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Court : Chennai

Decided On : Mar-12-1923

Reported in : AIR1925Mad360

Appellant : William Brunton

Respondent : John E.C. Brunton

Judgement :

Schwabe, C.J.

1. I have had the opportunity of reading the judgment of Coutts-Trotter J., with which I so fully agree that I can say what I have to say shortly. This is an appeal from the judgment of Kumaraswami Sastri, J., in a suit brought by Mr. Jack Brunton against his step-brother Mr. William Brunton. William Brunton was a partner with his father in an engineering business at Cochin. His mother had died and his father married again. On the father's death, William Brunton entered into a partnership with his stepmother, Mrs. Rita Brunton, the mother of the plaintiff, Jack. By the terms of the partnership deed Mrs. Brunton wag entitled to 2/3 of the capital and William Brunton to 1/3: but they were each entitled to half of the profits and liable for half of the losses. There were provisions in the deed for the equalization of capital between the two. Time went on and the business prospered under the management of William Brunton. Throughout, he was on most friendly and affectionate terms with the step-mother. From time to time the business required further capital and this was provided by the partners on what was called

current account. His contributions were much larger than hers, so that she retained a larger capital account in the business, and he a larger current account. The current account carried interest but the capital account did not. In June 1916 two proposals were made by William Brunton to Mis. Brunton - one for turning the business into a limited company, and the other for equalization of their capital. The proposals are contained in a letter dated 24th June, 1916. I have no doubt that Mrs. Brunton was an intelligent woman and quite capable of appreciating questions of business. The company plan she would have none of, and said so quite plainly. She considered the question of equalization and, though it seems to have been doubted by the learned Judge, I have myself no doubt that she accepted in writing the terms of the equalization of capital. That this is so is clear from the evidence of the defendant and of Mr. D'Cruz, an old and trusted employee of the firm, who produced a letter from Mr. Brunton saying that he had a letter from her agreeing, and giving the necessary instructions. The next balance sheet was accordingly prepared on the new basis. There can be no doubt that this was done and there can be no question of mistake, and I am quite satisfied that she, in fact, wrote giving her consent. Why the consented I think is clear from Jack Brunton's evidence for he says that, in October, 1916, he tried to dissuade her from affirming what had been done by signing the new balance sheet, but she said that it was fair to William, and that she had done it. I think also that she may have been partly influenced to do so by William Brunton's letter pointing out that she would benefit in income because by transferring his money from the current account to the capital account, the firm would no longer have to pay interest on the amount. It was the plaintiff's case that she consented in January, 1917, when she was in a bad state of health, and that there was undue influence and concealment of material facts. The learned Judge found, and I am quite clear that be was right that nothing of the sort happened in January, 1919 but that everything was completed by the previous October. On all this part of the case the evidence of the plaintiff and his wife is most unreliable, as they obviously confuse a dispute or discussion about granting to the plaintiff an unlimited power-of-attorney with the question of the signing of the balance sheet, the object, being to make out that the signing was done at a time when Mrs. Brunton's health was not good.

2. This does not conclude the matter, because William and Mrs. Brunton being partners, it was his duty to make to her a full disclosure of all the material facts within his knowledge which would assist her in deciding whether to enter into a contract with him in relation to the interests in the partnership. The learned Judge finds that he did not in fact make the necessary disclosure and on this finding alone bases his judgment. There are some passages in the judgment which suggest that the learned Judge's view was at least one of suspicion as to the honesty, and motives of the defendant, William Brunton, though he does not base his decision on any such ground; and I think it right to say that, as far as I can judge on the evidence and facts before us, there is nothing to show that William Brunton acted otherwise than with candour and honesty throughout.

3. Whether there was or was not a proper disclosure of facts within his knowledge is a question, that I approach with very great caution, because it was not the case of the plaintiff nor was it the case put forward at the trial. Not one question was put to William Brunton suggesting that he kept anything back from her; nor was it suggested what he ought to have told her which he did not or what knowledge he had which she had not. It is obviously a dangerous thing to decide a case on grounds other than those which have been raised at the hearing. Mr. Grant tells us - and it is not contradicted - that unti 1 the judgment he had not the least idea that this was the case he had to meet, or was meeting, the case that he was fighting was one of undue influence and fraud or a deliberate concealment made and a final consent; obtained not in October, 1916, but in January, 1917, when the lady's health was becoming impaired, though Dot, I would point out, sufficiently impaired to prevent Jaok Brunton from obtaining from her a very wide power of-attorney or to prevent bar, on the possible danger of giving to him such wide powers being pointed out, from refusing to allow it to become operative' The case now made is that the valuation in the balance sheet of land and machinery was inadequate and that the giving up by her of one-sixth interest in the capital was not compensated for by William Brunton giving up his preferential right to Rs. 88,000 in the current account, and his right to interest on that. It is said that on the balance sheet as it stood in 1917 she had given up on balance at least Rs. 50,000 and on a proper valuation a good deal more. The evidence as to this is not very satisfactory to my mind. In 1917, and probably in 1916, there had been a boom in Cochin, owing, it is

said, chiefly to the opening of a Harbour; and it is common knowledge that the value of machinery in situ rose owing to the difficulty of manufacture and transport during the War. But how far these things would be permanent must obviously have been a question of speculation. I am not satisfied on the evidence that the defendant was any better informed on these matters than Mrs. Brunton. Further, and to this I attach the greatest weight, it would appear that before the carrying through of the matter by the signing of the balance sheet, the plaintiff had fully discussed the matter with his mother. He himself had been employed in the firm and was quite competent to advise her and did so by saying that it was impossible for any one without a full and fresh valuation to decide whether the proposal was to her advantage or not; but she took the view that William wanted it, that it was fair to him and that she thought it right, and did it. In these circumstances, in my judgment, there is no evidence of a failure on the defendant's part to make sufficient disclosure of facts within his knowledge and not within hers. She had the very difficulty pointed out to her son and, if she chose then to accept, with her eyes open to the difficulty without requiring any further valuation or asking for any further information, she could not, in my judgment, be permitted afterwards to repudiate the bargain, and her son, the plaintiff, is in no better position. If what I have just referred to took place after she had agreed, the position is the same, because, in my judgment, that amounts to an election by her to be bound by the contract.

4. When a suit is brought to avoid a contract by reason of misrepresentation, fraud, non-disclosure of material facts or undue influence, there are certain recognised principles applicable. In the well' known judgment of the Exchequer Chamber in Clough v. London North Western Railway Co. (1872) 7 Ex. 26, the principles were enunciated thus: We agree that the contract continued valid till the party defrauded has determined his election by avoiding it. In such cases (i.e. of fraud) the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or has he elected to avoid it, or has he made no election? 'We think that so long as be has made no election, he retains the right to determine it either way; subject to this that if, in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or, if in consequence of his delay the position even of the wrongdoer is

affected, it will preclude him from exercising his right to rescind. The matter was put from another point of view in Lindsay Petroleum Co. v. Hurd (1874) 5 P.C. 221, thus : 'The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be justified, is founded upon mere delay, that delay of course not amounting to a bar of any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy.' These passages in these two judgments were approved by the House of Lords in Erlanger v. New Sombero Phosphate Co. (1878) 3 A.C. 1218 , see particularly the opinion of Lord Blackburn at p. 1277. Applying those principles to this case, in my judgment, the setting aside of this contract is out of the question. In this case, for the reasons I have stated, I think that Mrs. Brunton elected to affirm it with quite sufficient knowledge of the facts in October 1916. Secondly, the plaintiff himself having full knowledge of the facts, in my judgment, deliberately elected not to avoid the contract. This, I think, is clear from a letter of his Solicitors, dated 27th November, 1917, in which he claimed certain advantages which he contended accrued to him by reason of the equalisation of capital. Further, there has been in this case such laches or acquiescence which would render it practically unjust to give any such remedy. The plaintiff has, by his conduct, done what might be fairly regarded as equivalent to a waiver of it or put William Brunton in a situation in which it would not be reasonable to place him if a right to such remedy were afterwards to be asserted. He elected to purchase the business on the basis of equalised capital and went on with it for several years and ultimately sold it, and no attempt to repudiate was made, and he thus changed his position so that, in my judgment, it would be quite

impossible to grant restitutio ad integrum now.

5. The defendant has appealed from other parts of the judgment but has withdrawn those grounds of appeal. There is a cross-appeal by the plaintiff on two points : (1) as to the construction of the partnership agreement and whether the defendant had properly elected to purchase thereunder, as to which I agree with the learned Judge and I have nothing to add, and (2) as to the value of the Cochin land, a pure question of fact, and no grounds have)' been put before us which would justify us in interfering. The decree will be varied and the accounts taken on the basis of the' contract for the equalisation of capital standing good. In the Court below the costs of issues & and 7 as to equalisation must be paid by the plaintiff to the defendant. As to the rest each party must bear his own costs. This appeal has succeeded as to a part and failed as to other parts, and the cross-appeal fails and I think that the proper order will be that the cause of both parties of the appeal and cross appeal will come out of the estate. Certificate for one Counsel.

Coutts-Trotter, J.

6. (His Lordship held on the evidence that no undue influence or misrepresentation or fraudulent concealment had been proved and proceeded :) What happened at the-trial was that, after the case had been fought on a plain issue of fraud, the learned Judge, when be came to give judgment-discovered an entirely new case for the plaintiff - one to which, I am satisfied, Mr. Grant's mind was never directed and with which he had no opportunity of dealing; that case was not that Mr. William Brunton had committed a deliberate fraud or that he had extracted the 'assent of Mrs. Brunton to the equalisation of capital in January, 1917 when she is alleged not to have known what she was doing because of her physical and mental condition. Accepting, the assent to the balance sheet which, of course, involved an assent to the equalisation of capital as having taken place in October, 1916, the learned Judge nevertheless held that that assent was given by Mrs. Brunton at a time when Mr. William Brunton was in sole possession of the material facts and that he had failed to acquaint her with those facts, that consequently the doctrine that has its clearest exposition in Law v. Law (1095) 1 Ch. 140, applied, and that, accordingly, the transaction must be set aside.

7. [His Lordship held that the case set tip broke down on the evidence before the Court.]

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