

APPELLATE CIVIL.

1881
August 8.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.
MAHADAJI GOPAL BAKLEKAR (ORIGINAL PLAINTIFF), APPELLANT,
VITHAL BALLAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*
*Mortgage—Sale—Mortgage fraudulently made to defeat execution of decree—
Right of mortgagor to sue subsequently to recover possession—Estoppel.*

In 1851 T. obtained a decree against G., the father of the plaintiff. In order to defeat the execution of that decree, G. in collusion with one B. permitted the latter to obtain a decree based upon an award against him and to sell the land in execution, at which sale B. himself and another person purchased it. In 1857 these purchasers sold the property to V. (defendant No. 1). In 1858, T. attached the land in execution of his decree, but the attachment was raised on the application of defendants Nos. 1 and 3, who alleged that the property was theirs. In 1876 the plaintiff, who was the son of G., sued the defendants to recover possession. He alleged that the transaction was only ostensibly a sale, but was really a mortgage made by his father to the defendants, and that the defendants held as mortgagees. Two documents were produced (exhibits 19 and 18), dated respectively in the years 1855 and 1862, whereby defendant No. 1 as a mortgagee acknowledged the receipt of two sums of Rs. 375 from G. It further appeared that on the faith of exhibit 18 the defendants had been permitted to remain in possession for ten years without disturbance as mortgagees. The Subordinate Courts held that the decree, sale, and re-sale of the lands, were fraudulent and collusive transactions, and that G. having been a party to the fraud, the plaintiff could not recover the lands from the defendants. On appeal

Held that the plaintiff was entitled to recover; that the defendants having accepted repayment of Rs. 750 as mortgagees, and, as such, having been permitted to remain in possession of the lands without disturbance; were estopped from setting themselves up as purchasers or owners, which false character had been merely assumed for the purpose of defeating the execution of the decree obtained by T.

SECOND appeal from the decision of J. L. Johnston, Acting Assistant Judge of Ratnagiri, affirming the decree of N. K. Kothare, Second Class Subordinate Judge of Rajapur.

This was a suit for possession of certain lands, and for a share of *khoti taksim*, in two villages situated in the taluka of Rajapur.

In 1851 one Trimbak Krishna Soni obtained a decree against Gopal Anant, the father of the plaintiff. In order to defeat the execution of that decree, Gopal Anant, in collusion with one Bhikaji Ramchandra, permitted the latter to obtain a decree based

* Second Appeal, No. 466 of 1880.

upon an award against him, and to sell the land in execution, at which sale Bhikaji himself and another person purchased it. In 1857 these purchasers sold the property to Vithal Ballal (defendant No. 1). In 1858 Trimbak Krishna Soni attached the land in execution of his decree, but the attachment was raised on the application of defendants Nos. 1 and 3, who alleged that the property was theirs. In 1876 the plaintiff, who was the son of Gopal Anant, sued the defendants to recover possession. He alleged that the transaction was only ostensibly a sale, but was really a mortgage made by his father to the defendants, and that the defendants held as mortgagees. Two documents were produced (exhibits 17 and 18) dated, respectively, in the years 1855 and 1862, whereby defendant No. 1 as mortgagee acknowledged the receipt of two sums of Rs. 375 from Gopal Anant. It further appeared that on the faith of exhibit No. 18 the defendants had been permitted to remain in possession for ten years without disturbance as mortgagees.

The defendants contended (*inter alia*) that they were purchasers and not mortgagees, and that exhibits 18 and 19 were forged documents.

The Subordinate Judge found on the evidence that the arbitration award and the decree obtained on it by Bhikaji were fraudulent transactions; that Gopal's lands were sold under that decree, in order to defeat the execution of Trimbak Soni's decree against Gopal; that the re-sale of the lands by the execution purchasers to Vithal (defendant No. 1) was also a collusive transaction; that exhibits 18 and 19 were genuine documents executed by Vithal to Gopal. He further held that the plaintiff was not entitled to recover the lands, inasmuch as Gopal was a party to the fraudulent transactions. He observed: "Exhibits 18 and 19 are genuine. Vithal's signature on them agrees with that on the other papers in the suit. Vithal's son, Ramchandra, has in some measure admitted exhibit 19. The contents of it are in order and correct. They contain an agreement to release the *thikans* (fields) sold by auction. As the auction sale is fraudulent, it does not seem just to enforce this agreement. These documents are closely connected with the auction, and can only be explained by the circumstances attending the auction. The agreement,

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therefore, is invalid. Gopal and Vithal's fraud about the auction is the same. Vithal comes better off, as the agreement is not enforced. The 24 *thikans* remain with Vithal." The Subordinate Judge, accordingly, dismissed the plaintiff's claim to the lands referred to in exhibits 18 and 19. He, however, held that the *khoti taksim* had been mortgaged by Gopal to Gangadhar (defendant No. 3), and awarded it to the plaintiff on payment, by him, of Rs. 200 to Gangadhar.

In appeal the Assistant Judge affirmed the decree of the first Court, observing, with respect to the agreement contained in exhibits 18 and 19, that "it would be unjust to enforce such an immoral agreement."

The plaintiff appealed to the High Court.

Y. V. Athalye for the appellant.—The lower Courts have found as a fact that the arbitration award and the sale under it are colourable transactions. They were, therefore, wrong in refusing to allow the plaintiff to redeem the lands on the prior mortgage, which has been held to be proved. A party to a fraudulent transaction is not precluded from asking relief in a Court of Equity by disclosing the true nature of the transaction and explaining the circumstances which led to it. The learned pleader in support of his contention referred to *Param Singh v. Laljimal* (1); *Ram Surun Singh v. Musst. Pran Peary* (2); *Kanhya Lal v. Mahadeo Singh* (3); *Gopi Wasudev Bhat v. Markande Narayan Bhat* (4); *Govinda v. Jesha Premaji* (5).

Shamrav Vithal (with him the Hon. Rao Saheb *V. N. Mandlik*) for the respondents.—The plaintiff's father was a party to the fraudulent award and the subsequent proceedings on it. The lower Courts, therefore, were perfectly justified in dismissing the plaintiff's claim to the lands, on the principle that no man should be allowed to take advantage of his own wrong: *Broom's Legal Maxims* (4 ed.), 275.

WESTROPP; C.J.—Trimbak Krishna Soni's attachment was defeated in 1858 by the pretence that the defendants, Vithal and

(1) I. L. R., 1 All., 403.

(2) 13 M. I. A., 257; S. C., 15 Calc.
W. R. P. C., 14.

(3) 6 Calc., W. R., Civ. Rul., 293.

(4) I. L. R., 3 Bom., 30.

(5) *Supra*, p. 73.

Gangadhar (who are undivided co-parceners), were holding the land as purchasers, and such was the capacity which certain of the exhibits represented those defendants to fill. Before 1862 the whole of the property had become vested in them ostensibly as purchasers ; but exhibits 19 and 18, which are found to be genuine, show that their real position was that of mortgagees, and that in that capacity they had received two sums of Rs. 375 each, *i. e.* Rs. 750 in the aggregate. Assuming as above assumed, and as the Courts below have found, that the arbitration award, the decree founded thereon, and the sale to Bhikaji and transfer by Bhikaji to Vithal, were for the fraudulent purpose of shielding Gopal's equity of redemption in the lands from the execution of Soni, yet it is impossible for any Court of Equity to allow the defendants to pose as purchasers or owners, when they have accepted repayment of Rs. 750 as mortgagees. Having done this, as is acknowledged by Vithal in exhibits 19 and 18, the former of which is dated in 1855, and the latter in 1862, and, having, on the faith of the latter document, been permitted by the plaintiff to remain in possession for ten years without disturbance as mortgagees, it is manifest that they are completely estopped from setting themselves up as purchasers or owners, in which false character alone it was that the fraudulent defeat of Soni's execution was effected. The plaintiff is entitled to recover the whole of the *thikans*, the subject of this suit, as well as the *khoti taksim* decreed to him by the Courts below. The decree of the District Judge must be varied accordingly, and by awarding to the plaintiff mesne profits (to be ascertained in execution) from the 3rd July, 1876 (being the date of the presentation of the plaint), to the delivery of possession to the plaintiff. The parties, respectively, must bear their own costs of the suit, and the defendants, Vithal and Gangadhar, must pay to the plaintiff his costs of both appeals.

Decree reversed.

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