Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of T. P. Petherpermal Chetty v. *R. Muniandy Servai and others, from the Chief Court of Lower Burma; delivered the 18th March* 1908.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

In this case an action was originally brought by R. Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherpermal Chetty, the uncle and predecessor of the Appellant (hereinafter called "Petherpermal the elder"), and two formal defendants, R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy District, Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568. 12. 0.

On the 11th June 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the above-mentioned lands to Petherpermal Chetty the elder, a money-lender

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residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568. 12. with interest, and other relief.

Petherpermal the elder filed his defence, and, the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present Suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear that, whatever may have been the design to effect which the deed of the 11th June 1895 was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July 1897 R. Muniandy Servai and Petherpermal the elder executed a deed of release by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case, that the deed of the 11th June 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by Counsel on behalf of the Appellant that, on an issue of fact such as this, the finding of the Judge who tried the case and saw the witnesses, approved, as it was, upon appeal, should under the circum-

stances of the case be disturbed. The only questions, therefore, for their Lordships' decision are—

1. Is the Plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

2. Is his right of action barred by the 91st Article of Schedule II. to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus:—

> "446. . . . . Where a transaction is once "made out to be a mere *benami* it is evident that "the *benamidar* absolutely disappears from the title. "His name is simply an *alias* for that of the person "beneficially interested. The fact that A has assumed "the name of B in order to cheat X can be no reason "whatever why a court should assist or permit B to "cheat A. But if A requires the help of the court "to get the estate back into his own possession, or "to get the title into his own name, it may be very "material to consider whether A has actually cheated "X or not. If he has done so by means of his *alias*, "then it has ceased to be a mere mask, and has "become a reality. It may be very proper for a "court to say that it will not allow him to resume "the individuality which he has once cast off in "order to defraud others. If, however, he has not "defrauded anyone, there can be no reason why the "court should punish his intention by giving his "estate away to B, whose roguery is even more "complicated than his own. This appears to be "the principle of the English decisions. For "instance, persons have been allowed to recover

> " property which they had assigned away. . .
> " . . . . where they had intended to defraud
> " creditors, who, in fact, were never injured. . . .
> " But where the fraudulent or illegal purpose has
> " actually been effected by means of the colourable
> " grant, then the maxim applies, *In pari delicto potior*
> " *est conditio possidentis.* The Court will help neither
> " party. 'Let the estate lie where it falls'."

Notwithstanding this, it is contended on behalf of the Appellant that so much confusion would be imported into the law, if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers* (1 Q.B.D. 291) and the authorities upon which that decision is based clearly establish this. *Symes*

v. *Hughes* (L.R. 9 Eq. 475, at p. 479) and *In re Great Berlin Steamboat Co.* (26 Ch. D. 616) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L.J., in *Kearley* v. *Thomson* (24 Q.B.D. 742).

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the Plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, article in the second Schedule to the Act

is, therefore, that which applies to the case, and the Suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this Appeal should be dismissed. They will humbly advise His Majesty accordingly.

The Appellant will pay the costs of the Appeal.