

## APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

1913.

July 4.

GIRDHARLAL PRAYAGDATT (ORIGINAL DEFENDANT), APPELLANT,  
MANIKAMMA KOM NARAYANSWAMI (ORIGINAL PLAINTIFF), RESPOND-  
ENT, AND GIRDHARLAL PRAYAGDATT (ORIGINAL DEFENDANT),  
APPELLANT, v. YASHODABAI BHRATAR DAMODARPANT PHATAK  
(ORIGINAL PLAINTIFF), RESPONDENT.\*

*Mortgage—Suit to recover the amount due—Defendant's plea that the mortgage was effected to defraud his creditor—Attachment of the property by the creditor—Order for sale subject to the mortgage—Creditor paid off before sale—Decree for plaintiff on the ground that defendant cannot plead his own fraud—Fraud not carried out—Defendant's intention not punishable.*

The plaintiff sued to recover from the defendant the amount due under a mortgage. The defendant pleaded that the mortgage deed was effected to protect his property from his creditor and that no consideration really passed under the deed. Previous to the suit the defendant's creditor had attached the mortgaged property and the mortgagee (present plaintiff) had made a claim on the basis of the mortgage for the release of the property from attachment. The mortgagor (present defendant) admitted the mortgage and the property was ordered to be sold subject to the mortgage. But the property was, however, not sold because the mortgagor paid off his creditor before the order for sale was carried into effect.

Both the lower Courts decreed the claim on the ground that the defendant could not be allowed to defeat the plaintiff by pleading his own fraud.

On second appeal by the defendant :—

*Held*, setting aside the decree, that as the defendant's creditor had not been defrauded, there was no reason why the Court should punish his intention to defraud by passing a decree against him.

*Sidlingappa v. Hirasa*<sup>(1)</sup>, explained and distinguished.

*Ram Surun Singh v. Mussamut Pran Peary*<sup>(2)</sup>, referred to.

SECOND appeals against the decision of A. W. Varley, Assistant Judge, and that of E. H. Leggatt, District Judge of Dharwar, confirming the decrees passed by

\* Second Appeals Nos. 532 and 830 of 1912.

<sup>(1)</sup> (1907) 31 Bom. 405.

<sup>(2)</sup> (1870) 13 Moo. I. A. 551.

V. V. Wagh, Joint Subordinate Judge of Dharwar in two suits Nos. 491 and 492 of 1909.

Two plaintiffs instituted two suits against the defendant to recover the amount due to them under two mortgage deeds. One mortgage was dated the 31st March 1885 and was for Rs. 1,000 and the other was dated the 13th July 1885 and was for Rs. 1,500.

The defence to both the suits was one and the same. The defendant pleaded that the mortgages were passed with the intention of protecting his property from his creditor Rajesaheb and that he received no consideration under the deeds.

Subsequent to the mortgages the defendant's creditor Rejesaheb attached the mortgaged property in execution of his decree against the defendant. The mortgagees intervened and applied for the removal of the attachment on the strength of the mortgage deeds admitted by the mortgagor and the Court ordered that the property should be sold subject to the mortgages. The property, however, was not sold as the defendant paid off his creditor before the date fixed for the sale.

The Subordinate Judge relying on the decision in *Sidlingappa v. Hirasa*<sup>(1)</sup> found that the defendant could not be allowed to raise the plea that the mortgages were colourable transactions passed to protect the property from his creditor Rajesaheb. He, therefore, decreed the claims in both the suits.

The defendant filed two appeals, Nos. 71 and 72, in the District Court at Dharwar and in both appeals the decrees of the Subordinate Judge were confirmed.

The defendant, thereupon, preferred two second appeals.

*S. V. Palekar* for the appellant (defendant):—It was wrong to hold that we could not raise the plea that

(1). (1907) 31 Bom. 405.

1913.

GIRDHARLAL  
PRAYAGDATT  
v.  
MANIKAMMA.

GIRDHARLAL  
PRAYAGDATT  
v.  
YASHODABAI.

1913.

GIRDHARLAL  
PRAYAGDATT

v.

MANIKAMMA.

GIRDHARLAL  
PRAYAGDATT

v.

YASHODABAI.

the mortgages were colourable transactions made for the purpose of saving the property from our creditor. Our admission of the mortgage in the previous miscellaneous proceeding cannot estop us from pleading that no consideration passed to us under the deeds: *Ram Surun Singh v. Mussamut Pran Peary*<sup>(1)</sup>.

*V. V. Bhadkamkar*, for the respondent (one of the plaintiffs).—When fraud has been actually carried into effect, it is not open to a party to the fraud to contend that the deed was hollow. He cannot plead his own fraud: *Sidlingappa v. Hirasal*<sup>(2)</sup>, *Govinda Kuar v. Lala Kishun Prosad*<sup>(3)</sup>, *Sham Lall Mitra v. Amarendro Nath Bose*<sup>(4)</sup>, *Juggernath Augurwallah v. E. A. Smith and Co.*<sup>(5)</sup>

In the previous execution proceeding, the defendant admitted the mortgage transactions and succeeded in getting an order from the Court that the property be sold subject to the mortgages. The fraud was thus actually carried into effect.

[Beaman, J. :—Was the property actually put to sale?]

No. The allegation is that the creditor was paid off before the date of the sale. But there was no specific issue on the point nor any proof of payment. The payment, even if proved, cannot avail the defendant because the Court which ordered the sale was led to believe that the mortgages were genuine transactions and there was the completion of fraud.

*K. H. Kelkar*, for the respondent (the other plaintiff).

SCOTT, C. J. :—These appeals are preferred in two suits filed by different plaintiffs in the Court of the Subordinate Judge at Dharwar on the 22nd of October 1909. In the first suit, the plaintiff sued to recover

<sup>(1)</sup> (1870) 13 Moo. I. A. 551.

<sup>(3)</sup> (1900) 28 Cal. 370.

<sup>(2)</sup> (1907) 31 Bom. 405.

<sup>(4)</sup> (1895) 23 Cal. 460.

<sup>(5)</sup> (1906) 33 Cal. 547.

the amount due upon a mortgage dated the 31st. of March 1885, the mortgage having been executed by the defendant in favour of the plaintiff's husband. In the second suit, the plaintiff sued to recover the amount due upon a mortgage of the 31st of July 1885, the mortgage having been executed by the defendant in favour of the plaintiff's father. The defendant in each case is in possession of the mortgage property, and in each case the defence is the same, namely, that the mortgage deed was passed in order to protect the property from the defendant's creditor Rajesaheb. The defendant in his evidence stated that the considerations for the two deeds were received in the Registration Office and repaid to the mortgagees outside the office. The properties were attached by the creditor Rajesaheb, and the mortgagees then made claims on the basis of the deeds for release of the property from attachment. The mortgagor admitted the claims and the Court ordered that the property should be sold subject to the mortgages abovementioned. The properties were, however, not sold because the defendant paid off the creditor Rajesaheb before the orders for the sales were carried into effect.

The learned Judges in the lower Courts have held that the case of the defendant is on all fours with that of the defendant in *Sidlingappa v. Hirasa*<sup>(1)</sup> and therefore he cannot be allowed to defeat the plaintiff's claim by pleading his own fraud. The most obvious distinction between the present cases and that relied upon by the learned Judges is that the creditor Rajesaheb has not been defrauded. As observed in Mayne's Hindu Law, paragraph 446 (6th Edn.), "if . . . he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own." There is

(1) (1907) 31 Bom. 405.

1913.

GIRDHARLAL  
PRAYAGDATT

v.

MANIKAMMA.

GIRDHARLAL  
PRAYAGDATT

v.

YASHODABAI.

1913.

GIRDHARLAL  
PRAYAGDATT

v.

MANIKAMMA.

GIRDHARLAL  
PRAYAGDATT

v.

YASHODABAI.

another distinction also between the present case and *Sidlingappa's*<sup>(1)</sup>, and that is, that the plaintiff in each of these cases is seeking to enforce his contract for payment of money under his mortgage deed, and that point of distinction was referred to by Sir Lawrence Jenkins in *Sidlingappa's*<sup>(1)</sup> case where he said: "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." It is to be observed that the authorities relied upon in that case were authorities which were not concerned with the relations of mortgagor and mortgagee. Where those relations exist the considerations stated in the judgment of the Privy Council in *Ram Surun Singh v. Mussamut Pran Peary*<sup>(2)</sup> must apply, subject to the dominant principle that where the fraud has actually been carried into effect the estate must lie where it falls. We, therefore, set aside the decrees of the lower Courts and remand the case for decision on the merits.

Costs, costs in the cause.

BEAMAN, J.:—As I was a party to the judgment in *Sidlingappa v. Hirasa*<sup>(1)</sup>, I may be allowed to add that while still adhering to the principle of that judgment, I do not think that within the proper limits of its application it need be brought in question here. I agree with my Lord the Chief Justice that this case can be distinguished. Here the claim appears to lie in contract and in contract still executory so that it is difficult to see how, if the contract be in reality illegal, it could be enforced at all in the plaintiff's favour, or why, if not illegal, the defendant should not be allowed in ordinary course to show that he received no consideration. But I think that a still

<sup>(1)</sup> (1907) 31 Bom. 405.

<sup>(2)</sup> (1870) 13 Moo. I. A. 551.

broader ground of distinction is that in this case, as found by the Courts below, no fraud was actually effectuated, and that is really the basis of the decision, as I understood it at the time, given by Jenkins C. J., in *Sidlingappā's*<sup>(1)</sup> case. Upon all the other points of distinction set forth in my Lord the Chief Justice's judgment just delivered I entirely agree.

*Decrees set aside.*

G. B. R.

<sup>(1)</sup> (1907) 31 Bom. 405.

### APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.*

DAKORE TOWN MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, v.  
TRAVEDI ANUPRAM HARIBHAI (ORIGINAL PLAINTIFF), RESPONDENT.\*

1913.

July 11.

*District Municipal Act (Bombay Act III of 1901), sections 113 and 122—  
Suit against Municipality for re-instating a stone removed by it—Plaintiff's  
adverse possession—Municipality creature of the statute—Duties of Municipa-  
lity—Municipal District—Encroachment—Obstruction to safe and convenient  
passage—Notice of removal—Justification by reference to statutory powers.*

In a suit brought against a Municipality to restrain them from obstructing the plaintiff in re-instating a stone which was imbedded in his *otla* in its original position, the lower appellate Court found that the stone had been *in situ* for twelve years, therefore the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone.

On second appeal by the Municipality,

*Held*, that the Municipality was the creature of the Statute with duties *inter alia* to preserve the passage along public streets. It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more. Under section 113 of the District Municipal Act. (Bom. Act III of 1901) the Municipality might, on proof that the encroachment objected to was an obstruction to the safe and convenient passage along a street, by written notice require the owner to remove it. Section 122 of the Act empowered the

\* Second Appeal No. 211 of 1913.