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there is both a guardian of the person and a manager of the estate of a lunatic, we were to rule that each had the power to sue. The Legislature has provided for this contingency where a next friend has to be appointed (see the addition to section 443 made by the Act of 1890), but it has used the single word "guardian" in section 440, thereby, in our opinion, indicating that irrespective of the name of the appointment, the guardian intended in it must have the power to bring a suit which he could only have in the case of a lunatic by virtue of his being appointed the manager of the estate,—in other words, that the person denominated guardian must mean the person who is himself competent to sue. A guardian of the person only of the lunatic has no such power. While, however, holding that the Subordinate Judge was right in deciding that the application was presented by an unauthorized person, we must rule that he was wrong in summarily rejecting the application. Under section 440 a person other than the guardian is given the power to institute a suit with the leave of the Court. The Subordinate Judge should have followed the provisions of that section, and determined whether or not such leave should be given. We reverse his order for this reason and return the application for him to dispose of it according to law. We express no opinion on the new point raised before us as to the right of the lunatic to a separate share. We make costs costs in the cause.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

1898. *August 29.*

HONAPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARSAPA AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 4 AND 7), RESPONDENTS.*

Fraud—Fraudulent conveyance—Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.

When property has been conveyed by the owner to another person with the object of defrauding his (the owner's) creditors, and the fraud has been carried out, the owner cannot succeed in a suit to recover possession.

* Second Appeal, No. 28 of 1898.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, reversing the decree of Ráo Sáheb V. V. Tilak, Subordinate Judge of Chikodi.

Suit to recover possession of land.

The following are the only facts in the case material to this report.

In 1868 the plaintiff's father Narsapa, in order to defraud his creditors, mortgaged the land in question to one Jivaji Tregal, and in 1872 the plaintiff's brother Rama (with the plaintiff's consent) for the same purpose sold it to the mortgagee Jivaji. Notwithstanding this mortgage and sale, however, Narsapa and his son (the plaintiff and Rama) remained in possession until 1880. In that year the son of Jivaji (the mortgagee and vendee) sold the land to Shidapa (defendant No. 7) and the latter obtained possession. It was disputed at the hearing whether Shidapa remained in possession, but the allegations relating to this point are not material to this report.

In 1895 the plaintiff brought this suit to recover possession of the land. The Subordinate Judge passed a decree in his favour, holding that he was not estopped from asserting his claim by the mortgage and sale in 1868 and 1872.

On appeal, the Judge reversed the decree and dismissed the suit, holding that the mortgage and sale were fraudulent transactions and that the plaintiff having thus parted with his estate the Court would not assist him to recover it.

The plaintiff preferred a second appeal.

Mahadev V. Bhat for the appellant (plaintiff):—The fraudulent sale in 1872 was really the fraud of the plaintiff's brother, and the plaintiff is not precluded from recovering—*Sreemutty Debia* v. *Bimola*[1]; *Param Singh* v. *Lalji Mal*[2].

Balaji A. Bhagvat and *Dhondu P. Kirloskar* for respondents (defendants):—The plaintiff cannot be allowed to benefit by his own fraud. The lower Courts have found that the mortgage and sale were in fraud of creditors. By that fraud the plaintiff

(1) (1874) 21 Cal. W. R., 422. (2) (1877) 1 All., 403.

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lost possession and cannot now recover it—*Chenvirappa* v. *Puttappa*[1]; *Yaramati* v. *Chundru Papayya*[2]; *Babaji* v. *Krishna*[3].

FARRAN, C. J. (after discussing other questions raised in the case continued:—) But assuming that Shidapa did regain, and is now in possession of, the land and that he claims to retain such possession on the strength of the mortgage and sale by Narsapa and his son Rama to Jivaji Tregal and of the sale by the son of the latter to himself (Shidapa), the question which has been discussed by the District Judge and my learned colleague arises. I do not enter upon the distinction which my learned colleague draws between a fraudulent conveyance in England and a fraudulent conveyance in India, but take the facts as they are found. The Subordinate Judge finds that the sale to Jivaji was fictitious and that the defendant No. 7, Shidapa, acquired nothing by his purchase. The District Judge raised these issues :—

(3) Is the plaintiff estopped from asserting his title to the land?

(4) In view of the fact that the plaintiff confessedly sold fraudulently to Jivaji, from whose son the defendant No. 7 alleges that he purchased *bonâ fide* and for valuable consideration, what right has the plaintiff (*a*) against him ; (*b*) against the defendants Nos. 1—4 in possession whom he wishes to eject?

The findings are :—On the 3rd issue that the plaintiff is estopped, and on the 4th issue that the plaintiff has no right remaining against defendants Nos. 1—4 or defendant No. 7

The District Judge does not anywhere set out the exact nature of the transaction. The nearest approach to it is found in the following passage :—

"The original mortgage to Jivaji Tregal was admittedly a fraud and intended to operate against honest creditors. It admittedly did so. Assuming for the sake of the plaintiff's argument at this bar that there was a distinction beween the mortgage to Jivaji Tregal and the subsequent sale to him, inasmuch as the mortgage did, while the sale did not in fact protect the property from the creditors, it remains plain to all that the origin of Tregal's connection with the property was in fraud, and that

(1) (1887) 11 Bom., 708. (2) (1897) 20 Mad., 326.
(3) (1893) 18 Bom., 372.

since the sale was admittedly pursuant to and in completion of the mortgage, the same taint affects it." Later on he writes: "The plaintiff having perpetrated a fraud and pursuant thereto parted with his estate, neither law nor equity will help him."

The above findings taken all together appear to me to represent the following state of facts:—By a mortgage and sale, which formed one single transaction, the plaintiff conveyed the property in question to Jivaji Tregal for the purpose of defeating the claims of honest creditors, who were in consequence defrauded; that the said Jivaji Tregal or his son transferred the estate thus conveyed to Jivaji to the defendant Shidapa; that Shidapa under colour of the above deeds ousted the defendants Nos. 1—4 from the property, and that they (defendants Nos. 1 to 4) recovered possession through the Court of the Mámlatdár. The plaintiff now seeks to recover the estate which he conveyed away in order to defraud creditors from the defendants Nos 1—4 and Shidapa.

The law applicable to that state of facts is, in my opinion, that laid down by Benson, J., in *Yaramati Krishnayya* v. *Chundru Papayya*[1], which I think that we should follow in preference to the Allahabad decision in *Param Singh* v. *Lalji Mal*[2]. There is no question of estoppel in the matter. When both parties are equally conversant with the true state of the facts, it is absurd to refer to the doctrine of estoppel. The rule is *in pari delicto potior est conditio possidentis*. Equity will not lend her aid to enable a successfully fraudulent plaintiff to avoid the coils which his own fraud has woven around him. All the Courts, except the Allahabad Court in the above case, refer to the English authorities to guide them in this matter. I am of opinion that they rightly do so. The judgment in the Madras case, which I have referred to, gives, I think, succinctly the result of the English authorities. Therefore, I consider that we should follow it. The Calcutta decisions in *Goberdhan Singh* v. *Ritu Roy*[3] are to the same effect, though the learned Judges have not stated the law so elaborately as has been done in the Madras case to which I have referred. The decree is confirmed with costs.

(1) (1897) 20 Mad., 326. (2) (1877) 1 All., 403.
(3) (1896) 23 Calc., 962 at p. 966.

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FULTON, J. (after dealing with other questions in the case continued:—) But as regards Shidapa the case is different. As this man claims under a title derived from Narsapa, he cannot dispute the fact of Narsapa's ownership. He says he is in possession, and if this is so, the question arises whether, as against the plaintiff, who alleges that the conveyance to Tregal was a sham transaction entered into to defeat creditors, he is entitled to retain possession. The District Judge, without determining whether Shidapa was a *bonâ-fide* purchaser for value or whether the plaintiff's claim is barred by limitation, has held that the plaintiff alleging a fraud on creditors, which he has found to be successful, cannot maintain this suit to recover possession. To support this view he relies on the decision in *Chenvirappa* v. *Puttappa*[1], but though many of the remarks in that case are in favour of the important principle for which the learned District Judge so ably contends, the decision cannot be cited as an authority governing the present case, inasmuch as the point decided was simply that a party to a collusive decree is bound by it. Quite apart from the equitable considerations referred to by the learned Judge, that decision seems to depend really on section 13 of the Civil Procedure Code. See *Varadarajulu* v. *Srinivasulu*[2]. Here, however, the question is unaffected by any decree between the parties. The plaintiff in effect says: "The land is mine, because though I assented to a deed in favour of the defendants' vendor, and put him in possession, the transaction was a sham transaction and had no effect in conveying any property to him." Now, assuming the facts alleged to be proved, it is difficult to avoid the conclusion that the property still remains in the plaintiff. The mere execution of a conveyance and transfer of possession does not appear sufficient, in India, to effect a change of ownership, unless there be an intention to convey. The intention, I think, is essential to the conveyance. This is obvious in the case of a man who signs a conveyance in ignorance of its contents. The surrender of his property to another is an act of the will, and if there is no will, there is no surrender. *A fortiori*, if, the attention being directed to the nature of the deed, the will is exerted, not towards the surrender

(1) (1887) 11 Bom., 708. (2) (1897) 20 Mad., 333.

of the property, but towards its retention, there can, I think, be no conveyance. Of course, if the opposite party, in whose favour the deed purports to be executed, is ignorant of the intention and takes the property believing that it has been conveyed to him, the law of estoppel will intervene for his protection. But if he, too, knows of the want of intention to convey and assents to the proceeding, no question of estoppel seems to arise. In such a a case the decisions in *Tillakchand* v. *Jitamal*[1] and *Abdul Hye* v. *Mir Mohammed*[2] show that the property remains in the original owner. Referring to these cases, the Chief Justice in *Sadashiv Vaman* v. *Trimbak Divakar*[3] said (p. 170): "In India, where the *benami* system is common, it has been recognized by our Courts that there may be a sham conveyance, which, though registered and delivered to the grantee, not being intended to pass the property, but merely to be used as a blind to deceive creditors or others, conveys no estate to the nominal grantee." In such a case possession is given not under the deed, the execution of which has no bearing on the real transaction between the parties, but under the private arrangement.

The question, then, arises whether, when the owner of the property seeks to recover it, the Court has any discretion to refuse him its aid. Doubtless the private arrangement, being *ex hypothesi* in fraud of creditors, is a void agreement, and if it is necessary for the plaintiff to rely upon it to support his claim, his case must break down. But is it necessary? The general rule of law, I believe, is that a man is entitled to possession of his own property unless the defendant can show some right for retaining it. It may, therefore, be argued that the Court has no discretion in the matter, and it seems necessary to consider the point.

In *Rangammal* v. *Venkatachari* [4] and *Yaramati Krishnayya* v. *Chundru Papayya* [5], the Madras High Court refused a declaration of invalidity in respect of certain collusive deeds; but as those were suits under section 39 or section 42 of the Specific Relief Act, in which a discretion is reserved, they are not exactly in point. They leave open the question whether, when a claim

(1) (1873) 10 Bom. H. C. Rep., 210.
(2) (1883) 10 Cal., 616.
(3) (1898) 23 Bom., 146.
(4) (1895) 18 Mad., 378; (1896) 20 Mad., 323.
(5) (1897) 20 Mad., 326.

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is made in a form which would not have come within the cognizance of Courts of Equity in England, there is the same latitude. In England probably the plaintiff could not obtain relief without first setting the deeds aside (see *Sadashiv Vaman* v. *Trimbak Divakar* (1)), but here this preliminary step appears unnecessary. See *Nagathal* v. *Ponnusami* (2) and *Sham Lall Mitra* v. *Amarendro Nath Bose* (3) in which their Lordships said (p. 466): "Here, if the plaintiff's allegations are substantiated, the deeds in question were never intended to be operative, and, therefore, would not be operative, no matter whether they are set aside or not."

On the simple question whether, notwithstanding the fraudulent execution of a sham conveyance, the owner is entitled to recover his property, the cases of *Phool Bibee* v. *Goor Surun Doss* (4), *Bykunt Nath Sen* v. *Goboollah Sikdar* (5) and *Param Sing* v. *Lalji Mal* (6) are explicit in his favour. But the last of these three cases, in which a decree had to be set aside, is inconsistent with the decision of this Court in *Chenvirappa* v. *Puttappa* (7). The cases of *Mahadaji Gopal* v. *Vithal Ballal* (8) and *Dharma Sakharam* v. *Nago Badgu* (9), which at first sight seem authorities in the plaintiff's favour, have been explained in *Chenvirappa* v. *Puttappa* and *Babaji* v. *Krishna* (10), and owing to special circumstances depended on an estoppel preventing the defendants, who were mortgagees, "from setting up the fictitious form of the transaction as fraudulently intended to shield the property from the claims of creditors." In *Sreemutty Debia* v. *Bimola Soondurce* (11) and *Babaji* v. *Krishna*, the defendants in possession were allowed to prove the unreality of the deeds relied on by the plaintiffs. In *Sham Lall Mitra* v. *Amarendro Nath Bose* (3), where the fraud had not been carried into effect, the plaintiff was allowed to get relief notwithstanding his execution of a collusive deed. But in *Goberdhan Singh* v. *Ritu Roy* (12),

(1) *Ante* p. 146.
(2) (1889) 13 Mad., 44.
(3) (1895) 23 Cal., 460.
(4) (1872) 18 W. R., 485.
(5) (1875) 24 W. R., 391.
(6) (1877) 1 All., 403.
(7) (1887) 11 Bom., 708.
(8) (1881) 7 Bom., 78.
(9) P. J. for 1890, p. 275.
(10) (1893) 18 Bom., 372.
(11) (1874) 21 W. R., 422.
(12) (1896) 23 Cal., 962.

where the fraud was complete, the claim of a plaintiff seeking to recover possession from his so-called benamidár was rejected.

This last decision should, I think, be followed. I know of no technical rule compelling the Court to pass a decree for possession, and the mere fact that in this country the owner is not obliged to sue to get the deed set aside as he would probably have to do in England, does not seem any ground for coming to a result different from that at which on similar facts Courts in England would arrive in exercise of their equitable jurisdiction. The distinction in the form of the suit is merely nominal. If relief is granted, the fraudulent object, namely, the preservation of the property by the owner, is achieved through the action of the Court. And, whatever may be the form of the suit, whether cancellation of the deed or for recovery of possession, the object is one for the accomplishment of which no Court ought, I think, to render any assistance.

Where a defendant in possession proves that he is the real owner and that the deed under which the plaintiff is claiming is fraudulent and collusive, he is left in possession, because the plaintiff has no just claim to the property. He owes his safety, not to the Court's action, but to the fact that he is in possession, and the plaintiff cannot establish a right to turn him out. But, if we look to the substance rather than the form, similar reasoning seems to apply when the original owner, after a successful fraud, seeks to recover possession from the benamidár. In justice he has no right to the land which ought to have been sold for the benefit of his creditors, and the Court, therefore, will not give him what he is not equitably entitled to. In the one case, as in the other, the Court considers whether the plaintiff can make out, not merely a technically correct title, but also a substantially just one. Where the fraud is not completed, it may well be contended that, as the collusive transaction has not really frustrated justice, the original owner still retains a good claim to the property.

For the foregoing reasons I would confirm the decree with costs.

Decree confirmed.