1935

HARI v. THE KING-EMPEROR

Lord Atkin

Mr. Dunne, appearing for the Crown, has told their Lordships perfectly fairly that, on such an application being made, he appreciates the constraining force of the consideration that would be put before the Court by the appellant, and he thinks—he has not, of course, any power to bind the Court—that that is an application which, after the expression of their Lordships' view, is not very likely to be refused.

Their Lordships think that that is the most effective way of dealing with this case, and they must leave it in that position. The result is that, with that intimation of opinion, they consider that this appeal must be dismissed, and they will humbly advise His Majesty accordingly.

There will, of course, be no order as to costs.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for respondent: *Solicitor, India Office.*

A. M. T.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

1935 *January* 15

GOPAL BHAURAO JAPE (ORIGINAL PLAINTIFF), APPELLANT *v.* SHREE JAGANNATH PANDIT WASUDEORAO PANDIT MAHARAJ AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sections 2, 28, Schedule I, Articles 44 and 91—Undue influence, a question of fact—Defence of undue influence—Defendant not precluded from setting up the defence though a suit for setting aside the instrument would be barred—Counterclaim in mofussil Courts.

The question whether an instrument is obtained from a person by undue influence or misrepresentation is a question of fact.

Satgur Prasad v. *Har Narain Das*, [1] followed.

The lands in suit were leased to the plaintiff by defendant No. 1 by a registered lease dated July 8, 1922, for a period of 25 years. On March 12, 1927, a suit was filed by the plaintiff for an injunction restraining defendant No. 1 from interfering with his possession and in the alternative for possession of the lands if defendant No. 1

*Second Appeal No. 404 of 1931.

[1] (1932) L. R. 59 I. A. 147: 34 Bom. L. R. 771, P. C.

was held to be actually in possession. Defendant No. 1 resisted the suit on the ground that the lease was obtained from him by undue influence and misrepresentation. The lower Courts upheld the contention and dismissed the suit. On appeal to the High Court it was contended for the plaintiff that defendant No. 1 was precluded from challenging the validity of the lease as, if he had sued to have the lease set aside, the suit would have been barred by the law of limitation and that it was not open to a defendant in the mofussil to raise a defence in the nature of a counterclaim.

Held, that defendant No. 1 was not precluded from urging by way of defence that the lease was obtained by the plaintiff by undue influence and misrepresentation although a suit by him to have the instrument set aside or cancelled would have been time-barred under Article 91 of the Limitation Act, 1908.

Rangnath Sakharam v. *Govind Narasinv*,[1] *Lakshmi Doss* v. *Roop Laul*,[2] *Doddawa* v. *Yellawa*,[3] *Hargovandas Lakhmidas* v. *Bajibhai Jijibhai*,[4] *Minalal Shadiram* v. *Kharsetji*,[5] followed.

Jugaldas v. *Ambashankar*,[6] distinguished;

(2) that as defendant No. 1 was not putting up a defence in the nature of a counterclaim it was not necessary for him to support his title by a suit for specific performance as admittedly he was the owner of the property.

Currimbhoy & Co. v. *Creet*[7] and *Pir Bakhsh* v. *Mahomed Tahar*,[8] distinguished.

The Indian Limitation Act is not applicable to the case of a defendant and the party in possession is not affected by it. It refers only to the remedy of the plaintiff and not even to his rights, and even though the remedy may be barred, the right may still exist. The object of the Act is to prevent a party from putting forward stale or antiquated demands; but a ground of defence cannot become stale or barred by the law of limitation. It is therefore open to a defendant to put forward any defence though such defence may be barred on the date it is put forward.

SECOND APPEAL against the decision of N. J. Wadia, District Judge of Poona, confirming the decree passed by M. T. Mehta, Subordinate Judge at Poona.

Suit to set aside a lease.

Shri Jagannath Pandit (defendant No. 1), a First Class Sardar of the Deccan, came into possession of large estates in several villages in the Poona and other Districts, in 1917, as the adopted son of Tai Maharaj, the widow of Wasudeo Maharaj. In April 1921 he appointed the plaintiff,

(1) (1904) 28 Bom. 639.
(2) (1906) 30 Mad. 169 F. B.
(3) (1921) 46 Bom. 776 F. B.
(4) (1889) 14 Bom. 222.
(5) (1906) 30 Bom. 395.
(6) (1888) 12 Bom. 501.
(7) (1932) L. R. 60 I. A. 297 : 60 Cal. 980 : 35 Bom. L. R. 223 P. C.
(8) (1934) 58 Bom. 650, P. C.

1935

GOPAL BHAURAO v. SHREE JAGANNATH PANDIT

Gopal Bhaurao Jape, as his karbhari or manager to supervise the whole of his estates. The plaintiff, who was several years older than the Sardar, was closely related to him as the husband of his natural sister. The plaintiff's salary was fixed at Rs. 70 per month and he was promised an increment of Rs. 5 after one year. In March 1922, when the question of increment arose, it was stated that instead of giving him an increase in his salary it was agreed that a lease in respect of certain lands should be passed by defendant No. 1 in favour of the plaintiff and accordingly on July 8, 1922, by a registered rent note, two parcels of lands, assessed at Rs. 45–12–0, were leased by defendant No. 1 to the plaintiff for a period of 25 years at an annual rent of Rs. 45–12–0. Thereafter disputes arose between the parties and on March 12, 1927, the plaintiff filed a suit against Shri Jagannath Pandit (defendant No. 1) and other defendants for a permanent injunction restraining defendant No. 1 from interfering with the plaintiff's possession. He also prayed in the alternative for recovery of possession if defendants Nos. 1 to 4 were held to be in actual possession.

Defendant No. 1 contended, *inter alia*, that the lease was obtained by the plaintiff by the exercise of undue influence and misrepresentation and therefore the plaintiff acquired no rights under the deed. The other defendants supported defendant No. 1.

The Subordinate Judge held that it was proved that the lease was obtained by the plaintiff by undue influence and misrepresentation and dismissed the suit.

On appeal the District Judge agreeing with the findings dismissed the appeal.

The plaintiff appealed to the High Court.

A. G. Desai and *J. G. Rele*, for the appellant.

M. R. Jayakar, with *K. V. Joshi*, for the respondent.

RANGNEKAR J. The appellant brought a suit for an injunction restraining defendant No. 1 from interfering in

any way with his possession and enjoyment of certain lands which, he alleged, were leased to him by a registered lease dated July 8, 1922, for a period of twenty-five years at a certain rental, and in the alternative for possession of the lands. The question in the suit related to the validity of this lease, the defendant contending that it was obtained from him by undue influence and misrepresentation. Although the plaintiff originally alleged that he was in possession, it is clear on the record that he admitted later on that at the date of the suit and for some time previous to it the defendant had been in possession of the lands in question.

Both the Courts found that the lease was obtained by undue influence and misrepresentation. Hence this appeal.

It is contended on behalf of the appellant that the finding of the lower Courts on this issue cannot be accepted, and it is further contended that the question whether the document was obtained by undue influence and misrepresentation is a mixed question of fact and law. Apart from any authority, I think the question as to whether an instrument was obtained from a person by undue influence and misrepresentation is and must be a question of fact. I am strengthened in this opinion by a recent pronouncement of their Lordships of the Privy Council in *Satgur Prasad* v. *Har Narain Das*,[1] and in my opinion, therefore, if this was the only question in the appeal, the appeal must fail.

Mr. Desai, however, on behalf of the appellant, has raised a question of law. He says, first, that the defendant is precluded from challenging the validity of the lease as he had not taken any proceedings to have it set aside. Secondly, he argues that he is precluded from doing so as, if he had sued to have the lease set aside, the suit would have been barred by the law of limitation ; and, lastly, he argues that it is not open to a defendant in the mofussil to raise a defence

[1] (1932) L. R. 59 I. A. 147 : 34 Bom. L. R. 771, P. C.

1935

GOPAL BHAURAO v. SHREE JAGANNATH PANDIT

Rangnekar J.

of the nature of a counterclaim. In support of the last contention he relies on two decisions of the Privy Council in *Currimbhoy & Co.* v. *Creet*[1] and *Pir Bakhsh* v. *Mahomed Tahar.*[2] I am unable to find anything in these decisions to support such an astounding proposition as Mr. Desai has put forward. All that was decided in both these cases was that where a defendant seeks to support his possession of property on the ground of the doctrine of part performance or on the ground that he had entered into an agreement to buy the property, and therefore was entitled to specific performance of it, he cannot be allowed to do it if at the date of the suit a suit for specific performance of such an agreement had become barred. That clearly is not the position here. The defendant does not want to support his title to the property as admittedly he is the owner of it. All that he says is that he cannot be driven out of possession of the property and that he has a better title than the plaintiff to it as the claim made by the plaintiff is under an instrument which is voidable and which was obtained from him by undue influence and misrepresentation. To accept this contention would, in my opinion, lead to disastrous consequences. Supposing a suit is filed on a promissory note and the defendant says that the note was obtained from him by undue influence or fraud or misrepresentation, if the contention is accepted, the defendant would not be allowed to raise the defence but must submit to a decree, or at least ask for a stay of the suit and file an independent suit for such a declaration and for consequential relief, and this, in my opinion, would be absurd.

As regards the first contention that the defendant was precluded from avoiding the document, as he had not taken proceedings to have it set aside, it is clear from the record that no such contention was ever raised in either Court. There is no issue with regard to it. The contention seems

[1] (1932) L. R. 60 I. A. 297 : 60 Cal. 980 : 35 Bom. L. R. 223, P. C.
[2] (1934) 58 Bom. 650, P. C.

to me to be of the nature of an estoppel, and the determination of it must depend upon evidence. Mr. Desai points out that the plaintiff had alleged in the plaint that the defendant should be referred to an independent suit or should have filed an independent suit, and later in 1929 he put in an application. He stated therein that if defendant No. 1 does not admit the rent-note, he must file a separate suit for getting it set aside and to recover possession. I am unable to construe these two statements as raising the question of estoppel. Apart from that, it is clear that the plaintiff asked that only one issue should be raised and never suggested another issue on this ground. The issue which he suggested was whether the plaintiff is not entitled to be restored to possession. Mr. Desai further supports his argument by reference to the finding of the trial Court on issues Nos. 3 and 4, but it appears from what the learned Judge says that it was in the course of the arguments that the plaintiff argued that exhibit 72 is a valid document till it is set aside, and hence the defendants are bound to hand over possession. These issues have nothing to do with the question now raised. Issue No. 3 raises the question whether the plaintiff is entitled to the injunction sought, and issue No. 4, whether he is entitled to possession sought. I cannot, therefore, allow Mr. Desai to raise the question in second appeal.

The second contention, however, appears to me to be a question of law, and I, therefore, allowed Mr. Desai to argue it, and he has done it fully and has referred to various cases in support of it. He relied upon *Jugaldas* v. *Ambashankar*.[1] This case, undoubtedly, appears on the face of the judgment to support Mr. Desai's contention, but on a careful consideration of the facts in that case, the case is clearly distinguishable, and has been so distinguished by no less an authority than Sir Lawrence Jenkins in *Rangnath Sakharam* v. *Govind Narasinv*.[2] In the

[1] (1888) 12 Bom. 501.

[2] (1904) 28 Bom. 639.

1935

GOPAL BHAURAO v. SHREE JAGANNATH PANDIT

Rangnekar J.

latter case the plaintiff sued to recover from the defendant the amount due for interest on a mortgage-bond dated April 15, 1893, by sale of the mortgaged property. The suit was brought in 1900. The defendant contended that he did not execute the bond with free consent and that it was obtained from him under pressure of criminal proceedings. It was held by the Court that the defendant was entitled to resist the claim made against him by pleading fraud, and that he was entitled to urge that plea though he had not brought a suit to set aside that transaction. It was further held that under the circumstances he was not precluded from urging that plea by lapse of time. In dealing with *Jugaldas* v. *Ambashankar*,[1] Sir Lawrence Jenkins observed as follows (p. 642) :—

"In support of the plea of limitation reliance is placed on the decision of Sir Charles Sargent in *Jugaldas* v. *Ambashankar*[1], but when the facts are examined, it is apparent that the argument now advanced is not supported by the actual decision in the case. There the plaintiffs sued to recover from the defendant Rs. 960 as arrears of rent. The defendant sought to set up as an answer to the claim that the defendant's original landlord had been defrauded by the plaintiffs and that the conveyance by the original landlord to the plaintiffs in that suit was vitiated by fraud.

"Now fraud does not make a transaction void, but only voidable at the instance of the person defrauded. The fraud (*assuming for the sake of argument that there was* fraud in the strict sense of the term) in that case, entitling the defrauded party to avoid, was exercised not upon the defendant, but upon one not a party to that suit who had not avoided the transaction. Under these circumstances it is obvious that it was not open to the defendant in that suit to plead that the transaction was void as against him. It is quite true that Sir Charles Sargent alludes to the fact that the person alleged to have been defrauded had not taken effective steps to impeach the sale, and the relevancy of the allusion is that not having done so, it was not open to the defendant to say that the transaction was void. When the facts of the case are once understood it will be seen that it lays down nothing which is contrary to the doctrine that prevails in the other Courts in India."

As pointed out by Sir Lawrence Jenkins in that case, the Courts in India have consistently held that a defendant is not precluded from urging by way of defence that the instrument on which an action is brought ought not to be enforced on equitable grounds such as undue influence,

[1] (1888) 12 Bom. 501.

fraud or misrepresentation although a suit by him to have the instrument set aside or cancelled would then be time-barred under either Article 44 or Article 91 of the Indian Limitation Act. I need not refer to the various authorities. I am unable to accept Mr. Desai's contention that this case must be taken to have been overruled by the two Privy Council decisions to which I have referred.

I think that the principle laid down by Sir Lawrence Jenkins is, with respect, correct. Section 3 of the Indian Limitation Act refers only to the remedy of the plaintiff and not to his rights, and even though the remedy may be barred, the right may exist, but it is clear that it does not refer at all to a defendant. The object of the Indian Limitation Act is to prevent a party from putting forward stale or antiquated demands, and I am unable to conceive that a ground of defence can become stale or barred by the law of limitation. All that the Indian Limitation Act does is to take away the remedy of a plaintiff to enforce his rights by an action, and I think it is open to a defendant to put forward any defence though such defence as a claim made by him may be barred on the date it is put forward. I am supported in this by the observations of their Lordships of the Privy Council in *Shri Kishan Lal* v. *Mussamat Kashmiro*,[1] the particular passage being at page 961. In that case the defendant contended that certain arbitration proceedings, which resulted in an award which was sought to be enforced, were not taken in good faith, that the agreement of reference was signed without her authority by somebody and she was then under the influence of her brother-in-law Faqir Chand who deceived her and misrepresented to her the nature and the effect of the agreement of reference, and induced her by misrepresentations and threats to acknowledge the agreement of reference before the Sub-Registrar, and that she had no legal adviser. It was argued on behalf of the plaintiff that this defence would not

[1] (1916) 20 Cal. W. N. 957.

1935

GOPAL BHAURAO v. SHREE JAGANNATH PANDIT

Rangnekar J.

be allowed as, if she had sued to set it aside, her claim would have been barred. Dealing with this argument, their Lordships observe as follows (p. 966) :—

"It has been contended here that limitation is a bar to Mussamat Kashmiro's defence. The Indian Limitation Act would not apply to her defence. Even if she were suing to recover possession of property of which she was deprived by the award, time would not, under the circumstances of this case, begin to run against her until Faqir Chand died."

In a full bench decision in *Doddawa* v. *Yellawa*[1] it was held by the full bench that "the Limitation Act is an Act for the limitation of suits, prescribing the period within which suits asking for various reliefs can be brought". In *Hargovandas Lakhmidas* v. *Bajibhai Jijibhai*,[2] dealing with this point Mr. Justice Jardine said as follows (p. 225) :—

"It has, however, been contended for the plaintiffs by Mr. Jardine that neither Bajibhai nor the other defendants who derive their title from him can be allowed to profit by these findings, as no suit was brought for relief on the ground of fraud within the period of three years defined in Art. 95 of Schedule II of the Limitation Act XV of 1877, nor within twelve years from the date of the sale. Mr. Jardine relied on *Jugaldas* v. *Ambashankar*[3] as an interpretation of section 28 of the Limitation Act. That case decided that certain tenants, defendants, wishing to impeach the sale by their former landlords to the plaintiffs could not, even with the vendors' consent, set up the defence that the vendors had been cheated, their right to file a suit to set aside the sale being then barred by limitation. In endeavouring to distinguish that case, Mr. Branson pointed out the absence of any allusion to section 28 of the Act, or to any case upon the subject of prescription. I do not think that the case can be treated as an interpretation of that section to govern the present case, which depends on the construction of that section."

It was finally held by the learned Judge that section 28 does not apply to the case of defendants who rely upon actual possession which has never been disturbed. There are other authorities on the point to which it is not necessary to refer.

The second case relied upon by Mr. Desai is a decision of Sir S. Subrahmania Ayyar in *Roop Laul* v. *Lakshmi Doss*.[4] It is true that in that case the learned Judges followed the case of *Jugaldas* v. *Ambashankar*[3] and said that a party

(1) (1921) 46 Bom. 776 at p. 797.
(2) (1889) 14 Bom. 222.
(3) (1888) 12 Bom. 501.
(4) (1905) 29 Mad. 1.

who has not sued within the period prescribed by Article 91 to set aside an instrument on the ground of undue influence cannot be heard in derogation of the rights created by it. It appears that the suit which gave rise to an appeal was heard by Boddam J., who dismissed it. On appeal Sir Subrahmania Ayyar was of opinion that the appeal should be allowed. Sankaran Nair J. was of opinion that it should be dismissed. The decision of the senior Judge prevailed. The defendant appealed under the Letters Patent and the appeal was heard by a full bench, and the judgment of Sir Subrahmania Ayyar was disapproved, if not actually overruled: *Lakshmi Doss* v. *Roop Laul*.[1] The material observations of the full bench are at p. 178 and they are as follows:—

"As regards the question of limitation, even assuming that the facts entitling the defendant to have the deed set aside became known to him more than three years before this suit was brought against him, we are unable to agree with the view of Sir Subrahmania Ayyar J., that article 91 of the second schedule to the Limitation Act applies in this case and that the defence of the defendant is time-barred. We do not think it follows that because a party's remedy as plaintiff to have an instrument avoided is time-barred, his right to say, by way of equitable defence if sued, that the instrument ought not to be enforced, is equally time-barred."

The full bench then distinguished the case of *Jugaldas* v. *Ambashankar*,[2] and followed the decision of Sir Lawrence Jenkins in *Rangnath Sakharam* v. *Govind Narasinv*.[3] Sir Subrahmania Ayyar also relied upon the decision in the case of *Janki Kunwar* v. *Ajit Singh*,[4] and Mr. Desai also relies upon it. But that was a case of a plaintiff and has no application to the present point.

In *Minalal Shadiram* v. *Kharsetji*,[5] where the defendant set up fraud and misrepresentation with reference to a claim on a bond, it was observed by Mr. Justice Scott that a defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may have himself brought an unsuccessful suit to set

[1] (1906) 30 Mad. 169, F. B.
[2] (1888) 12 Bom. 501.
[3] (1904) 28 Bom. 639.
[4] (1887) 15 Cal. 58, P. C.
[5] (1906) 30 Bom. 395.

1935

GOPAL BHAURAO v. SHREE JAGANNATH PANDIT

Rangnekar J.

aside the transaction, and is not under certain circumstances like those in hand precluded from urging that plea by lapse of time.

These authorities, therefore, clearly show that the statute of limitation is not applicable to the case of a defendant, and the party in possession is not affected by it. Section 28, in my opinion, presupposes that a person by force of limitation has lost his remedy by a suit for possession, and it is only in regard to such person that the section declares that his right to the property is extinguished, and it cannot apply to persons who are in possession. In my opinion, it is clear from the authorities that where the title of a person in possession is challenged, he may set forth any defence in favour of his right to the property and the statute will not run so as to prevent him from setting forth any such relief.

I have already pointed out that in this case the question now raised was not agitated in the Courts below. It is difficult for lack of materials even to hold that the defendant, if he had then sued, may have been met with the plea of limitation. Article 91 clearly shows that the *terminus a quo* is from the date when the facts entitling a party to have an instrument set aside become known to him. That is a question of fact which for its answer must depend upon evidence, and it is no use taking a statement here and a statement there from the judgment and to say that a plea of this nature can be made and supported.

Then as regards the fact as to when the plaintiff was dispossessed and the defendant came into possession, there is no clear finding. Mr. Desai says that the learned Judge in appeal has recorded a finding on the question of possession, but I am unable to accept this as a finding, because I find that what the learned Judge has said in one sentence he has

qualified in the next, and then come to a third inconsistent conclusion. This is what he says :—" The rent-notes taken by the plaintiff from his so-called tenants are bogus rent-notes taken in order to create evidence of title." If so, it is clear that the plaintiff was not in possession, but then the learned Judge says this :—" Nevertheless the plaintiff's rent-notes do in my opinion provide some evidence for showing that the possession was his up to 1927." If he had stopped at that, Mr. Desai might have supported his contention, but in the following sentence the learned Judge observes as follows :—" Although the evidence as regards possession is unsatisfactory on both sides, I am inclined to hold that such evidence as there is supports the plaintiff's contention that he was actually in possession of the land. That fact in itself, however, is not of very great importance since the plaintiff has admitted that he lost possession afterwards." And finally he winds up by saying, " The utmost that his evidence shows is that for some years after the rent-note he continued to enjoy a somewhat precarious possession of the land." It is difficult to treat this as a finding that the plaintiff was in possession and was dispossessed as alleged in 1927. On the other hand, the respondents contend that the record shows that the plaintiff was dispossessed in 1924. It is not, however, necessary to express any opinion on the question of possession in view of the conclusion to which I have come.

I think that the decisions of the Courts below are correct, and the appeal must be dismissed with costs.

Appeal dismissed.

J. G. R.