(1922) 07 CAL CK 0037

Calcutta High Court

Case No: None

Annada Charan Sil and Another	APPELLANT
Vs	
Hargobinda Sil and Others	RESPONDENT

Date of Decision: July 13, 1922

Citation: AIR 1923 Cal 570 : 75 Ind. Cas. 557

Hon'ble Judges: Chotzner, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by the defendants in a suit to enforce a mortgage executed by them on the 22nd December 1916 in favour of the plaintiffs to secure a loan of Rs. 800. The plaintiffs alleged that nothing had been paid on the mortgage and according to the terms thereof they claimed Rs. 1,071. The defendants pleaded that the debt had been satisfied and the claim was unfounded. The Court of first instance dismissed the suit. Upon appeal the District Judge reversed that decision and decreed the claim in full with interest from the date of suit to the date of judgment. In their plaint the plaintiffs allege that the mortgage-bond was part of a transaction which took place between the parties on the 22nd December 1916. The plaintiffs and the defendants were partners in a paddy business at Akyab. The defendants, it is alleged, fixed the price of the share of the plaintiff in the business at Rs. 3,000 and purchased that share for the sum. The defendants paid Rs. 1,500 in cash, Rs. 400 by a boat and for the balance of Rs. 1,100 executed two bonds for Rs. 300 and Rs. 800 respectively. According to the plaintiffs, the bond for Rs. 300 has been satisfied; but nothing has been paid on the bond for Rs. 800. The defendants alleged that the sale had been effected not for Rs. 3,000 but for Rs. 2,000 that Rs. 500 had been paid in cash and that for the balance two bonas had been executed for Rs. 300 and Rs. 800 respectively. They further pleaded that both the bonds had been satisfied. The conveyance, when produced, showed that the consideration for the sale was Rs. 2,000 as alleged by the defendants and not Rs. 3,000 as alleged by the plaintiffs. This placed the plaintiffs in a situation of considerable embarrassment and they asked for leave to amend the plaint. This application was refused. There was,

consequently, an obvious variance between the pleadings and the proof. If in these circumstances the plaintiffs proceeded with their case on the basis mentioned in their plaint, they would contravene a well-known rule of law repeatedly affirmed by the Judicial Committee, by Lord Westbury in Eshenchunder Singh v. Shamachurn Bhutto 11 M.I.A. 7 : 6 W.R.P.C. 57 : 2 Ind. Jur. (N.S.) 87 : 2 Sar. P.C.J. 209 : 20 E.R. 3, by Sir Barnes Peacock in Mylapore Iyasawmy Vyapoory Mudaliar v. Yeo Ray 14 I.A. 168 : 14 C. 801 : 11 Ind. Jur. 397 : 5 Sar. P.C.J. 50 : 7 Ind. Dec. 531 and by Sir Lawrence Jenkins in Malaraju Lakshmi Venkayyamma Row v. Venkatadri Appa Row 59 Ind. Cas. 767 : 33 C.L.J. 171 : 25 C.W.N. 654 : 19 A.L.J. 97 : 40 M.L.J. 144 : 13 L.W. 256 : (1921) M.W.N. 77 : 29 M.L.T. 164 : 23 Bom. L.R. 713 This principle is well-established, namely, that the determination in a case should be founded upon a case either to be found in the pleadings or involved in and consistent with the case thereby made; and it has been applied recently in this Court in the case of Nabadwipendra Mookerjee v. Madhu Sudan Mandal 16 Ind. Cas. 741 : 18 C.W.N. 473 Rees v. John Young 66 Ind. Cas. 745 : 34 C.L.J. 178 : 25 C.W.N. 519 Gopal Krishna Sil v. Abdul Samad Chaudhuri 66 Ind. Cas. 640 : 34 C.L.J. 319 and Satis Chandra Ghosh v. Kalidasi Dasi 68 Ind. Cas. 577 : 34 C.L.J. 529 : 26 C.W.N. 177 : AIR (1922) (C.) 203. No doubt, as explained by Viscount Haldane in Umar Abdul Rahiman v. Gustadji Muncherji Cooper 34 Ind. Cas. 268 : 20 C.W.N. 297 : 3 L.W. 308 : (1916) 1 M.W.N. 137 : 30 M.L.J. 444 (P.C.), and by Lord Dunedin in Motabhoy Mulla v. Mulji Haridas 29 Ind. Cas. 223 : 42 I.A. 103 : 17 M.L.T. 402 : 28 M.L.J. 589 : 13 A.L.J. 529 : 19 C.W.N. 713 : 21 C.L.J. 507 : 17 Bom. L.R. 460 : 2 L.W. 524 : (1915) M.W.N. 522 : 39 B. 399 (P.C.) the rule should not be applied in an abstract way regardless of the circumstances of the case. But, when the plaintiffs dad failed to obtain an amendment of the plaint so as to bring their case into ha mony with the statement in the conveyance the only course open to them was to make an attempt to adduce evidence in contradiction to the statement in the conveyance, namely, to show by oral evidence that, although the conveyance recited the consideration as Rs. 2,000, the actual consideration was Rs. 3,000. This they did, notwithstanding the protest of the defendants. Consequently, two questions arise, namely, first whether it was permissible to the plaintiffs, in view of the provisions of Section 92 of the Evidence Act, to contradict the terms of the conveyance; and, secondly, whether it was competent; to them to prove that they had committed a fraud upon the revenues of the country.

2. As regards the first point it has been pointed out by the Madras High Court in Adityam Iyer v. Ramakrishna Iyer 21 Ind. Cas. 458 : 38 M. 514 : (1913) M.W.N. 847 : 14 M.L.T. 382 : 25 M.L.J. 602 that while want or failure or difference in kind of the consideration may be proved evidence to vary the amount of consideration in a registered sale-deed is inadmissible. This position is not inconsistent with the decisions of the Judicial Committee in Achal Ram v. Kazim Husain Khan 32 I.A. 113 : 27 A. 271 : 9 C.W.N. 477 : 15 M.L.J. 197 : 8 Sar. P.C.J. 772 : 8 O.C. 155 (P.C.) and Hanif-un-nlsa v. Faizunnisa 11 Ind. Cas. 398 : 33 A. 340 : 15 C.W.N. 521 : 8 A.L.J. 373 : 13 C.L.J. 510 : 13 Bom. L.R. 391 : 10 M.L.T. 23 : (1911) 2 M.W.N. 370 : 21 M.L.J. 1126 :

38 I.A. 85 (P.C.) which affirmed the proposition that it was open to the parties to prove by oral evidence that the actual consideration was different from what was mentioned in the a eed, or that there was no consideration for the deeo. This view was approved by this Court in the case of Gopai Singh v. Laloo Lall 2 Ind. Cas. 953 : 10 C.L.J. 27. There can be little doubt that the view taken by the Madras High Court in Adityam Iyer v. Ramakrishna Iyer 21 Ind. Cas. 458 : 38 M. 514 : (1913) M.W.N. 847 : 14 M.L.T. 382 : 25 M.L.J. 602 is well-founded on principle. To take an illsutration, suppose a mortgage-bond had been executed for Rs. 1,000. Would it be competent to the mortgagee who instituted a suit to enforce the security for Rs. 1,000 to prove by oral evidence that the real consideration was not Rs. 1,000 as stated in the bond but Rs. 5,000. If such a course were permissible, the protection intended by the Legislature to be afforded by the adoption of the rule embodied in Section 92 of the Evidence Act would be completely nullified.

3. As regards the second point, there can be no doubt that if the plaintffs are permitted to prove their allegation that the conveyance was not for Rs. 2,000 but for Rs. 3,000 they will have to establish that they have committed a fraud upon the revenues of the country. If the conveyance had been for Rs. 3,000 the stamp duty payable would have been Rs. 30. Their allegation is that, although the consideration was Rs. 3,000 it was deliberately stated to be Rs. 2,000 because they were unable to procure a stamp-paper of the proper value. This story has been disbelieved by both the Courts below. In such circumstances, if they are now permitted to contradict the statement in the conveyances, they would only be permitted to allege that they have violated the law. Under these circumstances, the principle applies, that a party cannot come into the Court with fraud on his lips and ask for a relief; as to such the Courts of Justice are not open; see the observations of Sanderson, C.J., in Gregory v. Hawoth 25 California 622 at p. 657 where a similar attempt was made. In the same case it was pointed out that the parties should not be permitted to depart from the deeds and to establish a case which is contrary to their pleadings. This cannot be allowed without a gross violation of the rule which requires that the allegations of the complaint, the evidence ana the findings should correspond in legal intent. The averment, the proof ana the finding should harmonise and proceed upon the same theory, each pointing with logical distinctness to the same result. A recovery, if had, must be secundum allegata and must be grounded upon facts which are averred in the complaint and not upon those which are denied.

4. We are consequently of opinion that the case has not been approached from the right point of view by the District Judge. The rights of the parties must be determined on the assumption that the statements in the conveyance are true. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him for re-consideration. The costs of this appeal will abide theresult.