

(1884) 07 CAL CK 0016

Calcutta High Court

Case No: None

Eugene Pogose by her
next friend, P.N.
Pogose

APPELLANT

Vs

The Delhi and London
Banking Co. Ltd.

RESPONDENT

Date of Decision: July 8, 1884

Citation: (1884) ILR (Cal) 951

Hon'ble Judges: Richard Garth, C.J; Beverley, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

This suit was brought by Mrs. Eugene Pogose, the wife of Mr. Peter Nicholas Pogose, to establish her title to certain property in the district of Mymensingh, which had been attached by the respondents, the Delhi Bank, in execution of a decree against the plaintiff's husband.

2. The plaintiff made a claim to this property in the execution proceedings; but that claim, having been rejected by the Court, she has brought this suit to obtain a declaration of her rights.

3. Her ease is, that this property (together with four other properties in the district of Backergunge) was settled upon her and her children by a marriage settlement, dated the 5th November 1877, corresponding with the 21st Kartik 1284 ; the marriage having been solemnized on the following day.

4. The execution of this deed by the plaintiff's husband on the date in question is not denied; but the defendant's case is, that, having regard to the circumstances under which it was executed, the settlement was void as against them, having been made for the express purpose of defrauding Mr. Pogose's creditors.

5. The facts are these:

On the 15th of June 1877 the Delhi and London Bank, who had lent money to Mr. Pogose, obtained a decree against him for the sum of Rs. 11,076-10-8 and costs Rs. 1,026-5-6 ; total Rs. 12,103.

6. They were about to take steps to enforce this decree by attachment of Mr. Pogose's property ; but he begged them not to do so, upon the ground, that he was collecting salami from the tenants, and that any attachment upon either his person or property would be sure to reduce his salami very seriously.

7. This led to communications between the solicitors on both sides, and on the 21st of June Mr. Pogose signed an agreement, by which, in consideration of the Bank's refraining from the immediate attachment of his person or property as threatened, he stipulated to pay them a sum of Rs. 2,000 quarterly, and in default, to assist the Bank in attaching his properties, a schedule of which was annexed to the agreement. This schedule was supplied by Mr. Pogose's solicitors, who, it was expressly stated, had a mortgage upon the property for Rs. 4,000,

8. In pursuance of this agreement Mr. Pogose paid the Bank

On 7th September	1877	...	Rs. 1,000
" 3rd October	"	...	Rs. 1,000
" 22nd February	1878	...	Rs. 1,510
" 25th February	1878	...	Rs. 490
Total		...	Rs. 4,000

9. Meanwhile, as we have seen, Mr. Pogose was married to the plaintiff on the 6th of November 1877; and immediately after the last of the above payments, he and the plaintiff went off to England; and no further payments have since been made.

10. The Bank having waited some time, took out execution of their decree in the early part of 1880, and this Mymensingh property was attached. The claim was made on the part of Mrs. Eugene Pogose on the 24th June 1880 ; but the Court found that the settlement was invalid against creditors on the ground of fraud. The Judge, certainly, on that occasion does not seem to have quite understood the law upon the subject, or to have recognized the difference between an ante-nuptial and a post-nuptial settlement; but upon the facts he was clearly of opinion that the settlement was a gross fraud.

11. The Subordinate Judge in the present case has, in our opinion, taken a more correct view of the law; and he also has come to the conclusion, that the settlement is void as against the defendants, on the ground of fraud.

12. He says: "At the time when Mr. Pogose was hopelessly in debt, he contracted a marriage, in consideration of which he settled whatever property he had upon his wife and children, subject to his maintenance, and a debt which had previously been charged on the property in dispute. The circumstances under which the deed was

executed, as well as the nature of , the transaction, tend to show that the conveyance was made with a view to screen the property from the creditors."

13. And again: "There is no direct evidence to show that plaintiff was aware of the fraud committed by Mr. Pogose, and it is difficult to have any direct evidence on the point. Before the marriage between plaintiff and Mr. Pogose, they had been related to each other, and it is probable that plaintiff and her parents were aware of the insolvent state of Mr. Pogose, when the conveyance was executed, or at least they would be informed of it, if they had taken the trouble of making any enquiry about it; and it can by no means be said that they acted bona fide in the case. The fact that Mr. Pogose conveyed all his property charging it with his maintenance and the payment of the mortgage debt only, in consideration of his marriage with plaintiff, who did not in return advance any sum to, or place any property at the disposal of, Mr. Pogose, clearly tends to show that the settlement was made under the cloak of marriage with a view to defraud creditors. If such a settlement were given effect to, a premium would be held out to fraud, and a Court of Equity, which is jealous in protecting the interests of creditors, ought to set aside the transaction as void against creditors."

14. Against this judgment the plaintiff has appealed ; and her case has been very ably argued before us by Mr. Evans. He contends that before an antenuptial settlement can be set aside, it must be proved-1st, that the husband was insolvent, or, at any rate, hopelessly indebted at the time of the marriage ; 2nd, that the marriage itself was a fraudulent contrivance for defrauding the husband's creditors; and, 3rd, that the wife not only knew of her husband's indebtedness, but was herself privy to the fraud.

15. And he has further urged upon us, that the knowledge of a minor wife's parents or guardians cannot, for this purpose, be taken to be her own knowledge, and that, in order to avoid the deed, actual notice of the fraud must be brought home to the plaintiff herself, inasmuch as having been a minor at the time of the marriage, she was entitled to the special protection of the law.

16. In support of these propositions he has referred to several authorities, and amongst them the following which, in our opinion, having regard to what we find to be the facts of the case, do not avail his client: *Campion v. Cotton* 17 Ves., 263, *Fraser v. Thomson* 1 Giff., 49, *Colombine v. Penhall* 1 Sm. & G. 228, *Ex-parte Mayor* 1 Mont., 2920, *Bulwer v. Hunter* L.R. 8 Eq. 46, *Kewan v. Crawford* L.R. 6 Ch. D. 29.

17. It is true that in *Colombine v. Penhall* 1 Sm. G. 228 and *Bulwer v. Hunter* L.R. 8 Eq. 46 the settlements were held to be void upon the ground that the marriage itself, as well as the settlements, was part of the scheme for defrauding the creditors. But we do not understand that in either of those cases the Court intended to say that, unless the marriage itself was part of the fraud, the settlement could not be avoided.

18. If any such opinion had been expressed by the Court in either of those cases, it would certainly have been unnecessary for the purposes of the decision; because in both, there had been previous cohabitation between the husband and wife, and it was found as a fact that the marriage itself was a part of the scheme to defraud. This, of course, made the argument so much" stronger against the validity of the settlements.

19. But it does not follow from these cases that where the marriage itself has been arranged in good faith, the settlement, if it is found to have been made for the purpose of defeating creditors, cannot be avoided. If that were so, it would be making marriage settlements the one single exception to the law laid down by the Statutes of Elizabeth.

20. Take a case, for instance, of this kind. Suppose that a marriage has been agreed upon in good faith, at a time when the intended husband was perfectly solvent; and that a settlement of a part of his property has been arranged upon the usual terms. Suppose, also, that before the marriage takes place, a change comes over the husband's fortunes. He has executions out against him, and becomes nearly, if not wholly, insolvent; whereupon the scheme of the proposed settlement is changed, and the whole of the husband's property is settled upon the wife, with her knowledge and connivance, for the express purpose of defrauding the husband's creditors.

21. Can it be that such a settlement would be valid as against the creditors? If it were so, there would certainly be one law applicable to marriage settlements, and another applicable to all other conveyances.

22. Of course, for the purpose of avoiding ante-nuptial settlements, it must be shewn that the wife was actually or constructively a party to the fraud. If she were not so, she would be a bond fide purchaser without notice. In the case of *Kewan v. Crawford* L.R. 6 Ch. D. 29, the wife was found entirely ignorant of the fraud, upon which the settlement was based; and in *Campion v. Cotton* it was found that no fraud was established.

23. Every case, as it seems to us, must depend upon its own circumstances; and we certainly find no warrant in the authorities for excluding contracts made in consideration of marriage from the law which governs all other contracts.

24. It has been said that the Statute of Elizabeth (29 Elizabeth, c. 5) is not in force in the Indian Mofussil; and in strictness perhaps that may be true. But that statute, in the opinion of Lord Mansfield, was only declaratory of the common law. The principles of it are undoubtedly those of equity and good conscience, and their Lordships of the Privy Council have expressly sanctioned the adoption in the Mofussil of these principles. (See the late case of *Abdul Hye v. Mir Mohammed Mozaffar Hossein* ILR 10 Cal. 616 : L.R. 11 IndAp 10 in which, speaking of the Statute of Elizabeth, their Lordships say: "There seems to be no doubt that its principles and

the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience."

25. We have, therefore, to consider in this case, whether, having regard to the circumstances under which the settlement was made, it operates to protect the property in question against the defendant's execution.

26. Mr. Peter Nicholas Pogose, against whom the decree has been obtained, was the son of Mr. Nicholas Petroos Pogose, who is now dead. The latter was once a gentleman of very large property; but he became hopelessly and notoriously insolvent, and his property was assigned to trustees for the benefit of his creditors.

27. The first witness for the plaintiff, who has been in the service of the Pogose family as mohurir since the year 1841, described the property of Mr. Pogose's father as worth seven or eight lacs of rupees, whilst his debts were upwards of twelve lacs.

28. The plaintiff was a second cousin of her husband, and the daughter of Mr. and Mrs. Carlo Johannes Manook, who have given their evidence in this case under a commission.

29. It is especially worthy of note, that neither the plaintiff nor her husband have been examined as witnesses; although, so far as we can see, there would have been no difficulty in obtaining their evidence on commission.

30. The plaintiff at the time of the marriage was sixteen years of age; and we are told by her parents that the proposals for the marriage took place in 1876, about a year before the marriage. No arrangement at that time was made or suggested about any settlement.

31. The defendants' decree, as we have seen, was passed in June 1877. The agreement by Mr. Pogose with the Bank was on the 21st of June; and almost immediately after this agreement, about four months before the marriage, we find this settlement arranged for the first time.

32. It is obviously a settlement of a very unusual character; and although we cannot doubt that some professional gentleman was employed in the matter, no such person is called as a witness, nor is any explanation given of the unusual character of the document. It professes to denude Mr. Pogose of the whole of his property of every description. This is proved by the plaintiff's own witnesses. He had a one-seventh share of his mother's property, which consisted of an 8-anna share in an estate in Mymensingh (the property in question), and in four other smaller properties in Backergunge. The whole of this one-seventh share was settled.

33. There was no honest reason, so far as we can see, why Mr. Pogose should have so completely denuded himself; and it does not appear that Mrs. Pogose brought

anything whatever into settlement.

34. The instrument upon the face of it, is called a deed of gift. It recites a promise by Mr. Pogose that, in consideration of the intended marriage, he should convey to his wife all "his rights and interests in the property, to the intent that she should become the owner and enjoy the profits thereof; that she (the wife) should support him (the husband) for life; that she should not alienate the properties; and that on her death the children of the marriage should have a right of disposing of the property by gift or sale, and that from henceforth (that is to say, from the time of the execution of the deed) all his (the husband's) rights in the property should cease to exist." The deed then goes on to convey the property to the wife to and for the above intents and purposes.

35. Mr. Evans has contended that, notwithstanding the words "henceforth all my rights in the same shall cease to exist," there was an ultimate reversionary interest left in Mr. Pogose; but whether this was so or not, it is clear that the practical effect of the deed was to deprive Mr. Pogose of all interest in the property, which might in any way be available for his creditors; at the same time he secured by way of trust a maintenance for himself for life.

36. We entirely agree with the Courts below that the manifest object of this transaction was to defraud Mr. Pogose's creditors; and it only remains now to consider-

1st--What was the state of Mr. Pogose's affairs at the time he made this settlement; and

2nd--How far Mrs. Pogosa was party or privy to the fraud.

37. At the time of his marriage Mr. Pogose still owed the Bank upwards of Rs. 10,000, he owed his solicitors Rs. 4,000; and there is evidence of three other Small Cause Court decrees being out against him, which were taken at the hearing before us to amount to Rs. 3,000. He, therefore, owed at least Rs. 17,000; and it is possible, of course, that his debts may have been very much larger.

38. Then, what was the value of the property settled? His father had died hopelessly insolvent; and we have seen that all that Mr. Pogose had, was a seventh share in the properties mentioned in the deed of gift, which had come to him under his mother's marriage settlement.

39. It appears from the description of these properties in the schedule to the deed of gift, that Mr. Pogose's interest in the Mymensingh property, the property in question, was one-seventh of an 8-anna share of the whole zamindary, and the value of this seems to have been about double the value of her interest in the other properties, which are situated in Backergunge.

40. The sudder jumma payable for the Mymensingh property is Rs. 10,525. The sudder jumma payable for the four Backergunge properties is about Rs. 5,239. So we may take it roughly that the value of Mr. Pogose's interest in the Mymensingh property was about double the value of his interest in the other properties. Then as to the value of these properties, we have no reliable information in the evidence itself. The first witness says nothing upon the subject. He appears to be under the impression that Mr. Pogose got one-seventh of his father's estate, but this is a mistake. He got nothing from his father; and the property in question came, to him under his mother's settlement.

41. The second witness is Umakant Chakravarti. He speaks of the plaintiff's interest in the property in suit being worth Rs. 60,000 or Rs. 70,000; but he is evidently speaking at random; because at this rate he estimates it at about three or four times the value, which has been put upon it by the plaintiff herself.

42. Mr. Manook also puts the property at Rs. 40,000 or Rs. 50,000: and the rental of it at Rs. 200 a month; but he also speaks with considerable hesitation, merely from what Mr. Pogose told him, and not upon his own knowledge; and considering how deeply interested he and his wife are in the success of the suit, we certainly are not disposed to place much reliance upon their evidence.

43. Fortunately, however, we have, from the proceedings before us, and from the statements and conduct of the plaintiff and her husband, the means of forming a pretty correct estimate of the value of the property in question.

44. In the execution proceedings in the former suit, when the question now before us was first raised, the value of that property was found to be Rs. 12,000.

45. Again, in the present suit, this property has been valued (not for stamp fee, but for purposes of jurisdiction) at Rs. 12,000, and we find that in 1878, when Mr. Pogose took out a certificate of guardianship to his wife's property under Act XL of 1858, the stamp on the certificate was Rs. 65 only, which represented Rs. 12,000 as the value of the entire property.

46. Rs. 12,000 therefore is probably more than the property now in suit is really worth; but assuming this to be its value, and assuming also, for the reason already given, that the Mymensingh estate is worth twice as much as the Backergunge estates, the value of the whole property settled would not exceed Rs. 18,000 at the most.

47. Then we have seen, that Mr. Pogose's debts amounted at least to Es. 17,000 at the date of his marriage, so that he was at that time almost, if not wholly, insolvent.

48. It now only remains to be seen, how far the plaintiff herself, or those who acted for her in making the settlement, were party or privy to the fraud.

49. The whole history of the transaction from first to last tends to satisfy us, that all the parties to the transaction were cognizant of Mr. Pogose's difficulties, and that the alleged settlement was only a device for the purpose of defeating his creditors, and retaining the settled property in his own possession.

50. In the first place, as we have already pointed out, there was nothing said about a settlement when the marriage was first arranged. It was negotiated in the year 1876; but it was not until the Bank had obtained their decree against Mr. Pogose, and he had been threatened with an attachment, and had entered into the agreement of the 21st of June, that the settlement in question was thought of.

51. Then it must be borne in mind, that the Manooks were nearly related to the Pogose family. They must have known perfectly well, what was notorious throughout the country at that time, that Mr. Pogose's father, who was once a man of fortune, had become hopelessly insolvent. Mr. Manook could hardly, under such circumstances, have allowed his daughter to marry Mr. Pogose without ascertaining his pecuniary position. And considering that Mr. Pogose's Babus were perfectly aware of his indebtedness, it seems impossible to suppose that Mr. Manook should not have known it.

52. Then the extraordinary character of the settlement itself appears to us a clear indication of fraud. Why should Mr. Pogose have conveyed the whole of his property to his wife, subject only to a trust for his own maintenance? It could hardly have been for any other purpose than to protect it from his creditors.

53. Then his dealings with the property after the marriage took place show, that notwithstanding the settlement, he still retained the dominion over it, and disposed of the proceeds of it as the real owner.

54. He had undertaken in September 1877 to pay the Bank Rs. 2,000 every quarter; and this money, it appears from his letters, he hoped to obtain from the tenants of the property by way of salami soon after the beginning of the year 1878.

55. In his letter to the Bank of the 26th of August 1877 he says that he did not expect to get in this money until the end of January 1878; and, as a matter of fact, he had not, so far as we can judge, collected the second Rs. 2,000 till after the month of January; because the payments which he made to the Bank were Rs. 1,510 on the 22nd of February, and Rs. 490 on the 25th of February.

56. But if the settlement of November was a bond fide deed, those sums, which he paid to the Bank, belonged not to him, but to Mrs. Pogose. Mr. Pogose had no right after the settlement was made to appropriate a single pice of the proceeds of the settled property to the payment of his own debts.

57. We cannot suppose that either Mrs. Pogose or her parents were ignorant of these payments; and yet Mr. Pogose makes them out of the property which had been professedly settled upon his wife without the slightest objection.

58. And so far as appears, he has ever since managed the property and been in receipt of the rents and profits of it, through his brother, Mr. Carr Pogose. It is true that in June 1878 he obtained a certificate as the guardian of his wife's estates; but this he would naturally do for the purpose of keeping up appearances; and no steps have ever been taken, so far as we can ascertain, to register Mrs. Pogose as the owner.

59. So soon as Mr. Pogose had put it out of the power of the Bank to arrest him, by paying them the Rs. 2,000 in February 1878, he at once went off to England with Mrs. Pogose, and, so far as appears, he has been there ever since.

60. The first witness tells us that the plaintiff herself, after residing in England, for a year or so, returned to Dacca, and it appears from the plaint that at the commencement of this suit she had again gone back to England, but we have no evidence, nor any reason to suppose, that Mr. Pogose has ever returned to this country; and certain it is that neither he nor his wife have ventured to give any evidence in this cause, or have attempted to explain what appears to us to be so palpably a fraud.

61. This is just one of those cases, in which it was the duty of the plaintiff to give the Court all the information in her power. It is obvious that to her and her husband it is a matter of the most vital importance to establish the validity of this deed. The facts, of which the Court has a right to be informed, are facts essentially within their knowledge, and that of their legal adviser, whoever he was, and yet neither they, nor their legal adviser, have been examined as witnesses. What inference, except one adverse to the plaintiff, can we draw from this circumstance?

62. It has been contended by Mr. Evans that, in order to avoid the settlement against Mrs. Pogose and her children, it was necessary to show that she herself was a party to the fraud; and that, however fraudulent the conduct of her father may have been, that would not avoid the settlement as against her, But no authority has been adduced in favour of this contention; and, so far as it is necessary for us to decide the point, we consider that it is not warranted by law.

63. If a guardian, whilst acting for a minor, is guilty of a fraud or illegality in contracts which he makes on the minor's behalf, the minor can no more enforce such contracts, than the guardian could, if he were acting on his own behalf.

64. If a guardian, for instance, in making a lease of the minor's property, were guilty of such fraud as against the proposed lessee, as would justify the lessee in repudiating the lease, the minor could no more enforce the lease as against the lessee, than the guardian could, if he were acting for himself. This proposition was in fact admitted in the course of the argument.

65. Then, what is the state of things here? Mrs. Pogose is attempting, as against the creditors of her husband, to enforce a marriage settlement, which has been

negotiated and made on her behalf by her father as guardian. If her father, under these circumstances, makes a contract for her, which is contrary to law, or void against third persons, on the ground of public policy, we consider that she can no more enforce such a contract against those third persons, than if she, being an adult, had made the contract for herself.

66. It may be true that no suit can be brought against a minor for any fraud or misrepresentation of which his guardian has been guilty, but that is a different matter. A minor may not be answerable on the one hand for the fraud of his guardian, but on the other hand, he cannot take advantage of it.

67. In this case we are satisfied, upon the question of fact, that both the lower Courts have arrived at a just conclusion. We have no doubt whatever that the settlement in question was a mere device, for the purpose of defrauding Mr. Pogose's creditors. We believe that it has never been acted upon bond fide, and was never intended to be acted upon, except so far as was necessary for that purpose. We believe, moreover, that Mrs. Pogose herself was fully aware of the object of the deed, and that Mr. Manook, the father, was both party and privy to it.

68. Under these circumstances, we consider that it would be contrary to equity and good conscience, and a very pernicious example, to allow such a device to prevail against the claims of creditors.

69. We all know that in this country, more especially amongst certain classes of the community, a marriage is easily contracted, and almost as easily dissolved.

70. We know also the vast variety of devices which are constantly resorted to for the purpose of defeating the claims of creditors. And if it were generally understood that the simple expedient of a marriage, coupled with a settlement upon the wife of all her husband's property, subject only to a general trust for his maintenance, would have the effect of securing to an insolvent man the full enjoyment of his property, and of effectually setting his creditors at defiance, we fear that such marriages and settlements would be of very frequent occurrence.

71. The appeal is dismissed with costs.