

1931

MOHAMMAD
ISRAHIM
v.
ZAHUR
AHMAD.

Raza
and Srivastava, JJ.

I have had the advantage of reading the common judgment of my learned brothers RAZA and SRIVASTAVA in this case. My learned brothers have accepted the decision of the Full Bench in the last-mentioned case to which I still adhere. I have therefore nothing more to say. My answer to the question is therefore the same as is given by my learned brothers.

PRIVY COUNCIL.

P. C.*
1932
January, 18.

SATGUR PRASAD (DEFENDANT No. 1) v. HAR NARAIN
DAS (PLAINTIFF).

[AND CROSS APPEAL]

[On Appeal from the Chief Court of Oudh.]

Mesne Profits—Date from which payable—Possession obtained under Deed—Fraud and Undue Influence—Fiduciary Relation—Concurrent Findings—Restitutio in integrum—Indian Contract Act (IX of 1872) section 65—Indian Trusts Act (II of 1882) section 88—Code of Civil Procedure (V of 1908) section 2 (12).

On the 5th of November, 1924, the defendant obtained possession of immoveable property under a deed by which the plaintiff transferred it to him subject to conditions. In a suit brought by the plaintiff in 1927 it was concurrently found that the deed had been procured by fraud and undue influence, and that the defendant was in a fiduciary relation to the plaintiff and had taken advantage of that relation.

Held, that under the concurrent findings, for disturbing which no ground had been shown, the plaintiff was entitled to recover the property with mesne profits from the 25th of November, 1924, not only from the date of the suit. The defendant was liable under the Indian Trusts Act, 1882, section 88 to pay mesne profits from the date when he took possession, receiving credit for sums which he had paid under the deed; if the matter had remained in contract he would have been similarly liable under the Indian Contract Act, 1872, section 65. Apart from the above statutory provisions the plaintiff having rescinded the transaction without delay was entitled in equity to an account of the profits upon the principle of *restitutio in integrum*.

Reg. v. Saddlers' Co. (1863) 10 H. L. C., 404; 11 E. R., 1083, and other English decisions, applied.

*Present: Lord BLANESBURGH, Sir GEORGE LOWNDES, and Sir DINSHAH MULLA.

Consolidated Appeal and Cross-Appeal (No. 24 of 1930) from a decree of the Chief Court (2nd of May, 1928) which modified a decree of a single judge of that Court (28th of November, 1927).

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The dispute related to an estate of which a Mahant had been recorded as the taluqdar under the Oudh Taluqdari Estates Act, 1869. Upon the death intestate of a succeeding mahant, disputes between claimants were settled by an agreement of the 20th of January, 1922, under which Mahant Har Narain Das (plaintiff) was to succeed for his life, and upon his death Satgur Prasad, alias Hari Saran Das (defendant No. 1). On the 25th of November, 1924, the plaintiff executed a deed by which he surrendered his life interest to defendant No. 1 on condition that the latter paid him Rs. 1,000 a month; a monthly allowance of Rs. 100 was to be made also to defendant No. 3 and of Rs. 50 to his wife. In pursuance of this deed defendant No. 1 took possession of the estate.

The plaintiff brought the present suit in the Chief Court on the 21st of February, 1927, claiming a declaration that the deed of the 25th of November, 1924, was void on the ground that it had been procured by fraud and undue influence, and that defendant No. 1 was entitled to no benefit under it, a decree for possession and mesne profits, estimated at 5 lakhs, was prayed for.

The trial Judge (PULLAN, J.) set aside the deed and made a decree for possession and for mesne profits to be assessed in execution proceedings.

Upon an appeal by defendant No. 1 only the decree was affirmed by STUART, C. J. and WAZIR, HASAN, J., subject to a modification on a point not material to this report. Mesne profits were decreed only from the date of the suit, on the ground that the deed was voidable at the option of the plaintiff, and that he did not exercise his option till then.

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Both Courts found that the deed was procured by fraud and undue influence, and that defendants Nos. 1 and 3 had been in a fiduciary relation to the plaintiff, and had taken advantage of that relation to procure the deed.

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1931. November 27, 30, December 1. *Upjohn, K. C., DeGruyther, K. C. and Jopling*, for the defendant No. 1. There was no evidence that the deed was induced by fraud or undue influence; the Courts misapplied the law applicable: *Raghunath Prasad v. Sarju Prasad* (1). The rule with regard to concurrent findings does not apply: *Harendru Lal Roy v. Hari Dasi Debi* (2). *Dunne, K. C., Dube, K. C., Wallach* and *Sir Tej Bahadur Sapru* for the plaintiff, not being called upon in the first appeal. Upon the cross-appeal the plaintiff is entitled to mesne profits from the date when possession was taken under the deed. If the possession is to be regarded as under a contract, the plaintiff was so entitled by the Indian Contract Act, 1872, section 65. If the possession was under the conveyance the Court could, and should, have ordered mesne profits on that basis under the Specific Relief Act, 1877, section 35. [Reference was made to *Erlanger v. New Sombrero Phosphate Co.* (3)].

Upjohn, K. C., to the cross-appeal. By the definition in section 2 of the Code of Civil Procedure mesne profits are recoverable only for the period of wrongful possession. Under section 19 of the Contract Act, the contract was voidable; it became void only when the plaintiff by bringing his suit elected to avoid it: *Clough v. L. and N. W. Railway Co.* (4), *United Shoe Machinery Co. v. Brunet* (5), *Elliott v. Boynton* (6). The cross-appeal seeks two inconsistent

(1) (1923) I.L.R., 3 Pat., 279;
L. R., 51 I.A., 101.

(3) (1878) 3 App. Cas. 1218, 1278.

(5) (1909) A.C., 330, 339.

(2) (1914) I.L.R., 41 Cal., 972, 988;
L.R., 41 I.A. 110, 119.

(4) (1871) L.R., 7 Ex. 26.

(6) (1924) 1 Ch. 236.

remedies; the plaintiff cannot both affirm and disaffirm the transaction. Section 65 of the Contract Act applies only where an agreement is found to have been void *ab initio*, or "becomes void" by impossibility of performance.

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Sir *Dinshah Mulla*, having regard to the finding of fiduciary relation, do not sections 86, 88 and 89 of the Trusts Act apply?

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The plaintiff did not claim on that basis. Further, the sections do not apply. The principle there embodied relates to transactions which are void unless ratified, not to this class of case. Reference was made also to *Edwards v. McLeay* (1) and *Neesom v. Clarkson* (2).

Dunne, K. C., in reply. The plaint prayed for the relief now sought. The plaintiff on discovering the fraud was entitled to the property and the profits made out of it: Kerr on Fraud and Mistake, 6th edn., p. 469 and cases there cited. The matter has passed out of contract, and the above principle, also section 88 of the Trusts Act, apply. But if it is still in contract, section 65 of the Contract Act applies; illustration (c) shows that a contract "becomes void" on rescission.

1932. January, 18. This judgment of their Lordships was delivered by Sir GEORGE LOWNDES.

These are consolidated cross-appeals against a decree of the Chief Court of Oudh, dated the 2nd of May, 1928. The appellant in the one case, Satgur Prasad, was the principal defendant in a suit instituted on the original side of the Chief Court, which was decided against him both by the trial Judge and the Court of Appeal. In the other the plaintiff, Mahant Har Narain Das, is the appellant, raising subsidiary questions on which the Court of Appeal had decided against him.

(1) (1818) 2 Swam. 287; 36 E. R. (2) (1845) 4 Ha. 97; 97 E.R., 576.
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The main issue in the suit was as to the validity of a deed, dated the 25th of November, 1924, by which the plaintiff purported to make over a valuable estate and other property to the defendant-appellant subject to certain conditions. The object of the suit was to set aside this deed on the ground that it was procured by undue influence and fraud. There are concurrent findings of both the Courts in India that this has been established, and they are undoubtedly findings of pure fact. It is not disputed that if they are to stand the appellant cannot escape the decree which has been passed against him.

The practice of this Board with regard to concurrent findings of fact is well established. Such findings will not be disturbed unless it is shown that there has been a miscarriage of justice, or the violation of some principle of law or procedure: *Moung Tha Hnyeen v. Moung Pan Nyo* (1), *Rani Srimati v. Khajendra Narayan Singh* (2), per Lord Lindley at p. 131; cited and followed in *Robins v. The National Trust* (3).

This does not necessarily imply that their Lordships make the findings their own, for, almost *ex hypothesi*, they have not considered them in detail: but only that where matters of fact have been fairly tried by two local Courts, which are often in a better position to conclude upon them than this Board, and the same conclusion has been reached by both, it is not in the public interest that the facts should again be examined in the ultimate Court of Appeal.

Nothing has been suggested, during a two-days' argument for the defendant-appellant, which would bring the case within the principles so laid down, the learned Counsel confining themselves to a searching criticism of the reasons assigned by the learned Judges in the Courts below for the conclusions to which they had come. Their Lordships think that no useful

(1) () L.B., 27 L.A., 166

(2) () L.B., 31 I.A., 127.

(3) (1927) A.C., 515.

purpose would be served by following their argument through the somewhat unsavoury details so disclosed. They will only record their opinion that no sufficient reason has been shown for disturbing the concurrent findings to which they have referred.

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The cross-appeal of the plaintiff raises a question of greater difficulty. Under the decrees of both Courts he is entitled to possession of all the properties sued for. The details were set out in three schedules annexed to his plaint. These are embodied in the decree of the trial Judge, which in this respect was confirmed by the Court of Appeal.

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He also claimed by his plaint mesne profits accruing during the possession of the defendant-appellant (hereinafter for convenience referred to as the defendant), the amount of which he estimated at five lakhs of rupees. There were two other defendants to the suit, but neither of them has appeared on the present appeals. There seems to have been no discussion upon this question in the trial Court, the learned Judge merely reciting an agreement of the parties that the issue as to the defendant's liability to account should be left to be dealt with in execution proceedings, which their Lordships understand to be in accordance with the usual practice.

In the Court of Appeal, however, it was urged on behalf of the defendant that the account should only go from the date of suit (the 21st of February, 1927), and not from the date when the defendant got possession, *i.e.*, approximately the 25th of November, 1924. The learned Judges of the Appellate Court accepted this contention, assigning as their reason for so doing "that the document of the 25th of November, 1924, was only voidable at the option of the plaintiff, and the plaintiff did not exercise that option earlier than the date of the suit."

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It is against this finding only that the cross-appeal of the plaintiff has been pressed, and it is contended on his behalf that, having regard to the conclusion, now established, that the deed under which the defendant got possession was procured by undue influence and fraud, the plaintiff is entitled to the account which he has claimed.

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The defendant supports the finding of the Court of Appeal on this question. Mesne profits, it is said, under the definition contained in Section 2 (12) of the Civil Procedure Code, can only be awarded for the period during which the defendant was in wrongful possession, and until the plaintiff elected to avoid the contract under which possession was made over to him, his possession was not wrongful.

But in the first place their Lordships are unable to regard the deed of the 25th of November, 1924, merely as a contract voidable at the option of the plaintiff, but good until avoided. It was in effect a conveyance, under which the title to the properties passed to the defendant, and which had to be formally set aside. Before the institution of the suit the defendant could no doubt have made a valid transfer to an innocent purchaser, but it by no means follows from this that as between him and the person he had defrauded his possession was not wrongful. To admit of such an assertion would be to allow him to take advantage of his own wrong, which no court of equity will permit.

If the matter could be regarded as one of contract, their Lordships think that it would fall within the terms of Section 65 of the Contract Act, which provides that "when a contract becomes void"—and their Lordships would have no difficulty in holding these words sufficient to cover the case of a voidable contract which had been avoided—any person who has received any

advantage under such contract is bound to restore it to the person from whom he received it, or make compensation therefor.

Regarding the transaction, however, as one that has passed out of the realm of contract, it would seem to be met by Section 88 of the Trusts Act, which has always applied to the province of Oudh. Both Courts in India have found that the defendant stood in a fiduciary relation to the plaintiff, and that he procured the conveyance by taking advantage of this relationship. He would therefore be bound under the terms of the section to hold any advantage so gained for the benefit of the plaintiff.

But apart from either of these statutory provisions, their Lordships think that the plaintiff is entitled to succeed in his claim upon general principles of equity. So it is stated in Kerr on Fraud and Mistake (6th Edition, 469), dealing with the doctrine of *restitutio in integrum*, that "a party exercising his option to rescind is entitled to be restored as far as possible to his former position." For this proposition there is ample authority. In *Reg. v. Saddlers' Company* (1) Lord BLACKBURN says:—

"Fraud, as I think, renders any transaction voidable at the election of the party defrauded; and if, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning."

In *Dally v. Wonham* (2) where a purchase by the agent of a vendor was set aside upon much the same grounds as here, the vendor-plaintiff was given an account of rents and profits received by the defendant, from the date of the conveyance, the defendant being allowed credit in the account for all moneys properly

(1) (1863) 10 H.L.C., 404, 420; 11 (2) (1863) 33 Brav. 154; 55 E.R. E.R. 1033, 1039.

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expended by him on repairs and lasting improvements, and all sums paid to the plaintiff on account of an annuity which was, as in the present case, part of the consideration for the conveyance.

In *Mulhallen v. Marum* (1), the Lord Chancellor (Lord LYNDBURST), in setting aside a lease which had been obtained by fraud and undue influence, said, "I shall give an account against the defendant from the time of filing the bill, but not before on account of the delay." In this case eleven years had elapsed since the date of the lease before the bill was filed.

Reference might also be made to the form of decree proposed by Lord WESTBURY L. C. in *Tyrrell v. The Bank of London* (2) and to *Erlanger v. New Sombrero Phosphate Coy.* (3).

Their Lordships think that in the case now before them, where there is no difficulty in putting the parties back in the position which they occupied respectively on the 25th of November, 1924, and where there is no proof of undue delay on the part of the plaintiff in bringing his suit, he should have an account of the rents and profits of the immoveable properties from that date, the defendant being entitled to credit in the account for all payments made by him to the plaintiff. Interest should be allowed at the usual rate upon both sides of the account.

For the reasons given their Lordships will humbly advise His Majesty that the appeal of Satgur Prasad should be dismissed, and that of Mahant Har Narain Das allowed; and that the decree of the Chief Court of Oudh dated the 2nd of May, 1928, should be varied by substituting for the words "date of the suit" the words "twenty-fifth of November, 1924," and by adding after the words "possession by him" the words "the defendant-appellant being entitled to credit in the

(1) (1843) 3 Dr. and War. 317.

(2) (1862) 10 H.L.C., 26; 11 E.R.

(3) (1873) 3 App., Cor., 1218.

934.

account so to be taken for all sums paid by him after that date to the respondent No. 1, and interest being allowed at the usual rate on both sides thereof." In other respects the decree of the Chief Court will stand.

The appellant, Satgur Prasad, must pay the costs of Mahant Har Narain Das before this Board.

Solicitors for defendant No. 1: *Barrow, Rogers and Nevill.*

Solicitor for plaintiff: *H. S. L. Polak.*

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FULL BENCH.

Before Syed Wazir Hasan, Chief Judge. Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

RAM UDIT (PLAINTIFF-APPELLANT) v. RAM SAMUJH (DEFENDANT-RESPONDENT).*

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April, 1.

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Deed of gift in respect of some plots—Donee making possessory mortgage of some of gifted plots—Donee suing mortgagee for possession of the remaining plots alleging wrongful dispossession by him—Suit dismissed on the ground that gift was invalid and inoperative—Second mortgage by donee of the plots previously mortgaged to another person—Redemption suit by subsequent mortgagee against prior mortgagee—Decision in previous suit about invalidity of gift, whether operates as res judicata to the suit for redemption—Estoppel.

G executed a deed of gift in favour of B in respect of a number of plots. D made a possessory mortgage in respect of some of these plots in favour of R. B relying upon his title under the gift sued R for possession of the remaining plots alleging that he had been wrongfully dispossessed from them by R. The suit was dismissed on the ground that G was not competent to execute the deed of gift and that the gift was invalid and inoperative. Sometime after that B executed

*Second Civil Appeal No. 128 of 1930, against the decree of M. Ziauddin Ahmad, Subordinate Judge, Sultanpur, dated the 19th of February, 1930, reversing the decree of Faudit Shiam Manohar Tewari, Munsif Munsafirkhana, Sultanpur, dated the 11th of November, 1929.