

(1939) 09 MAD CK 0009
In the Madras High Court

Muna Ravanna, Muna Muhammad Kassim Sahib	APPELLANT
Vs	
Ana, Runa, Suna, Subramanian Chettiar	RESPONDENT

Date of Decision : 15-09-1939

Acts Referred:

Evidence Act, 1872 — Section 43

Citation : AIR 1940 Mad 444 : (1940) 51 LW 34

Hon'ble Judges : Abdur Rahman, J

Bench : Division Bench

Judgement

Abdur Rahman, J.—The suit out of which this appeal arises was instituted by a defeated claimant on the dismissal of his petition under Order

21, Rule 58, Civil P.C., raising objections to the attachment of a property purchased by him from one Syed Ibrahim under a sale deed Ex. B

executed on 22nd May 1928. The property was attached in execution of a decree passed in favour of the Ceylon Holland Trading Society against

a firm of which the said Syed Ibrahim was a partner in respect of certain dealings which had taken place in 1929. The decree was assigned by the

Trading Society to the defendant in the present suit and the attachment was effected at the latter's instance. The objection raised by the plaintiff

was fully investigated by the execution Court and was dismissed on the ground that the judgment debtor was found to be in possession of the

property on his own behalf and the sale deed in favour of the plaintiff was not bona fide or for consideration. Aggrieved by this order the plaintiff

instituted the present suit under Order 21, Rule 63. This has been also-dismissed by the Subordinate Judge of Sivaganga who held the sale by

Syed Ibrahim to be fictitious and found that it was not intended to divest the judgment debtor of his possession for title to the property. The plaintiff

appeals. Realizing the infirmities in the plaintiff's evidence and having regard to the close relationship between the vendor and the vendee, to both

of which we will have to refer in due course, learned Counsel for the appellant has first of all contended that it was unnecessary for him to establish

the consideration for which the sale was effected in his client's favour and that it was enough for him, in proof of his title, to produce and prove a

duly registered deed executed by the owner. Once the plaintiff has, he says, succeeded in establishing ostensible title to the property, it would be

for the defendant to disclose it and if he failed so to do, the ostensible title in his client's favour must prevail.

2. Having heard Mr. Rajah Ayyar on behalf of the appellant, we are of opinion that the contention has no force and must be overruled. The plaintiff

had, as stated above, failed in his objections raised to the attachment of the property after they had been investigated by the execution Court and

when he instituted the present suit to get rid of the order passed against him, it would be for him to show as he wished the Court to believe, that the

sale in his favour was a genuine transaction and that he had purchased the property for a valuable consideration. This was a fact specially within the

plaintiff's knowledge and the burden of proving that fact must obviously lie on him. The recital as to the passing of consideration in the sale deed

cannot be of any evidentiary value by itself as against a person who, like the defendant or his predecessor in interest, was not a party to the deed.

Moreover, the order passed by the Court in execution, although summary in character, would nonetheless remain binding on the appellant unless it

was set aside by a decree passed in a regular suit. Mr. Rajah Ayyar however contends that a Division Bench of this Court has taken a different

view in *Appatuhrai Chettiar v. Vellayan Chettiar* (1932) 19 AIR Mad. 302 and relies on the following passage appearing at p. 750:

If following the usual practice, the plaintiff assumes the original burden and puts in the registered deed, then, if the defendant has nothing at all to

say against it, the plaintiff would succeed, If however the defendant can then show utter inadequacy of consideration or some other circumstance

suggesting a fraudulent sale, the plaintiff would in turn have to plead something more than the innocent appearance of the instrument. He must show

that it is as good as it looks.

3. The last words, it may be remarked, have been taken from a Full Bench judgment in *Jamahar Kumari Bibi v. Askaran Boid* (1916) 3 AIR Cal.

666 where Jenkins C.J. observed:

The onus in this case is on Jamahar to show affirmatively that not only the ostensible but the real title also is in her. She is a plaintiff who is calling in

a suit contemplated by the Code, an adverse decision of the Court given, it is true, in a summary proceeding but conclusive subject to the result of

this suit... The plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent

appearance of the instruments under which she claims; she must show that they are as good as they look.

4. Having gone through the judgment in *Appatuhrai Chettiar v. Vellayan Chettiar* (1932) 19 AIR Mad. 302 carefully we are unable to agree that

the learned Judges had held that the onus of proving want of consideration would be on the defendant. They observed at page 751:

Of course, as observed in the beginning of this judgment, the defendant cannot escape the burden at some stage or other. If the plaintiff produces

his deed, and swears that it is genuine and for full consideration, and the defendant has nothing to say to the contrary, the plaintiff will succeed...

But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right

which he claims.

5. The italicized words are important and give expression to the view entertained by them. It must however be admitted that certain expressions in

this judgment are rather loose and seem to lend support to the contention raised by the learned Counsel for the appellant, although one can well

conceive of the situation where a party raised an objection to an attachment and produced a duly registered deed in support of it while the

opposing party kept silent and did not challenge the transaction. If this was all that the learned Judges were trying to convey, no exception can be

taken to what they said in that limited sense but it would be wrong to extend their meaning to anything more than this. The burden of proof, if the

expression is used in the sense of introducing evidence, is constantly fluctuating and if a party has *prima facie* proved execution of a sale deed in his

favour and sworn to the consideration having been paid by him, this may be

enough in the circumstances of a particular case to shift the onus to the opposing party who may then be called upon to show or rather rebut that the deed was not executed by those having title or that the consideration had not passed in fact.

6. We are confirmed in the view we take of this decision by the fact that two decisions of the Privy Council were referred to by the learned Judges

in support of the proposition which they were intending to propound. The first one was given in *V.E.A.R.M. Firm v. Maung Ba Kyin* (1927) 14

AIR 237 and the second in AIR 1930 255 (Privy Council) . The facts of the first case AIR 1927 237 (Privy Council) to which we will have to

refer in some detail later, were that the plaintiffs had shown that a large part of the consideration had passed in respect of the transaction which the

plaintiffs had alleged to be genuine. It was after they had succeeded in showing that the transaction was for consideration that it was pointed out by

the learned Judges of the High Court at Rangoon that under those circumstances they were of opinion that the burden lay very heavily on the

defendant to show that the deed of sale was not a genuine one. Their Lordships of the Judicial Committee were merely confirming the statement

made by the learned Judges of the High Court and not laying down any abstract principle in regard to the onus of proof in such cases. The learned

Judges had while deciding 55 Mad 7481 themselves observed that the Privy Council decision did not lay down any proposition casting the onus

upon the defendant. The second decision of their Lordships of the Privy Council, however, was more directly in point and the decision in 55 Mad

7481 cannot be held to lay down any different principle. Their Lordships had in their judgment observed as follows:

Under Order 21, Rule 63 the decision in the said claim proceedings was final subject to the result of this suit which the plaintiff had instituted for a

declaration that the deeds are valid and that the said properties are not liable to be attached in execution of the decree of the appellant. In their

Lordships' opinion she is not entitled to this declaration unless she establishes to their satisfaction that the deeds in question were bona fide and

were intended by defendant 2 to pass the beneficial interest in the premises in favour of the mutavalli of the wakf and the plaintiff respectively.

7. These observations are clear in themselves but Mr. Rajah Ayyar contends that

their Lordships were not enunciating any general principle but had only observed that the plaintiff would not be entitled to the declaration unless she established to their (i.e. their Lordships") satisfaction that the deeds in question were bona fide, etc. It must be remembered in this connexion that the person who had asked for a declaration that the deeds were valid and that the properties were not attachable had succeeded in the High Court and it was the creditor decree-holder who had appealed to the Privy Council. The main question for determination in that case was whether a deed of wakf dated 19th November 1916 and a deed of gift dated 30th June 1917 were void or voidable at the option of the appellant who had obtained a money decree against respondent 2, the executant of these documents. The observations were not made because the plaintiff had lost in the High Court and in consequence of that failure she had been required to show to their Lordships" satisfaction that the judgment under appeal was wrong, but she was called upon to show that the deeds were bona fide in spite of a decision by the High Court in her favour. This observation was made by their Lordships because the onus of proving the bona fide nature of the transaction was held to lie on her. What transpired at the hearing of this appeal in arguments and reported in AIR 1930 255 (Privy Council) leaves no room for doubt as to the view their Lord, ships had taken in regard to this question. Mr. Dunne who appeared for the creditor (appellant) asserted that the transactions were a series of bluffs and that the judgment-debtor was attempting to defraud the appellant by putting all his property beyond the reach of his creditors. Mr. Jopling on behalf of the alienee-respondent alleged that the transactions were real and bona fide, effected by registered deeds which were duly acted upon. In reply to this argument the following observations were made by their Lordships and are extremely important:

Viscount Dunedin : The onus is upon you to show that the order in execution is wrong.

Sir Lancelot Sanderson : In this suit, having regard to what was decided in the execution department the onus was on you to show that these were real transactions.

Counsel : I submit that the judgment of the executing Court is not evidence or conclusive against me: Section 43, Evidence Act.

Sir Binod Mitter : That judgment is final under Order 21, Rule 63, unless set aside.

Counsel: We are expressly allowed to bring this suit. The function of the executing Court was to deal with the question of possession.

Sir Binod Mitter : The judgment in execution may not be res judicata but the question is whether it is not evidence to some extent. Of course the principal question under Order 21, Rule 58 is one of possession, but the Court has to go incidentally into the question of title in order to determine the character of possession. That had been laid down in several Indian cases.

Counsel : The deed of dower is one for value. There is no rule that a man cannot prefer one creditor to another.

Sir Binod Mitter : That question was recently decided by the Board in Ma Pwa May v. Chettiar Firm (1929) 16 AIR 279.

Mr. Dunne in reply : The onus was upon the respondent to satisfy the Court that these two transactions were valid and real transactions.

Viscount Dunedin: That is quite clear.

8. In view of these cases having been cited before the learned Judges and noticed by them in their judgment in Appatuhrai Chettiar v. Vellayan

Chettiar (1932) 19 AIR Mad. 302, it is impossible to hold that they were laying down any different rule. The next case to which our attention was

drawn was decided by a Division Bench of the Patna High Court. It was that in Gilu Mull v. Manohar Das Jai Narain (1928) 15 AIR Pat. 434

where it was held that the burden of proof in a suit under Order 21, Rule 63 lay on the party seeking to establish his right to attach the property in

dispute. But it must be remembered that the objection under Order 21, Rule 58, had been dismissed in this case for non-prosecution and this is

how Kulwant Sahay J, who had written a concurring judgment in this case distinguished it in the following year in Mahadeo Missir v. Ram Prasad

(1929) 16 AIR Pat. 579. After referring to various judgments of the Bombay, Allahabad and Calcutta Courts it was held in the latter case that in a

suit under Order 21, Rule 63 the onus was on the plaintiff who relied on a deed of transfer, to prove not merely the valid execution of the

document and the passing of consideration thereunder but also the fact that the document was really what it purported to be and was not merely a

colourable transaction. It may be stated here that the decision in AIR 1927 237

(Privy Council) by their Lordships of the Judicial Committee was understood by the learned Judges of the Patna High Court in the same manner as we have understood it. The learned Judges observe that the circumstances upon which their Lordships of the High Court of Rangoon placed the onus upon the defendant were set out in the judgment, namely the fact that the plaintiff had proved the passing of the consideration.

9. When the matter went before their Lordships of the Judicial Committee they observed as follows:

Now they (meaning the plaintiffs) being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration.

10. Their Lordships then proceeded to observe:

So far as the Rs. 17,000 was concerned, there was adequacy of consideration. Therefore there only remains the Rs 3000.

11. The remaining paragraph printed at page 855 of the case reported in AIR 1927 237 (Privy Council) may be reproduced to make out their Lordships' meaning clearly:

No doubt the evidence is in a very ragged condition as to precisely where and when that money was paid and, if it was necessary to show it was paid in hard cash, probably such proof would fail. But their Lordships take this view, that supposing that it was not established, inasmuch as it has been held by the Judges below that the total value of the property was only Rs. 20,000 this Rs. 17,000 being an absolutely good consideration, the remaining Rs. 3000 is not enough to allow them to draw the conclusion that it was a fraudulent sale.

12. It was then observed by the learned Judges of the Patna High Court:

In other words, their Lordships cast the burden upon the defendant in that case to show that the sale was fraudulent because the plaintiff had

succeeded in proving the passing of a consideration.. Their Lordships agreed with the view of the High Court that the plaintiff had succeeded in

establishing the passing of consideration at least to the extent of Rs. 17,000 and that the only question was as regards the balance of Rs. 3000 and

it appears that what was urged before their Lordships was that as the evidence as regards the passing of this portion of the consideration was unsatisfactory the sale was a fraudulent sale. Their Lordships refused to accede to this argument in view of the fact that Es 17,000 out of the consideration of Rs 20,000 was an absolutely good consideration and that the remaining Rs. 3000 was not enough to allow them to draw the conclusion that it was a fraudulent sale. Their Lordships do not lay it down as a proposition of law that in a suit under the provisions of Order 21, Rule 63, Civil P.C., where the plaintiff relies on a deed of sale alleged to have been executed by the judgment debtor, the onus lies on the defendant to prove that the sale is not a real sale.

13. We have referred to this case in detail as we find that Sir Dinshaw Mullah has in his well known commentary on the CPC at p. 789, (Edn. 10), understood the decision by their Lordships of the Privy Council in AIR 1927 237 (Privy Council) as laying down a different rule and has also cited an Allahabad case, Abdul Sattar Vs. M.L. Rani Hira Dei , in support of the conclusion that if in spite of an adverse decision by an execution Court, a plaintiff brings a suit claiming his title under a deed, the onus would be on the defendant to prove the benami character of the deed. There is no doubt that the learned Judges of the Allahabad Court do observe at p. 270 that, a comparatively recent pronouncement of their Lordships of the Privy Council made in AIR 1927 237 (Privy Council) has definitely laid down that the plaintiffs being the ostensible owners of the property under a duly registered deed and a deed of transfer, the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale Was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration, but how they understood the Privy Council decision is explained in the paragraph beginning on the same page the earlier portion of which reads as follows:

There is no doubt that the Privy Council case to which reference has been made above is an authority for the proposition that an ostensible owner of the property whose objection has been dismissed under Order 21, Rule 58, Civil P.C., and who therefore brings a suit under Order 21, Rule

63, Civil P.C., for establishment of his right, is not called upon to establish not only the due execution of the deed of conveyance by the original

owner, but also that he was not the benamidar for the judgment-debtor as alleged by the decree-holder. The rule that in such a case the plaintiff

must establish his title is not departed from.

14. To this no exception can be taken but what is stated by these learned Judges later in this paragraph does not seem to follow from what they

had stated to be the effect of the decision of their Lordships of the Judicial Committee. They observe there as follows:

The quantum of onus is however the same as in an ordinary case in which the benami character of an instrument is in question. The initial onus

undoubtedly rests on the plaintiff. He has to establish his title to the property; but having established the due execution of the deed of conveyance

by one who admittedly owned the property, the apparent tenor of the deed must prevail unless it is established by the defendant that the ostensible

owner is only a benamidar.

15. This would mean that the plaintiff was not, in their opinion, to show that "he was not the benamidar for the judgment-debtor as alleged by the

decree-holder." But this is exactly how they had understood the decision of the Judicial Committee themselves in an earlier portion of this very

paragraph. After comparing Section 283 of the old Code with Order 21, Rule 63 of the present Code the learned Judges of the Allahabad High

Court subsequently add:

The scope of Rule 63 is wider than that of Section 283 of the old Code. The former makes a title suit within the period of one year necessary by a

person who preferred an objection and against whom an order is made. To our minds this is the only ground on which it is possible to reconcile the

view taken in the cases decided by the Indian High Courts with the view now expressed by their Lordships of the Privy Council. Whether the

ground suggested above is well founded or not, we must follow the Privy Council case, which, if not reconcilable in the manner suggested above,

should be deemed to have overruled the contrary opinion previously expressed by the High Courts. We must take it to be the law that, in a case

like this, the plaintiff having established due execution of the sale deed in his favour by a person who was admittedly the owner of the property to

which it relates, he should be deemed to have discharged the initial onus which lay upon him; and the burden of proof being thus shifted on the

defendant, the latter must establish the benami character of such deed by showing that the consideration proceeded from the alleged owner or

otherwise,

16. The conclusion thus arrived at by them does not follow from their own reading of the Privy Council decision and we are with great deference

unable to follow it. Nor are we inclined to agree with what has been stated by Sir Dinshaw Mulla in his commentary with regard to the effect of the

decision in 5 Rang 852.3 The general rule that would apply to cases where the plaintiff sues on the basis of his title and the defendant raises a plea

of benami would not, in our opinion, apply where the question has been gone into once by an execution Court on a petition of objections under

Order 21, Rule 58 and decided against the claimant. If the claimant brings a suit later under Order 21, Rule 63 he will have to establish that he was

in possession of the property on his own behalf and not on that of the judgment-debtor and that the consideration for the sale had emanated from

him. Once this is established it would then be for the defendants to rebut the evidence and to show that the plaintiff's name was benami or that the

sale in his favour was fraudulent. Mr. Rajah Ayyar drew our attention in the end to the observations of their Lordships of the Judicial Committee in

AIR 1938 290 (Privy Council) where Sir George Lowndes in delivering their Lordships' opinion observed as follows:

A good deal of argument was addressed to the question of burden of proof. Apparently it has been the settled practice of Indian Courts, when

objections to an attachment in execution have been disallowed and a suit has been filed by the objector under Order 21, Rule 63 of the Code, to

put the onus of proving the bona fides of any transaction upon which the objector relies upon him in his capacity of plaintiff. This is a matter which

may possibly require further consideration when the question of onus is really material. In the present case where the facts are fully established, and

the inference from them is clear, their Lordships think that nothing would be gained by any examination of the authorities to which reference has

been made.

17. This case does not hold that the onus of proving the bona fide nature of the

trans-action in a suit under Order 21, Rule 63 would not lie on the plaintiff. But the suggestion was that the question would not have been left for further consideration unless their Lordships were inclined to doubt the proposition stated by the learned Judges of the High Court of Lahore in the case under appeal. We are unable to read this judgment as throwing any doubt on the proposition that the onus would in such circumstances lie on the plaintiff and feel that their Lordships refused to go into this question as they felt that it was unnecessary so to do. At all events the decision by their Lordships reported in AIR 1927 237 (Privy Council) can not be held to have been overruled subsequently and must be held to cover the point to be decided now.

18. Our attention was drawn by Mr. Sitarama Rao to a number of cases decided by the Lahore High Court, out of which it would be sufficient to refer to a Division Bench decision in Janki Das v. Gulzar (1932) 19 AIR Lah. 174 and to a case decided by Teckchand J. in Mela Ram v. Inayart

Begam (1937) 24 AIR Lah. 847. They hold that the onus would in the circumstances of the present case lie on the plaintiff. The same conclusion

was arrived at by the Patna High Court in Radhakishun v. Keola Prasad (1937) 24 AIR Pat. 76 where the learned Chief Justice and another

Judge of that Court took the same view. We are therefore of opinion that the onus of establishing that the transaction was genuine and for

consideration was on the plaintiff-appellant and if he has failed to establish this, his suit must be held to have been rightly dismissed by the Court

below. Coming to the facts of the case we find that a sale deed in regard to three properties including the one attached by the assignee decree-

holder was executed by Syed Ibrahim on 22nd May 1928. The consideration for the sale was alleged to be a sum of Rs. 30,000. In regard to the

consideration the following recital in the sale deed is interesting:

The amount due to you with matter of the borrowings had from you by my father during his lifetime is Rs. 17,000; the amount which I have already

received from you for the purpose of discharging the other debts borrowed during his lifetime and for meeting the expenses of his funeral

obsequies, khattamfatiha, etc., and formeeting my marriage expenses, etc., is Rs. 10,500, and the sum which I have this day received in. cash for

the benefit of the family is Rs. 2500. Total of the said items is Rs. 30,000.

19. It might be mentioned that even the comparatively smaller sum of Rs. 2500 which was alleged to have been received by the vendor on the date of execution of the deed was not paid before the Sub-Registrar. The oral evidence produced in this connexion is worthless and cannot be relied upon. The plaintiff has failed to produce any accounts even in regard to the larger sum of Rs. 17,000 which was stated to have been advanced by him to the vendor's father who had died some time in 1926. There is nothing on the record to show why such large sums were lent by the plaintiff and the dates on which they were said to have been advanced are not known, anyhow not stated. The plaintiff when cross-examined had to admit that he had no accounts to show that he was in possession of such large amounts at the time when he was said to have advanced them by way of loan and was obliged to take shelter behind the statement that these were his savings. This is all the more surprising when we find that he had been maintaining accounts of his business according to his own statement. and producing them before the Income Tax authorities. It was admitted that he had no voucher or any other document for the moneys alleged to have been lent by him. Nor has he produced any witness to prove the advances made by him to Syed Ibrahim's father. The main statement in this connexion is that of the plaintiff himself and this does not carry conviction. It is impossible to rely on the statement made by P.W. 4 in cross-examination. The allegation in regard to the advance of Rs.10,500, made by the plaintiff to Syed Ibrahim himself does not also stand the test of even a cursory examination.

20. The plaintiff has had to admit in his cross-examination that he had no voucher to evidence the advance of this sum. Nor could he state in the witness box when the several sums making up Rs. 10,500 were paid by him. No accounts were produced by the plaintiff in regard to this advance either and besides the two witnesses (P. W.s 4 and 5) before whom these sums of money were stated to have been acknowledged by Syed Ibrahim there is no other witness who has deposed to the advance made by the plaintiff. Two slips of papers (Exs. C and C-2) have been produced on behalf of Syed Ibrahim but it is remarkable that Syed Ibrahim has not come into the witness box. Nor have his accounts been produced in Court. These slips of papers could have been easily manufactured for the purposes of this case. They are written in pencil and it is

difficult to conceive that this was the only memoranda of money kept by Syed Ibrahim for the money advanced to him. As for P. W.s 4 and 5 they have come into Court as witnesses in the pose of mediators who were sent by the plaintiff to Syed Ibrahim to get the amount due by him and brought about the sale of the properties as he had no liquid cash to pay. P.W. 5 is a close relation of the plaintiff and if his statement is to be believed the entire sum of Rs. 27,500 was paid by the plaintiff on two occasions while, the plaintiff himself tells a different tale. As for P.W. 4 he seems to have purchased some village in partnership with the plaintiff 4 or 5 years before his statement was recorded in 1935 and this seems to be sufficient for him to come and make a statement in his favour. Had these witnesses brought about the transaction, it is improbable that they would not have attested the sale deed in favour of the plaintiff. The Subordinate Judge placed no reliance on the statements of the witnesses produced by the plaintiff and having read their statements ourselves we entirely agree with the estimate he formed of them. The plaintiff's task was rendered far more difficult than it might have otherwise been by the facts that he is not only a maternal uncle of Syed Ibrahim but that his brother's daughter was married to the latter. If Syed Ibrahim wanted to execute a fictitious sale deed it was difficult for him to find a person more suitable than the plaintiff to fulfil his nefarious design. We must for the above reasons find that the plaintiff has" totally failed to establish that the sale deed executed by Syed Ibrahim in his favour Was for consideration or was a genuine transaction. On this finding the appeal fails and is dismissed with costs.