

APPEAL FROM ORIGINAL CIVIL.

Before Derbyshire C. J. and Lord-Williams J.

JOHN MINAS APCAR

v.

LOUIS CAIRD MALCHUS.*

1938

Nov. 15, 16.

Misrepresentation—Contract of sale, when voidable on the ground of misrepresentation—Indian Contract Act (IX of 1872), ss. 17, 18, 19.

The phrase "fraudulent within the meaning of s. 17" in the exception to s. 19 of the Indian Contract Act, 1872, qualifies only the word "silence" which immediately precedes the phrase, and does not qualify the word "misrepresentation".

A person, seeking to avoid a contract on the ground that his consent to it was caused by misrepresentation, need not, if the misrepresentation was fraudulent, prove that he had no means of discovering the truth with ordinary diligence. It is only when the misrepresentation was innocently made and was not fraudulent that he has to prove that he had no such means.

Niaz Ahmad Khan v. Parshotam Chandra (1) relied upon.

Per Lord-Williams J. The observations in Sugden's Law of Vendors and Purchasers of Estates, 14th Ed., at p. 2, to the effect that "*simplex commendatio non obligat*" and that if a seller of an estate praised the estate at random, or affirmed falsely that a bid of a particular sum had been obtained from a person for the estate, and the purchaser was thereby induced to purchase it, and was deceived in the value, no action on the ground of deceit would lie against the seller for rescission of the contract of sale, have no application in India, where the law is governed by ss. 17, 18 and 19 of the Indian Contract Act, 1872.

APPEAL from a judgment and decree of Ameer Ali J. by the defendant.

The facts of the case and the arguments in the appeal appear sufficiently from the judgment of Derbyshire C.J.

Debendra Nath Bagchi and *Harendra Kumar Sarbadhikari* for the appellant.

N. C. Chatterjee and *P. P. Mukerji* for the respondent.

*Appeal from Original Decree, No. 56 of 1937, in Suit No. 1376 of 1934.

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DERBYSHIRE C. J. This is an appeal by the defendant in the suit, against a decree passed by Ameer Ali J. pursuant to a judgment delivered on June 2, 1937, whereby he, in effect, ordered rescission of a contract for the sale of a share in some property.

The plaintiff is a young man of thirty and the defendant is described as the cousin of the plaintiff and forty-nine years of age. In the year 1931, the plaintiff inherited a little money from his father who had recently died and, he was living with the defendant. Whilst he was there he entered into an agreement with the defendant for the purchase by him from the defendant of 1/32nd share in some property described as the Dinhata Jute Company in Cooch-behar for the sum of Rs. 12,500.

The plaintiff says that he was induced to enter into that contract by the fraud of the defendant and asks that the contract be rescinded. In his claim, originally, the plaintiff stated that the defendant made various misrepresentations to him, but only one was specified, namely, that the defendant represented to the plaintiff that the municipal value of the Dinhata Jute Company was four *lakhs* of rupees.

The plaint was filed on August 2, 1934. On August 30, 1934, the defendant's attorney wrote for further particulars of misrepresentations alleged, and on January 5, 1935, the plaintiff's attorney by a letter set out three representations upon which he relied. The representations were :—

- (i) "That the defendant received an offer of
 "Rs. 9,20,000 from a client of Mr. Philip
 "Oddie of Messrs. Morgan & Co., solicit-
 "ors, and also another offer of
 "Rs. 8,20,000 from another party, and
 "also showed various correspondence that
 "passed between Mr. Oddie and the
 "defendant to persuade the plaintiff.

(ii) "The defendant also showed the plaintiff a
 "promissory note executed by Paresh Lal
 "Ray, an official of E. B. Railway,
 "Lalmanirhât, for Rs. 23,000 in considera-
 "tion of the defendant's transferring one
 "anna share in his Dinhata Jute Company
 "in Coochbehar for Rs. 25,000 of which
 "Rs. 2,000 was paid in cash.

(iii) "The defendant also showed the plaintiff
 "a conveyance in favour of Nawab Khusru
 "Jung (Home Minister, Kashmir State)
 "for Rs. 50,000 purporting to convey two
 "annas share in the said jute company".

We are only concerned with the representation that the defendant received offers of Rs. 9,20,000 and Rs. 8,20,000 through Mr. Philip Oddie of Messrs. Morgan & Co. It does not appear to be disputed that the other representations were true. We have been through the evidence in this matter and I, for my part, have come to the same conclusion as the learned Judge who tried the suit as to the credibility of the various persons who gave evidence. I regard the plaintiff as truthful, but somewhat simple. I do not believe the evidence of the defendant and I see no reason to disbelieve the evidence given by Mr. Hafez who was called as a witness by the Court.

The fraud complained of is this: the plaintiff says that before he agreed to buy the share of the property he was shown three letters relating to the Dinhata Jute property. The first one was a letter dated November 4, 1930, from Mr. Oddie, a solicitor with the well-known firm of attorneys, Messrs. Morgan & Co. of Calcutta, and it was written to the defendant. The relevant portion of it is as follows:—

"I am glad to say that I have now got into touch
 "with the client about whom I spoke to you the other
 "day, and he is anxious to buy the above property.

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"The terms upon which it can go through is as follows:—

"1. Purchase price to be Rupees nine *lakhs* payable as to three *lakhs* on completion of the conveyance and the balance to be paid by equal four "monthly instalments over a period of two years".

Then follow other terms as to interest on the purchase money, and it is suggested that Mr. Oddie might be able to go to England for the purpose of floating a company to take over the property.

The second letter was written by Mr. H. M. Hafez to Mr. Oddie on January 13, 1931, headed: "Dinhata Jute Co." The material portion of it is as follows:

"With reference to my conversation with you this "morning this letter is to make you an offer for the "purchase of the above property on the following "terms:—

"1. Purchase price will be Rs. 9,20,000.

"2. A deposit of Rs. 3,00,000 will be paid "immediately if this offer is accepted and the balance "will be paid in two instalments over a period of one "year.

"3. Security will be given for the balance in a "form which will be submitted to you on hearing from "you that this offer is accepted".

The third letter was one from Mr. Hafez to Mr. Oddie dated February 6, 1931, again headed "Dinhata Jute Property":

"With reference to my conversation with you this "morning this letter is to make an offer on behalf of "my principal for the purchase of the above property "on the following terms:—

"1. Purchase price will be Rs. 8,50,000.

"2. A deposit of Rs. 3,00,000 will be paid "immediately if this offer is accepted and the balance "will be paid in four instalments over a period of "two years".

Then follow other terms as to security.

From the correspondence which has been disclosed it appears that Mr. Hafez had written a letter to Mr. Oddie on January 15, 1931, in which he had withdrawn his offer on account of what he described as "discourtesy" on the part of Mr. Oddie. The letter of February 6, 1931, appears to be a renewal of the offer at a somewhat smaller suggested purchase price. The plaintiff says that he was told by the defendant that the municipal value of the property was four *lakhs* and that the defendant had entered into the contracts referred to above in the letters. He says that the letters were not genuine offers at all, that the letters from Mr. Hafez to Mr. Oddie were written on the instructions of the defendant himself in order to give a fictitiously high value, at any rate in the eyes of a purchaser, to the property, and that by reason of his representations, particularly those contained in the letters when they were shown to him, that he entered into this agreement. The property in question has not been used as jute works since 1917 and is worth very little indeed.

The learned Judge was very anxious to get to the bottom of the matter and he had Mr. Hafez summoned before him and Mr. Hafez gave evidence. Mr. Hafez said that the defendant asked him to write these letters to Mr. Oddie so as to increase the price of the property and that to oblige a friend, that is, to oblige the defendant, he wrote the letters at the defendant's dictation. The words of the letters are the words of the defendant. The defendant apparently was unwilling at first to go into the witness box, but eventually did so. Although he denied having caused the letters to be written, his denials in the way in which he gave evidence produced a very bad impression on the Judge's mind and the Judge did not believe him. The Judge did believe Mr. Hafez. After reading the evidence and the letters I agree with the learned Judge and I have come to the conclusion that the defendant did cause those letters to be written in which bogus offers for the property were made. I believe and I find that they were made

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for the purpose of giving a fictitiously high value to the property and I further find that the plaintiff was induced by the contents of those letters to enter into the agreement he now seeks to have rescinded.

It appears to me that those letters were, to use the words of s. 17(1) of the Indian Contract Act, 1872, "a suggestion, as to a fact, of that which is not "true by one who does not believe it to be true". They were false and fraudulent documents, brought into being for the purpose of deceiving persons to whom the defendant might later wish to sell shares in the property. I have no doubt that the making and the exhibition of those documents to the plaintiff were fraud within the meaning of s. 17 of the Indian Contract Act. Section 19 of the same Act provides :

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Then there follows an *exception* :—

If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of s. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

It has been argued before us that the *exception* applies here. No such argument was raised in the Court below. In my view, the *exception* does not apply in this case. It has been argued, accepting the plaintiff's story, that there has been misrepresentation fraudulent within the meaning of s. 17. In the case of *Niaz Ahmad Khan v. Parshotam Chandra* (1) the application of this *exception* to a case of fraud was discussed. The Court (Sulaiman C. J. and Young J.) said :—

If the statute were clear it would be our bounden duty to give effect to its meaning quite irrespective of any consideration as to what the law is in England. But on the face of it the *exception* is ambiguously worded. The difficulty is caused mainly by the punctuation, *viz.*, a comma after the word "silence," which seems to indicate that the words "fraudulent within the meaning of s. 17" apply both to "misrepresentation" and to "silence". But as observed by their Lordships of the Privy Council in the case of *Maharani of Burdwan v. Krishna Kamini Dasi* (2) and *Pugh v. Ashutosh Sen* (3)

(1) (1930) I. L. R. 53 All. 374, 379- (2) (1887) I. L. R. 14 Cal. 365 (371);
380. L. R. 14 I. A. 30 (35).

(3) (1928) I. L. R. 8. Pat. 516 (525); L. R. 56 I. A. 93 (100).

punctuation is no part of the statute, and a court of law is bound to interpret the section without the commas inserted in the print. If the comma after the word "silence" is to be ignored, the expression "fraudulent within the meaning of s. 17" might well apply to "silence" exclusively and not to "misrepresentation." This interpretation is strengthened by the circumstance that the legislature has used the preposition "by" twice, *i.e.*, both before "misrepresentation" and also before "silence". If the expression "fraudulent within the meaning of s. 17" qualifies "misrepresentation" the result would be that due diligence would be required in the case where misrepresentation became fraudulent, but would not be required when the misrepresentation fell within s. 18 and was just short of fraud, for the *exception* would be confined to the former kind only. This would be a startling result.

We are, therefore, inclined to think that there was no intention to depart from the well-established rule of English law. It also seems to us that if we are to hold that a fraud does not vitiate a contract unless the party defrauded had no means of discovering the truth, it would have very serious consequences. For instance, in most cases advantage is taken of simple-minded people who are careless enough not to take the trouble to find out the truth which an ordinary man with sense would do with ordinary diligence. We are, therefore, inclined to hold that in the case of an active misrepresentation knowing the fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence.

I am inclined to agree with this view of the matter. A similar view was taken in the case of *Abdulla Khan v. Girdhari Lal* (1) where the Court said:—

Currie v. Rennie (2) is a different case, as it was based on misrepresentation alone, and not fraud, which was held not to avoid the contract, as, under s. 19 of the Contract Act, the plaintiff had the means of discovering the truth with ordinary diligence. This is a case of active fraud, which none but an expert was capable of detecting.

The learned authors, Sir Frederick Pollock and Sir Dinshah Mulla, in their work on the Indian Contract Act, 6th Ed., at p. 130 say:—

It will be observed that the *exception* does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent.

In my opinion, this is a case of deliberate active fraud which comes within s. 19 and not within the *exception* I have mentioned. Further, I am of the opinion that the circumstances under which fraud was perpetrated in this case were such that an ordinary person with ordinary diligence could not be expected to discover that fraud. In my opinion, the learned

(1) [1904] P. R. (Jud. Civil) 149, 151. (2) [1886] P. R. (Jud. Civil) 73.

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Judge was right, in coming to the conclusion that this agreement had been procured by fraud, and, in ordering that the plaintiff's contract should be rescinded.

This appeal is, therefore, dismissed with costs.

LORT-WILLIAMS J. I agree. I desire only to add a few words upon the points of law which have been raised.

The appellant has relied upon certain observations in Sugden's Law of Vendors and Purchasers of Estates, 14th Ed., at p. 2, as follows:—

Our law adopts the rule of the civil law "*simplex commendatio non obligat*," if the seller merely made use of those expressions, which are usual to sellers, who praise at random the goods which they are desirous to sell, the buyer could not procure the sale to be dissolved. An action of deceit cannot be maintained against a vendor for having falsely affirmed that a person bid a particular sum for the estate, although the purchaser was thereby induced to purchase it, and was deceived in the value.

In my opinion, those observations have no application to this country and do not correctly state the law in force here. In fact, it appears from the relevant foot-note at p. 95 of Dart on Vendors and Purchasers, 8th Ed., Vol. 1, that it is questionable whether the observations to which I have referred correctly state the law in force in England at the present time. The law in India is governed by the Indian Contract Act, the relevant sections being 17, 18 and 19.

In s. 17 "fraud" is defined. The section provides as follows:—

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation. Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

In s. 18 "misrepresentation" is defined and the section provides as follows:—

"Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Section 19 deals with the voidability of agreements without free consent and provides as follows:—

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception. If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of s. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation. A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

It has been argued on behalf of the appellant that the exception to s. 19 applies to misrepresentation "fraudulent without the meaning of s. 17". But no such kind of misrepresentation is mentioned in the sections. In fact "misrepresentation" is not mentioned in s. 17 at all. As I have already mentioned, s. 17 deals with "fraud" and s. 18 with "misrepresentation". But "silence" which may amount to fraud is mentioned in s. 17. Therefore arose the necessity of mentioning in the *exception* to s. 19 silence "fraudulent within the meaning of "s. 17."

In my opinion, it is clear that the words "fraudulent within the meaning of s. 17" refer only to the

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word "silence" and not to the word "misrepresentation". If anything further were needed to make this clear, the use of the word "by" twice in the phrase "by misrepresentation or by silence" makes the statement grammatically correct and clear, and shows conclusively that the words "fraudulent within the meaning of s. 17" apply only to the word "silence".

For these reasons I agree with the headnote of the case of *Niaz Ahmad Khan v. Parshotam Chandra* (1) to the effect that the *exception* to s. 19 of the Contract Act applies to cases of misrepresentation as distinguished from fraud and should not be interpreted as being meant to apply to misrepresentation which is "fraudulent within the meaning of s. 17" and that the phrase "fraudulent within the meaning of s. 17" should be deemed to apply to the preceding word "silence" exclusively, and not to the word "misrepresentation".

But I do not agree with the observations of the learned Judges to the effect that they find themselves in disagreement with the commentary on this section of the learned authors of the Indian Contract and Specific Relief Acts, Sir Frederick Pollock and Sir Dinshah Mulla. I agree with the learned commentators that the exception to s. 19 is wider than the corresponding English authorities and that the legislature intended it to be wider. In other words, in my opinion, it was intended to be wider than the law as stated in the case of *Redgrave v. Hurd* (2) to which our attention has been drawn by the learned counsel for the respondent. But the learned commentators never suggested, as My Lord has already pointed out, that the exception refers to fraudulent misrepresentation or misrepresentation "fraudulent within the meaning of s. 17."

Appeal dismissed.

Attorney for appellant: *P. C. Ghosh.*

Attorney for respondent: *M. N. Sen.*

P. K. D.