

(1921) 03 AHC CK 0004
In the Allahabad High Court

Muhammad Shafi and Another

APPELLANT

Vs

Nanhe

RESPONDENT

Date of Decision : 02-03-1921

Acts Referred:

Citation : AIR 1921 All 140 : 63 Ind. Cas. 921

Hon'ble Judges : Stuart, J; Ryves, J

Bench : Division Bench

Judgement

1. This appeal raises an interesting question. Nanhe, the defendant-respondent, executed a mortgage in favour of Muhammad Shafi and Ali Husain, the plaintiffs-appellants, and this is a suit by the mortgagees for sale of the property covered by that mortgage. The defense to the suit was that the mortgage had been paid off. The Courts below have come to the following findings of fact: (1) That the mortgage was executed as alleged. (2) That subsequently one Chander Sen brought a suit against Muhammad Shafi and Ali Husain, the mortgagees, for money alleged to be due to him, and Chander Sen during the pendency of that suit prayed for an injunction against Muhammad Shafi and Ali Husain to restrain them from suing on their mortgage and from recovering the mortgage money. Thereupon Nanhe appeared in Court and stated that he had paid off the mortgage money, and in proof of the fact, produced the mortgage-deed. A temporary injunction which had been granted to Chander Sen was thereupon set aside. And (3) most Important of all, that as a matter of fact no part of the mortgage money had been paid by Nanhe. The Court of first instance decreed the suit. The lower Appellate Court allowed the defendants appeal and dismissed the suit altogether, on the ground that the fraud contemplated had been effected. In appeal before us it was urged that the fraud had not, as a matter of fact, been attested, because although it is true that the injunction sought by Chander Sen was set aside, nevertheless the decree which, we are told, he obtained against Muhammad Shafi and Ali Husain was still outstanding and, therefore, if the plaintiffs succeeded in this suit, Chander Sen would be able to attach the money in the hands of the plaintiff; and the argument was that the

fraud was only successful for the time being and as gush did net some within the rule laid down by their Lordships of the Privy Council in *Petherpermal Chetty v. Muniandy Servai* 5 A.L.J. 290 : 10 B. L.R. 590 : 12 C.W.N. 562 : 7 C.L.J. 528 : 14 B. L.R. 108 : 35 C. 551 : 35 I.A. 98 : 18 M.L.J. 277 : M.L.T. 12 : 4 L.B.R. 266 (P.C.), following the case of *Taylor v. Bowers* (1841) 1 Q.B.D. 291 : 4 L.J.Q.B. 163 : 34 L.T. 938 : 24 W.R. 499. We know nothing now about Chander Sen's decree, whether it has been satisfied or not, or whether it is still outstanding, but it is quite clear on the findings of fact arrived at by the lower Appellate Court that the fraud contemplated was completely successful in carrying out its immediate object. The object was to prevent Chander Sen attaching the mortgage-debt in the hands of Muhammad Shafi and Ali Husain, The rule of law is laid down in the case mentioned at the bottom of page 294 of the report. Their Lordships say: "if 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 take in 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." The facts of that case are very different, but the principle seems to us to apply. That and similar cases were cases of fraudulent transfers to defeat creditors. This is a case of a fraudulent admission of payment by one creditor in order to defeat other creditors. The object is really the same and was brought about by a fraudulent conspiracy for which the present plaintiffs must have been chiefly responsible, as it was in their interest. We, therefore, think that the decree of the Court below was right. We dismiss the appeal with costs, including fees in this Court on the higher scale.