

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Arathoon, on her demise Gregory Executor, v. Cochrane, from the Supreme Court of Judicature at Fort William in Bengal ; delivered on the 6th February, 1861.*

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Present :

LORD CHELMSFORD.

LORD KINGSDOWN.

JUDGE OF THE ADMIRALTY COURT.

SIR EDWARD RYAN.

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SIR LAWRENCE PEEL.

IN this case the original appeal was brought by Catherine Arathoon, since deceased, against a Decree of the Supreme Court of Calcutta, on the Equity side, which in effect set aside an execution issued by the Appellant, and directed a reconveyance of the property seized and sold under it. Mrs. Arathoon having died, the suit has been revived by the present Appellant, who is her personal Representative.

The Respondent is the assignee, under the Insolvent Act, of A. H. Arathoon (the husband of the late Appellant), against whose property the execution in question was issued.

The husband and wife were both Armenian Christians. The marriage took place in the year 1836, the lady at that time being little more than twelve years of age, entitled to a large property, both real and personal, and under the wardship and protection of the Provincial Court of Dacca, where she resided.

Previously to the marriage the future husband, at the instance of an aunt of the wife, signed an

ikrar-namah, or agreement, by which provision was made for some settlement of the real and personal estate of the wife. The instrument itself was destroyed by Arathoon, after the marriage, in a fit of passion, as he alleges, and the contents of it do not distinctly appear.

Though the marriage took place without the sanction of the Court, the husband was put into possession of the real and personal property of the wife. It is suggested in the Appellant's case that he was so put into possession as the tutor and guardian of his wife during her minority, and that this was done in conformity with the Armenian law, by which their rights were to be governed. It does not appear that on this occasion the ikrar-namah was brought under the notice of the Court.

There were several children of the marriage, which proved a very unhappy one; there were continual quarrels between the husband and wife; and at last they separated in 1845.

In June 1845 Mrs. Arathoon brought a suit against her husband in the Zillah Court of Buckerunge, in which she stated that she had attained her majority; charged him with ill-treatment and malversation of her property; and prayed that he might be decreed to account for the same, and that she might be put into possession of the whole of her real and personal estate, which had been, as she alleged, entrusted to him as her legal guardian.

The husband, by his answer, insisted that the rights of the parties were to be governed by English law, and that by such law the proprietary right to his wife's real and personal estate had vested in him, and that the instrument which he had executed was not binding upon him.

On the 22nd of September, 1845, the suit was heard before the Judge of the Zillah Court, who held that the Armenian law was to prevail; that the husband by his conduct had put an end to the state of tutelage in which the Plaintiff was placed; and that her right to the control of her own property, which he stated to be undoubted according to the law, could no longer be withheld. He then declared that the wife was entitled, both by law and by virtue of the agreement entered into before the marriage, to have delivered up to her the whole of her real and personal property, and also to have an account

of the bygone rents and profits, subject to a deduction in respect of the sums which the Defendant could prove that he had expended in the maintenance of the family during the time that the wife resided with him. The Decree then, as we understand it, though the matter is not very clear, charged the Defendant with the value of all the real and personal property of the wife which he was shown to have possessed, amounting to 399,510 rupees, of which about 186,000 rupees was the value of the real, and the remainder the value of the personal estate.

Against this Decree there was an appeal to the Sudder Court at Calcutta, by which the judgment below was affirmed on the 17th of August, 1848.

It is obvious that this Decree involved the consideration of several important questions; whether the Armenian or the English Law was to regulate the rights of the parties; and if the Armenian, whether by that Law the wife was entitled to the whole of her real and personal estate as if she were a *femme sole*, exempt from all claims on the part either of her husband or children (a notion not entirely consistent with the fact that the husband had been required before the marriage to execute an agreement renouncing or limiting his right); and, if so, whether the agreement had contained a provision limiting the wife's powers, and securing the property after the death of the parents to the children. If, on the other hand, the rights of the parties were to be regulated by the English Law, it would be difficult upon any principles to maintain the Decree.

It is insisted by the Appellant that this Decree not having been made the subject of appeal within twelve months to Her Majesty in Council had become final before the compromise which is the subject of the proceedings now before their Lordships was made, but their Lordships think that what afterwards took place removes any bar which could have been caused by lapse of time.

The Decree in question had been made in the absence of the children, who were not parties to the suit. There were, at this time, four such children, all, of course, by our law, infants. Three were residing with their father, and one, the youngest, with the mother.

On the 2nd of August, 1848, a few days after

the affirmance of the Decree, a bill was filed in the Supreme Court of Calcutta in the names of the infant children of Mr. and Mrs. Arathoon, by the brother of Arathoon, as their next friend, against the father and mother. This Bill stated that by the terms of the agreement, or ikrar-namah, executed by the husband before the marriage, the children were entitled in reversion to the whole real and personal property of the wife; that such agreement had been destroyed by Arathoon; that he was totally unable to pay the large debt awarded against him in his wife's suit; that he would be thrown into prison, and the children, who were residing with him, would be left to starve. The Bill prayed that the contents of the agreement might be ascertained, and that the rights of the children might be secured, and that the wife might be restrained by injunction from executing the Decree which she had obtained, and by which the whole property in which the children were interested would be swept away.

It is suggested by the Appellant that the object of the children's suit was to defeat, without any appeal, the execution of the Decree obtained by the wife, and that the suit was instituted in collusion with the husband, which is very possible. But however this may be, on the institution of the second suit further proceedings in both suits were stayed, negotiations for an amicable settlement of the disputes between the husband and wife were entered into, the parties came together again, and cohabited till the 30th of April, 1849.

It is clear that the time which elapsed during this interval could have no effect in barring Arathoon's right of appeal against the Decree of the 17th of August, 1848.

On the 30th of April, 1849, the parties again separated. Mrs. Arathoon thereupon sued out a writ of execution, under the Decree of the 17th of August, 1848, and was put into possession of her real estates, in the receipt of the rents and profits of which her husband had been up to this time.

On the 12th of May, 1850, Arathoon sued out of the Supreme Court a writ of habeas corpus against his wife to recover possession of her youngest child, then a little more than three years old, who was

living with his mother, and an order was made by the Chief Justice for the delivery of such child to the father.

On the 15th of May, 1849, Mrs. Arathoon filed her separate answer in the suit of the children. She denied that the ikrar-namah signed by the husband contained any provision for the children or any restriction upon her rights, or that she was at all bound by it if it did. She stated that, under the Decree of August 1848 she had obtained possession of her real estate, but that all her personal estate, and the mesne profits of her real estate, still remained to be recovered from her husband.

To enforce these claims she issued two writs of execution out of the Zillah Court, by one of which, dated the 21st of May, 1849, the Zillah Judge directed the Nazir of the Court to apprehend Arathoon, unless he paid the sum of 115,620 rupees 8 annas 10 pice ; and by the other of which, dated the 29th of the same month, the Judge directed the same officer to levy of the lands, goods, and chattels of her husband the sum of 116,236 rupees 8 annas 9 pice, besides costs of suit.

How these sums were made out does not very distinctly appear, nor do we understand upon what principle the two writs were issued, one against the person and the other against the property of the husband, for different amounts, nor whether they were for different portions of the same debt, or whether the one was included in the other.

For the purposes of the present Appeal, however, these questions are not very material. It is clear that both these writs were founded on the Decree of the 17th August, 1848 ; that the real estate awarded by that Decree had been delivered up ; and that the sum found due for personal estate, and rents and profits of the real estate, alone remained to be accounted for, subject to an allowance in respect of the sums expended in maintenance.

In this state of the litigation in this unfortunate family, negotiations were entered into for the settlement of all their disputes. Agents and friends were employed on both sides ; and at length, after a long interval of discussion, the terms were agreed upon, and were embodied in a deed in the English form, dated the 17th July, 1849, which was made between

Mrs. Arathoon of the first part, her husband of the second part, the next friend of the infants in their suit of the third part, and a formal party of the fourth part.

This deed contained a very full recital of the disputes subsisting between the parties, and a statement of the personal property of the wife disposed of by the husband, or remaining in his hands, by which it appeared that 70,000 rupees had been laid out in the purchase of a real estate in the Old China Bazar at Calcutta in his own name, and that Government promissory notes to the amount of 21,000 rupees were still in his hands; and it then provided that all the suits and litigation should be terminated upon the terms subsequently stated. These were, in effect, that, upon the children's suit being compromised by order of the Court, Mrs. Arathoon would enter up satisfaction on the Judgments which she had obtained against her husband, and in the mean time suspend their execution; that the promissory notes in the hands of the husband should be made over to her; that the property situate in Calcutta should be vested in trustees, to be approved of by the Master, upon trust to pay the rents to Arathoon, he maintaining three of the children, who were to remain with him, and after his death to pay the rents to the wife, if she survived, and after the death of the husband and wife, in trust for all the children, and the issue of such as should die. It was then provided that one of the children already born, and the child of which the wife was then pregnant, should reside with her, and that the husband and wife should, in future, live separate, and a deed of separation and mutual releases were to be executed. The next friend of the infants was to obtain a reference to the Master, to inquire whether it would be for their benefit that their suit should be compromised on these terms, and the wife was to pay her own costs, and also the costs of the infant Plaintiffs in their suit.

An order was accordingly obtained in the infants' suit for a reference to the Master, as provided by the agreement. The Master seems to have doubted whether he could sanction, on their behalf, the proposed compromise, and he required, before he did so, that Arathoon should put in his answer. By

his answer Arathoon admitted that the ikrar-namah was to the effect stated in the bill, and that in a fit of passion he had destroyed it; he said that at the time of the marriage he was a person of independent, though small, property, and he admitted that he was wholly unable to pay the large amount for which execution had been issued against him, or adequately to maintain the children.

The Master ultimately approved the compromise. His report was confirmed by the Court, which, on the 18th February, 1850, made an order directing the compromise, as regarded the children, to be carried into effect, and a proper deed to be executed for conveying the estate in the Old China Bazar to trustees, upon the trusts proposed by the agreement.

A deed was accordingly prepared and executed, bearing date the 25th December, 1850, by which this estate was conveyed to two gentlemen of the names of Bagram and Voss. The promissory notes of the Government described in the deed of compromise were transferred to Mrs. Arathoon. She remained in possession of her real estate; she lived separate from her husband without any interference by him, and she had the custody of the child who was to be retained by her, and also of that which was born subsequently to the agreement, and the suit of the children was put an end to. In short, she received the full benefit of every stipulation contained in her favour in the deed of compromise, which, as regarded her interests, was in substance fully and completely executed.

She did not enter up, and probably was not called upon to enter up, satisfaction on the judgments which she had obtained against her husband, and on which execution had been issued; this was a mere formal act.

The amount of the promissory notes which had been handed over to her, and the value of the China Bazar estate, now settled on the children, were included in the sums for which the executions had been issued, and by the transfer and conveyance under the terms of the compromise, these judgments had been actually satisfied.

Availing herself, however, of the circumstance that satisfaction had not been entered up, Mrs. Arathoon, on the 21st January, 1853, while she was

enjoying the benefits secured to her by the compromise, adopted the extraordinary proceeding of putting in force one of the writs of execution which had been thus satisfied, and seizing under it a house in Free School Street, Calcutta, as property belonging to her husband and liable to her execution. The husband's interest in this house was sold by the Sheriff and the house was purchased by Mrs. Arathoon, and in May 1854 was conveyed to a trustee for her.

Arathoon hereupon took the benefit of the Insolvent Act. The Respondent was appointed assignee, and, in the month of September 1855, he filed against the late Appellant and the Trustee for her, to whom the house in Free School Street had been conveyed, the bill out of which the present appeal arises. This Bill insisted on the terms of the compromise, and prayed that it might be declared binding upon the Defendant, Mrs. Arathoon, and that she might be decreed to enter up satisfaction on the Decree or Judgment in her suit, and that the house in Free School Street might be conveyed to the Plaintiff as assignee of Arathoon.

The Defendant by her answer admitted the agreement, but alleged that she had been induced to enter into it by the positive statement of her husband, that except the China Bazar estate he was possessed of no property whatever; while, in fact, he was at that time possessed of the house in Free School Street, which had been conveyed at the same time with the Old China Bazar estate to the same Trustees; that the fact of such right of her husband to this property had been fraudulently concealed from her at the time of the compromise, and she insisted that, under the circumstances, she was well justified in seizing the Free School Street house under her writ of execution, and in refusing to enter up satisfaction on her judgment. She appended to her answer the copy of a notice which she had received from the Trustees under the deed of the 25th December, 1850, already referred to, in which it was stated that, by a deed of the same date, the house in Free School Street had been conveyed to them by Arathoon upon certain trusts for the benefit of himself, his wife, and children, which do not appear to differ very materially from those to which the Old China Bazar estate was subject.



Evidence was gone into, and at the hearing the Court was of opinion that the defence was not made out in point of fact, and that if it had been it could not have been sustained in point of law.

The Decree ordered satisfaction to be entered on the judgment, and the estate in question to be conveyed to the Plaintiff, subject to any claims which might be established against it by the Trustees under the conveyance in trust alleged to have been executed by Arathoon.

Their Lordships agree with the Court below in their opinions on all the points which they had to consider.

There is no evidence that Mrs. Arathoon in entering into the agreement of compromise acted under the belief that her husband was possessed of no real estate beyond that in the Old China Bazar. If she really was acting upon that assumption it was necessary, in order to make the fact of any importance, that it should have been communicated to her husband; for otherwise there could be nothing to require him to make any discovery of his property, or to subject him to any imputation of bad faith for omitting to do so. But no such communication appears ever to have been made, and there is no sufficient proof that Arathoon ever made, or was ever called upon to make, any disclosure as to the amount or particulars of his property, except as to purchases made with the money of his wife. There is no statement in his answer in the suit of the children that he had no real property except the Old China Bazar estate, and he had, and his wife could not well be ignorant that he had, a share in a house in Calcutta which had belonged to his mother.

The grounds of the compromise are fully stated in the recitals of the deed. It is not pretended that such recitals are inaccurate, and from the beginning to the end there is no trace of the alleged statement of the husband, nor of the pretence now set up that his state of destitution was any consideration for the wife entering into the compromise. He had, indeed, stated, what was equally true whether the Free School Street house belonged to him or not, that he was unable to satisfy the judgment obtained by his wife. This lady received ample consideration for abandoning her writs of execution. She secured a separation from her husband. She got rid of

any claim by him and by her children to any part of her real or personal estate, except the property in the Old China Bazar. She prevented any appeal against the Decree which had been pronounced in her favour in the Sudder Court, and she secured the custody of two of her children.

That the inquiry as to Arathoon's property was confined to purchases made with the money of his wife, is clear from what took place in the month of March 1850.

At that time Mr. Templeton, the solicitor of Mrs. Arathoon, supposed that Arathoon was the owner of the house in Free-School Street; and he insisted that this house had been purchased with Mrs. Arathoon's money, and ought to be included in the settlement on the children. He wrote to this effect to Mr. Denman, the solicitor acting for the infants; and it is clear from the evidence that both Mr. Denman and Mr. Templeton considered that the principle of the arrangement for the compromise was that all real estate which had been purchased with Mrs. Arathoon's money should be the subject of the settlement. This is perfectly consistent with the recital in the deed, and with the commission of a fraud by Arathoon in misrepresenting or concealing the fact that such purchase had been so made. But there is no trace of any claim being made on behalf of Mrs. Arathoon on the property at this time, supposing it to be the independent property of the husband, not purchased with her money, nor is there any complaint of misrepresentation or concealment by him, if that was the case. There was full opportunity of inquiring into the circumstances between the month of March, when the claim in question was brought forward, and the subsequent month of December, when the compromise was carried into effect; and the lady at that time acquiesced in the arrangement previously made, and accepted the benefits thereby given to her in satisfaction of her claims under the judgment.

On the whole, their Lordships are satisfied that no such fraud as is the foundation of the defence in this case has been established against the husband. If it had been it could not have been used as a defence in this suit, which is not one for the specific performance of an agreement remaining *in fieri*, and

in which a Court of Equity has a discretionary power to grant or to refuse relief beyond the law. It is a Bill to set aside an act done in plain violation of an agreement which in all its material parts had been executed, and all the benefits of which the party violating it retained on her part, while as against the other party she treated it as a nullity.

There may be reason to suspect from the evidence that the house in Free School Street was purchased with the wife's money, and that if so purchased it ought to have been included in the settlement, and that it was kept out of the settlement by the fraudulent misrepresentations or concealment of the husband. But on that hypothesis the proceedings of the wife are equally irregular. If the house was bound by a trust for the children it could not be subject to a writ of execution for her private debts. Her proper course would have been not to treat the agreement as a nullity, but to act upon it, and enforce it by a Bill to compel a settlement of the property which had been improperly withheld.

In truth, however, it appears that a settlement had been made of the house on trusts pretty much the same with those applicable to the property in the Old China Bazar.

On the whole, their Lordships agree both with the decision in the Court below, and with the reasons assigned for it in the extremely able judgment of the Chief Justice, and they must advise Her Majesty to affirm the Decree complained of, with costs.

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