(1974) 12 CAL CK 0017

Calcutta High Court

Case No: Appeal from Original Decree No. 715 of 1968

Harihar Singh and Another	APPELLANT
Vs	
Monomohan Roy	RESPONDENT

Date of Decision: Dec. 24, 1974

Acts Referred:

- Companies Act, 1956 - Section 531A, 533, 536, 538, 539
- Transfer of Property Act, 1882 - Section 55(6)(b)

Hon'ble Judges: N.C. Mukharji, J; M.M. Dutt, J

Bench: Division Bench

Advocate: P.N. Mitter and Nilmoni Goswami, for the Appellant;Ranjit Kumar Banerjee and A.K. Motilal, for the Respondent

Final Decision: Allowed

Judgement

1. This appeal is at the instance of the defendants and it arises out of a suit for declaration of title and for permanent injunction.

2. The case of the plaintiff Manomohan Roy is that he purchased the disputed property by a registered kobala dated February 14, 1935 for valuable consideration. With a view to carry on a business he promoted a limited company, named, All India Sugar Mills Co. Ltd. (hereinafter referred to as the company). He became the Ex-Officio Director of the company and got some shares allotted to his name in lieu of the disputed property although no formal deed of transfer was made by him in favour of the company. He was the supreme authority of the company. The property vested in the company and was shown in its balance sheet. The company also took possession of the property in 1937/38. It is alleged that as there was no formal deed of transfer, the property legally remained under his control. Though there was no chance of the factory of the company being constructed on the disputed property, he could not find out any way of recovering possessing of the same.

3. The plaintiff took the advice of the defendant no.2. Dharmadas Mallick, who advised him to execute a colourable benami document without consideration in respect of the disputed property in favour of his officer, the defendant No.1 Harihar Singh. Harihar Singh represented to the plaintiff that he and Dharmadas would, in the event of a benami deed was executed in his favour, recover possession of the property on the strength of such a deed after evicting the company and put the plaintiff in possession thereof. The plaintiff, in good faith relied on the advice of the defendants and executed a kobala without consideration on May 19, 1956 for self and as the Ex-Officio Director of the company. The plaintiff bore all the expenses for the execution and registration of the said kobala. It is alleged that the said kobala was not executed for the purpose of transferring any interest in the disputed property in favour of Harihar Singh and that it was not intended that Harihar Singh would acquire any interest on the strength thereof. Lest the said document would be held to be benami and would stand in the way of recovery of possession of the property, the plaintiff took every step necessary to show off the same as a real transfer. Harihar Singh, it is alleged, did not pay the sum of Rs.20,000/- stated to be the consideration money in the said document. He had no means to pay the said sum or any sum.

4. As the plaintiff was the Ex-Officio Director of the company and was himself a party in the document and as it would not be in accordance with law to institute a suit against himself, he took resort to the execution of such a document. Moreover, the liquidation proceedings were going on at the time the document was executed, and the plaintiff did not think it was to dispossess the company himself.

5. After the execution of the document the company went into liquidation and as there was no formal deed of transfer in favour of the company, the property in dispute was not treated as the asset of the company. Harihar Singh took possession of the property on behalf of the plaintiff on the basis of the said kobala about the year 1958.

6. The further case of the plaintiff is that the disputed property remained in possession of Harihar Singh for one year and he proposed to start a brick field on the same. The plaintiff entrusted the defendant No.2 Dharmadas with the same and it was agreed that the plaintiff would become the proprietor of the half share of the said business and would get half of the profits. Harihar Singh paid some money to the plaintiff on account of his share of profit up to 1960-61, but taking advantage of the ailments of the plaintiff, he stopped payment since 1961 in spite of repeated requests. Harihar Singh has been asserting title to the disputed property on the strength of the impugned kobala. Hence, the suit was instituted by the plaintiff.

7. The defendants nos. 1 and 2 entered appearance in the suit and contested the same by filing two separate written statements. It was contended by them that the suit was not maintainable in its present form. They denied the material allegations of the plaint including the allegation that the kobala was a benami transaction

without consideration. It was averred that the defendant no.1 paid Rs.20,000/- for the purchase of the disputed property by the said kobala. It was alleged that the company had no semblance of title or possession in respect of any portion of the disputed property, and that it was solely to the interest of the plaintiff that the company was ushered into existence by the plaintiff to gain his own private ends. The plaintiff intended to transfer the disputed property and transferred the same for valuable consideration by the said kobala. It was alleged that the plaintiff represented to the defendant no.1 that none but the plaintiff himself was the absolute owner of the disputed property, although there were some indications about ostensible transfer of the same to the company and that too with an ulterior motive. The motive for the execution of a sham and fictious document without any real intention to transfer the disputed property, as alleged by the plaintiff was denied. It was asserted that the defendant no.1 had been in possession of the disputed property since the date of transfer of the same by the said kobala.

8. The learned Subordinate Judge came to the findings that the transfer sought to be made by the said kobala was a sham and colourable transaction; that the defendant no.1 had not the means to pay the consideration money of Rs.20,000/- and that there was no independent possession of the defendant no.1 f the disputed property. As to the contention made on behalf of the defendants that the plaintiff could not be allowed to take advantage of his own fraud, it was held by the learned Subordinate Judge that there was no material to show that the actual title of the disputed property was ever transferred to the company and as such no fraud was committed by the plaintiff. Upon the said findings, the learned Subordinate Judge decreed the suit. Hence, this appeal at the instance of the defendants.

9. Mr. P. N. Mitter, learned Advocate, appearing on behalf of the defendants-appellants has strenuously urged that on face of the plaint, the plaintiff must be non-suited. He submits that it is the plaintiff''s case that he defrauded the company by an allotment of shares worth Rs.10,000/- the company by an allotment of shares worth Rs.10,000/- without executing any deed of transfer and thereafter by getting the disputed property out of the company in collusion with the defendants. It is contended by him that according to the plaintiff, he and the defendants were in pari delicto and the fraud having been successfully perpetrated, the plaintiff is not entitled to get any assistance from the court to recover possession of the disputed property, even assuming that the kobala executed in favour of defendant no.1 was a sham transaction. A somewhat similar contention was made before the learned Subordinate Judge who did not accept the same on the ground that as there was no transfer of title of the disputed property to the company it could not be aid that any fraud was committed by the plaintiff.

10. We have started the plaintiff''s case in some details. It is the positive case of the plaintiff that the disputed property vested in the company and that the same was shown in its balance as its property. Further, it was categorically averred by the

plaintiff in his plaint that the company took possession of the disputed property. It is the evidence of the plaintiff that he started the company and got shares worth Rs.10,000/- allotted to his name in lieu of the disputed property. It is appellant from his evidence that he and the defendants colluded for the purpose of getting the disputed property out of the possession of the company by means of a sham and colourable document. The question naturally arises whether the company acquired any interest in the property. The company was admittedly entitled to the call money of Rs.10,000/- in respect of the shares allotted to the plaintiff. The plaintiff did not pay the said amount of the call money. It is the plaintiff''s own case that he was the supreme authority of the company. The plaintiff himself treated the disputed property as the property of the company which is evident from the fact that the same was shown in the balance sheet of the company. It transpires from his evidence that the subscribed capital of the company would go into liquidation, he managed to get back possession of the disputed property with the assistance of the defendants. It s contended by Mr. Mitter that by virtue of S. 55(6)(b) of the Transfer of Property Act, the company had a charge on the disputed property for the amount of the call money of Rs.10,000/-, even though no conveyance was executed.

11. In our view, the said contention of Mr. Mitter has considerable force. The plaintiff was bound to pay the said sum of Rs.10,000/- to the company but he did not, on the ground that he had made over possession of the disputed property to the company. The explanation of the plaintiff is that as the factory was not started on the disputed property the conveyance was not executed. We are unable to accept this. If the plaintiff remained the owner of the property, in that case, there would not have been any necessity for such a device and contrivance to deprive the company of the possession of the same. We may refer to a very significant fact, namely, that the plaintiff got a resolution passed by the Board of Directors on March 4, 1956 (Ext. ''K''). By the said resolution, any one of the three Directors, namely, Amiya Bhusan Mondal, Bimal Chandra Mukherjee and the plaintiff was empowered to negotiate and sell the disputed property and to sign necessary documents and do all other needful acts on behalf of the company. In the kobala, Ext ''A'', the said resolution empowering the plaintiff to sell the disputed property has been mentioned in the recital thereof. Further, on the date the said kobala was executed, namely, on May 19, 1956, the plaintiff swore an affidavit to the effect that he was empowered by the Board of Directors of the company by the said resolution to negotiate and sell the disputed property. These facts clearly show that the plaintiff was conscious that the disputed property was the property of the company or at least the company has some interest in the same inasmuch as the plaintiff did not pay the said sum of Rs.10,000/- for shares allotted to him. Thus it is apparent that the plaintiff in order to defraud the company of the said sum of Rs.10,000/- for which the disputed property stood charged, got the sale deed executed by him and also on behalf of the company in the benami of the defendant no.1. If the plaintiff really believed that title remained with him, in that case, he would not have executed the kobala as the

Director of the company. The only object of this was to prevent the company from recovering the property from the plaintiff who would pass off the same as the property of the defendant no.1. We are unable to accept the contention of Mr. Banerjee, learned Advocate appearing on behalf of the plaintiff-respondent that in the absence of any conveyance, the company did not get any title to the disputed property and that the plaintiff cannot be said to have committed any fraud. We hold that the company had a charge on the disputed property in view of S. 55 (6)(b) of the Transfer of Property Act for the said sum of Rs.10,000/-. In Jibhaoo. V. Ajab Singh it has been held by a Division Bench of the Bombay High Court that under S. 55(6)(b) a charge arises immediately the purchase price is paid by the buyer to the seller. This principle was applies to the present case, for the call money of Rs.10,000/- was equivalent to the purchase price of the disputed property.

12. Mr. Mitter has made an alternative argument. It is contended by him that in view of the fact that the plaintiff was the Director of the company, he was in a fiduciary relationship to the latter and he held the disputed property as a trustee of the company. He submits that the plaintiff cannot claim any title to the property inasmuch as he was liable to the company for the said sum of Rs.10,000/- on account of the call money. There is much substance in this contention. Although the position of directors differs from that of trustees in some respects, yet to the extent of their being entrusted with the moneys of the company, they are trustees and are jointly and severally liable for breach of trust (See Ramskill v. Edwards, In re Carriage Co-operative Supply Association and Peninsular Locomotive Co. Ltd. v. H. Langham Reed). In Regal v. Gulliver the directors were held to be in a fiduciary relationship and, therefore, liable to repay to the company the profit they had made on the sale of the shares. In the instant case, the plaintiff must also be held to be in a fiduciary relationship to the company in respect of the disputed property. It is, however, said on behalf of the plaintiff that the company also had obtained some benefit from the possession of the disputed property. In our view, this argument is not available to the plaintiff. In E.B.M. Company v. Dominion Bank, it has been observed by Lord Russel of Killowen as follows :

There Lordships are unable to appreciate how the company by depriving itself of its main asset, could be helped in its litigation with the Dominion Government, and they are of opinion that the benefit to the Company upon which Masten, J.A. based this part of his judgment is not only incapable of bearing the weight assigned to it but it is in fact non-existent. But apart from this consideration, the judgment cannot be sustained on its second ground because, as will be appointed out later, if directors misuse their powers as directors, for their own advantage, the transaction is as against the Company of no effect, and the Court will not inquire whether the company derived any benefit from the transaction.

In view of the above principle of law as laid down by Lord Russel of Killowen, the plaintiff having misused his position as the director of the Company by not

conveying the property to the company, cannot be heard to say that the company derived some benefit as the possession of the disputed property was transferred to it.

13. The learned Subordinate Judge found that no consideration passed for the said kobala (Ext. ''A''). The defendants sought to prove payment of the sum of Rs.20,000/- to the plaintiff on account of consideration money. It transpires from the evidence of the defendants no.1 and 2 and it is not disputed that the defendant no.1 Harihar Singh is the brother-in-law (wife''s brother) of defendant no.2 Dharmadas, who is a witness to the execution of the kobala (Ext. ''A''). It is the evidence of Dharmadas that Harihar Singh had been living in his house since the age of 16 and that he had left his house after his marriage. As to the source of the consideration money of Rs.20,000/- it has been sought to be proved that Harihar Singh got the money from his business in Katwa. It is alleged by him that he had deposited the said sum of Rs.20,000/- with Dharmadas within a period of 2/3 months. On the other hand, Dharmadas says that Harihar Singh kept in deposit with him the said sum of Rs.20,000/- and other sums since the age of 16. There is, therefore, material discrepancy between their evidence in this regard. It is in evidence that there are Postal Savings Bank, a State Bank, and Co-operative Bank at Katwa. Instead of depositing such a considerable sum of money with any of the said Banks, it is not understandable why Harihar Singh considered it safe to deposit the said sum with Dharmadas. Harihar Singh admits that he has no bank accounts. No books of account have been produced to show his income from his alleged business. Dharmadas has stated categorically that Harihar Singh took a receipt for the sum of Rs.20,000/- from the plaintiff, but no such receipt has been produced. The learned Subordinate Judge could not place any reliance on the testimony of Harihar Singh and Dharmadas. We are also unable to believe their evidence and we agree with the finding of the learned Subordinate Judge that Harihar Singh had no means to pay the said sum of Rs.20,000/- and that no consideration money passed for the kobala (Ext. ''A''). The kobala is, therefore, a sham and colourable transaction and the plaintiff had to take resort to such a transaction for the purpose of getting back possession of the disputed property from the company. We are also of the view that the defendants no.1 and 2 also colluded with the plaintiff in effecting the transaction. In this connection, it may be mentioned that the plaintiff, Dharmadas and Harihar Singh were prosecuted by the company on a charge of cheating.

14. The purpose for which the kobala has been created is undoubtedly illegal. The plaintiff was successful in getting back possession of the property with the active assistance of the defendants no.1 and 2. It is now well settled that a person cannot plead his own fraud, that is, he 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 (See Immani Appa Rao v. Gollapalli Ramalingamurthi. The plaintiff has come to Court with a case that in order to get back possession from the company, he had to create a benami document of transfer in favour of the defendant no.1.

The cause of action of the suit is really based on fraud. The plaintiff is not, therefore, entitled to ask for the assistance of the Court to recover possession of the disputed property from the defendants who were also parties to the fraud. It is true that the defendant no.1 did not pay any money on account of consideration for the impugned kobala but that will be no ground in decreeing the plaintiff''s claim which is based on fraud. In the above decision, the Supreme Court has quoted the following observation of Lord Mansfield, C.J. in Holman v. Johnson, (1775) 1 CWP 341 :

The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this : ex dolo malo non oritur action. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff''s own stating or otherwise the cause of action appears to arise ex-turpi causa or the transgression of a positive law of this country, there the Court says he has not right to be assisted. It is upon that ground the Court goes; nor for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

15. In the instant case, the plaintiff''s cause of action is founded upon an illegal act. The Court will not, therefore, lend its aid to the plaintiff.

16. It is argued by Mr. Banerjee that it is not correct to say that the plaintiff has been able to achieve the purpose for which the illegal act was done by him, namely, the creation of a sham and colourable transaction of sale in favour of the defendant no.1. He submits that the company is not without any remedy, for it can sue the plaintiff for damages or for the possession of the property. He has referred to us Ss. 531A, 533, 536 and 538 to 545 of the Companies Act, 1956. It is said that apart from the remedies that are provided for in the said provisions of the Companies Act, the company could also take criminal proceedings against the plaintiff. We are not at all impressed with this contention of Mr. Banerjee. It has been already stated and it is also the plaintiff''s case that the plaintiff took resort to the execution of the said kobala solely for the purpose of getting back possession of the disputed property from the company. It is the plaintiff''s case that after the execution of the kobala he got back possession of the disputed property through his benamdar Harihar Singh. Therefore, the purpose for which that illegal transaction was effected was achieved. It might the plaintiff for the recovery of the disputed property or for damages, but because of that it is difficult to hold that the purpose of the illegal transaction was not achieved. In any event, the plaintiff having founded his case upon his fraudulent act, cannot any relief from the Court of law. He is hit by the principle embodied in the legal maxim ex dolo malo non oritur actio.

17. It is next argued on behalf on the plaintiff that he is entitled to succeed on proof of his case that the kobala was a benami transaction without any consideration and that there is no necessity for him to prove his fraudulent act. In support of his contention, much reliance has been placed on behalf of the plaintiff on a decision of the Supreme Court in Sm. Surasaibalini Debi v. Phanindra Mohan Majumdar. It has been held by the Supreme Court that where the plaintiff is seeking to enforce his title to property and it is not an integral part of his pleading which he must prove to entitle him to relief that there was between him and the defendant an unlawful transaction or arrangement which he seeks to enforce, the plaintiff will be entitled to the assistance of the Court, even if the initial title of the plaintiff is rooted in an illegal transaction. In Cheshire & Fifoot''s Law of Contract, 7th Edition., page 326, it has been stated :

If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action.

In our opinion, the plaintiff cannot maintain his cause of action and enforce his title to the disputed property without proving the motive or purpose for which he had to execute the benami document in favour of the defendant no.1. It is, however, said that the motive or purpose of a benami transfer is not always necessary to be proved so as to avoid the same. Even assuming that to be so, in the instant case, that is absolutely necessary to be proved, for the kobala was executed not only by the plaintiff but also by the company through the plaintiff as its Director. The illegal and fraudulent purpose is the integral part of the pleading which the plaintiff must prove in order to succeed in the suit. The principle of law which has been laid down by the Supreme Court in Surasaibalinis" case does not help the plaintiff. The said contention made on the plaintiff is accordingly rejected. We do not agree with the finding of the learned Subordinate Judge that there was not material to show that actual title of the disputed property was ever transferred to the company and as such there was nothing to show that the fraud if any, by the plaintiff, was perpetrated. We are of the view that it is apparent from the plaintiff''s own case that he acted fraudulently from the company with the assistance of the defendants.

18. No other point has been argued in this appeal.

19. For the reasons stated above, the judgment and decree of the learned Subordinate Judge are set aside and the suit is dismissed. The appeal is allowed but in view of our finding that the defendants also participated in the illegal and fraudulent acts of the plaintiff, we direct each party to bear his own costs throughout.

N. C. Mukherjee, J: I agree.