ORIGINAL CIVIL.

Before Remfry J.

1934

Feb. 26, 27, 28; *Mar.* 8.

W. C. BINNS

v.

W. & T. AVERY LIMITED.*

Contract—Mistake in recording—Unilateral mistake—Non-disclosure—Fraudulent conduct—Rectification—Damages.

Where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently if he seeks to take advantage of that error, and cannot be allowed to enforce it.

Dagdu v. *Bhana* (1) and *Tamplin* v. *James* (2) followed.

Bell v. *Lever Brothers, Ld.* (3) distinguished.

ORIGINAL SUIT.

The facts of the case and arguments of counsel appear fully from the judgment.

Barwell and *N. C. Chatterjee* for the plaintiff.

Isaacs and *B. Das* for the defendant company.

Cur. adv. vult.

REMFRY J. In this suit the plaintiff claims that, by a written contract dated the 15th of May, 1932, the defendant company agreed to employ him for a period of 4 years from that date on a salary of Rs. 460 a month until December, 1932, from which date the salary was to be Rs. 600.

In the plaint, it is alleged that the defendant company, in breach of their contract, on the 4th of February, 1933, tendered to the plaintiff an agreement

* Original Suit No. 512 of 1933.

(1) (1904) I. L. R. 28 Bom. 420. (2) (1880) 15 Ch. D. 215.
(3) [1932] A. C. 161.

with a salary of Rs. 525 a month, which the plaintiff refused to accept and that thereupon the defendant company suspended him.

The plaintiff claims that the defendant company repudiated their contract and sues for damages.

In the written statement, the defendant company pleaded *inter alia* that the plaintiff had, on the 15th of April, expressed his willingness to renew his agreement on a salary of Rs. 500 and that, in the alleged agreement, dated the 15th of May, 1932, the figure Rs. 600 was a clerical error and the plaintiff was aware that there was a mistake, when that agreement was signed; and the defendant company denied that there was any contract at a salary of Rs. 600 or at all.

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The admitted facts are that the plaintiff, after being trained in the defendant company's works in England, came out to this country on an agreement for four years at a salary of Rs. 400 a month with such increments as the defendant company might be pleased to give him. He received an increment of Rs. 25 a month at the end of the first year, *i.e.*, in 1929 and another of Rs. 35 on the 2nd September, 1931. This agreement ended on the 15th May, 1932. On the 15th of April, 1932, there was an interview between Mr. Clowes, the General Manager in India of the company, and the plaintiff. Subsequently, probably in October, and certainly not before the 5th September, Mr. Allinson, the Assistant General Manager, made over to the plaintiff a formal agreement, in which it was stated that his pay was Rs. 600 a month from December, 1932. This document was signed and witnessed—both the plaintiff and Mr. Allinson signed it. Subsequently, at the end of December or early in January, 1933, the

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defendant company alleged that the figure Rs. 600 was a mistake, and that Rs. 500 was the salary agreed upon, but the plaintiff maintained that he was entitled to the Rs. 600, and refused to accept the suggestion that the figure should be altered. He also refused to accept an offer of an agreement on a salary of Rs. 525—a proposal made by the defendant company to settle the matter. On his final refusal to accept that offer, he was suspended on the 4th February, 1933. The defendant company, on the 1st March 1933 wrote for the plaintiff's final decision, but the plaintiff filed this suit.

The main point in dispute is as to what was arranged on the 15th of April 1932.

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[After discussing the evidence, the Court came to the following conclusion :]

I find that the plaintiff agreed to accept a salary of Rs. 500 on the 15th of April, 1932, and that the agreement was drawn up for a salary of Rs. 600 owing to a mistake on the part of the defendant company and did not express the intention of the parties, and that the plaintiff, fully realising the mistake, deliberately sought to take advantage of it.

It was argued for the plaintiff that, on those findings, the result must be that the Court must enforce the contract as drawn up, for, as there was no counterclaim for rectification of that document, this Court could not give any equitable relief and that section 22 of the Contract Act provides that an agreement is not affected by a unilateral mistake.

For the defendant, it was argued that a case of fraudulent misrepresentation had been established, and that, apart from anything in the nature of fraud, there was a mutual mistake of fact, or a mistake on the part of the defendant company in recording the agreement, or a mistake induced by the conduct of the plaintiff.

Any case of fraud must come within the particulars given. There is nothing to support the allegation that the plaintiff fraudulently concealed that he was then only drawing Rs. 460 a month. I find nothing to support the allegation that the defendant company relied on anything stated by the plaintiff, but, as stated above, in my opinion, the plaintiff knew when he saw and signed the agreement that the real agreement was that his salary should be Rs. 500.

Whether this amounts to fraud and comes within the particulars will be discussed later.

I find nothing to support any case of a mutual mistake—the fact being that the plaintiff was under no mistake of fact at all.

The parties appear to have been *ad idem* in the sense that both Mr. Allinson and the plaintiff knew that they were signing an agreement for Rs. 600. At the same time the plaintiff knew that that was not the real agreement and Mr. Allinson then thought that it was.

Unless it was the duty of the plaintiff to point out the mistake, he did nothing to induce the defendant company to sign the agreement.

Undoubtedly when a written contract has been signed by the parties, the party alleging that it has been erroneously recorded and that he signed it under a mistake, must establish that fact beyond all doubt. Even if such mistake is established it was contended that unless fraud is also established the plea must fail. On this point Jenkins C.J., in *Dagdu* v. *Bhana* (1), laid it down that a mistake known at the time to the other party may be proved and performance in accordance with the terms of the error will not be compelled. He also said that this rule applied when the party could not have reasonably supposed that the words expressed the real intentions of the parties.

(1) (1904) I. L. R. 28 Bom. 420, 426.

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In *Garrard* v. *Frankel* (1) Romilly M.R. ordered the rectification of a lease where the lessee agreed to pay £230 and signed the lease for £130, knowing that there was an error, but he did not characterize the conduct of the defendant as fraudulent and based his decision on the ground that the lease did not correctly express the agreement of the parties.

For the plaintiff it was pointed out that this decision had been commented on by text writers and by Farwell J., as he then was, in *May* v. *Platt* (2). But there the learned Judge said that that decision could only be supported on the ground of fraud, but he adds that Romilly M.R. refrained from describing the defendant's conduct as fraudulent. It follows that the view taken was that that conduct was fraudulent.

In *Tamplin* v. *James* (3) Brett L.J. described the conduct of a man who sought to take advantage of what he knew to be a mistake as fraudulent.

It was contended on behalf of the plaintiff that Lord Atkin in *Bell* v. *Lever Brothers, Ld.* (4) expressed an opinion that conduct of that sort was not fraudulent.

But the point under consideration was whether it was the duty of a servant to make a full confession of his shortcomings, before receiving his pay. The position of the plaintiff was entirely different, he knew that he was signing an agreement which contained a mistake.

All that I need decide for the purposes of this case is that where the parties have made an agreement and one party records it erroneously, the other party if he knows at the time that there is an error acts fraudulently if he seeks to take advantage of that error and cannot be allowed to enforce it.

It was argued on behalf of the plaintiff that, even if there was an error in drawing up the agreement and even if the plaintiff acted fraudulently in seeking

(1) (1862) 30 Beav. 445; 54 E.R. 961.
(2) [1900] 1 Ch. 616.
(3) (1880) 15 Ch. D. 215, 221.
(4) [1932] A.C. 161.

to take advantage of that error, the defendant company could obtain no relief in this case but must in order to obtain relief file a suit for rectification of the agreement as drawn up. This was based on the ground that there was no counterclaim for rectification. Reliance was placed on the decision in *Anarullah Shaikh* v. *Koylash Chunder Bose* (1).

In that case the defendant in a suit for rent sought to set up a defence that the lease was fraudulently drawn up and did not correctly express the agreement between the parties. He claimed that it is valid in part and invalid as to the rest. The Court certainly held that his remedy was to file a suit for rectification. Jenkins C.J. held in *Dagdu* v. *Bhana* (2) that the court could give effect to an equitable defence which in a suit brought for the purpose would entitle the defendant to rectification of the document although no suit for it had been filed and although no claim had been made for it in the pleadings. This decision was followed in this Court in *Nanda Lal Agrani* v. *Jogendra Chandra Datta* (3). This was also decided by the Judicial Committee—but I have mislaid the reference.

In my opinion, the general rule is as stated by Jenkins C.J., but, even if the matter is one for the discretion of the court, that discretion should be exercised in this case in favour of the defendant company.

In this case the defence was not that the defendant company claimed that the agreement should be rectified and enforced as rectified. The plaintiff had, on his own evidence, repudiated the agreement set up by the defendant company. No suit would lie for specific performance of the agreement as set up by the defendant company. The defence was that the agreement set up by the plaintiff was obtained fraudulently—which was always a legal defence.

(1) (1881) I. L. R. 8 Calc. 118. (2) (1904) I. L. R. 28 Bom. 420.
(3) (1922) 36 C. L. J. 421.

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It was also argued that the defendant company should not be allowed to give evidence of any previous contract because it was not pleaded. But obviously that fact could be proved as part of the circumstances and as the defendant company did not rely on it except as evidence it was not necessary to plead it.

[The court considered the issues].

The question of damages does not require any consideration on the findings of fact and law arrived at above. But, in case it should become material, I will deal with it shortly. For the plaintiff it was argued that he was entitled to the whole of the Rs. 600 a month for a year less Rs. 450 *earned* by him, in that year. For the defendant company it was argued that at most he was entitled to Rs. 600 for three months.

It appears that the plaintiff did his best and only obtained a post for three months at Rs. 150 a month with some commission which he did not claim. He only tried to obtain work in India.

The agreement was for four years and there was no provision for giving notice on either side. The plaintiff was a fitter—a highly trained workman.

I think the plaintiff is correct as far as he goes—the period should certainly be for one year as the agreement was for over three years longer, but as the point was not argued I have not considered whether the plaintiff might not be entitled to further damages as he has not yet obtained employment.

The difficult question is whether the plaintiff was bound to mitigate the damages by accepting the defendant company's offer at a salary of Rs. 525.

The only English case near the point is *Brace* v. *Calder* (1). There, however, the breach of contract was the dissolution of a partnership of four persons. Two of the old partners carried on the business and offered the plaintiff the same terms. Nominal damages and no costs was the result.

(1) [1895] 2 Q.B. 253.

I notice, however, that according to Sutherland on Damages the matter has been more fully considered in America. I regard American decisions as far from binding, but certainly illuminating. Apparently the view taken is that an offer by the master must be accepted unless it involves giving up any right of action or would be degrading. No such points required consideration in the case cited. Undoubtedly, the rule that damages must be mitigated only requires that a reasonable course of action must be taken, and certainly does not require the plaintiff to do anything unreasonable or of a speculative nature. But, in my opinion, the plaintiff cannot decline to mitigate his damages on the ground that, owing to his own conduct, he had made it difficult to accept the offer made. He cannot increase his damages by his own default or his own wrong. In this case, therefore, if the decision had been that there was a mistake but the plaintiff was entitled to take advantage of it I would have assessed the damages at Rs. 75 a month for 12 months less the Rs. 450 earned, on the ground that any difficulty in accepting the offer of the defendant company was of the plaintiff's own making. If the finding had been that there was no mistake on the part of the defendant company, then I think it would be unreasonable to expect the plaintiff to accept their offer, and the damages should be at the rate of Rs. 600 a month for 12 months.

In my opinion, the suit must be dismissed with costs.

Suit dismissed.

Attorney for plaintiff: *R. L. Mukherjee.*

Attorneys for defendants: *Sandersons & Morgans.*

G. K. D.