APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Richardson.

INDRA NATH BANERJEE

v.

ROOKE.*

1909
Aug. 2.

Principal and Agent—Bribe or secret Commission accepted by Agent after transaction completed—Contracts obtained by fraud voidable, but not void—Limitation Act (XV of 1877) Sch. II, Art. 95.

The plaintiff instituted a suit against the defendants within three years from the date when the fraud as alleged in the suit became first known to him, though he had suspicions of the fraud prior to the three years. The suit was for setting aside a lease which, the plaintiff alleged, he had been induced to grant to the defendant No. 1 under fraudulent representations made to the plaintiff by the defendant No. 2, who whilst purporting to act as the plaintiff's servant or agent, received, after the lease had been duly drawn up, executed and registered, the sum of Rs. 500 from the defendant No. 1 as a bribe or secret commission by way of payment for the services rendered to the latter in connection with the making of the arrangements for the execution of the lease :—

Held, that mere suspicion is not knowledge, and the suit was not barred by limitation.

Held, further, that a bribe is nevertheless a bribe because its payment is postponed. When a bribe has been given, it is immaterial to inquire what, if any, effect the bribe had on the mind of the receiver and whether he was influenced thereby to recommend to the plaintiff an arrangement with the appellant which he would not otherwise have recommended.

Harrington v. *Victoria Graving Dock Company* (1) and *Shipway* v. *Broadwood* (2) referred to.

Held, further, that a contract induced by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative position which they originally occupied.

Urquhart v. *Macpherson* (3) followed.

Clough v. *London and North Western Railway Company* (4) referred to.

APPEAL by Indra Nath Banerjee, the defendant No. 1.

The plaintiff, E. G. Rooke, was the owner of a one-sixth share of the *dar-patni* right of Mouzah Jote Janki. On the 28th

* Appeal from Original Decree, No. 354 of 1907, against the decree of Aghore Chandra Hazra, Subordinate Judge of Burdwan, dated July 24, 1907.

(1) (1878) L. R. 3 Q. B. D. 549.
(2) [1899] 1 Q. B. 369.
(3) (1878) L. R. 3 App. Cas. 831.
(4) (1871) L. R. 7 Ex. 26.

1909

INDRA NATH BANERJEE v. ROOKE.

June 1898 the defendant No. 1, Indra Nath Banerjee, obtained from the owners of the remaining five-sixth share a *se-patni* lease. On the 3rd June 1899 the defendant No. 1 instituted a suit for partition against the plaintiff. Shortly after the institution of this partition suit, the defendant No. 2, one Bijoy Gobinda Chatterji, approached the plaintiff and, on certain representations made to him, induced him to compromise the suit which was finally withdrawn on the 8th June 1899. In the compromise it was agreed that the plaintiff should give the defendant No. 1 a *mokarari* lease of the mineral rights in his one-sixth share of his *dar-patni* interest and the lease was accordingly duly drawn up, executed and registered on the 21st September 1899. Subsequently, on the 18th August 1904 relying on the *mokarari* lease, the plaintiff instituted a suit against the defendant No. 1 for arrears of royalty due under the said lease. This suit was decreed by the Munsif in the plaintiff's favour, and, on the 26th August 1906, the appeal preferred in the same was dismissed. On the 27th June 1905 the plaintiff instituted a second suit against the defendant No. 1 for recovery of a part of the *lakheraj* lands to which he was entitled under the *mokarari* lease of 1899 and of which the plaintiff alleged he had been dispossessed. On the 31st January 1906 the Munsif dismissed this suit which on appeal was also dismissed by the Subordinate Judge on the 6th August 1906. Before the hearing of the appeals in the aforesaid two suits, the present suit was instituted on the 4th May 1906 by the plaintiff against the defendant to set aside the said *mokarari* lease on the ground of fraud, the fraud alleged being that some time after the execution of the said lease the defendant No. 1 caused the payment of Rs. 500 to be made to the defendant No. 2 as a bribe or secret commission in respect of services rendered by the latter during the negotiations which led up to the compromise and the lease, and in which he purported to act as the plaintiff's servant or agent. This suit was decreed with costs by the Subordinate Judge. The defendant No. 1, thereupon, appealed to the High Court.

Dr. Rashbehary Ghose (with him *Babu D. N. Chakrabarty, Babu Narendra Nath Sett* and *Babu Sailendra Nath Palit*), for the appellant. The fraud on which the plaintiff relied has not been sufficiently set out in the pleadings, and it was incumbent on the plaintiff to have done so, if he intended to rely on the fraud. The plaintiff in the two suits, which he prosecuted up to the Court of Appeal, had based his claim on the lease and he has now alleged that this lease has been granted by him in consequence of fraudulent representations made to him. He has by his conduct waived his right to treat this as a fraud. Further, this suit is barred by limitation, as it has been instituted after three years from the date of the alleged fraud. The present suit is one for avoiding or cancelling a lease and not for damages. The plaintiff has had conferred on him certain advantages by the defendant No. 1 in return for other advantages to the said defendant and he did not offer to give up these advantages. It is quite impossible to restore the parties now to their former position. The sum of Rs. 500 which has been paid to the defendant No. 2 under the orders of the defendant No. 1, was not paid as a bribe or commission.

Babu Umakali Mookerjee and *Babu Joy Gopal Ghosh*, for the respondent.

Cur. adv. vult.

RICHARDSON J. The plaintiff in this case has one-sixth share of a *dar-patni* comprising Mouzah Jote Janki. The defendant No. 1, Babu Indra Nath Banerjee, obtained from the owners of the remaining five-sixth share of the *dar-patni* a lease of that share as *se-patnidar*. The lease is dated the 28th June 1898. On the 3rd June 1899, the defendant No. 1 instituted a suit for partition against the present plaintiff, Mr. Rooke, which suit was terminated by a compromise and withdrawn on the 8th June 1899, each party paying his own costs. It appears that under the compromise Mr. Rooke agreed to give the defendant No. 1, a *mokarari* lease of the mineral rights in his share of *dar-patni* interest. That lease was duly drawn up, and it was executed and registered on the 21st September 1899. Mr. Rooke brings the present suit to set aside

1909
INDRA NATH BANERJEE v. ROOKE.
RICHARDSON J.

the lease on the ground of fraud, the fraud alleged being that some time after the execution of the lease, Babu Indra Nath Banerjee caused a sum of Rs. 500 to be paid to defendant No. 2, Bejoy Gobind Chatterjee, as a bribe or secret commission in respect of services rendered by the latter during the negotiations which led up to the compromise and the lease, and in which he purported to act as Mr. Rooke's servant or agent.

It is admitted that the amount stated was in fact paid to the defendant No. 2 under the orders of the defendant No. 1 sometime between November 1899 and February 1900; but it is denied that the money was paid as a bribe or commission. An entry of the payment was made in the accounts of the defendant No. 1, under date the 23rd August 1900. Mr. Rooke asserts, and the statement may be accepted, that the payment came to his knowledge on the 20th April and 1st May 1906, owing to disclosures made on those dates in the course of the evidence given by certain witnesses in another suit. To conclude this brief sketch of the facts, it may be stated that Mr. Rooke on the 18th August 1904 instituted, against the defendant No. 1, a suit (No. 1462 of 1904) for arrears of royalty due under the lease of 1899. The Munsif's judgment in Mr. Rooke's favour was pronounced on the 27th January 1906, and the Subordinate Judge's judgment dismissing the appeal on the 26th August 1906. On the 27th June 1905 Mr. Rooke instituted another suit (No. 126 of 1905) against the defendant No. 1 on the allegation that the latter had dispossessed him of part of the *lakheraj* lands to which he was entitled under the lease of 1899. The Munsif's judgment dismissing the suit was pronounced on the 31st January, the appeal by Mr. Rooke being dismissed by the Subordinate Judge on the 6th August 1906. Mr. Rooke apparently contested both these suits on appeal relying on the lease of 1899, though the appeals came on for hearing after the date on which the present suit was instituted (the 4th May 1906).

I turn now to the terms of the lease of 1899. The lease was a permanent lease of the lessor's underground rights in respect of the coal in his share of the *dar-patni*. No *salami*

was paid, but the defendant No. 1 agreed to admit Mr. Rooke's *lakheraj* rights (about which there had been some dispute) in 99 bighas of land in Mouzah Jote Janki comprised in six plots described in the Schedule. The plots adjoin one another and form therefore a compact block. The rate of royalty provided by the lease was six annas per ton for steam coal, the plaintiff being entitled to one anna per ton in respect of his one-sixth share of the *dar-patni* subject to a minimum of Rs. 72 a year.

The learned Subordinate Judge has given the plaintiff a decree setting aside the lease and directing the plaintiff to refund to the defendant No. 1 the amount of Rs. 108 recovered by him in Suit No. 1462 of 1904 on account of royalty under the lease, and prohibiting the plaintiff from executing his decree in that suit. From this decree the defendant No. 1 appeals.

In the first place it is contended for the appellant that the plaintiff does not sufficiently set out in the plaint the fraud he alleges, or that the fraud found by the Subordinate Judge is a fraud of some different kind from the fraud alleged in the plaint. We think that there is no substance in this contention, and that it is sufficiently refuted by a reference to paragraphs 13 and 14 of the plaint.

It is next urged for the appellant that the suit is barred by limitation under Article 95 of the second Schedule of the Limitation Act. Mr. Rooke admits that shortly after the execution of the lease of the 31st September 1899, he had reason to suspect that the lease had been obtained by fraud; but he says in effect that he had no certain information on the subject on which he could act before the disclosures of April and May 1906. We think that this is a good answer to the objection under consideration. Mr. Rooke had no substantial ground to go upon until he came to know of the payment which had been made to Bejoy, and until then it appears to us that the fraud alleged did not become known to Mr. Rooke within the meaning of Article 95. Mere suspicion is not knowledge. After the payment was disclosed there was no delay on Mr. Rooke's part in bringing this suit. We are clearly of opinion that the suit is not barred by limitation.

1909

INDRA NATH BANERJEE v. ROOKE.

RICHARDSON J.

Then, again, on the principal questions of fact involved, we think we must accept the conclusions arrived at by the learned Subordinate Judge. There is no doubt in our minds that during the negotiations which preceded the lease, defendant No. 2, Bejoy, was a servant or agent of the plaintiff, Mr. Rooke, and that it was Bejoy's duty to do the best he could for Mr. Rooke, uninfluenced by any considerations of his own interest. The fact that it is admitted that the money was paid does not alter the character of the payment. Asked to explain why the money was paid, the defendant No. 1 himself said: "I never paid any money to Bejoy to bring about the compromise, but I directed payment of Rs. 500 to Bejoy out of Jote-Janki funds as a present or reward—call it *dalali* or call it anything—because Bejoy expected me to pay him something: because Bejoy asked me if I would not show him some favour now that I was in a position to work my plan." We have already stated that the position of Bejoy appears to us to be clear. He is not a mere go-between, he was the servant of the plaintiff. The fact that the money was paid after the lease had been executed is immaterial if it was paid, as we think it was, in accordance with, or as the result of some previous arrangement or understanding between the appellant and Bejoy, there being evidence on the record to show that such an understanding existed. There is the evidence, for instance, of Apurbanand Roy, a servant of the appellant, who said in suit No. 267 of 1904 in the Subordinate Judge's Court "I know Bejoy Chatterjee. He was Mr. Rooke's Manager for all affairs. The meaning of which is that I heard he was his Chief Officer. Bejoy had conversation with Mr. Rooke about the settlement of his 2 annas, 13 gundas, 1 cowri, 1 krant share. He said, I can bring about the settlement if you can pay me *dalali* (brokerage). He did not tell the amount of the brokerage. He said he won't do it unless brokerage was paid. I told this to the plaintiff."

In his evidence in the present suit, Apurbanand makes the following statement :—"I met Bejoy before the settlement by Mr. Rooke with Indra Babu and had a talk with him about it. Bejoy said that he could settle the matter with Rooke if I (he)

obtained something for his troubles. I informed Indra Babu about Bejoy's demand, and he replied that that would be seen hereafter (পরে দেখা যাইবে)."

Indra Babu himself says that he refused to accept Bejoy's offer, but there is the evidence of his own servant that he left the matter open for future determination.

The evidence of Umesh Chandra Mukherjee, witness for the plaintiff, who was formerly a *mohurir* of the defendant No. 1 in the days when he practised as pleader at Burdwan, may also be referred to in connection with the relation of Bejoy to the plaintiff.

On the evidence we see no reason at all to doubt that payment in question had a corrupt taint and that the understanding, express or tacit, which existed in regard to it during the negotiations, placed Bejoy in a position in which his personal interests conflicted with his duty to his employer. A bribe is nevertheless a bribe, because its payment is postponed and the expectation of a bribe or reward from the appellant gave Bejoy a motive or incentive for acting contrary to his duty.

But, then, it is said that the negotiations were not in fact affected by the payment or understanding with regard to it. There is, however, good authority in support of the proposition that when a bribe has been given it is immaterial to enquire what, if any, effect the bribe had on the mind of its receiver. I refer to the cases of *Harrington* v. *Victoria Graving Dock Company* (1) and *Shipway* v. *Broadwood* (2). The salutary rule laid down by these cases applies equally to the expectation of a bribe. In the present case, therefore, it is immaterial to consider what effect the expectation of this payment had on the mind of Bejoy, and whether he was influenced thereby to recommend to the plaintiff an arrangement with the appellant which he would not otherwise have recommended. There is, moreover, the further consideration that the money subsequently given to Bejoy might, if there had been no understanding between him and the appellant, have been paid to the plaintiff as *salami*.

(1) (1878) L. R. 3 Q. B. D. 549. (2) [1899] 1 Q. B. 369.

1909

INDRA NATH BANERJEE v. ROOKE

RICHARDSON J.

Before leaving this part of the case, I may add that it is idle for the appellant to say that payments of this kind are made every day. When they are brought to light and come before a Court of Justice, they must be treated as what they are. Payments in the nature of a bribe or secret commission are open to the greatest reprehension.

But when all this has been said, it still remains to consider whether the present suit—a suit for rescission—is maintainable in the circumstances.

It was argued on behalf of the appellant that Mr. Rooke, though he had instituted this suit, and thereby elected, so far as it lay in his power to do so, to rescind the lease, nevertheless, by reason of the fact that he subsequently prosecuted one appeal and defended another on the footing that the lease was a valid and subsisting lease, was precluded from seeking to rescind the lease. That contention appears to me to be difficult to support. I am disposed to think that the determination to rescind was definitely made on the 4th May 1906, and that what was done subsequently in the suits previously instituted would not affect that determination. For the appellant, reference was made in this connection to the case of *Clough* v. *The London and North Western Railway Company* (1), an authority which, in my opinion, is not of much assistance to the appellant in the present circumstances. It might be said here that the plaintiff's action in the two appeals was merely inadvertent, the suits having been instituted, and the appeals preferred before the present suit was instituted. It seems unreasonable to suppose that what occurred was sufficient to deprive the plaintiff of his right to proceed with a suit already instituted. It is unnecessary, however, to express a definite opinion on the point, because there appears to be a broader ground on which this suit should be dismissed. A contract induced by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative positions which they originally occupied. In the case of *Urquhart* v. *Macpherson* (2) their Lordships of the Privy Council speak of

(1) (1871) L. R. 7 Ex. 26, 35. (2) (1878) L. R. 3 App. Cas. 831.

the ordinary principle that "contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is, or may be, injured by the fraud, subject to the condition that the other party, if the contract is disaffirmed, can be remitted to his former state." Other authorities will be found cited in the text books, and reference may be made to Leake on Contracts, Edition 1906, at page 258. In the present case, it is, in our opinion, impossible to restore the appellant to his original position. There is an alternative remedy to a party who has been induced by fraud to enter into a contract, and that is to sue for damages, and we think that that is the remedy which the plaintiff (if he had been well-advised) should have asked for here.

A glance at the lease and at what has been done under it will make the position clear. In the first place the lease does not stand altogether by itself. It is a part of the compromise under which the suit for partition brought by the appellant was withdrawn. The withdrawal of the suit for partition by the appellant must be taken into consideration as being part of the whole arrangement between the parties. Then under the lease the plaintiff obtained an admission from the appellant of his title to the 99 bighas of *lakheraj* land mentioned above. He has been in possession of that land all this time. He has not, so far as we know, offered to surrender any of the rights which the lease gave him in respect of that land; and, thirdly, under the lease the defendant No. 1 has laid out large sums of money—Rs. 90,000 we are told—on a colliery, and no suggestion is made how that expenditure or the business of the colliery is to be dealt with if the lease is rescinded.

Having regard to all the circumstances, we are clearly of opinion that it is impossible now to put the appellant back in his original position and that the plaintiff has misconceived his remedy and should have asked for damages. We cannot award him damages because the claim for damages was not pressed in the lower Court and there is no claim of that kind before us. But even if we were in a position to consider the question on the evidence as it stands, it is not shown that the plaintiff

1909

INDRA NATH BANERJEE v. ROOKE.

RICHARDSON J.

sustained damage much in excess of the sum of Rs. 500 paid to Bejoy. It is clear that if that money had not found its way into Bejoy's pocket, that or a larger amount might have been paid to the plaintiff by way of *salami* for the lease. But in regard to the rates of royalty, it does not appear that they are below the rates prevalent in the neighbourhood. The evidence indeed tends rather to show the contrary. Nor is it shown that the amount of minimum royalty reserved is below the amount reserved in cases of this kind. It must be remembered that the coal had not been worked at the date of the lease.

For the reasons indicated, we are of opinion that the decree of the Subordinate Judge must be set aside and the suit dismissed.

In the circumstances we make no order as to costs.

SHARFUDDIN J. I fully agree with the remarks of my learned brother and fully concur.

Appeal dismissed.

O. M.