cause of action arising out of the sale dated 22nd August 1908 to the plaintiff was barred by limitation as against first defendant, we cannot, in the light of Section 3 of the limitation Act shut our eyes to the fact that it is also time-barred against 13th defendant and his legal representatives and under Order XLI, Rule 33 must, to be consistent, make the same order in their case.

37. The decree has not yet been signed and we have no doubt that there is "sufficient reason" within the meaning of Order XXVII, Rule 1 to review our decision apart from our inherent powers u/s 151, Civil Procedure Code. See *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* 20 E.R. 701; *Debi Bakhsh Singh v. Habib Shah* 19 Ind. Cas. 526 See also *In re St. Nazaire Co.* L.T. 110 : W.R. 854 and *In re Suffield and Watts, Ex parte Brown* 46 W.R. 584 : as to the powers of Court to correct an error obvious on the face of the record before the order has been completed.

38. If the Court of first instance had taken the correct view on the question of limitation it would have dismissed the suit, as laid, against all the defendants; and u/s 107(2), Civil Procedure Code, we have the same powers and duties to see that a proper and workable decree is passed as the original Court had. The decree of the lower Court provided that if any surplus remained after the sale of the properties the plaintiff should have a decree against defendants Nos. 1 to 13 for the recovery of such amounts.

39. Now that the decree for sale has been held to be not maintainable, we should in effect be allowing the nature of the case to be changed, and in effect be varying the decree of the lower Court as against 13th defendant if we were to allow a personal decree to be made against the 13th defendant's legal representatives, irrespective of the charge.

40. The words in our judgment "but the decree will stand as against 13th defendant's legal representative as he did not appeal" will now be expunged and the decree will be drawn up as if they had never existed.