

Privy Council Appeal No. 109 of 1926.

V. P. R. V. Chockalingam Chetty - - - - - *Appellant*

v.

Seethai Ache and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH OCTOBER, 1927.

Present at the Hearing :

LORD SHAW.

LORD SINHA.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

The point for decision in these appeals from the High Court at Rangoon is a very short one, but there is one other matter dealt with by the Trial Judge to which their Lordships desire to refer in the first place—the transaction by which the plaintiff acquired the right to sue for these and other properties in Burma, now valued by him at three lakhs of rupees, from an Official Assignee in Insolvency in another Province for the trifling sum of Rs. 580, which could be of no real advantage to the insolvent estate, having regard to the extent of the liabilities.

The lands in Burma, which are the subject of these two consolidated suits in the District Court of Pegu, were acquired by a joint Hindu family of Nattukottai Chetties, a moneylending community residing with their families in what is now the Ramnad District in the south-east of the Madras Presidency, and carrying on business by their agents in other parts of India, Burma, the Straits Settlements and elsewhere. The family was known in Burma as the K.P. firm, these being the distinctive initials prefixed to all their business signatures according to the practice of the community.

In 1908 K. P. Ramanathan Chetty, a young man who had recently succeeded his father as managing member of the family, finding that the Burma agency was in difficulties, got the other members of the joint family to join with him in executing a deed of trust by which they transferred the properties mentioned in the schedule to the deed to a trustee for the benefit of their creditors. The trustee was empowered, among other things, to sell the scheduled properties and invest purchasers with full proprietary rights therein, but was to act in certain matters with the consent of another person described in the deed as a "coadjutor."

In 1911 the first defendant's firm, who held two decrees against the K.P. firm for over Rs. 72,000, were pressing for payment, and it was arranged that certain properties in the Pegu District, included in the trust deed, should be transferred to them in satisfaction of their claim. A deed of transfer was accordingly executed on the 1st December, 1911, in Burma by the duly authorised agents of the trustee under the deed, and K. P. Ramanathan, the managing member of the family.

Satisfaction was duly entered up, and the first defendant took and remained in possession without any question being raised by anyone until some six years later the present plaintiff, V. P. R. V. Chockalingham Chetty, a member of the same community as the K.P. family, who was employed in Rangoon as the agent of another firm, obtained a transfer from the Bank of Bengal of a decree against the K.P. firm for Rs. 90,000, in consideration, the District Judge states, of a payment of Rs. 2,500, and proceeded to attach as the properties of the judgment debtors the lands which had been conveyed to and were in possession of the first defendant. Finding, however, that the attachment proceedings must prove infructuous owing to the fact that the two senior members of the K.P. family had been adjudged insolvents on their own petition in January, 1918, in the Court of the District Judge of Ramnad at Madura, the plaintiff went over from Burma to Madura, and on the 19th October, 1919, presented a petition to the Official Assignee at Madura, alleging that the properties mentioned in a list annexed to the petition, containing some 75 items, had either been sold benami for the benefit of the insolvent or obtained in the name of his agent or agents with the same object, and praying that they should be sold by public auction, as there were numerous persons prepared to bid, and in case no one appeared the petitioner was prepared to purchase them himself.

The affidavit filed in support of the petition has not been exhibited, but the petition itself contains no mention of the point chiefly relied on in the suits, that the sale to the first defendant was not in accordance with the trust deed. It was opposed by the first insolvent, who stated that he had no personal knowledge of the transactions of his agents in Burma, and prayed for further enquiry in order that the truth might be ascertained. The next

thing that appears is that in December, 1919, the Official Assignee advertised the properties for sale as being part of the insolvents' estate, and on the 26th January, 1920, there being no other bidders, the plaintiff became the purchaser for Rs. 580 of lands which he stated in his evidence to be worth three lakhs of rupees, the lands now in suit being valued at Rs. 40,000, and the remainder, for which he proposed to institute other suits, at Rs. 260,000.

The District Judge found that the plaintiff's allegation that the sales in question in these suits were benami for the K.P. family was made recklessly and without any foundation, and described his conduct in this matter as most astounding and repugnant. He also criticised the Official Assignee for not making further inquiry as to whether the insolvents had properties in Burma in the names of their agents, and inferred from the insignificant price which the Official Assignee accepted that he attached very little weight to the plaintiff's case that these valuable properties still formed part of the insolvents' estate. It seems difficult to resist this inference; but, however this may be, their Lordships desire to observe generally that it forms no part of the Official Assignee's duties as an officer of the Court charged with the realisation of insolvent estates either himself to prefer frivolous claims unsupported by reliable evidence or to transfer them to others and thus promote unnecessary and useless litigation. Further, sales by an Official Assignee of lands in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue—which has not been contended—they are open to the same objections, and in their Lordships' opinion are strongly to be deprecated. In the present case, as already pointed out, there was not even any corresponding advantage to the insolvent estate.

Having obtained the transfer, the plaintiff proceeded to file two suits in the District Court of Pegu, which were tried together, against the first defendant and those claiming through him, in which he not only set up the benami character of the transactions, but also contended that the sale to the first defendant was invalid as not in accordance with the provisions of the trust deed.

The plaint in the first suit alleged that the sale to the first defendant was invalid and inoperative in law: that the sale by the first defendant to the second defendant, the E.N.M.K. firm, on the 20th December, 1919, was benami for the K.P. firm, which had been adjudged insolvent; and that the sale of the 1st April, 1920, by the second defendant to P. R. N. Nadesan Chetty, represented by the third and fourth defendants, was also benami for the K.P. firm; and that the sales by Nadesan to defendants five to eleven, the defendants in possession, were made fraudulently and collusively with a view to defeating the plaintiff's claim, and were invalid and inoperative. The plaint in the second

suit was in similar terms and challenged the transfers made to the first defendant and by the first defendant to the second defendant, Singaram Chetty, the defendant in possession. The District Judge rejected all the plaintiff's contentions and dismissed both suits, holding, as already stated, on the admissions and the plaintiff's own evidence, that the allegation that the sales were benami was made by the plaintiff recklessly and without any foundation.

The plaintiff filed appeals from these decrees to the High Court at Rangoon, but did not make the first and second defendants in the first suit or the first defendant in the second suit parties to the appeals.

The learned Judges state in their judgment that when the appeals came on for argument it was pointed out that the foundation of title of all the defendants was the sale deed to the first defendant; that the decrees of the Lower Court declared the sale deed to be perfectly valid as between the plaintiff and the first defendant; that owing to the failure to make the first defendant a respondent, there was no appeal from this finding, which had consequently become *res judicata* as between the plaintiff and the first defendant, and must also be regarded as *res judicata* against the respondents, who claimed through the first defendant, or, in other words, as it was put by the learned Judges at the end of the judgment, the finding that the sale to the first defendant was good carried with it a finding that it was also good as between the plaintiff and the purchasers from the first defendant.

As regards this question, their Lordships agree with the learned Judges of the High Court that the plaintiff cannot be allowed in these appeals to question the validity of the sale to the first defendant or to set up in the first suit the benami character of the purchase by the E.N.M.K. firm from the first defendant so long as the findings in favour of the first defendant and the E.N.M.K. firm stand, and are, therefore, of opinion that as regards this part of the case the plaintiff must fail unless the first defendant and the E.N.M.K. firm are made parties to the appeal. The purchase from the E.N.M.K. firm and the subsequent purchases in the first suit and the purchase from the first defendant in the second suit might stand on a different footing were there any evidence worthy of the name to show that they were made benami for the K.P. firm, because the first defendant and the E.N.M.K. firm would not be necessary parties as regards these issues, but this contention was not raised either in the Court below or before their Lordships, and may therefore be disregarded.

As regards the rest of the case, owing to the plaintiff's failure to make these defendants respondents within the time limited for filing an appeal, these appeals, so far as they are concerned, are *prima facie* barred by limitation, and they are entitled to hold the decrees in their favour, which, as pointed out by their Lordships in a very recent case, is a substantive right of a very valuable

kind of which they should not lightly be deprived. When parties are added by the Court after the institution of a suit under O. I, Rule 10 (2), Section 22 of the Limitation Act provides that the date when they are added is to be deemed to be the date of the institution of the suit so far as they are concerned for purposes of limitation, and the rights which they may have acquired under the Limitation Act are therefore sufficiently safeguarded. The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in O. XLI, Rule 20, on which the plaintiff relied both in the Appellate Court and before their Lordships. That Rule empowers the Court to make such party a respondent when it appears to the Court that "he is interested in the result of the appeal." Giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants. It was for the plaintiff-appellant, who applied to the Court to exercise its powers under this Rule, to show what was the nature of their interest, and this he has failed to do.

Their Lordships are therefore of opinion that the Appellate Court were right in rejecting his application under this Rule.

The Appellate Court was then asked to take action under O. XLI, Rule 33. That Rule empowers an Appellate Court to pass any decree and make any order which ought to have been passed or made, and to make or pass such further decree or order as the case may require, and provides, further, that this power may be exercised notwithstanding that the appeal is as to part only of the decree, and "may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against the decrees in so far as they affected some of them and allowed the appeal as against them to become barred. In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the Rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them. Assuming that under this Rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, their Lordships see no sufficient reason for interfering with the refusal of the Appellate Court to do so in this instance. They are therefore of opinion that these appeals fail on both grounds, and will humbly advise His Majesty that they should be dismissed with costs.

In the Privy Council.

V. P. R. V. CHOCKALINGAM CHETTY

v.

SEETHAI ACHE AND OTHERS.

DELIVERED BY SIR JOHN WALLIS.

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