

Bhaboot Mal Vs. Sens Mal

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Court : Rajasthan

Decided On : Jul-14-1972

Reported in : AIR1973Raj56; 1972()WLN451

Judge : Jagat Narayan, C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115; [Evidence Act, 1872](#) - Sections 116

Appeal No. : Civil Revn. Appln. No. 387 of 1971

Appellant : Bhaboot Mal

Respondent : Sens Mal

Advocate for Def. : Sumerchand, Adv.

Advocate for Pet/Ap. : Hastimal, Adv.

Disposition : Application allowed

Judgement :

ORDER

Jagat Narayan, C.J.

1. This is a revision application by the defendant against a decision of Munsif. Bali, on issue No. 5 holding that he is estopped from pleading that the sale deed of the

house and the rent note were ostensible, bogus and collusive.

2. The plaintiff brought the pre-sent suit against the defendant for recovery of arrears of rent and for ejectment, on the ground that the tenancy has been terminated by a valid notice. It was alleged in the plaint that the house in suit belongs to the plaintiff and had been purchased by him and that it was in his possession. It was also alleged that the defendant took the house on rent of Rs. 50/- per month on 2-4-1959, and executed a rent note.

3. The suit was contested by the defendant. He alleged that he was heavily indebted and in order to defraud the creditors he executed a fictitious sale deed and a fictitious rent note in favour of the plaintiff in collusion with him and that this was only done to save the property from the creditors. It was further pleaded that the possession over the house was never given by the defendant to the plaintiff and that the intention of the parties in executing the sale deed and the rent note was to debar the creditors from, selling it in execution of their decrees. It was also pleaded that Mahendra Silk Mills Ltd., Bombay, got the house in suit attached and put to auction, but through, the intervention of the plaintiff a compromise was arrived at by him on payment of Rs. 11,000/- and that this sum was borrowed by him from the plaintiff and was paid to the creditors and that the sale deed was executed by way of security for the repayment of that sum. The pleadings of the defendant are no doubt confused but a perusal of the written statement goes to show that he also pleaded that the relationship of landlord and tenant never existed between him and the plaintiff. It is contended on behalf of the defendant that Section 116 of the Evidence Act presupposes that the person affected by the estoppel is a tenant and that it is open to the defendant to show that he was never a tenant of the plaintiff. The decision in *Sk. Rashid v. Hussain Bakash*, AIR 1943 Nag 265 was referred to in support of this proposition.

4. On behalf of the plaintiff a preliminary objection was raised that the revision application is not maintainable in view of the decision of this Court in *Harakchand v. State of Rajasthan*, ILR (1970) 20 Raj 88 (FB). Learned counsel for the defendant referred to the decision of their Lordships of the Privy Council in *Joy Chand v. Kamalaksha*, AIR 1949 PC 239 which has been cited with approval in

Harakchand's case. ILR (1970) 20 Raj 88 (FB) at Page 93. It was held in that case that an erroneous decision on a question of res judicata or on a question of limitation may become a question of wrong assumption of jurisdiction or failure to exercise jurisdiction. I am of the opinion that a wrong decision on a question of estoppel, as in the present case, will also lead to a failure to exercise jurisdiction or to a wrong assumption of jurisdiction. The preliminary objection has, therefore, no force and is rejected,

5. Next it was contended on behalf of the plaintiff that the Nagpur case is distinguishable inasmuch as an oral tenancy was alleged in that case which was denied. That decision is relied upon for the proposition that Section 116 presupposes that the person affected by the estoppel is a tenant. No decision was cited to show that this proposition is in any way erroneous. I am accordingly of the opinion that it is open to the tenant to prove that the relationship of landlord and tenant did not subsist between him and the plaintiff at any time. In order to prove this assertion the defendant will have to prove all the facts which have been pleaded by him in his written statement namely that he was heavily indebted to several creditors, that the Mahendra Silk Mills Ltd., Bombay, sold the house in suit attached in execution of their decree, that a compromise was arrived at through the intervention of the plaintiff under which a sum of Rupees 11,000/- was paid to the Mills, that this sum was borrowed from the plaintiff, that there were numerous other creditors of the defendant and that the sale deed and the rent note were executed in collusion with the plaintiff to defraud the creditors. Learned counsel for the defendant referred to the decision of the Supreme Court in *Immani Appa Rao v. Gollapalli Ramalingamurthi*, AIR 1962 SC 370 in which it was held as follows:--

'Where both the transferor and the transferee were in equal fraud in carrying out the transfer to defraud the creditors of the transferor and the fraud contemplated has been carried out but the possession remains with the transferor, in a suit by transferee for possession, it is open to the transferor to plead fraud and the absence of consideration.

In such a case there can be no question of estoppel for the obvious reason that the fraud in question was agreed to by both the parties and both parties have

assisted each other in carrying out She fraud. When it is said that a person cannot plead his own fraud it really means that a person cannot be permitted to go to a Court of Law to seek for its assistance and yet base his claim for the Court's assistance on the ground of his fraud.

In considering which of the conflicting maxim. should be applied, the approach of the Court must be conditioned solely by considerations of public policy.

In this case the paramount consideration of public interest requires that the plea of fraud should be allowed to be raised and tried, and if it is upheld the estate should be allowed to remain where it rests. The adoption of this course is less injurious to public interest than the alternative course of giving effect to a fraudulent',

6. Whether or not the principle underlying the above decision will apply to the present case is to depend on the finding of the trial Court after both the parties would have led evidence on the issues which have been framed in the suit. But I have no doubt in my mind that in view of the pleadings of the defendant in the present case he is not estopped from leading evidence to show, that the sale deed and the rent note are fictitious documents which were executed as & result of collusion between the plaintiff and the defendant to defraud the creditors of the latter.

7. The revision application is accordingly allowed the finding of the learned Munsif on issue No. 5 is set aside and the issue is decided in favour of the defendant,

8. In the circumstances of the case I leave the parties to bear their own costs of this revision application. The stay order passed in the case is vacated. Let the record be sent to the trial Court immediately with a direction that the suit shall be disposed of expeditiously.