CALCUTTA HIGH COURT

Jadu Nath Poddar

Vs

Rup Lal Poddar

(Raimpini, C.J. Mookerjee, J.)

22.03.1906

JUDGMENT

Rampini, J.

1. In the suit, out of which this appeal arises, the plaintiff seeks to obtain a declaration of his right to certain property and to recover possession of it from the defendants. He had executed a deed of relinquishment in favour of the defendants) in which he alleged that in respect of that property he was the benamidar of the defendants, and he now sues to have it established that this deed of relinquishment was a colourable deed, which he executed to save his property from being sold in execution of decrees obtained against him by his creditors. He alleges that his intended fraud was not carried out because he won the appeals he preferred in the suits with his creditors and so he desires to get hack possession of his property. The defendants traverse his allegations. The Lower Appellate Court has given the plaintiff a decrees.

2. The defendants appeal on two grounds--(1) that the plaintiff is estopped from alleging the deed of relinquishment to be colourable and (2) that the plaintiff is not entitled to rescind a dead he executed for the purpose of perpetrating fraud.

3. There is clearly no estoppel in this case. The defendants were in no way misled and thereby induced to do anything or alter their position. Further, the rule laid down by this Court is that, when the intention to commit fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is benami. This rule has no doubt been attacked by the Madras High Court in the case of *Yaramati Kriahnayya v. Chundru Papayya*[1] and a different rule has been laid down by the Bombay High Court in *Chenviroppa v. Puttappa*[2] but I see no reason to dissent From the rulings of this Court on the subject. I would therefore dismiss this appeal with costs.

Mookerjee, J.

4. On the 29th November 1898, the plaintiff executed a deed of relinquishment in favour of the first defendant, by which he declared that the properties in dispute in this litigation belonged to the latter. On the 14th January 1899, the first defendant executed in favour of the second defendant a conveyance in respect of a half share of these properties, as if he-was the beneficial owner entitled to deal with them, The plaintiff now seeks to recover possession upon declaration that the deed of relinquishment was not intended to and did not confer any valid title upon the first defendant, and that consequently the second defendant did not acquire any rights under hispurchase. It has been found as a fact that the second defendant is not a bond fide purchaser for value without notice, and that at the time he made his purchase, the first defendant was not competent to deal with the properties. The accuracy of this finding has not been challenged before this Court. The defendants, however, contended in the Courts below, and they have repeated the. objection in this Court, that the plaintiff is not entitled to any relief because at the time when he executed the deed of relinquishment, he did it for the express purpose of defrauding his creditors. The plaintiff admits that shortly before the deed was executed, some persons, who alleged themselves to be his creditors, had obtained decrees against. him, against which he preferred appeals. He apprehended that during the pendency of the-appeals, the decree-holders might take out execution, and with a. view to protect his properties he executed this deed of relinquishment as a shield against those creditors. As a matter of fact, no execution was ever taken out, and the appeals instituted by (he-plaintiff were ultimately successful, with the result that the alleged claims of the creditors were held to be unfounded and were dismissed. Under these circumstances, the plaintiff contended that his. conduct was not such as to preclude him from establishing the truth and recovering possession of the properties. The Courts below have concurrently adopted this view of the matter and have given the plaintiff a decree for possession. The defendants have appealed to this Court, and on their behalf it has been contended that as the plaintiff executed the deed of relin-quishment in order to defraud his creditors, he has no standing in a Court of Equity, which will not extend relief to a fraudulent grantor. In support of this proposition, reliance has been placed upon the cases of *Chenvirappa v. Puttappa (1887) I.L.R. 11 Bom. 708(Supra), Rangammal v. Venkatachari*[3] *affirmed on appeal*[4] *and Yaramati Krishnayya v. Chundru Papayya (1897) I.L.R. 20 Mad. 326(Supra).* The learned vakeel for the appellant has further argued that the contrary view taken in the case of *Sham Lull Mitra v. Amarendra Nath Bose*[5]*,* where it was held that it is open to a party to show that a document executed, but not carried into effect, is colourable, was not necessary for the purposes of that decision and cannot be supported upon the authorities. The learned vakeel has invited us to refer the question raised to a Full Bench for decision. There can be no doubt that there has been considerable diversity of judicial opinion upon the matter, and it Is necessary, therefore, to examine the various authorities and the principles upon which they are founded.

5. One of the earliest cases in these provinces in which the question was raised as to how far the

grantor of a fraudulent deed is entitled to ask a Court to relieve him of its consequences is that of *Ram Indar Deo Rai. Roop Narain Ghose*[6] *I*n that case A who was indebted to 11, executed a mortgage in his favour, but with a view to defraud other creditors antedated it by eight years. A further gave a wairant of attorney to B to enable B to confess judgment on behalf of A in a suit by B to enforce the security as against A. The mortgage was intended to be fictitious and was granted with a view to screen the property from the creditors of A. B also executed an engagement in favour of A, which recited the true nature of the whole transaction. Subsequently, B sued upon the mortgage, obtained a decree upon confession of judgment, had the property put up to auction, purchased it himself and instead of holding it as trustee for A, later on conveyed it to a stranger. A sued to recover the property. The Sudder Court dismissed the suit upon two grounds-first, that the plaintiff could not. recover the property from a bond fide purchaser for value without notice, and, secondly, that the plaintiff could not ask to be relieved of the consequences of his own fraudulent act. With regard to this second ground, the Court observed that it is a general principle of law that a man entering into a fraudulent agreement with another of this nature to defeat the rights of third parties, creditors for instance, shall not, himself or his representatives, be relieved against the consequences of his own fraudulent act, though the cieditors may, and if his partner in the fraud takes advantage, ever so dishonestly, of the power, which has been put into his hands, a Court of Justice will not interfere on behalf of him or his heirs. With regard to this case, two points deserve attention, namely, first, that apparently the fraudulent object in view was not carried out, and, secondly, that if the plaintiff had been allowed to recover the property, either the first transferee from him would have lost the sum justly payable to him or the second transferee, who had taken without notice of the secret agreement, would have lost his money.

6. A similar question was raised in *Roushun Khatoon v. Collector of Mymensingh*[7] A sued to recover property from B, which had been conveyed to him under a secret engagement that he was to hold it for the benefit of A. The Sudder Court dismissed the suit on the ground that the sale, though nominal, was effected by a deed duly drawn out, attested and registered, possession given by mutation in the Revenue Registers, and all this done to deceive the public and to evade a rightful process of law. The decision was rested on the ground that no person can take advantage of his own wrong. It may be observed that the suit was resisted not only by It, but also by persons, who had purchased at a sale held by the Collector, to whom B had given the property as a security for due payment of the Government revenue.

7. In the case of *Brihmo Mye Dibeea v. Ram Dolab Hor*[8] the cases just referred to were followed. A transferred properties to B with a view to save them from the claim of his creditors. The creditors took out execution, attached the properties and were successfully met with a claim by the transferee. A then sued to recover the property from B, and a purchaser claiming under him.

A Full Bench of the Sudder Court held that the Court will never sanction or in any way give the aid of its authority to a party who, by his own admission, founds his claim upon fraudulent agreements contrived in order to defeat the ends of justice. It may be remarked that the fraud intended to injure the rights of the creditors had been successfully accomplished, and also that the transferee from B claimed to be a bond fide purchaser for value without notice.

7. In the case of *Rajnarain Roy v. Jugunuath Prashad Mullck*[9] A sued to recover property, to which he claimed title by purchase from X. It was found that B was the real owner of the property, and had executed a conveyance in favour of X, complete in form, but nominal in intention and effect, with a view to escape the pressure of the claims of his creditors. The Sudder Court held that A was entitled to succeed, and observed that a party having made a transfer in fraud cannot reclaim property from the transferee upon tender of proof that the documents were not bond fide or sue to treat the acts of the transferee as null and void. It will be observed that the plaintiff was a bond fide purchaser for value from X, and on that ground alone was entitled to succeed; at the same time, there was nothing to show that the fraud contemplated had been carried into effect.

8. In the case of *Koonjee Singh, v. Jaakee singh*[10] A sued to recover property, which was alleged to have been purchased by him in the name of B, with a view to save it from his creditors. The majority of the learned Judges held that the suit was not maintainable as the claim was founded on a deed drawn out benmni in order to deceive creditors. The dissentient Judge however, held that as the contemplated fraud had not bee, carried out, the plaintiff was entitled to succeed, and he pointed out that, if the suit was decreed, instead of creditors of the plaintiff being defrauded, they must be benefited, because if the property be declared to belong to plaintiff, his creditors may take it in. satisfaction of their claim. I may point out that the view thus indicated accords with the opinion of the Supreme Court of the United States in Black v. Darling(1890) 140 U.S. 239, namely, that in an action to recover money deposited with the defendant, it is no valid defence to urge that the plaintiff made the deposit with the intent to cheat and defraud his own creditors, because, as soon as the plaintiff recovers, his creditors are likely to be benefited by the money.

9. In *Bhowanny Sunkur Pandey v. Purem Bebee*[11] the Sudder Court ruled upon the authority of the cases of *Ram Indur v. Roop Narain* [12]New Ed 149 and *Brihmo Mye v. Ram Dulab*[13] that no relief will be given to a party suing for the purpose of setting aside a benami sale, avowedly made with the fraudulent intention of defeating the rights of a third party, who had a claim against the property. The report does not show whether the plaintiffs had succeeded in the scheme which had been plauned with a view to enable them to evade payment of their just debts.

10. In the case of *Ram Soonder Sandial v. Anund Nath Roy*[14] the Sudder Court held, following

the decision in *Rajnarain v. Jugunnath Pershad* [15]that a plaintiff was entitled to succeed as against a defendant, who admitted that ho had made a fictitious transfer in favour of the plaintiff with a view to evade payment to his own creditors. It will be observed that in this case the plaintiffs were allowed to succeed, although it was found that they were not the beneficial owners and were cognisant of all the particulars connected with the scheme for defrauding the creditors. There was nothing to show that the intended fraud had been actually practised against the creditors, and yet the Court held that the ostensible transfer could not be legally disputed. Substantially the same view was taken in *Ram Lal v. Kishan Chunder*[16] These cases, however, are inconsistent with the earlier decision of the Sudder Court in *Birj Mohun Sein v. Ram Narsingh Rai*[17] where the defendants, who had collusively created a fictitious taluk in favour of the plaintiffs in order to evade their liability under a decree passed against them in another suit, were allowed to plead and successfully, their previous collusion in answer to the unfounded claim of the plaintiffs.

11. A view similar to the one taken in the last case was adopted by the Sudder Court in *Obhoy Churn Ghuttuch v. Treelochun Chatterjee*[18] It was ruled upon the authority of *Roberts v. Roberts*[19] and *Montefiori v. Montefiori*[20] that, although a deed may be avoided on the ground of fraud, the objection must come from a person neither party nor privy to it, for no man can allege his own fraud to invalidate his own deed. The defendants admitted in answer to the claim that they had executed a deed of sale in favour of the plaintiffs, but pleaded that it was a purely fictitious transaction resorted to for the purpose of defeating the claims of parties, who held decrees against the vendors. It was contended that, as the persons through whom the plaintiffs derived title were in pari delicto with the defendants, the latter should not be debarred from pleading the fictitious nature of the transaction. The Sudder Court held that a plea of this description could not be heard in a Court of Justice, and observad that it was well that it should be understood that, when people execute fictitious deeds for the purpose of defeating their cieditors, avoiding an attachment, or effecting any other fraudulent purpose, they place themselves completely at the mercy of the person in whose name the fictitious conveyance is made out, and that their plea of the tiansaction beina; a benami one will not be listened to. This case therefore proceeded upon the doctrine laid down by Lord Mansfield in *Montefiori v. Montefiori (1762) 1 W.R. 363(Supra)* that it was immaterial whether the fraud is alleged as a matter of defence or as a ground of action, because "no man shall set up his own iniquity as a defence, any more than a cause of action."

12. The cases analysed above are based on the doctrine that, where a party admits that he has made a fictitious transfer of his property to another with a view to effect a fraud, but asks to have his act undone, the Court would refuse relief and would leave the parties to the consequence of their misconduct, dismissing the claim, when the suit was brought by the real owner to get back

possession of his property and refusing to listen to the defence, when he set it up in opposition to the person whom he had invested with the legal title. The rule thus stated was subsequently adopted, in the cases of Hurry Sunker Mookerjee v. Kali Coomar Mookerjee (1864) W.R Gap. 265(Supra), Alok Scondry Gooplo v. Horo Lal Roy (1866) 6 W.R. 287(Supra) and Keshub Chunder Bern v. Vyasmonee (1867) 7 W.R. 118(Supra). In some of these oases, no doubt, the fraudulent object had been carried into effect, while in others the attempt had failed; but it was expressly stated in Hurry Sunker Mookerjee v. Kali Coomar Mookerjee (1864) W.R. Gap. 265(supra) that it was immaterial whether any creditors of the transferor were actually defrauded, and in Alok Soondry Goopto v. Horo Lal Roy (1866) 6 W.R. 287(Supra) Jackson J., with the concurrence of Sir Barnes Peacock C. J., observed that, as Courts of Justice are designed for the protection of honest suitors and the enforcement of just claims, they are not available as machinery to aid the carrying out of schemes of fraud. This view might seem to receive some apparent support from the observations of the Judicial Committee in *Azimut v. Hurdwaree*[21], *Sookheemonee Das-see v. Mohendro Nath Dutt*[22] and Ramanugra v. Mahasunder (1873) 12 B.L.R. 433(Supra). In none of these cases, however, did the question arise directly for consideration, nor was it actually decided. It may be added that the Courts went so far as to hold that the rule was applicable not only to the parties to the transaction, hut also to persons, who take under the real owner, whether as heirs or pur-chaseis; see Luckhee Narain Chuckerbutty v. Taramonee Dossee (1865) 3 W.R. 92(supra), Furrceeloonisa v. Ruhamut (1865) 4 W.R. 37(Supra), Garib Hassain v. Asimunnissa (1862) Hay. 528(Supra), *Purikheet Sahoo v. Radha Kishen Sahoo* [23]and *Katee Nath Kur v. Doyal Kristo Deb (1870) 13 W.R. 87(Supra).* In the case last mentioned, however, Sir Charles Hobhouse J. expressed considerable doubt as to the correctness of the view. and assented to it on the ground that it was supported by a considerable body of authorities and might be regarded as desirable in the circumstances of this country.

13. About this time the Judicial "Committee decided the case of Ram Surun Singh v. Mussumat Pranpeareei (1870) 13 M.I.A. 551 : 15 W.R.P.C. 14(Supra), in which it was held that, where in a suit two of the defendants in their answer made a statement in respect of an alleged mortgage transaction with the object of defeating the unfounded claim of the plaintiff, it was open to either of these two persons in a subsequent litigation, in which they were arrayed as plaintiff and defendant, to plead that the statement in the joint answer in the former suit was false and intended as a fraud on the third party. Lord Justice James observed in delivering the' judgment of their Lordships that it is open to a mortgagor to deny that the money the receipt of which is formally acknowledged under his band and seal was actually advanced, and that he could do so notwithstanding that he had made a contrary statement in a previous litigation with, a third party; for a pleading by two defendants against the suit of another plaintiff can never amount to an estoppel as between them. A similar principle was adopted by the Judicial Committee in the case of Mussumat Odey Koowur v. Mumsumat Ladoo (1870) 13 M.I.A. 585 : 15 W.R. C. 16 : 6

B.L.R. 283(supra). These decisions were relied upon by Sir Richard Couch C. J. in Sreematty Debia Chowdhnrain v. Bimola Soonduree Debia (1874) 21 W.R. 422(Supra) as establishing that-even where the object of a bitnami transaction is to obtain a shield against a creditor, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the benami, and that in truth it still remained with the person, who professed to part with it. The same view was also taken in the cases of Phool Bibee v. Goor Suran Doss (1872) 18 W.R. 485(Supra), Sreenath Roy v. Bindoobashnee Debia (1873) 20 W.R 112, Gopeenath Naik v. Jadoo Ghose (1874) 23 W.R. 42(suupra), *Bykunt Nath Sen v. Goboollah Sikdar*[24] *and Mukim Mullck v. Ramjan Sirdar*[25] Later on, many of the authorities on the subject were reviewed in *Shamlall Mitra v. Amarendro Nath Bone*[26]and the learned Judges, while approving of the rule laid down by Sir Richard Couch in Sremutty Delia Clowdhurain v. Bimola Soonduree I ebia (1874) 21 W.R. 422(suupra), indicated that there might be a substantial distinction between cases in which the fraud had been carried into execution and cases in which : the contemplated fraud had not gone beyond the stage of intention. This distinction was subsequently adopted as well founded in the cases of *Kali Charan Pal v. Rasik Lal* Pal[27] Goberdhan Singh v. Ritu Boy (1896) I.L.R. 23 Calc. 962(suupra), *Banka Behary Bass v. Raj Kumar Dass* [28]and *Gonnda Kuar v. Lala Kishun Prosad* [29]It is clear, therefore, that, although in the earliest cases a very stringent rule was laid down to the effect that a person, is not entitled to ask a Court of Justice to afford him relief from the consequences of his own misconduct, the later cases enunciate a more lenient rule that the real nature of the transaction ought to guide the Court in determining the real rights of the parties. Upon this rule has been engrafted the distinction that, although where the intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality, which he has once cast off, in order to defraud others, yet if he has not defrauded any one, the Court will not punish his int-ntion by giving his estate away to another, whose retention of it, is an act of gross fraud. In my opinion, this rule is eminently just and ought to be adopted as based on sound equitable doctrine. It is obvious that, where the fraudulent purpose has actually been accomplished by means of the colourable grant, the maxim applies--" In pari delicate potiorest conditio possidentis." But where the fraud has not been accomplished, can this maxim be legitimately applied? A makes a fictitious grant to B with a view to defraud his creditor C, but the creditor is not actually defrauded. So far as the transaction itself is concerned, the parties no doubt stand in the same position; A had a fraudulent intention and B was willing to aid him in carrying that intention into effect. But if the intention is not carried out and B dishonestly sets up a title to the property, his guilt is obviously greater than that of A, and I cannot appreciate upon what ground the Courts can refuse to afford relief to A as against B, whose roguery, as has been well said, is even more complicated than that of A. To refuse relief in such a case would be to encourage a double fraud on the one side (B) to punish the single fraud on the other (A): Gowan v. Gowau (1860) 30 Mo. 476(Supra). It further appears

to be clear that, if we adopt this view and hold that fraudulent intention is the sole determining element, irrespective of the question whether or not that intention has been accomplished, the result would be that the grantor would be punished, even though he abandoned his fraudulent purpose. I am aware of no case where the theory, which underlies the rule in its most strigent form, has been more vigorously explained than in Church v. Muir (1869) 33 N.J. Law. 319(Supra), where Chief Justice _ Beasley observed as follows: "A contract, the purpose of which is to protect the debtor against the just claims of creditors, is an immoral act. Such an affair is inimical to social policy. In their essence and in their effects such contracts are as immoral, as pernicious, as many of those which the law has declared to be utterly void. In these respects, how are they to be distinguished from contracts, which have been so often judicially condemned, not on account of any enormous immorality, but on the score of their inconsistency with public interest and good government. They are hostile to. fair dealing and commercial honesty, and 011 this account should be subjected to the bar of outlawry." This condemnation of fraudulent conveyances may be conceded to be just, but it seems to me that the consequences may be easily carried too far. In my opinion, mere intention, not carried into effect, ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights; and if be either abandons his fraudulent purpose before it is accomplished, or pays his debs to the full value of the property conveyed, the fraud should be regarded as purged; see Carll v. Emery (1888) 148 Mass. 32 : 18 N.E. Rep. 574 (Supra) and Drinkiwater v. Drinkwater (1808) 4 Mass. 354(supra), in the former of which cases Daveus J., in delivering the judgment of the Supreme Court of Massachusetts, observed as follows: It would seem equally clear that, when a party, who has -transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself, in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party, who has been a participant in the fraudulent transaction, by reason of such participation should be able to hold the property, the possession of which he had so acquired and thus prevent it from being devoted to its legitimate uses.

14. If we apply these principles to the case now before us, the inference is irresistible that the plaintiff ought to succeed. At the time when the plaintiff executed the deed of relinquishment, he apprehended trouble from creditors, who had obtained decrees against him. These decrees, as I have already stated, were subsequently reversed, and it was established that the claims, which they had set up, were unfounded. Upon what principle can it be maintained that the plaintiff was guilty of fraud, which disentitles him to protection from a Court of Equity? I am fortified in the view I take by the reasoning contained in the decision in the case of *Baker v. Gulman (1868) 52 Harbour (N.Y.) 36(Supra).* A sued B for slander. B to protect himself conveyed property to C, who agreed to reconvey; B defeated the slander suit. Subsequently C betrayed the trust, and refused to give back the property. The Supreme Court of New York held that 0 must reconvey.

Johnson J. observed (hat as the plaintiff in the slander suit was ultimately defeated, he had. no lawful claim as a creditor, and the conveyance could in no sense be said to be fraudulent, because it was made to hinder a person, who had preferred a claim which had no foundation in law or justice and the verity of. which was not established by a judgment of a competent Court. To extend the operation of the rule to a cafe of this description does not appear to me to be defensible upon any intelligible ground either of law or of public policy. The learned vakil for the defendants-appellants strenuously contended that the view taken by Sir Richard Couch in *Sreemutty Delia v. Bimola Soonduree Debia (1874) 21 W.R. 422(Supra) is based upon the decision in Symes v. Hughes (1870) L.R. 9 Eq. 476(Supra)* which, as well as the case of Taylor v. Bowers (1876) 1 Q.B.D. 291(suupra), has been doubted by Fry L. J. in Kearley v. Thomson (1890) 24 Q.B.D. 742(Supra). He also referred to a passage from Kerr on Fraud and Mistake, third edition, 405, in which the learned author questions the soundness of the distinction taken between cases, where a deed executed or a conveyance made has performed its office and cases where the deed or conveyance has not been used for the purpose for which it was executed. With all respect for the learned author, I am unable to adopt his criticism as sound in principle, and there is undoubtedly high authority in support of the contrary view. Thus in Birch v. BIagrave (1755) Amb. 264 : 27 Eep. Rep 176 a person was allowed to recover property, which had been assigned away in order to avoid service in the office of a Sheriff, when it was found that he was excused service not because he actually pleaded that he had no property in the country, but because he ultimately paid the fine. Lord Hardwicke drew a distinction between a case in which the unlawful intention had been carried into execution and a rase in which no fraud was actually committed. The same distinction is snpported by the cases of Cottington v. Fletcher (1740) 2 Atk. 156 : 26 Eng. Rep. 498, Young v. Peachey (1741) 2 Atk. 254 : 26 Eng. Rep. 557, Platamone v. Staple (1815) G. Coop. 250; 35 Eng.Rep. 548, and was recognised in In re Great Berlin Steam Boat Co. (1884) 26 Ch. D. 610 and in the observation of Lord Westbury in Tennent v. Tennent (1870) L.R. 2 H.L. S.C. 9. In Cecil v. Butcher (1821) 2 J. and W. 564; 22 R.R. 213 Sir Thomas Plumer M. E. reviewed the earlier authorities, and concluded that the fact that the deed had not been acted upon and the illegal object had not been carried into execution was an element to be taken into consideration. To the same effect are the cases of Danes v. Olty (1865) 35 Beav. 208 and Manning v. Gill (1872) L.R. 13. Eq. 485 in which persons were allowed to recover property, which they had alienated, in order to avoid the effects of conviction for a felony, which the grantors supposed they had committed, but which they had not and could not have committed.

15. It is manifest, therefore, that there is a considerable body of authorities in favour of the view indicated in Symes v. Hughes (1870) L.R. 9. Eq. 475 upon which Sir Richard Couch relied, namely, that "where the purpose for which the assignment was made is not carried iuto execution and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property back from the assignee, who has given no

consideration for it." There is ample authority that in such cases equity will not permit the assignee to work a fraud and retain the property himself by setting up the Statute of Frauds as a defence. [Haigh v. Kaye(1872) L.R. 7 Ch. 469, Lincoln v. Wright (1859) 4 DeG. and J. 16, and Childers v. Childers(1857) 1 DeG. and J. 482.] I may further observe that the distinction between the effect of fraud merely intended and a fraudulent purpose actually accomplished has been recognised by the Indian Legislature in the Indian Trusts Act (II of 1882), Section 84 of which provides as follows: "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

16. As pointed out in Story on Equity Jurisprudence, vol. I, Section 298, the test is whether the parries are truly in pari delicto, and it appears to me that, when the fraudulent intention has not been carried into effect and the nominal transferee dishonestly sets up a title for himself, the parties cannot rightly bo regarded as in part delicto. I am not unmindful that the contrary view has been maintained by eminent Judges; see for instance Bateman v. Ramsay (1837) Saussc & Scully 459, Hamilton v. Bali (1839) 2 Ir. Eq. Rep. 191 and McUrdy v. Martin (1842) 5 Ir. Eq. Rep. 515; but for the reasons I have already stated, I am unable to adopt the view laid down in those cases. I may add that this view was adopted by the Allahabad High Court in Param Singh v. Lalji Mal (1877) I.L.R. 1 All. 403 which perhaps goes too far, and by the Bombay High Court in Hanapa v. Narsapa (1898) I.L.R. 23 Bom. 406 and Babaji v. Krishnaa (1893) I.L.R. 18 Bom. 372, the last mentioned of -which, cases was followed by this Court in Preonath Koer v. Kazl Mahomed Shazid (1903) 8 C.W.N. 620. I am not satisfied that the Madras High Court did really take a different view in the cases of Rangamnial v. Venkatachari (1896) I.L.R. 20 Mad. 323 and Yaramati Krishnayya v. Chundru Papayya (1897) I.L.R. 20 Mad. 326. Upon a careful examination of the judgments in Chenvirappa v. Puttappa (1887) I.L.R. 11 Bom. 708, Rangammal v. Venkatachari (1896) I.L.R. 20 Mad. 323 and Yaramati v. Chundru (1897) I.L.R. 20 Mad. 326, I am rather inclined to hold that they dissent only from the rule laid down by Sir Richard Couch in somewhat broad and unqualified terms in Sremutty Debia Ohowdhurain v. Bimoila Soonduree Debia (1871) 21 W.R. 422, but are really in harmony with the principles embodied in Goberdhan Singh v. Ritu Roy (1396) I.L.R. 23 Calc. 962 and Banka Behary Bass v. Rajkumar Bass (1899) I.L.R. 27 Calc. 231. If, however, the learned Judges intended to affirm a rule inconsistent with the decisions last mentioned, I regret I am unable to adopt such view. (With all respect I am unable to see how the view taken by this Court enables a party to a dishonest trick, by which his creditors may have been defrauded, to get himself reinstated, when his purpose has been served. On the other hand, it seems to me that, if the Court refuses to aid a plaintiff, who has made a fictitious transfer of his property from an improper motive, but has not carried into effect his intention, the Court really becomes an instrument to aid the defendant in

his fraudulent claim to possession contrary to the real agreement with the plaintiff. I fail to appreciate how in such an event a Court of Equity can rightly hold that the plaintiff must suffer, because he had an improper motive, though no one has suffered by reason thereof and the conduct of the defendant is beyond question unconscionable; see Lobo v. Brito (1897) I.L.R. 21.Mad. 231.

17. There is another aspect of the case before me, which calls for notice. The plaintiff did not execute a conveyance in favour of the defendant, but gave him a deed of relinquishment. Now it is well settled that title to land cannot pass by admission, when the Statute requires a deed; see Waldron v. Harvey (1904) 102 Am. St. Rep. 959 and McNeelly v. S.R.O. Coy *(1903) 62 L.R.A. 562 (Supra)*. It is obvious therefore that the mere execution of the deed of release did not create any title in the defendant. No doubt under certain circumstances the plaintiff might be estopped from setting up a title in himself; but as the nominal transferee and the purchaser from him were both. aware of the true nature of the deed of relinquishment they can not set up a title by estoppel. How has then the title, which was vested in the plaintiff, passed away from him? The deed of relinquishment does not operate as a conveyance or even as a contract to convey the interest of the plaintiff nor does it operate by way of estoppel. As observed by their Lordships of the Judicial Committee in Mussnmat Oodey Koowur Mussumat Ladoo (1870) 13 M.I.A. 583; 15 W.R.P.C. 16; 6 B.L.R. 283 there is no other way, in which, it can operate. I must hold accordingly that the plaintiff has still an enforceable title and there is nothing to prevent him from recovering the property in suit.

18. The result, therefore, it that the decree made by the Courts below must be affirmed and this appeal dismissed with costs.

Cases Referred.

1(1897) I.L.R. 20 Mad. 326
2(1887) I.L.R. 11 Bom. 708
3(1895) I.L.R. 18 Mad. 378
4(1896) I.L.R. 20 Mad. 323
5(1895) I.L.R. 23 Calc. 460
6(1814) 2 Sel. Rep. 118; New Ed. 149
7(1816) Beng. S.D.A. 120
8(1819) Beng. S.D.A. 276
9(1851) Beng. S.D.A. 774
10(1852) Beng. S.D.A. 838
11(1853) Beng. S.D.A. 630
12(1814) 2 Sel. Rep. 118

13(1849) Beng. S.D.A. 270
14(1856) Beng. S.D.A. 512
15(1851) Beng. S.D.A. 774
16(1860) Beng. S.D.A. Vol. I, 436
17(1829) 4 Sel. Rep. 341 : New. Ed. 435
18(1850) Beng. S.D.A. 1639
19(1819) 2 B. and Ald. 367 : 20 R.R. 477
20(1762) 1 W.R. 363
21(1870) 13 M.I.A. 395, 402 : 14 W.R.P.C. 14
22(1869) 13 W.R.P.C. 14 : 4 B.L.R.P.C. 16
23(1865) 3 W.R. 221
24(1875) 24 W.R 391
25(1881) 9 C.L.R. 61
26(1895) I.L.R. 23 Calc. 400
27(1894) I.L.R. 23 Calc. 962 (note)
28(1899) I.L.R. 27 Calc. 231
29(1900) I.L.R.. 28 Calc. 370