Privy Council Appeal No. 11 *of* 1941

T. R. Bhavani Shankar Joshi and another – – *Appellants*

v.

Gordhandas Jamnadas and another – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JANUARY, 1943

Present at the Hearing:
LORD MACMILLAN
LORD ROMER
SIR GEORGE RANKIN
[*Delivered by* SIR GEORGE RANKIN]

This appeal arises out of an application made under r. 16 of Order 21 of the Code of Civil Procedure:

> 16. Where a decree . . . is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.
>
> Provided that where the decree . . . has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution.

On 19th February, 1924, F. Friedmann's Diamanthandel Maatschappij (F. Friedmann's Diamond Trading Company Ltd.), herein called "the Dutch company," obtained from the High Court at Madras in its original jurisdiction a decree for Rs.24,207.4.0 with certain interest and costs against one Ramanath Joshi the appellants' father. He died on 15th September, 1924, and on 8th February, 1927, leave was given by the High Court to execute the decree against the appellants as his legal representatives. The second appellant was at that time a minor but this fact was at first overlooked. On 26th January, 1935, application was made to the High Court under the rule above cited by one Gordhandas Jamnadas, who claimed to have taken an assignment dated 8th November, 1933, of the decree and asked for sale of certain immovables of the judgment debtors situate within the High Court's original jurisdiction and for an attachment of a decree which they had obtained in a court at West Tanjore. An order having been irregularly made on 22nd October, 1935, without any guardian *ad litem* for the minor, one Venkatesa Tarwadi was appointed guardian in April, 1936, and by affidavit dated 24th April, 1936, he set up certain objections to the application. He said *first* that the assignment of 8th November, 1933, had been executed by one Shantilal Lallubhai Pandya whose power of attorney did not authorise him to assign the decree: *secondly*, that the decree had been adjusted by an arrangement for payment to the Dutch company of a sum of Rs.4,277.4.0 by way of com-

position at the rate of three annas in the rupee; that the alleged transferee Gordhandas Jamnadas had agreed to make this payment on the judgment debtors' behalf and had in fact paid it to the Dutch company though no steps had been taken to get the payment recorded: *thirdly*, that thereafter Shantilal and Gordhandas Jamnadas had in fraud of the judgment debtors executed the assignment of 8th November, 1933.

The second appellant came of age and his guardian was discharged by order of 20th July, 1937. On 3rd September, 1937, the Registrar allowed the application under r. 16, recognised the assignment and directed execution to proceed against the properties which had been mentioned in the application. On appeal to Gentle J. this order was set aside on 11th March, 1938. The learned Judge held that Shantilal's power of attorney did not authorise him to assign the decree and dismissed the application under r. 16. On appeal to a Division Bench the Registrar's order was restored by decree dated 19th January, 1939. Leach C.J. and Madhavan Nair J. held that though Shantilal's power of attorney did not authorise him to assign the decree, his principals the Dutch company had ratified his action in making the assignment. They rejected the allegation of fraud as unproved and refused to enquire into any alleged adjustment of the decree as none had been recorded under r. 2 of Order 21.

In this appeal Mr. Wallach for the appellants does not rely on any case to the effect that Gordhandas Jamnadas the first respondent was *benamidar* for the judgment debtors. Mr. Pringle for Gordhandas Jamnadas does not contend that Shantilal's power of attorney conferred on him authority from the Dutch company to assign the decree. The appellants' main complaint is against the finding that the Dutch company ratified the assignment of the decree. On this the first question is whether ratification would in law validate an assignment executed by an agent who was not authorised at the time of execution. The learned Chief Justice answered this question of law in the affirmative, having in mind not only the terms of r. 16 above cited but also the requirement of section 130 of the Transfer of Property Act. By that section " an instrument in writing signed by the transferor or his duly authorised agent " is the only method of effecting the transfer of an " actionable claim." Their Lordships are not to be taken as deciding that a decree is an " actionable claim " within the definition of that phrase given in section 3 of the Act. The decisions in India afford considerable support to a contrary view and they have not been discussed in argument at the bar. The cases upon which the learned Judges of the Division Bench proceeded were *Soames* v. *Spencer* (1822) 1 Dowl. and Ry. 32, *Maclean* v. *Dunn* (1828) 4 Bing 722 —English cases upon the Statute of Frauds. These were considered to be in point as showing that the 4th section of that statute did not exclude the possibility of ratification by the phrase " signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The question must depend on the exact language of the enactment to be construed, and must in India be examined in the light of sections 196 to 200 of the Indian Contract Act which contain the general law of India upon the point. On these sections their Lordships hold that it was open to the Dutch company to ratify the act of Shantilal who had purported to act on the company's behalf in assigning the decree to Gordhandas Jamnadas. Ratification is in law equivalent to previous authority; it may be express or it may be effected impliedly by conduct.

Upon the question of fact the appellants are in extreme difficulty. Notice must go to the alleged assignors by the terms of r. 16 and the Dutch company have been duly served. They appeared by their advocate before the Division Bench and confirmed the ratification. They are parties to the appeal now before the Board and do not appear at the hearing to complain that they still retain their rights as decree-holders. The High Court was under no duty to enquire who instructed the advocate who appeared for the Dutch company. In these circumstances the assignment of 8th November, 1933, must be upheld so far as regards the question of Shantilal's authority.

The next question arises upon the terms of the third clause of r. 2 of Order 21:

> 3. A payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any Court executing the decree.

Neither payment nor adjustment of any kind had been recorded in the present case. Can the appellants be permitted to maintain that the assignment is invalid because the decree had been discharged by payment or by a new bargain? A Full Bench decision of the High Court at Madras has held that while in these circumstances it may be open to the judgment debtor to attack the transferee's position by showing that he cannot legally possess that character, or that he is a *benamidar* or for reasons of a similar nature, the judgment debtor cannot, when there has been no certified adjustment, maintain that there is no decree to be transferred. *Nalam Subramanyam* v. *Devara Ramaswami* (1932) I.L.R. 55 Madras 720. A contrary view had been taken in Bombay *Raghunath Govind Mayekar* v. *Gangaram Yesu Mayekar* (1923) I.L.R. 47 Bombay 643, which proceeded on the ground that an application under r. 16 of Order 21 was made to the Court as the Court which passed the decree and not as a Court which is executing the decree. The question has been recently before the High Courts at Allahabad (*Murasi Lal* v. *Raghubir Saran* (1933) I.L.R. 56 *All.* 694) and Calcutta (*Sm. Sahedan Bibi* v. *Mir Ali* (1935) 40 Cal. W.N. 301) which have taken the same view as the Madras Full Bench and have amplified the same reasoning. Their Lordships are of opinion that the Bombay decision is not sustainable. The rule says that "the transferee may apply for execution of the decree to the Court which passed it." On the face of the rule the application to be made thereunder is an application for execution: that it is made to the Court which passed the decree does not tend to show the contrary. A consideration which strengthens the words just cited is that otherwise the decree-holder, who certainly can take out execution himself, cannot assign this right to another. Their Lordships are in agreement with the view taken by the High Court of Madras in the Full Bench case and in the present case.

In the Madras and Calcutta cases above mentioned the Court expressly refused to hold that a failure to record satisfaction or adjustment of the decree would prevent the judgment debtor from showing, if he could, that the decree-holder's assignee was really a *benamidar* for the judgment debtor, or that the assignment was made in fraud of the latter. Their Lordships see no reason to doubt the correctness of this reservation in any case where it becomes necessary to consider whether the assignment was taken by the debtor's agent or with the debtor's money. A case upon these lines was made by the present appellants but was disbelieved on the evidence by the Registrar and by the Division Bench, who have negatived the charge of fraud brought against Gordhandas Jamnadas. The case that he was *benamidar* for the judgment debtors has been abandoned by Mr. Wallach before the Board. On these points their Lordships are of opinion that the appellants have made out no case. Indeed, the affidavit of 24th April, 1936, made by Venkatesa Tanvadi, the second appellant's brother-in-law, while acting as his guardian *ad litem*, is of such a character that no weight can be attached to it. He does not profess to speak of his own knowledge and does not give the source of his information: much of what he states is, if true, within the knowledge of the elder brother, the first appellant, who has not deposed to any such effect.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the first respondent's costs.

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