

PRIVY COUNCIL

A.L.N. Narayanan Chettyar

Vs.

Official Assignee, High Court Rangoon

P.C.A.No.32 of 1940

(Lords Atkin, CJ. Russell of Killowen Romer, Sir George Rankin and Lord Justice
Clauson JJ.)

27.05.1941

JUDGMENT

LORD ATKIN J.

1. This is an appeal from the High Court of Judicature at Rangoon in a suit in which the plaintiffs claimed to set aside, on the ground of fraud, a sale of land to the defendant Kasi, now an insolvent, whose estate is represented by the Official Assignee. The District Judge of Bassein made an order in favour of the plaintiffs : but his decision was reversed by the High Court, who found that the fraud was not established and dismissed the suit. The evidence is voluminous and consists in large part of entries in account books. Their Lordships have fully examined it with the assistance of the learned counsel for the appellants, but finding themselves in substantial accord with the views of the facts expressed in the judgments in the High Court and with their reasons for differing from the trial Judge, do not find it necessary to discuss the facts again at length. The substance of the case is that the plaintiffs are nominal owners of seven-eighths share in A. L. A. R. N. Chettiar firm (who will be styled the plaintiffs' firm) carrying on a moneylending business in Kyaunggon, Lower Burma. The true owner of the share was one Nagappa: the remaining one-eighth share was held by defendant 2, Subbaya, who was a salaried partner under an agreement with Nagappa by which Subbaya was to act as managing partner. The plaintiffs' firm was possessed as part of its assets of 1314 acres of paddy land and a house in and about Kyaunggon, and in January 1931, Subbaya, as managing partner, agreed to sell this property to the defendant Kasi for Rs. 70,000. The transaction was carried out by a registered deed of sale dated 5th January 1931, and on completion Kasi paid the purchase price by a cheque on the National Bank of India, which was duly paid:

subsequently, though there was some controversy about this, he took possession. The cheque was drawn by a local banking firm R. M. P. M. which carried on an extensive business in Rangoon. Kasi had at one time been the "agent" of this firm: but had been succeeded in this post by one Somasundaram. Kasi to raise the Rs. 70,000 had borrowed the amount in different sums from five Chettiar firms who thereupon had made this sum available for him in the R. M. P. M. bank. The bank drew a cheque for the amount on the National Bank of India in favour of Kasi, who endorsed it to the plaintiffs' firm, and all the parties attended at the office of the National Bank where the cheque was paid.

2. It is not now disputed that the sale was for a fair value, and that Subbaya had authority as partner to sell. Both these issues were originally raised by the plaintiffs, but were determined against them by the trial Judge. The transaction so far appears a normal and regular transaction. But the plaintiffs allege that the apparent sale was fictitious and entered into under a conspiracy between Kasi and Subbaya to defraud the plaintiffs' firm. It is alleged that the consideration money was returned to Kasi by Subbaya the same day, with the result that the firm lost their property without the benefit of the price, while Kasi enjoyed the property and the price. One of the difficulties in the case has been to appreciate the nature of this conspiracy. It is plain from the plaintiffs' case that Kasi borrowed the Rs. 70,000 and made himself personally liable for the amount, and that he did not use the returned money to pay off the lenders; and there is no evidence that he applied any part of it for the benefit of Subbaya. and it would appear strange that Subbaya should hand over property of the firm in which he had one-eighth interest to Kasi for nothing. The suggestion made was that the scheme enabled Subbaya to enter the price as a credit to the firm, and then by book-keeping entries wipe out a debt due to the plaintiffs' firm from the Letpadan firm of which he and his elder brother were partners, debiting himself with the whole price. This is in fact what he did, but it hardly seems to require the assistance of Kasi : especially as in two other cases Subbaya seems to have dealt similarly with sums received from the firm, for one of which cases he was eventually sentenced to imprisonment. However whatever the motive, it is said that Kasi undoubtedly did receive the money back, for the next day it is alleged that he took Rs. 70,000 to the R.M.P.M. bank, and received from the bank four cheques, one on the Central Bank, one on the Allahabad Bank and two on the National City Bank for Rs. 66,000. If in fact Kasi was in possession of Rs. 70,000 the next day there can be no doubt, whatever the motive of the fraud, that the plaintiffs' case is proved. Subbaya gave evidence that he returned the money to Kasi, but as Subbaya was in any view an

accomplice, had himself been convicted of fraud on the plaintiffs' firm, and had by the terms of a compromise in the partnership suit brought by Nagappa a substantial interest in the success of the plaintiffs' claim his evidence of itself is not of much value. Everything therefore seemed to turn on proof that these cheques were issued for cash to Kasi on 6th January.

3. The kind of business represented by these cheque transactions is said not to be unusual in this kind of bank. The bank being ready to receive cash, takes an amount offered and gives to the temporary customer a cheque drawn on one of the recognised banks. There is an understanding that the cheque is not to be presented till a definite date: on which date it will either be presented to the bank on which it is drawn or returned to the Chettiar bank which issued it in exchange for cash. The cheque is drawn in the name of the customer : there is a diary kept recording the cheque and the due date: but according to the evidence there is no other entry kept in the bank's books other than a debit in the day book of a cheque on the named bank. What happens to the cash account which has temporarily been increased by the sum paid for the cheque was not explained. It was in respect of business of this nature that Kasi is said to have come to the bank on 6th January, and paying over Rs. 70,000 to have received cheques for Rs. 66,000 and to have created a credit for the balance in favour of Ganesh and Co., a firm with which he was intimately associated. Kasi denies that he received the money from Subbaya on the 5th, that he went to the bank on the 6th, or received any cheques. There is no doubt that cheques for Rs. 66,000 drawn on the banks mentioned above are entered in the books of the R. M. P. M. bank on 6th January, but there is nothing in the books to identify them with Kasi. Neither the cheques nor the counterfoils, nor the diary were produced in evidence. There was evidence of two witnesses that cheques were given to Kasi on that day to which reference will be made later. But the plaintiffs' case did not rest alone on the entries of the cheques on the day on which they were issued. They were returned unpaid at different dates within about a month : and on those dates it is said that there are entries showing that the cash which on their return would be available to Kasi was used in creating credits at his request in favour of firms in which he was interested: and in one case in creating a temporary loan of Rs. 7500 by him to the bank not on this occasion by means of a cheque. There is no separate account opened in respect of each cheque: no credit therefore is set against the amount of the cheque: none of the entries are in terms associated with Kasi, except the loan account of Rs. 7500 : and in respect of the original entry of that amount in the daybook there is an unfortunate blot which might serve to conceal the full initials of the name referred to. In the ledger the entry appears

in Kasi's full names. Kasi denies that he ever made such a loan: and as to the other amounts gives explanations which were not disproved, indicating that they had nothing to do with the Rs. 70,000. A substantial balance of the cheques remains with no indication at all as to what happened to it.

4. As to the parol evidence, Somasundaram who was "agent" of the bank, and appears to be an independent and respectable witness gave evidence that Kasi came to the bank on the 6th with money and wanted cheques. He referred him to the clerks whose duty it was to deal with the matter. He does not know how much money he brought, or what cheques he got. Another clerk, Subramanian, was more definite. According to him, Kasi conducted the actual transaction with him : brought him Rupees 70,000 which was laid on his desk : and received the cheques. He said he could not state the contents of the cheques without seeing them. It appeared, however, from other evidence that Subramanian, who was only a junior clerk, was not entrusted with the duty of handling cash: and it was said that he had been discharged from a former employment for dishonesty. The trial Judge placed no reliance on his evidence. For the defendants evidence was given by another clerk of the banking firm, Paraparam, also apparently an independent witness of integrity. He was senior to Subramanian and with three other clerks was in charge of cash. He had supervised the transaction on 5th January when Kasi was given the cheque for Rs. 70,000. He says that Kasi did not bring any money to the bank on 6th January : and that the bank did not issue any cheques to Kasi on that day or subsequently. There is thus a complete conflict between two responsible clerks in the Chettiar bank on this vital question of the cheques. But as regard Somasundaram the defendants have a legitimate criticism to make, viz., that he had given his evidence at an early stage in the case and his evidence was the first indication that the defendants had that the plaintiffs case was that the purchase price had been paid and then returned. Their Lordships are not prepared to decide this case at this stage on the footing that such a case was not open on the pleadings. But when the evidence was returned the defendants not unnaturally applied for further opportunity of cross-examining Somasundaram in the light of the books. Unfortunately this was refused and the refusal was upheld by the High Court on revision. His evidence on this point is obviously of less weight than if it had been fully tested. In the result as it appears to their Lordships the whole case depended upon the contents of the cheques. If drawn in favour of Kasi he must fail : if drawn in favour of strangers unconnected with Kasi the plaintiffs fail. But neither cheques nor counterfoils were produced. Nor is there satisfactory evidence that they had been lost or destroyed. Their Lordships would be reluctant to decide the case on any technical

objection that the evidence as to the cheques was inadmissible in their absence. But on the evidence as it stood there was so little reliable evidence to connect Kasi with the alleged dealings with bank on and after 6th January that the case of fraud must fail.

5. There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. Fraud of this nature, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. The High Court were justified in holding that the trial Judge's finding was largely based on suspicion and conjecture. There were documents unaccounted for which would conclusively prove the issue one way or the other. In their absence the High Court's decision on the merits was right and cannot be disturbed. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.