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High Court, would in the present case, and might constantly in other cases, put a premium on dishonesty.

However diligently the plaintiff might be prosecuting his suit, however contentious that suit might really be, there is no guarantee, that a defendant, who wished to defeat the plaintiff's just claim, might not successfully evade service of summons until he had negotiated the sale of all the property upon which the plaintiff's claim attached. That is in effect what, if we understand the Courts below aright, they find, has happened in this case.

If we are correct in this, then by applying the test of notice which had the approval of two eminent Chief Justices, there would be no difficulty in deciding that while the plaintiff was actively prosecuting a contentious suit, no counter equity had arisen on the other side owing to neither the defendant nor his vendee having in fact been aware of the plaintiff's proceedings. I think that in this case there cannot be the least doubt but that there was a contentious suit, and I think there can be no doubt but that the plaintiff was actively prosecuting it to the best of his ability and to the knowledge of the defendant. Therefore the impugned alienation falls within the prohibition of section 52, Transfer of Property Act.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

SIDLINGAPPA BIN GANESHAPPA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* HIRASA BIN TUKASA (ORIGINAL DEFENDANT 2), RESPONDENT.*

1907. *March* 19.

Benami sale—Purchaser from benamidar—Attachment in execution of a money decree against the original owner—Raising of the attachment at the instance of the purchaser from benamidar—Suit by the purchaser to recover possession—Original owner setting up his own fraud.

H., the owner of certain property, executed a *benami* sale-deed and the *benamidar* sold the property to the plaintiffs' father. The property was after-

* Second appeal No. 236 of 1906.

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wards attached in execution of a money decree against H., but the attachment was raised at the instance of the plaintiffs' father. Subsequently the plaintiffs brought a suit for the recovery of possession from H. H. pleaded his own fraud as an effective answer to the claim.

Held, allowing the plaintiffs' claim, that the defendant H. could not set up his fraud to a claim of immoveable property conveyed by him to the *beñamidar*.

SECOND appeal from the decision of L. Crump, District Judge of Dharwar, reversing the decree of H. V. Kane, Subordinate Judge of Hubli.

The property in dispute consisting of houses and land originally belonged to Hirasa bin Tukasa, defendant 2. He being much involved in debt, and being apprehensive of the sale of his property in execution of money decrees obtained against him by his creditors, executed a *benami* sale-deed of the property in favour of one Hanmantsa bin Dodapa on the 24th May 1890 for the alleged consideration of Rs. 400. On the 3rd March 1892, Hanmantasa conveyed the property to the plaintiffs' deceased father for Rs. 500. Subsequently in the year 1899 the property having been attached by one of the creditors of Hirasa, the attachment was raised on the strength of the sale to the plaintiffs' father. The plaintiffs' father having died in the meanwhile, the plaintiffs brought the present suit in the year 1903, alleging that they were owners in possession and that the defendants, who were their tenants, refused to vacate the premises though the period of their tenancy had expired and though they were called upon to restore possession to the plaintiffs. The plaintiffs therefore sought to recover possession of the property and rupees forty-eight on account of rent or damages for two years.

Defendant 1 answered that he had already vacated the house which was in his occupation as he could not pull on together with defendant 2; that he had paid rent to the plaintiffs for two years; and that he had no objection to the plaintiffs' claim for possession.

Defendant 2 contended that he was the owner of the house; that he feared that his creditor Surtanji would sell it in execution of a decree for money which was due by the defendant to him, therefore, he executed a *benami* sale-deed in the name of

Hanmantsa bin Dodapa, but himself continued to be in possession; that Hanmantsa himself being a poor man executed a *benami* sale-deed to the plaintiffs' father; that the defendant had all along been in possession as owner; and that the rent-note relied on by the plaintiffs was a hollow transaction.

The Subordinate Judge found that the sale-deeds and the rent-note referred to by defendant 2 were not hollow transactions and allowed the plaintiffs' claim with respect to possession only. He made the following observations in his judgment :—

There is, no doubt, much beneficial to defendant 2's case in all these documents, but to counteract it defendant 2 has defrauded his creditors by allowing plaintiffs' father to have partial and ostensible possession at least, and to have his (defendant 2's) creditor's attachment over the house raised in 1899 (see Exhibit 114) on the strength of the sale-deed in dispute. He did not impeach it in Court when served with a notice under section 287, Civil Procedure Code (Exhibit 74), and has done nothing up to now to show that the sale was *benami*.

Before concluding, I would record my opinion on the facts of the case. Both the parties' cases appear to me to be faulty; I strongly suspect plaintiffs' father's payment of the money under Exhibit 35; and plaintiffs' former clerk, Exhibit 67, who wrote the account book, Exhibit 69, and who ought to have known things, denies having any knowledge of the house belonging to plaintiffs' father. Defendant 2's pleader reminded me of my finding in another case (now in appeal) in which I was of opinion that plaintiffs had effected a distinct and deliberate forgery in their accounts. But I am bound to obey the rules regarding burden of proof; and as shown above, my opinion being that both the parties had possession partially, and defendant 2 had no exclusive possession, I must award the claim. I might also say if plaintiff had to prove payment of consideration, I would certainly have held him to have failed; defendant 2 would then have had the benefit of the doubt. I might note also that defendant 2 is not, in my opinion, entitled to any compassion as he has defeated a good many innocent sawkars on the strength of Exhibit 35, and deserves to lose the house.

On appeal by defendant 2 the Judge held that the sale-deed passed by defendant 2 to Hanmantsa and that passed by the latter to the plaintiffs' father were both sham transactions; that the plaintiffs' father was aware of the nature of Hanmantsa's sale-deed; and that the plaintiffs were not entitled to any relief. He, therefore, reversed the decree and dismissed the suit. The following are extracts from his judgment :—

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The learned Subordinate Judge has, as usual, discussed the evidence fully and carefully, but it may, I think, be fairly said that he appears to have allowed himself to be unduly embarrassed by the incidence of the burden of proof.

* * * * * * *

On the question of possession the respective contentions of the parties are as follows:—Plaintiffs allege that defendant 1 occupied the house as their tenant under Exhibit 37, and that subsequently in 1896 a joint rent-note was passed by defendant 1 and one Yellappa Marwadi. That after the death of the latter defendant 2 came into possession about 1899 as sub-tenant of defendant 1, and that defendant 1 left the house owing to quarrels with defendant 2 and the latter remained in possession for 3 or 4 years without paying any rent. Defendant 2 alleges that defendant 1 occupied part of the premises as his tenant; that in 1895 or 1896 defendant 2 went to Belgaum for one year and on his return lived for a year in the house of Fakirsa and on Yellappa's vacating the portion which defendant 2 had leased to him during his absence, defendant 2 resumed possession. Both parties admit the occupation by defendant 1 and Yellappa at the outset; it is somewhat strange that defendant 2 should have been permitted to usurp possession and to have occupied the house without rent for so many years. The oral evidence is certainly in favour of defendant 2. * *. It shows that defendant 1 was the tenant of defendant 2 and not *vice versa* as alleged for plaintiffs.

* * * * * * *

Taking the evidence as a whole, defendant 2 has in my opinion proved beyond reasonable doubt that both these sale-deeds are sham documents which were never intended to have any operation. I have nothing to do with the morality of such transactions. The law is clear enough in such a case as this and is embodied in the maxim: "*In pari delicto potier est conditio possidentis.*"

Plaintiffs preferred a second appeal.

V. M. Mone appeared for the appellants (plaintiffs):—Though the judge has found that the sale-deed passed to our father was *benami*, still he has also found that the defendant intended to defraud his creditors with the help of the transaction and fraud was successfully practised. Therefore the defendant cannot now take advantage of his own fraud: *Goberdhan Singh* v. *Ritu Roy*[1], *Govinda Kuar* v. *Lala Kishun Prosad*[2]. The former case draws the important distinction between cases in which fraud is merely contemplated or intended, and cases in which the fraud

(1) (1896) 23 Cal. 962. (2) (1900) 28 Cal. 370.

is actually carried out. In *Sham Lall Mitra* v. *Amarendro Nath Bose*[1] the former class of cases is illustrated. We submit that it makes no difference in principle whether the real owner is the plaintiff claiming relief from his fraud or the defendant pleading his own fraud as the defence to an action.

The ruling in *Govinda Kuar* v. *Lala Kishun Prosad*[2] lays down that where fraud is successfully accomplished, a party thereto cannot be allowed to show the real nature of the transaction. In the present case an attachment was levied by the defendant's creditor in a miscellaneous proceeding in July 1899 and it was raised at the instance of the plaintiffs' deceased father on the strength of the sale-deed. In that proceeding the defendant, though served with a notice under section 278 of the Civil Procedure Code, did not appear nor did he raise any objection. He did not take steps also to get the sale-deed set aside thereafter. Therefore we submit that the order passed under section 280 of the Civil Procedure Code releasing the house from attachment at the instance of the plaintiffs' father binds the defendant and he is now precluded from disputing the validity of the sale. As against him we have acquired by our sale-deed a complete title.

G. S. Mulgaumkar (with *S. A. Hattiangadi*) appeared for the respondent (defendant 2) :—Both the lower Courts have found that there was fraud and that the plaintiffs' father assisted in carrying it out. The parties are therefore in *pari delicto* and the maxim *in pari delicto potior est conditio possidentis* applies. The plaintiffs cannot make out their title except through the two *benami* sale-deeds which, it has been found, were got up for the purpose of defrauding creditors. The plaintiffs, therefore, cannot get the benefit of the sale to their father, see Broom's Legal Maxims, page 562. It is the plaintiffs who are estopped now from relying on the sale-deeds and not the defendant from disputing them. The defendant is not estopped from pleading the fraud in bar of the plaintiffs' claim : *Ram Surun Singh* v. *Mussamut Pran Peary*[3], *Mussumat Oodey Koowur* v. *Mussumat*

(1) (1895) 23 Cal. 460. (2) (1900) 28 Cal. 370.

(3) (1870) 13 Moo. I. A. 551.

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Badoo[1], *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*[2], *Babaji* v. *Krishna*[3]. It does not appear in these cases whether fraud was completed or not, but that circumstance would, we submit, make no difference.

As regards the proceeding under section 278 of the Civil Procedure Code, the order shows that the defendant was not a party to that proceeding and he cannot be regarded as having been a party to it: *Shivapa* v. *Dod Nagaya*[4], *Kedar Nath Chatterji* v. *Rakhal Das Chatterji*[5], *Ajibal Narasinha Hegde* v. *Shirekoli Timapa Hegde*[6]. Even assuming that he was a party, his collusion with the then claimant, plaintiffs' father, in that proceeding cannot work as an estoppel as between the plaintiffs and himself: *Ram Surun Singh* v. *Mussamut Pran Peary*.[7]

Mone in reply:—The decision in *Jadu Nath Poddar* v. *Rup Lal Poddar*[8] reviews all the existing cases on the subject. In the present case a notice of the miscellaneous proceeding was served on the defendant judgment-debtor, while in the cases relied on no such notice was served.

The parties are not in *pari delicto*. The present plaintiffs were not parties to the original fraud.

JENKINS, C. J.:—The question that arises on this appeal is, whether a defendant can plead his own fraud as an effective answer to a claim to immoveable property conveyed by him to a *benamidar*.

Hirasa, the 2nd defendant, on May the 24th, 1890, executed in favour of one Hanmantsa a sale-deed of the property in suit. On the 3rd of March 1892 Hanmantsa executed in favour of the plaintiffs' father a sale-deed of the same property.

In 1899 the property was attached in execution of a money decree passed against Hirasa, but on an application presented by the plaintiffs' father the attachment was raised in deference to the title apparently created by the sale-deeds.

(1) (1870) 13 Moo. I. A. 585.
(2) (1874) 21 W. R. 422 (Civ. Rul.).
(3) (1893) 18 Bom. 372.
(4) (1886) 11 Bom. 114.
(5) (1888) 15 Cal. 674.
(6) (1892) 17 Bom. 629.
(7) (1870) 13 Moo. I. A. 551.
(8) (1906) 33 Cal. 967.

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The plaintiff has now brought this suit to recover the property on the strength of his title under the sale-deeds, and he is met by the defendant's plea that those documents were part of a *benami* transaction whereby it was intended to shield Hirasa's property from his creditor.

This intention is established, the fraud was carried through, and the final stage in the scheme was the order releasing the property made under section 280 of the Civil Procedure Code on the claimant's application.

Notice of that application was served on Hirasa, but he in no way opposed the claimant's contention that he had acquired a good title under the sale-deeds.

Thus Hirasa enabled his decree-holder to be cheated out of his just rights.

He now seeks to plead his fraud as a defence to the plaintiffs' claim to recover possession of this property.

It is well settled that when a fraud of this class has been carried into effect, a party to it cannot, as plaintiff, plead the fraud to vitiate the transaction.

It is argued, however, that this proceeds on a principle that does not bar a defendant from pleading his fraud, and it is contended that in such cases the rule is that the Court will not help a plaintiff where the litigants are parties to a common fraud.

For the plaintiff it is urged that the rule is that a deed cannot be avoided on the ground of fraud by a party to the fraud; *Allegans turpitudinem suam* shall not be heard.

In support of each contention authority may be cited, but in our opinion it is sounder policy to accept the rule, which will be most apt to deter persons from frauds of this kind; for, experience shows that they are by no means uncommon.

And for this reason, we prefer the rule for which the plaintiff contends.

It has, moreover, the sanction of decisions that must command respect. Thus in *Doe, dem. Roberts* v. *Roberts*[1], the defendant's plea in an action for ejectment failed on the ground that a party

(1) (1819) 2 B. & Ald. 367.

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could not avoid his own deed by showing fraud to which he was himself a party.

It was said by Bayley, J., "by the production of the deed, the plaintiff established a *prima facie* title; and we cannot allow the defendant to be heard in a Court of justice to say, that his own deed is to be avoided by his own fraud." And Holroyd, J., laid down that "a deed may be avoided on the ground of fraud, but then the objection must come from a person neither party nor privy to it, for no man can allege his own fraud, in order to invalidate his own deed."

This case was followed in *Obhoychurn* v. *Treelochun*(1), and *Brackenbury* v. *Brackenbury*(2) favours the same view.

Here we are dealing not with that which is executory, but with what is executed; for, the defendant is not resisting the enforcement of a contract, but is invoking the aid of the Court to enable him to escape on the strength of his own fraud from the consequences of sale-deeds which ostensibly create a valid title in the plaintiff.

In these circumstances, it is, we think, by not displacing the plaintiffs' apparent title that we give true effect to the maxim "Let the estate lie where it falls."

Though we have dealt with the case as if both parties to this litigation had been equally culpable, it is to be noticed that it was the plaintiffs' father and not the plaintiff, who joined the defendant in the fraud, and it is a question whether it can be said that the plaintiff and the defendant are *in pari delicto* (*Matthew* v. *Hanbury*(3), *Muckleston* v. *Brown*(4)).

But however that may be, we hold, for the reasons we have already stated, that the plaintiff is entitled to succeed and so the decree of the District Court should be reversed and that of the Subordinate Court restored, with costs throughout.

Decree reversed.

G. B. R.

(1) (1859) Beng. S. D. 1639.
(2) (1820) 2 J. & W. 391 at p. 394.
(3) (1690) 2 Vern. 187.
(4) (1801) 6 Ves. 52 at p. 68.