

(1913) 07 BOM CK 0010
In the Bombay High Court
Case No : Second Appeal No. 532 of 1912

Girdharilal Prayagdat Vajpe	Vs	APPELLANT
Manikamma Narayansami and Yeshodabai Damodarpant Pathak		RESPONDENT

Date of Decision : 04-07-1913

Acts Referred:

Citation : AIR 1914 Bom 283 : (1913) 15 BOMLR 805

Hon'ble Judges : Beaman, J; Basil Scott, J

Bench : Division Bench

Judgement

Basil Scott, Kt., C.J.—These appeals are preferred in two suits filled 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 the amount due upon a mortgage dated the 31st of March 1885, the mortgage having been executed by the defendant in favour of the plaintiffs 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 plaintiffs father. The defendant in each case is in possession of the mortgaged 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 credit of 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 above-mentioned. The properties were, however, not sold because the defendant paid off the creditor Rajesaheb before the orders for the sales were carried into effect.

2. 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. Hiras* ILR

(1907) Bom. 405 : 9 Bom. L.R. 542, 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, para 446, " if he (the transferor) has been defrauded any one, 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 another distinction also between the present case and Sidlingappa's, 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 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 (1870) 13 M.I.A. 551 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 cases for decision on the merits.

3. Costs in the cause.

Beaman, J.

4. As I was a party to the judgment in Sidlingappa v. Hirasa ILR (1907) Bom. 405 : 9 Bom. L.R. 542, I may be allowed to add that while still fully 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 G 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 C course to show that he received no consideration. But I think that a still 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 Sidlingappa's case. Upon all the other points of distinction set forth in my Lord the Chief Justice's judgment just delivered I entirely agree.