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Court : Allahabad

Decided On : Mar-07-1935

Reported in : AIR1935All799; 155Ind.Cas.928

Appellant : Nawab Singh

Respondent : Daljit Singh

Judgement :

Bajpai, J.

1. This is a plaintiff's appeal whose suit was decreed by the trial Court, but dismissed by the lower appellate Court. The facts may be stated. On 28th June 1920. one Phul Kunwar sold the plaint property to Daljit Singh, defendant, to the present suit for Rs. 400. On 21st April 1921, Daljit Singh sold the same property along with certain mortgagee rights to Gajraj Singh for Rs. 800. It has been alleged in. the present controversy that the sale in favour of Gajraj was a bogus sale and it was not the intention of the parties that ownership should be transferred to Gajraj, but it was apprehended that the sale by Phul Kunwar might be pre-empted by a co-sharer and therefore Daljit and Gajraj adopted the trick of getting a document of transfer executed, Gajraj being an equal cosharer with the potential pre-emptor. A pre-emption suit was actually filed by one Narain Singh on 21st June 1921, and he impleaded Phul Kunwar, Daljit and Gajraj as defendants. His allegation naturally was that the sale by Daljit to Gajraj was a bogus sale. In this

pre-emption suit Daljit and Gajraj both pleaded that the sale of 21st April 1921, was a real and genuine sale by which ownership was transferred from Daljit to Gajraj; Daljit further appeared as a witness and said that he had received the consideration of Rs. 800 mentioned in the sale-deed of 21st April 1921. In the result the pre-emption suit was dismissed.

2. It appears that Gajraj applied for mutation on 6th September 1923 on the basis of the sale-deed in his favour. This application however was dismissed on the ground that the name that stood in the revenue papers as against the property was the name of Phul Kunwar and he name of Daljit even, the vendee from Phul Kunwar, had not been mutated and it was not possible therefore to enter the name of Gajraj. Gajraj and his heirs do not seem to have taken any steps after this. On 16th March 1927, Daljit asked for the mutation of his name on the basis of the sale-deed dated 28th June 1920, executed by Phul Kunwar and his name was mutated. Daljit has remained in possession of the property all along. In January 1931 the present suit was instituted by Nawab Singh alleging himself to be the reversioner of Gajraj Singh for recovery of possession of the property sold to Gajraj Singh by Daljit Singh on 21st April 1921. Daljit Singh disclosed the true nature of the transaction in his written statement and pleaded that the object of the transaction was to defeat a possible pre-emption suit and as a matter of fact no consideration passed upon the document of 21st April 1921. The lower appellate Court has distinctly held that sale-deed of 21st April 1921 was 'fictitious without consideration and was executed on account of the fear of a pre-emption suit.' He took into consideration the fact that Gajraj Singh and Daljit Singh were related, that both of them lived in one and the same house and that the mortgage-deed which was sold along with the property by the sale-deed of 21st April 1921 also remained all along with the defendant. Daljit Singh. The two sale-deeds, namely, one in favour of Daljit and the other in favour of Gajraj were also produced by Daljit Singh. On these considerations the lower appellate Court came to the conclusion that the sale-deed in question was 'fictitious and without consideration' and dismissed the plaintiff's suit. In second appeal it is argued that it was not open, to the defendant to plead fraud and to disclose the true nature of the transaction. It is said that a deed cannot be avoided on the ground of fraud by a party to the fraud and reliance is placed upon the case of *Sidlingappa v. Hirasa* (1907) 31 Bom. 405.

Reference is also made to the cases of *Kamayya v. Mamayya* 1918 Mad. 365 and *Shiva Narain Ram v. Phuljharai* 1919 Pat. 539. These cases, no doubt support the contention of the plaintiff-appellant, but the Bombay case was considered by this Court in the case of *Vilayat Husain v. Misran* 1923 All. 504, and the Letters Patent Bench came to the conclusion that that case was of doubtful authority. After a review of certain English decisions and following a well considered judgment of the Calcutta High Court in the case of *Raghupati Chatterji v. Nrishingh Hari Das* 1923 Cal. 90, it is held that:

Where a plaintiff is relying upon a deed, the defendant is entitled to give evidence of the circumstances under which the document came into existence and when these circumstances include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate the fraud, and that there is no difference in the degree of the guilt of the plaintiff and that of the defendant, the duty of the Court is not to assist either party.

3. Applying this principle I am of the opinion that it was open to the defendant to plead the circumstances under which the document which is the basis of the present suit came into existence and when those circumstances are scrutinised there cannot be the slightest doubt that Gajraj Singh and Daljit Singh both sat down in order to defraud a possible pre-emptor who was actually defrauded and under these circumstances 'the (estate should lie where it falls' and the Court should help neither party. This principle was mentioned with approval by their Lordships of the Privy Council in the case of *Petherpermal Chetty v. R. Muniandy Servai* (1908) 35 Cal. 551, where a passage from Mayne's Hindu Law, Edn. 7, p. 595 para. 446, was quoted in extenso, and it was observed that the principle was correctly stated by the learned author. In the Bombay case the conflict between the two legal maxims *nemo allegans turpitudinem suam audiendus* and *in pari delicto potior est conditio possidentis* was stated and it was said that authority could be cited for the contention of either party who sought to invoke the aid of the legal maxim that best suited him, but their Lordships of the Bombay High Court preferred to follow the rule laid down in *allegans turpitudinem suam*. I have already

said that the authority of the Bombay case was doubted by this Court in *Vilayat Husain v. Phuljhar* 1919 Pat. 539 and by the Calcutta High Court in *Raghupati Chatterji v. Nrishingha Hari Das* 1923 Cal. 90. It was also doubted by the Lahore High Court in *Qadir Bakhsh v. Hakam* 1932 Lah. 503, where Tek Chand, J., delivering the judgment of the Full Bench, has reviewed the entire case law on the subject and has pointed out that there is no real conflict between the two maxims and that whereas the one embodies the general rule the other provides an exception:

A person who has polluted his hands by being a party or privy to a fraudulent transaction shall not be allowed to approach the fountain of justice with his own infamy on his lips and obtain relief on the strength of such a transaction, and the moment he relies on such an agreement he will be told *nemo allegans suam turpitudinem audiendus est*.

4. This maxim is applicable where the plaintiff who has become a transferee under a fictitious transaction but who has not actually obtained possession of the property wants to enforce his right against the transferor who is in possession of the property. I am of the opinion that even if the object of the fictitious transaction was to cheat an innocent person and that innocent person has been cheated, the plaintiff would not be permitted to assume the individuality which was just a mere mask, and the Court in its obvious duty of masterly inaction should not help the plaintiff on the principle that a party cannot be heard to plead his own fraud and succeed on its basis. If the fraud has succeeded there is abundant authority for the proposition that the grantor or transferor who has made a fictitious transfer and has put the transferee in possession will not be allowed to recover possession inasmuch as he has by the transfer cheated a stranger and because the transaction has ceased to be in the words of Mayne 'a mere mask and has become a reality' and 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.

5. The position in the present case however is slightly different, because the plaintiff is not seeking to avoid a certain transaction, but wants relief on the basis

of the transaction. He alleges that there is a document of transfer in his or his predecessor's favour and possession has not been delivered to him on the basis of the document, possession may so be delivered and he says that if the defendant pleads that the transaction should not be given effect to on the ground that the transaction was brought about in order to perpetrate a fraud on creditors the defendant should not be heard on the maxim *nemo allegans turpitudinem*. It is under these circumstances that there is an exception to the general rule and the principle that is applicable is the principle contained in the maxim *in pari delicto*. The defendant will be permitted to state that the document is not supported by consideration and the document was executed in order to defraud another person, namely, the pre-emptor in the present case and on proof of the defendant's averments if it is found that the plaintiff and the defendants were *in pari delicto* the Court shall stay its hand and refuse its support to either confederate letting the estate lie where it falls. There is thus no real conflict between the two maxims, the first maxim, stating the general rule and the second maxim providing an exception to the general rule. In the present case therefore it is possible to apply the exception, i.e., the principle of *in pari delicto* in order to defeat the plaintiff's suit.

6. It is however said that, the plaintiff in the present case is not Gajraj Singh who was a party to the fraud, but his heir Nawab Singh and he is neither pleading any fraud nor when the fraud is allowed to be proved, can it be said that he is *in pari delicto*. The argument is that he is trying to enforce a transaction and the defendant should not be heard because of the application, of the general maxim stated by me before. The answer to this is that the defendant is not necessarily setting up any fraud, but is putting the plaintiff to strict proof of his title and is alleging that the basis of the plaintiff's title is not supported by consideration. On the finding of the lower appellate Court that the document is without consideration the defendant's case is that the plaintiff should be non-suited. It is argued on behalf of the plaintiff that in order to state his defence fully the defendant will have to state the circumstances under which the fraud was enacted and he should not be permitted to do so as against the plaintiff who was not his confederate at the time the fraud was perpetrated. Reliance is placed on *Muckleston v. Brown* (1801) 6 Ves. 52 and the case of *Matthew v. Hanbury* (1790) 2 Vernl. 188, and in both these cases it was held that although the testator himself might not be able to

obtain relief, there was nothing to prevent the executor from maintaining a suit. The cases are different. In those cases it was held that where a person has parted with his property in order to defraud strangers or where he has incurred liability under unlawful circumstances he would not be permitted to obtain relief, but his heirs or executor would be liable. This is not a case where Nawab Singh is seeking to obtain relief from the effects of any transaction entered into between his predecessor and the defendant by which a liability has been cast on the plaintiff's estate. The plaintiff is seeking to enforce a transaction which is not supported by consideration and whose object the Court perfectly well knows and I am of the opinion that neither Gajraj Singh nor his heir should be allowed to do so. I am fortified in my opinion by the view taken by the Punjab Chief Court in *Nand Lal v. Jethu Mal* 1916 Lah. 130.

7. Reference was also made by Mr. Ghatak to the recent Privy Council case of *Maungwe Nang v. Maung Tha Maung* 1929 P.C. 55, and my attention was drawn to a passage in the report at p. 254. Their Lordships found it unnecessary to decide the point on which a forceful argument was advanced, but their Lordships held that if certain facts regarding fraud are alleged, it is the duty of the Court adjudicating on the allegation of the grantor to see that he proves by cogent evidence the averment that he makes. This case however does not help me in any way in deciding the present appeal. One simple way in which this case may be looked at is that the plaintiff wants to enforce a document which the defendant alleges to be without consideration and the Court which is the final Court of facts has come to the conclusion that there was no consideration for the document. The plaintiff who is setting up the document must therefore necessarily fail. For the reasons given above, I dismiss this appeal with costs, but grant leave to file an appeal by way of Letters Patent.