

(1917) 10 MAD CK 0021
In the Madras High Court

Palaniandi Chetty and Others

APPELLANT

Vs

M.V. Appavu Chettiar and Others

RESPONDENT

Date of Decision : 05-10-1917

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 1918 Mad 225 : 45 Ind. Cas. 52

Hon'ble Judges : Seshagiri Aiyar, J; Coutts Trotter, J

Bench : Division Bench

Judgement

Coutts Trotter, J.—Although this appeal raises questions of difficulty and importance the facts material to it can be stated very shortly. The

plaintiff sued for a declaration that he was the absolute owner by purchase of the suit properties as against the defendants who were holders of

decrees against his vendor. The plaintiff's title was based on a sale-deed dated the 5th of September 1903 from Velayudan Cheity to himself for a

consideration of Rs. 14,250. It has been found that this deed and the transaction which it carried out was brought into existence with intent to

defraud and defeat the creditors of the transferor, and that finding is not and cannot be challenged; but the appellant contends that it is not

competent to the defendant to invoke that finding in aid in the present proceedings. POP the moment, I am assuming that the transaction in question

was in this sense a real one, that it effected and was meant to effect a real transfer of the property from the transferor to the transferee, that is to

say, it was not a merely colourable paper transaction leaving the real beneficial enjoyment of the property with him who purported to transfer it.

Had the transaction been a merely colourable one, it would, no doubt, have been void and the plaintiff could not have succeeded in his action. His

contention is that if it is only voidable it stands good until set aside in proceedings appropriate for the purpose, such proceedings being a suit

brought for the express purpose by or on behalf of all the creditors of the transferor.

2. The material section is Section 53 of the Transfer of Property Act, which is as follows: "Every transfer of Immovable property, made with intent

to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to

defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

3. The section broadly reproduces the effect of the famous Statute of Elizabeth, 13 Eliz. C. 5, and the English decisions on that Statute are always

referred to in India as authorities for the construction of the Indian section. In England it has been held that a suit to avoid a settlement must be

brought on behalf of all creditors: *Reese River Silver Mining Company v. Atwell* (1869) 7 Eq. 347 : 20 L.T. 183, and that decision has been

followed in India in *Hakim Lal v. Mooshahar Sahu* 11 C.W.N. 889 : 6 C.L.J. 410 and *Burjori Dorabji Patel v. Dhunbai* 8 Ind. Dec. 479. But it

has been held by the English Courts that where the plaintiff is a judgment-creditor who has sued out a Writ of Legit, he may sue on his own behalf

without reference to the general body of creditors and impeach the transfer as having been executed with intent to defraud his particular claim:

Blenkinsopp v. Blenkinsopp (1852) 1 De G.M. & G. 495: 21 L.J. Ch. 401. That case expressly left open the question as to whether the deed

could be set aside by a person who had signed judgment but not sued out the writ. We are asked to say that in India the section may be called in

aid by a creditor who has obtained a decree but "has not attached the properties, it being conceded that a creditor who has attached the properties

can use the section as a weapon of defence as well as of offence in a case like the present. See *Rajani Kumar Dass v. Gaur Kishore Shaha* 7

C.L.J. 386 and *Chidambaram Chettiar v. Sami Aiyar* 30 M.a 6 The matter has been definitely decided by the High Court of Bombay in *Ishar*

Timappa v. Devar Venkappa 5 Bom. L.R. 19, a decision to which Jenkins, C.J., was a party. In the absence of this Court, I propose to consider

the matter on principle.

4. The remedy sought may be treated as the equivalent of a remedy by way of equitable execution in aid of the legal right given by the judgment.

The English authorities subsequent to *Blenkinsopp v. Blenkinsopp* (1852) 1 De G.M.& G. 495 : 16 Jur. 787 : 91 R.R. 147 seem clearly to show

that such an equitable execution will not be granted until the title of him who seeks it has been completed; that is to say, according to the technical

language of the English Law, a judgment-creditor cannot invoke the equitable relief until he has followed up his judgment by suing out a writ of or

Elegit, as the case may be. This was expressly decided by Turner, V.C. (as he then was) in *Smith v. Hurst* (1852) 10 Hare 30 : 20 L.T. 303 and

he cites in his judgment, an interesting passage from Lord Redesdale's *Treatise on Pleading*. An authoritative and clear exposition of the principle

on which Turner, V.O., founded his decision is contained in Lord Cottenham's opinion in *Weafo v. Tuke of Marlborough* (1838) 3 My & Cr 407

2 Jur. 76 : 45 R.R. 304. Applying that principle I think it must be held that the mere obtaining of a judgment in India creates no title or only an

inchoate title in the judgment-creditor, and therefore he must follow up his judgment by attaching the properties in order to enable him to utilize

Section 53 in answer to a claim founded on the impeached deed of transfer. The inconvenience of allowing each and every creditor in turn to

attack the deed independently is obvious and is amply illustrated by the history of the present plaintiff who has been compelled to buy off a series

of creditors one after the other. Accordingly I am of opinion that *Ishvar Timappa v. Devar Yevhapva* 5 Bom. L.R. 19 is correctly decided and is in

accordance with principle and I respectfully follow it. I, therefore, hold that the fact that the deed was executed with intent to defraud the creditors

of the transferor affords the defendants no answer to the plaintiff's claim.

5. As the learned Judge has not decided the question as to whether the transaction is merely colourable, the case must go back to him for a finding

on the point. Six weeks are allowed for submission of findings and seven days are allowed for filing objections. Costs will be reserved.

6. *Seshagiri Aiyar, J.*--The property in this suit belonged to one *Velayndham Chetty*. He executed a sale-deed to the plaintiff in respect of it on the

5th September 1903. It is not disputed that at the time of the sale *Velayudham Chetty* was heavily involved in debt. The defendants in this suit had

a number of decrees against him for sums of money due to them before the date of the sale to the plaintiff. They attached the properties in execution of their decree. The plaintiff filed a claim petition which was rejected in September 1910. Thereupon he filed the present suit for a, declaration that the property belonged to him by virtue of the sale and that Velayndham Chetty had no interest left in the property for the defendants to attach and sell. The Subordinate Judge who tried the original suit held that the sale was binding to the extent of Rs. 9,946 odd, as that sum was applied towards discharging certain mortgages upon the property created by Velaypdham Chetty. He dismissed the suit as regards the rest of the claim put forward by the plaintiff. On appeal to the District Judge, the Subordinate Judge's decree was confirmed, In this second appeal a point was raised for the first time by Mr. A. Krishnaswami Aiyar to the effect that as the defendants had not sued to set aside the sale in favour of the plaintiff before they attached the properties in execution of their decrees, they were not entitled to resist the claim of the plaintiff in this suit. Mr. Ananta-krishna Aiyar objected to this contention being heard for the first time in second appeal, as he might have rectified the defect if the objection had been raised before the trial Court. It is difficult to see, what new evidence could have been let in by the defendants in answer to the abstract legal position argued in this Court. The plaintiff's case is that at the time of the attachment Velayudham Chetty had no interest in the property; because at that time no suit had been brought to set the sale in plaintiff's favour. To such a contention, if it is sound, the only answer will be that the sale "had been set aside in a properly framed suit. That is not the answer. The decision in *Rikim Tul v. Mooshahar*" Sahu 11 C.W.N. 889, where it was pointed out that an objection like this should not be entertained in second appeal, does not" help the respondents. In that case the suit was brought by some of the creditors, and when objection was taken in soon appeal that the suit should have been brought in a representative character, it was met by the plea that if the objection had been taken in time this defect could have been cored. That is not the present case. Although it is unfortunate that this question was not raised in the earlier stages, I do not see my way to refusing to hear the question argued.

7. On the merits, the first contention of Mr. Krishnaswami Aiyar was that u/s 53 of the Transfer of Property Act, it is not open to any one of the

Creditors of the transferor to challenge the validity, of the conveyance; he relied on the observations of Mookerjee and Holnwood, JJ., in *Hakim*

Lal v. Mooshahar Sahu 11 C.W.N. 889. In the first place it should be pointed out that Section 53 does not in terms apply to the present case, as it

is in Chapter II which preserves to Hindus, Muhammadans, and Buddhists their own law on the question covered by its provisions. This will not,

however, materially affect the decision, as there is nothing in the Hindu Law which is inconsistent with Section 55 of the Transfer of Property Act,

see *Rangilbhai Kalyandas v. Vinaya Vishnu* 6 Ind. Dec. 488. At any rate Section 53 of the Transfer of Property Act may be taken as indicating the

principles of equity, justice and good conscience which ought to guide Courts in the absence of specific legislative provisions. The decision in

Hakim Lal. Mooshahar Shun 11 C.W.N. 889, no doubt, lays down that it is settled law in England that if the debtor is alive and not a bankrupt at

the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13, Elizabeth, Chapter 5, it should be by a

creditor or creditors on behalf of himself or themselves and all other creditors of the debtor. The learned Judges say that the rule appears to be

based upon a perfectly sound and intelligible principle and point out the difficulties which the contrary conclusion may lead to. Speaking for myself,

there are as many difficulties in demanding that all the creditors should join in a representative action as there are in permitting a number of actions

being brought against the same purchaser. However that may be, the language of Section 518 of the Transfer of Property Act, (o my mind, is clear

that any person who was defrauded, defeated or delayed can impeach the transaction.

8. Before dealing with the English cases quoted by the learned Vakil for the appellant, I wish to draw attention to Section 11, explanation 6, of the

Code of Civil Procedure. That will apply to actions which may be brought by one of the defeated or delayed creditors if he claims a right which is

common to himself and to other creditors similarly situated. It may be that Section 53 of the Transfer of Property Act has been so worded having

regard to the language of this explanation to Section 11 of the Code of Civil Procedure. The case of *Hakim Lal v. Mooshahar Sahu* 11 C.W.N.

889 went up on appeal to the Judicial Committee but their Lordships did not decide the case on this point. See *Musahar Sahu v. Hakim Lal* 32

Ind. Cas. 343 : 20 *C.W.N.* 393 : 14 *A.L.J.* 198 : (1916) 1 *M.W.N.* 198 : 23 *C.L.J.* 406 : 18 *Bom. L.R.* 378. The only other Indian cases

bearing on the question are *Burjorji Dorabji Patel v. Dhunbai* 8 *Ind. Dec.* 479 and *Ishvar Timappa v. Devar Venkappa* 5 *Bom. L.R.* 19. Among a

number of points decided by Mr. Justice Telang in *Burjorji Dorabji Patel v. Dhunbai* 8 *Ind. Dec.* 479 the learned Judge points out that the plaintiffs

in that suit were only some of the creditors and that they were not entitled to succeed inasmuch as the suit was not filed by them on behalf of and

for the benefit of all the creditors. When this decision was passed, the Transfer of Property Act did not apply to the Bombay Presidency and the

decision proceeded solely upon English authorities. *Ishvar Timappa v. Devar Venkappa* 5 *Bom. L.R.* 19 was after the Transfer of Property Act

was applied to Bombay. It does not appear from the judgment that the learned Judges required that the other creditors should be nominee be

parties to the suit. Some observations of the Judicial Committee in *Ohatteput Singh v. Mahamj Bahadur* 2 *A.L.J.* 190 were relied upon by the

appellant. The observation that "such an issue could be raised and such a decree could be made only in a suit properly constituted for that

purpose" does not necessarily imply that a representative action, is the only mode of setting aside a fraudulent sale. Therefore I am of opinion on

the language of Section 53 of the Transfer of Property; Act that it is open to any creditor to impeach a conveyance made by his debtor, provided

he alleges in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights

to the litigating plaintiff but would enure for the benefit of all creditors like himself.

9. The English cases to which our attention was drawn do not in unmistakeable terms lay down that all the creditors should join in a representative

action before a fraudulent sale can be set aside. All that Justice Williams in *Veys v. Brown* (1884) 13 *Q.B.D.* 199 : 33 *W.R.* 168 held was that the

settlement should not be treated as void but it was liable to impeachment in a proper action. *Glegg v. Bromley* (1912) 3 *K.B.* 474 does not take

the matter any further. But both these cases are authorities for the position that the assignment by the debtor will be good and valid until it is set

aside in a proper proceeding. There are certain observations in May on Fraudulent Conveyances which on their face appeared to mean that a judgment-creditor was in a different position from an ordinary creditor and that it was open to the former by virtue of his judgment to levy execution without having the assignment set aside in a suit for that purpose. The proposition is thus stated: Where a creditor has a judgment, or order of Court, or process of execution in respect of his claim, and might obtain relief in equity thereunder against property, held by, or in trust for, his debtor, and the debtor is living, a Court of Equity can declare a settlement made by the debtor, which is fraudulent within 13 Eliz. 5 to be void against the plaintiff, without also declaring it to be void against the creditors generally, and may direct the settled property, or a sufficient part of it, to be applied in satisfaction of the plaintiff's claim." When the cases cited for this proposition are examined, they show that if a judgment was obtained at common law and further action was brought in the Equity Court to have it declared that the settlement or conveyance by the debtor in fraud of creditors was void, the Court of Chancery will not move in the matter until all the common law remedies had been exhausted. See *Smith v. Runt* (1852) 10 Hare 30 : 17 Jur. 30 : 90 R.R. 263 and *Neate v. Duke of Marlborough* (1838) 3 My & Cr 407: 2 Jur. 76 : 45 R.R. 304 and *Reese River Silver Mining Co. v. Atwell* (1869) 7 Eq. 347 But since the Judicature Act and since the Act of Edward I which define the rights of judgment-creditors, these decisions have no practical value. A judgment-creditor in England is in a very favourable position as compared with a judgment-creditor in this country. He becomes practically the owner of the property which he seizes either under a Writ of Elegit or of far. I do not think the English decisions which differentiate between the position of the judgment creditor and that of an ordinary creditor are of much use, in deciding Indian cases, The judgment-creditor in India, for all practical purposes, is in the same position as any ordinary creditor. If he attaches the property it gives him no lien: if he realises monies, they would be subject to participation by those who may be entitled to rateable distribution. But the position in England is altogether different. Therefore the passage in May relating to the judgment-creditor has no relevancy in this country: Nor is there anything in the words of "Section 53 to differentiate between the position of the decree-holder and that of an ordinary creditor.

10. The next question is whether the judgment-creditor can protect his rights to proceed against the property of the judgment-debtor by pleading in

defence that the sale which the plaintiff seeks to-establish in the suit should be set aside. There is no question that if the sale is void or is found to be

a sham transaction, it will not be necessary either for the creditor individually or conjointly with others, to sue to set aside the sale. But if it is only

voidable it seems to me that the creditors can have no remedy against the property conveyed until the sale is set aside. It is well settled that in

cases of voidable transactions until the transaction is avoided it continues in force. See *Rajeswara Dorai v. Arunachllam Chettiar* 3 Bom. L.R. 368

and *a Mhamad Haji Zakeria v. Ahmadbhai Habibbhai* 19 Ind. Cas. 596 : (1913) M.W.N. 453. Therefore at the time that the creditor attached the

property the sale was effective to confer title upon the plaintiff.

11. It was held by the Judicial Committee in *Phul Kumari v. Ghanshyam Misra* 12 C.W.N. 169 : 10 Bom. L.R. 1 : 2 M.L.T. 506 that the effect of

a decree in a suit brought by a defeated claimant is to place the parties in the position they occupied at the time the claim was put in. Consequently

if the defendant succeeds in his defence, the result of it will be to allow him to attach the property as if it were the property of the judgment-debtor.

This, as I already pointed out, can do him no good so long as the sale is not set aside. Therefore I am of opinion that the defendant is not entitled to

avoid the sale by his defence. Mr. Anantakrishna Aiyar drew our attention to *Vasudev Rughunath Oka v. Janardhan Sadashiv Apte* 29 Ind. Cas.

497. All that was decided in that case was that a subsequent transferee was not entitled to impeach a completed sale. It is true that another answer

to the defence could have been that the sale was subsisting at the time of the transfer. However, this is no authority for the position that without

setting aside the sale a judgment-creditor can impeach the transaction as a defence to the action commenced by the purchaser. The point we have

to decide was not considered in *Narayana Pattar v. Viraraghavan Pattar* 23 M. 184.; *Chidambaram Chettiar v. Sami Aiyar* 30 M. 6 and *Ishan*

Chunder Das Sarkar v. Bishu Sirdar 1 C.W.N. 665 : 12 Ind. Dec.1217 to which the learned Vakil for the respondents invited our attention. I

have, therefore, reluctantly come to the conclusion that the objection raised by Mr. A. Krishnaaswami Aiyar should be allowed.

12. In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following

13. Finding.--The issue on which I have been directed to record a finding is whether the transaction created by the sale-deed, dated 5th

September 1903, is merely colourable.

14. It has been found, and the finding stands good, that the transaction evidenced by the sale-deed was intended to defraud and defeat the

creditors. The question now for consideration is whether the transaction was merely colourable or whether it was intended that the property should

pass to the vendee.

15. The consideration for the sale-deed was Rs. 14,250 made up of (1) mortgage debts on the properties to the extent of Rs. 8,842 which the

vendee undertook to discharge (2) a debt of Rs. 2,408 due on a promissory note to Narayanasami Iyer, (3) Rs. 3,000 to be paid in cash to the

vendors to discharge sundry debts.

16. With regard to the mortgage debts, I think on the evidence on record it must be held that they were paid by plaintiff. Exhibits B to J show that

they were paid and that they were paid by plaintiff. There is really no evidence that the payments nominally made by plaintiff were really made by

his vendor. It is true that the debts were not paid at once and no payments were made until the creditors of the vendor began to be, troublesome,

but this fact proves nothing. The vendor was obviously more or less bankrupt and it is difficult to see how he could raise the money.

17. The payment of the debt due on the promissory note to Narayanasami Iyer has not been satisfactorily proved. Narayanasami Iyer was not

examined. There is no satisfactory evidence that the note is genuine as it was the plaintiff who alone spoke to it.

18. The cash payment is not satisfactorily proved. It was to be utilized for paying off sundry debts. There is no evidence at all that the whole sum

was utilized in paying debts and not one of the persons who are alleged to have been paid off has been examined.

19. The conclusion, therefore, is that some Rs. 9,900 were paid and that the rest of the consideration was not paid.

20. The next point for consideration is whether the plaintiff had possession of the properties after the sale-deed. It is clear from the evidence on

record that the family house which was sold under the sale-deed was occupied by the vendor and his relations. The vendor and the vendee are closely related, and I do not think that the fact that the vendee allowed his vendor's family to live in the house shows that the sale was meant to be inoperative. The more important question is with regard to the lands. The plaintiff has produced a number of lease deeds Exhibit M series, though he has not examined the lessees. The evidence of these deeds is attacked on the ground that none of these are earlier than 1904, i.e., till the vendor's creditors had begun to execute pressure. I do not think there is much in this. The sale-deed was in September 1903 and it is not usual to enter into leases at that time or until the next year. Exhibit N series are receipts for payment of kist. The earliest date of any of these receipts is January 1904 but Twist would not in any case be paid till January. As to the oral evidence it necessarily has to be received with caution. But there is this fact. Sandarac Chetty, one of plaintiff's agents, lives in one of the villages where the lands are. It is true that Sundaram Chetty is related by marriage to the vendor, but I see really no reason to doubt that he is agent of the plaintiff. This man formerly lived in Swamimalai. It seems probable that the reason he has moved to Ayyavadi is that he is plaintiff's agent and plaintiff has bought the lands there. It is difficult to explain his change of residence otherwise. The evidence on the other side is entirely oral and to a certain extent hearsay. It has been proved that the plaintiff paid over Rs. 9,000 and it seems unlikely that even a close relation would pay so large an amount without getting something for it. It is true that the whole consideration for the sale was not paid and it seems certain that the consideration even if fully paid was not adequate. Otherwise there is no explanation at all for Exhibit B, a release deed by which the plaintiff was to pay an extra Rs. 6,000. This release deed was executed after plaintiff had been worsted in litigation. Plaintiff, no doubt, thought that his sale deed would be attacked on the ground of inadequate consideration and wanted to save himself further trouble. Though the full consideration was not paid and though the consideration was inadequate, it does not follow that the sale was merely nominal. The vendor was in a very bad way at the time of sale and was not in a position to dictate terms. He wanted to prevent his creditors getting his property and he had recourse to a relation. The relation, though willing to oblige him," was not lively to do it for

nothing and it was quite likely that the relation would impose hard terms.

21. The subsequent conduct of the plaintiff is rather in favour of the theory that the transaction was a real one. He paid off under pressure a

considerable number of creditors and unless it is shown that he did not really pay them off, the presumption is that he paid them off because the

transaction was a real, though a fraudulent, one. There is really no evidence at all that the money which went to pay off the various debts came

from the vendor and not from the vendee and it is certainly not shown that the vendor who was hopelessly bankrupt was in a position to find the

money. It is contended that some of the debts may have been paid out of the income of the land, but though, as pointed out in paragraph 11 of the

Subordinate Judge's judgment; this might apply to the Rs. 6,000 supposed to have been paid under Exhibit B, yet it is clear that this sum

represented the income, of some five years. It is not explained how the vendor could have raised the money to pay the other debts which were

undoubtedly discharged.

22. The probabilities are, therefore, all in favour of the position that the sale was real and not nominal. I, therefore, find that the transaction created

by the sale-deed, Exhibit A, is not merely colourable.

23. This second appeal coming on for final-hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court

for trial, the Court delivered the following

24. Judgment.--We accept the finding, reverse the decrees of both the Courts below and give a decree to the plaintiff as prayed for.

25. Costs will be awarded to the appellants in this Court. Each party will pay his own costs in the lower Courts.