APPELLATE CIVIL

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Young.

1930 *November,* 10.

NIAZ AHMAD KHAN AND ANOTHER (DEFENDANTS) *v.* PARSHOTAM CHANDRA AND ANOTHER (PLAINTIFFS).*

Abatement of suit—Mortgage—Suit on mortgage may abate after preliminary decree for sale—Contract Act (IX of 1872), section 25(3)—Applicable where suit has abated and limitation for setting aside abatement has expired—Contract Act (IX of 1872), section 19, exception—Applies to misrepresentation not amounting to fraud—Interpretation of statutes—Punctuation.

If the sole plaintiff in a suit for sale upon a mortgage dies after the passing of the preliminary decree and no application to bring his heirs on the record is made within the period of limitation, the suit abates automatically.

Where, after such abatement the mortgagors executed a fresh mortgage in lieu of the original mortgage, section 25(3) of the Contract Act applied. The phrase, "limitation of suits," in that section does not, on the one hand, comprise any kind of bar on suits other than the bar of limitation of time; on the other hand it is not confined to the limitation of "suits" only, but includes cases of the operation of the law of limitation for "applications" also, e.g., an application for substitution of names on the death of a plaintiff.

The Exception to section 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 section 17'. The phrase "fraudulent within the meaning of section 17" should be deemed to apply to the preceding word "silence" exclusively and not to the word "misrepresentation."

In the matter of interpretation of statutes punctuation is not to be deemed a part of the statute.

In connection with the execution of a fresh mortgage by the mortgagors in favour of the grandsons of the original mortgagee deceased, it was not established that the mortgagors

* First Appeal No. 401 of 1928, from a decree of Akib Nomani, Additional Subordinate Judge of Meerut, dated the 23rd of July, 1928.

were induced to enter into the agreement by any false statements made by or on behalf of the new mortgagees as to the date of death of the original mortgagee; there was merely an omission or silence as to the fact of the abatement of the suit, and the mortgagors were not diligent enough to make any inquiries and ascertain the truth about it. *Held* that the contract of mortgage was not voidable by the mortgagors.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the appellants.

Mr. *P. L. Banerji* and Dr. *N. C. Vaish*, for the respondents.

SULAIMAN and YOUNG, JJ. :—This is a defendants' appeal arising out of a suit for sale on the basis of a mortgage deed, dated the 21st of September, 1923, for Rs. 20,000, carrying interest at nine per cent. per annum with annual rests. This document was executed probably in lieu of the amount due under an earlier bond of the 13th of December, 1916, on the basis of which a preliminary decree had been passed. There was additional consideration of Rs. 1,200 which was paid in cash before the Sub-Registrar. The first document stood in favour of Jai Kishen Das, but the second document was taken in the name of his grandsons who were minors.

The main defence to the suit was that the mortgage in question was without consideration and had been obtained fraudulently and it was also pleaded that it had not been properly attested. There was a further plea that the integrity of the mortgage was broken. The learned Subordinate Judge has overruled all these contentions and decreed the claim. The defendants have appealed from the decree and raised these points afresh.

The suit on the basis of the earlier bond resulted in a preliminary decree for sale, dated the 8th of March, 1923. It had been instituted by Jai Kishen Das as the sole plaintiff. It is now an admitted fact that the sole plaintiff died on the 2nd of May, 1923, and no application for the substitution of the names of his heirs was

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ever made within the three months allowed by law. On the 12th of September, 1923, that is to say, more than three months after the death but within sixty days of the expiry of the period of three months an application was made on behalf of the heirs of Jai Kishen Das for the preparation of the final decree. The fact of the death was mentioned in this application but there was no formal prayer for the substitution of the names or for the setting aside of the abatement. The prayer was for the passing of a final decree. An order for the issue of notice was passed on the same day. It is a controversial point whether notices were actually served on the mortgagors or not. . . .

Before the parties appeared in court as a result of the notice issued, the mortgage deed in question was executed on the 21st of September, 1923. It does not expressly recite the fact of the death of Jai Kishen Das but it stands in the names of his minor grandsons under the guardianship of Munshi Lal, who is a clerk of Babu Duli Chand the father of the minors.

The learned advocate for the respondents has urged before us that the suit did not abate after the preliminary decree had been passed. The lower court, however, has held the contrary. So far as this High Court is concerned this point is, at least for the present, concluded by recent authorities. After the passing of the new Code of Civil Procedure it was held by this Court in *Moti Lal* v. *Ram Narain* (1) and *Jagar Nath Umar* v. *Ram Karan Singh* (2), that the death of the sole plaintiff in a mortgage suit and the omission to bring his heirs on the record within the period of limitation resulted in an abatement of the suit. It was also held by a Full Bench of this Court in *Churya* v. *Baneshwar* (3) that the abatement was automatic and did not require any formal order by the court. Since then some doubts arose in

(1) (1917) I.L.R. 39 All., 551. (2) (1922) 20 A.L.J., 575.
(3) (1926) I.L.R., 48 All., 334.

consequence of the pronouncement by their Lordships of the Privy Council in the case of *Lachmi Narain Marwari* v. *Balmakund Marwari* (1).

The High Courts of Madras and Calcutta and the Chief Court of Lucknow came to the conclusion that in consequence of this pronouncement the previous rulings of their High Courts should be overruled and it must be held that there could be no abatement after a preliminary decree. The opinion formerly expressed by these High Courts was to the contrary. Our High Court has dissented from that view. The reasons are set forth in the case of *Anmol Singh* v. *Hari Shankar* (2) which has been followed at least by one Judge in *Bahadur Singh* v. *Nanak* (3). In view of these pronouncements we must hold that the suit did abate automatically.

The learned counsel for the appellants first contended that the document was entirely without consideration. His contention is that the previous suit having abated, there was in existence no enforceable decree under which the mortgagee could realise his amount. He therefore argues that there was no consideration for the mortgage deed in question, at least to the extent of Rs. 17,800. The reply on behalf of the respondents is that the case would be covered by section 25(3) of the Indian Contract Act under which a promise, made in writing and signed by the person to be charged therewith, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits, is excepted. The first suggestion made by Mr. *Peary Lal Banerji* is that the expression "limitation of suits" merely means a bar on suits and not necessarily a bar of limitation of time for suits. This suggestion does not appeal to us. We think that the word "limitation" means the limitation of time as prescribed by the law of limitation in force. There can be no question that the abatement of the previous suit was

(1) (1924) I.L.R., 4 Pat., 61. (2) (1930) I.L.R., 52 All., 910.
(3) [1930] A.L.J., 999.

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due to the rule of limitation under which an application for substitution of names had to be made within the prescribed period of three months. The learned advocate for the appellants contends that the expression is confined to the law for the limitation of suits and not to the law for the limitation of applications, and argues that inasmuch as the abatement was due to the rule of limitation applicable to applications only, the exception is of no avail to the respondents. We think that a liberal interpretation ought to be put on section 25 (3), and there is no doubt in our minds that the decree became unenforceable in consequence of the law of limitation applicable to suits. It is, therefore, obvious that the mortgage deed cannot fail to the ground owing to a total absence of consideration nor even for any part of the amount, as a written promise to pay a time barred debt is equally good and binding.

Although the mortgage deed could not be without consideration, nevertheless if the contract was vitiated by fraud or misrepresentation to the mortgagors, it would become voidable at the option of the mortgagors. "Fraud" is defined in section 17 of the Contract Act, and a suggestion as to a fact, made by a person who does not believe it to be true, is fraud, and so is an active concealment of a fact by one having knowledge or belief of the fact. On the other hand, under section 18 "misrepresentation" is a 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. There are other cases of misrepresentation also, with which we are not concerned in the present case. The principal difference between fraud and misrepresentation therefore is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a mis-statement of fact which misleads the promisor.

Under section 19 consent to an agreement caused by fraud or misrepresentation makes the contract voidable. But there is an Exception to the section which is in the following words: "If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 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."

Mr. *Peary Lal Banerji* for the respondents argues that the Exception means that any misrepresentation which is fraudulent within the meaning of section 17 or any silence which is fraudulent in the same way does not make the contract voidable if the other party had the means of discovering the truth with ordinary diligence. He strongly relies on the opinion of Messrs. Pollock and Mulla in their commentary on this section that there is in India a departure from the rule which prevails in England. The learned authors also observe that "If, as seems not altogether improbable, they were not intended to alter the English rule, they were chosen with singular infelicity." No direct authority on this point has been cited before us by the learned counsel for either party. We, however, think that unless on account of the clear language of the section we are driven to hold that there had been a departure from the long established rule of English law we would be reluctant to interpret the section in that way. 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 section 17" apply both to "misrepresentation" and to "silence". But as observed by their Lordships of the Privy Council

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in the case of *Maharani of Burdwan* v. *Murtunjoy Singh* (1) and *Pugh* v. *Ashutosh Sen* (2), 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 section 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 section 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 section 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.

We must now therefore come to examine the allegation of fraud. The court below has recorded a finding

(1) (1887) 14 I.A., 30 (35). (2) (1928) I.L.R., 8 Pat., 516 (525).

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against the appellants and the burden lies on them to satisfy us that the court below was wrong. There are no doubt a number of suspicious circumstances in this case. We may take it for granted that if the mortgagors had fully known all the facts and the legal consequences they would not have been so ready to execute a fresh document in lieu of the amount due under the preliminary decree, at a higher rate of interest. In all probability they would have contested the application for the preparation of the final decree. One might suspect that Mr. Duli Chand, who is a legal practitioner of some standing and who took the mortgage in favour of his minor sons under the guardianship of his clerk, was aware of the legal flaw which had come in owing to the omission to apply within the time required by law, and that he would have been anxious to produce a fresh document in order to get over that difficulty. On the other hand, as has been pointed out by Mr. *Peary Lal Banerji*, some confusion in the minds of the members of the legal profession might have been caused in consequence of a ruling of this High Court in *Gujrati* v. *Sitai Misir* (1), which was in force in 1923 and was subsequently overruled by a Full Bench in *Churya* v. *Baneshwar* (2). There might at that time have been some doubt as to whether an application for setting aside the abatement could have been made when no formal order for abatement had been passed. Under order VI rule 4, the particulars of fraud and misrepresentation which are pleaded must be specifically supplied in the pleadings. There were four mortgagors, viz. Niaz Ahmad Khan, Faiyaz Ahmad Khan, Azim Dad Khan and Inamullah Khan, on whom it is alleged that a fraud was practised. Niaz Ahmad Khan filed a written statement on the 14th of September, 1927, in which there was no suggestion even of a previous abatement of the suit. On the 17th of May, 1928, the written statement was amended and the fact of the abatement was added.

(1) (1922) I.L.R., 44 All., 459. (2) (1926) I.L.R., 48 All., 334.

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but even on that occasion there was no suggestion made that Babu Duli Chand had misled Niaz Ahmad Khan by falsely telling him that his uncle had died within a month of the date of the execution of the mortgage deed.

On the 17th of May, 1928, Azim Dad Khan filed a written statement in which he vaguely alleged fraud without specifying it. On the same day the official receiver representing Inamullah Khan filed a written statement vaguely alleging fraud and deceipt without specifying any particulars. Faiyaz Ahmad Khan filed no written statement.

It was not till the 12th of July, 1928, that a statement was made on behalf of the defendants that the fraud alleged in the written statement was the fact that the abatement of the suit had been kept a secret from them and that the time of the death of Jai Kishen Das was stated wrongly, that is two or four days before the execution of the mortgage deed they were told that Jai Kishen Das had died a month before. Even at that time it was not specifically mentioned that Mr. Duli Chand gave them the wrong date of the death of Jai Kishen Das.

In view of the fact that there was some doubt as to the exact procedure which had to be adopted for the setting aside of the abatement when no order for abatement had been passed, we are not disposed to consider that any concealment of the fact of abatement or mere silence on the part of the mortgagee would be sufficient to establish fraud. The fact whether any application had or had not been made in time could very easily have been ascertained on an inspection of the record of the case and any person who had acted with diligence would have discovered it. We are, therefore, not disposed to hold that any fraud or misrepresentation sufficient to vitiate the contract was established by the mere silence of the mortgagee to disclose the fact that no application had been made within the time allowed by law.

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[The judgment then proceeded to discuss the evidence, and concluded as follows.]

It, therefore, seems to us that the evidence is far short of showing that any false statement as to the date of death of Jai Kishen Das was made by B. Duli Chand or on his behalf to the mortgagors which induced them to enter into the agreement, but that there was merely an omission or at the most a concealment of the fact of the abatement of the suit from them. Although the evidence to show that Niaz Ahmad Khan was made aware of the exact date of the death of Jai Kishen Das is too meagre, there can be no doubt that the mortgagors were not diligent enough to make inquiries and ascertain the exact time of the death and the abatement in consequence. We, must, therefore, hold that the mortgage deed cannot be avoided on the ground of fraud or misrepresentation.

The plea as to absence of proof of execution cannot be seriously pressed. The evidence shows that the execution was made in the presence of witnesses. Apart from that an acknowledgment of execution would now be sufficient.

There is also no force in the contention that the integrity of the mortgage has been broken. The mortgage is executed by four persons whose properties were jointly and severally liable. Subsequently the mortgagee has acquired the interest of one of the mortgagors, Inamullah Khan, by means of purchase. As the interests are not co-extensive, the integrity cannot be broken. We must, therefore, overrule this plea.

The result, therefore, is that the appeal is dismissed with costs.