
(1928) 05 PAT CK 0016
In the Patna High Court

Lala Hira Lal

APPELLANT

Vs

Munshi Jagatpati Sahai

RESPONDENT

Date of Decision : 29-05-1928

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : AIR 1928 Patna 600 : 111 Ind. Cas. 797

Hon'ble Judges : Das, J;Allanson, J

Bench : Division Bench

Judgement

Das, J.—This appeal arises out of a suit instituted by the respondent in substance for the recovery of possession of certain properties specified in the plaint. The circumstances are these:

Lal Durga Prasad, who was at one time the owner of the disputed properties, borrowed a sum of money from the Raja of Surajpura on a hand-note on the 13th August, 1917. On the 26th August, 1919, the Raja obtained an ex parte decree against Lal Durga Prasad. The Raja made an application to have the disputed properties belonging to Durga Prasad attached in the execution proceedings which he adopted; find it is said that the disputed properties were in fact attached on the 3rd April, 1920. In due course the disputed properties were put up for sale, and it appears that on the 20th September, 1920, the plaintiff purchased those properties. Formal delivery of possession was given to him on the 18th December, 1920. It appears, however, that on the 3rd July, 1914, Lala Durga Prasad had given the disputed properties in ijara to Munshi Seogopal, father of the defendant, for nine years from 1322 to 1330. The consideration of the ijara was an advance of Rs. 1,450 made by Seogopal to Lal Durga Prasad. On the 20th May, 1915, Durga Prasad executed a mortgage deed in favour of Seogopal in respect of the disputed properties as a security for Rs. 2,000 advanced by Seogopal to him. On the 21st April, 1920, that is to say, 18 days after the alleged attachment already referred to, a usufructuary mortgage deed was executed by Durga Prasad in favour of the defendant by which Durga Prasad

purported to make over possession of the disputed properties to the defendant for a period up to the end of the Fasli year 1310. The consideration for the last mentioned transaction was an advance of Rs. 4,320 out of which the prior claims of the defendant in respect of the earlier transactions were satisfied. It appears, therefore, that there was a cash advance of Rs. 910 made by the defendant to Durga Prasad on the 21st April, 1920.

2. The position on the 20th September, 1920, was, therefore, this: If the attachment in the course of the execution proceedings taken by the Raja against Durga Prasad had in fact been effected on the 3rd April, 1920, or at any rate, before the 21st April, 1920, the plaintiff, as the auction-purchaser, was entitled to recover actual possession of the disputed properties on the expiry of the ijara lease of the 3rd July, 1914, in favour of the defendant, that is to say, he was entitled to recover possession in the beginning of the Fasli year 1331. If, on the other hand, the attachment was not properly effected before the 21st April, 1920, then the usufructuary mortgage deed of the 21st April, 1920, would have full operation notwithstanding the auction sale of the 20th September, 1920, and the defendant would be entitled to retain possession till 1340.

3. The position being this, Durga Prasad applied for setting aside the sale which took place on the 20th September, 1920, under the provision of Order XXI, Rule 90 of the Code. It is obvious that the defendant was Titally interested in the proceedings which were taken by Durga Prasad and it is the plaintiff's case that the defendant approached him and proposed to him that he, the defendant, might induce Durga Prasad to withdraw the proceedings under Order XXI, Rule 90 of the Code and if necessary pay Durga Prasad whatever he might demand as a consideration for withdrawing those proceedings if the plaintiff would agree to recognise the transaction of the 21st April, 1920. The plaintiff states that he agreed to these proposals and that eventually he executed a rehan deed in favour of the defendant on the 11th November, 1921, which according to him operated as a confirmation of the usufructuary mortgage deed of the 21st April 1920. The rehan deed admittedly executed by the plaintiff on the 11th November, 1921, however, not only confirms the transaction of the 21st April, 1922, but actually extends the period to 1342; so that under the transaction of the 11th November, 1921, the plaintiff is not entitled to be put in possession of the disputed properties until the beginning of the Fasli year 1343. The defendant relies upon the deed of the 11th November, 1921, as an answer to the plaintiff's claim. But according to the plaintiff, to quote his own words in para. 8 of the plaint, "the defendant defrauded and cheated this plaintiff and without his knowledge or approval and in collusion and concert with the scribe and witnesses got the period of rehan written out as 1342 Fasli instead of 1340 Fasli and although by that time there was no compromise with Lala Durga Prasad regarding" the appeals for re-hearing and for setting aside the sale, he got a wrong entry to be made that the said appeals had been compromised between the parties, and besides that he got several other wrong entries to be made by fraud in the said deed, and then he got the deed to be signed by the plaintiff and

got the same registered. And at last when this plaintiff came to know of the fraud of the defendant, he himself compromised the appeals for re-hearing and for setting aside the sale and on payment of Rs. 1,500 in cash got the same dismissed and under a deed of cancellation dated the 19th December, 1921, cancelled the said deed and there was no exchange of equivalents and the said deed remained altogether useless and illegal and the defendant cannot take any advantage of or rely on the same. In these circumstances the plaintiff contends that-he is entitled to recover immediate possession of the disputed properties.

4. The suit is resisted by the defendant Substantially on the ground that the rehan deed of the 11th November, 1921, operates to its fullest extent and that the plaintiff is not entitled to contend that that deed should be regarded as null and void. The case of the defendant is that, on proceedings being started by Durga Prasad to have the auction-sale set aside, the plaintiff approached the defendant and asked his assistance for the purpose of inducing Durga Prasad to withdraw those proceedings; and it is the defendant's case that the plaintiff offered to pay Rs. 1,500 to Durga Prasad as a consideration for his withdrawing those proceedings and agreed not only to confirm the rehan deed of the 21st April, 1920, executed by Durga Prasad in favour of the defendant which it will be remembered allowed the defendant to be in possession of the disputed properties up to the end of the Fasli year 1340, but also to extend the period up to 1342. The defendant alleges that he induced Durga Prasad to withdraw the proceedings taken by the latter and that thereupon the plaintiff executed the rehan deed in question in his favour on the 11th November, 1921. He accordingly contends that the suit is wholly without substance and that it should be dismissed. The learned Subordinate Judge has found in favour of the plaintiff; hence this appeal to this Court by the defendant.

5. It was contended before us, in the first instance, that there is no evidence that the properties were attached at any time before the 21st April, 1920, or at all and that in the circumstances the plaintiff's suit for possession must be dismissed Order XXI, Rule 54 of the Code deals with the question of attachment of Immovable properties. It provides as follows.

(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

6. Mr. S.M. Mullick on behalf of the respondent contends that though the procedure indicated in para. 2 must be followed, yet when it is shown that that

procedure has been complied with the attachment becomes effective from the date when the order is made by the Court prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The actual prohibitory order was passed on the 23rd March, 1920; and Mr. S.M. Mullick contends that provided he satisfies the Court that the procedure in para. 2 has all been carried out, he is entitled to ask us to hold that the attachment was an effective attachment as from the 23rd March, 1920. I am unable to agree with this argument, and my authority is the decision of the Judicial Committee in *Muthiah Chetti v. Palaniappa Chetti* 109 Ind. Cas. 626 : 32 C.W.N. 821: AIR 1928 PC 139 : 26 A.L.J. 616 : 51 M. 319 : 48 C.L.J. 11 : 28 L.W. 1 : 5 C.W.N. 579 : 55 M.L.J. 122 (P.C.) decided by the Judicial Committee on the 12th March last. In dealing with the point their Lordships pointed out that "a fascicules of clauses beginning at Rule 41 of Order XXI and applicable to "attachment of property", shows in instance after instance that attachment is a real thing, with a variety of real applications suited to the nature of the property to be attached" and proceeded to say " these instances go to show that under the CPC in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order and is something which is to be done and effected before attachment can be declared to have been accomplished".

7. Their Lordships then quote the provision of Order XXI Rule 54 and say as follows:

In view of these, provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. The result, if this were so, would be that a person holding an order could dispense with attachment altogether, as an operation or a fact. Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the Other things prescribed by the rules in the Code have been done.

8. This being the position, it is necessary to see whether " the other things prescribed by the rules in the Code have been done."

9. Now para. 2 of Rule 54 requires first that the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode ; secondly, a copy of the order shall be affixed on a conspicuous part of the Court house; and thirdly, where the property is land paying revenue to the Government, the order shall be affixed in the office of the Collector of the District, in. which the land is situate. There is some evidence that the order was proclaimed by beat of drum and that a copy of the order was fixed on a part of the property and also upon a part of the Court house; but there is absolutely no evidence that it was also affixed in the office of the Collector of the District in

which the land is situate. The learned Subordinate Judge says that as there is a presumption that official acts have been regularly performed, we ought to presume, in the absence of any evidence to the contrary, that the order was in fact affixed in the office of the Collector of the District; but in my opinion Section 114 of the Evidence Act to which the learned Subordinate Judge has referred authorises the presumption that a particular judicial or official act which has been performed has been performed regularly but it does not authorise the presumption without any evidence that the act has been performed, see *Deputy Legal Remembrancer v. Mir Sarwarjan* 6 C.W.N. 845 and *Narendra Lal Khan v. Jogi Hari* 32 C. 1107 : 2 C.L.J. 107. In my opinion there being no evidence that the act was done it is impossible to have recourse to any presumption in the matter. The defendant relies upon a transaction of the 21st April, 1920; and it is not disputed that that transaction is operative as against the plaintiff unless it is proved that the property which was the subject-matter of the transaction of the 21st April, 1920, was in fact attached before the 21st April, 1920. The onus is clearly upon the plaintiff to prove that the property was attached before the 21st April, 1920, The property is undoubtedly land paying revenue to the Government and there is no evidence whatever that the order of attachment was affixed on a conspicuous part of the office of the Collector of the District in which the land is situate. That being so, no valid attachment has been proved against the defendant; and the defendant is entitled to rely upon the transaction of the 21st April, 1920, as a complete answer to the present suit.

10. But there is a more effective defence to the suit. As I have said, the plaintiff executed a document on the 11th November, 1920, by which he not only accepted the rehan deed of the 21st April, 1920, but extended the term of that rehan by two years. Having executed this document the plaintiff himself presented it for registration and it is not open to doubt that on such registration the title of the defendant became complete. On the 19th December, 1921, however, the plaintiff executed a document by which he purported to rescind the deed of the 11th November, 1921. The terms of this document are as follows:

I executed a deed, dated the 11th November, 1921, in the name of Babu Hira Lal, son of Munshi Shiva Gopal Lal, deceased, by occupation cultivator and Mahajan resident of Mauza, Sahiar at present at Buxar, Pargana Bhojpur, Sub-registry Office Buxar and District Registry Office, Shahabad, for confirmation of the zerpeshgi deed, dated the 21st April, 1920, executed by Lal Babu Durga Prasad Singh of Barokhar, Pargana Khaira Garh, District Allahabad, which I had got registered at Arrah on the 11th November, 1921. The said Babu Hira Lal got the said deed executed by me by various frauds and misrepresentation and failed to fulfil the promises that he had made in lieu of consideration. Babu Hiral Lal refused to fulfil the contract and to bring into effect the stipulations made by him in consequence of which I the executant was compelled to do certain acts with some loss. The said ekrarnama is inoperative and has become null and void. The exchange of equivalents did not take place. Therefore, I of my own accord and free will hereby cancel the stipulations made by me under the said ekrarnama, as

well as the ekrarnama,. Henceforth the said document shall not be at all binding on me and, therefore, I execute this deed of revocation cancelling the ekrarnama, so that it may be of use when required.

11. It will be noticed that the plaintiff does not condescend to give particulars of the frauds and misrepresentations alleged to have been perpetrated on him by the defendant ; nor does he say in what way the defendant failed "to fulfil the promises that he made in lieu of consideration."

12. The document is, therefore, of no value whatever for our present purpose. It is obvious, therefore, that the deed of 11th November, 1921, constitutes a complete answer to the plaintiff's suit unless the plaintiff satisfies the Court that he is entitled to claim a rescission of that deed. It is remarkable, however, that in the plaint he asks for no relief in regard to his deed of the 11th November, 1912; but as the question has been argued before us, it is not necessary to decide the case on a point" so narrow as the one which I have just indicated. Now what are the grounds set forth in the plaint to entitle the plaintiff to rescind the deed of the 11th November, 1921? The grounds as set out in para. 8 of the plaint are as follows:

(1) The defendant in collusion and concert with the scribe and" witnesses got the period of rehan written out as 1342 Fasli instead of 1340 Fasli.

(2) Although by that time there was no compromise with Lal Durga Prasad Singh regarding the appeals for re-hearing and for setting aside the sale he got a wrong entry to be made that the said appeals had been compromised between the parties, and

(3) we got several other wrong entries to be made by fraud in the said deed, and then he got the deed to be signed by the plaintiff and got the same registered.

13. Now so far as the first two points are concerned, it is worthy of note that at the date when the plaintiff purported to rescind the deed of the 11th November, 1921, he was not aware of the grounds as set forth in para. 8 of the plaint. Now it is quite clear on the endorsement of the deed of the 11th November, 1921, that the plaintiff did not take the deed from the Registration Office till the 20th December, 1921, that is to say, till one day after he purported to cancel it. It is obvious, therefore, that he purported to cancel the deed of the 11th November, 1921, without being aware of the grounds which in hits opinion entitled him to cancel it. Apart from this consideration it is idle in my opinion for the plaintiff to contend that he was not aware of the terms of the deed of the 11th November, 1921, at the time when he executed it and registered it. The plaintiff was a Pleader's clerk and is at present in the service of the Surajpura Raj. In fact there is no doubt whatever that he is a benamidaroi the Surajpura Raj in this transaction, although both he as well as Nand Kumar, the manager of the Surajpura Raj, deny it. Now is it to be supposed that the plaintiff, situated as he was, executed and registered an import ant deed of this nature without even, reading it? The plaintiff tells a strange story is the witness-box. His evidence is as

follows:

I saw the draft brought by Hira Lal. I did not read the whole of it. Then gays I read it at all. I saw some corrections in it. I did not read the corrections also. When I saw the draft the fair copy had been already made. I saw the two together. I did not read the fair copy. When I went to register the deed I did not know what was written in it, Hira Lal gave me both the fair copy and the draft in the Registration Office at Arrah. There was no one on my behalf to see what was written in the draft or the rehan (fair copy). I did not ask any body to see. I had no talk with Babu Nand Kumar as to what was written in the draft or what corrections he made. I did not meet him. I had slight acquaintance with Nand Kumar Babu.

14. In regard to his evidence that he had Blight acquaintance with Nand Kumar, the question was put to him that he was the clerk of Nand Kumar before Nand Kumar became the manager of the Surajpura Raj. He denied it. Nand Kumar also denied the suggestion in the witness-box; but the defendant has put in a document which leaves no doubt on the question that the plaintiff was the clerk of Nand Kumar for a short time at least. There is no doubt that the evidence of the plaintiff as also that of Nand Kumar on this point is false. The question, however, remains whether the evidence of the plaintiff that he executed the document without reading it and registered it without knowing what he had executed is to be believed.

15. It appears that two drafts were made of the deed on the 11th November, 1921. One of them has been marked as Ex. 2 and the other as Ex. A. According to the plaintiff, Ex. A was the first draft made by the defendant. The terms were not agreed to by the plaintiff and that thereupon corrections were made in Ex. A by Nand Kumar which corrections were all embodied in Ex. 2 which according to the plaintiff was the final draft. According to the defendant, however, Ex. 2 was the first draft and Ex. A was the final draft. The deed as executed by the plaintiff on the 11th November, 1921, is Undoubtedly a copy of Ex. A with slight alterations. The learned Subordinate Judge has, however, accepted the case of the plaintiff that Ex. A was the first draft and that Ex. 2 is the final draft embodying the corrections in Ex. A by Nand Kumar. In fact the learned Subordinate Judge says that Ex. 2 carries out all the corrections made in Ex. A by Nand Kumar and that, therefore, Ex. 2 must be the final draft. I am unable to agree with the view taken by the learned Subordinate Judge. Now Ex. A which according to the defendant is the final draft provides as follows:

I do declare that the said rehandar shall continue as rehandar in possession and occupation of the rehan property up to 1342 Fasli and shall realise the income of the mauza in lieu of interest. I shall have no right to redeem the said mortgage up to 1342 Fasli. After 1342 Fasli whenever I will pay the entire rehan money in one lump on the full moon day of Jeth of any year, I shall take back the said rehan deed and I shall also resume the mauza let out in rehan.

16. Now it is worthy of note that this portion was left untouched by Nand Kumar Lal. Exhibit 2 on the other hand provides as follows:

I do declare that until the expiry of the term under the said deed dated the 21st April, 1920, executed by Durga Prasad the said rehandar Hira Lal shall continue to hold possession in the capacity of rehandar and I shall have no right to redeem the mortgage till, the period of the rehan entered in the said deed.

17. It is obvious that there is a vital difference in the two drafts. Whereas Ex. 2 purports merely to confirm the transaction of the 21st April 1920 under which the defendant was entitled to retain possession of the disputed properties up to 1340, Ex. A especially provides that the defendant would be entitled to retain possession of the disputed property up to 1342. The final document as executed by the defendant provides in specific terms that the defendant is to retain possession of the disputed properties up to the end of 1342. The critical portion of that deed is as follows; "I do declare that the said rehandar Babu Hira Lal shall continue as rehandar, shall remain in possession and occupation of the rehan property up to 1342 Fasli and shall appropriate the income of the mauza in lieu of interest. I shall have no right to redeem the mortgage up to 1342 Fasli, After 1342 Fasli whenever I will pay the entire rehan money in one lump on the 30th Jeth of any year, I shall take back the rehan deed and I shall also resume possession of the mausahs let out in rehan."

18. Now it seems to me that Ex. A must be the final draft. In the first place if the plaintiff's case were true then the critical portion in Ex. A providing that the defendant would have the right to remain in possession of the properties till 1342 would have been corrected by Nand Kumar. Nand Kumar was cross-examined on this point. He was asked why he did not make the appropriate correction in Ex. A in regard to the right of the defendant to remain in possession up to 1342. His answer was. "I did not make the corrections as I was not sure of the date in the previous rehan and he promised to bring the rehan deed."

19. His explanation is to the effect that he did not have access to the document of the 21st April, 1920, and in consequence he was not able to correct the critical passage in Ex. A; but it is to be pointed out that Ex. 2 which according to him is the final draft does not specify the date up to which the defendant is to retain possession. All that, it says is that the defendant would remain in possession to miad rehan that is to say until the expiry of the usufructuary deed of the 21st April, 1920. Now obviously it was possible for him to make a correction of this nature in Ex. A without having the document of the 21st April 1920, before him. I entirely disbelieve his explanation; and since I find it impossible to hold that the plaintiff could have executed the deed of the 11th November, 1921, without noticing that in three different places the year 1342 is specifically mentioned as the year up to which the defendant would be entitled to have possession of the disputed properties, I must hold that Ex. A was the final draft and that Ex. 1 the deed which was actually executed by the plaintiff on the 11th November, 1921, is the fair copy of Ex. A.

20. Another point was made by Mr. S.M. Mullick before us and it is this. He contends that he is entitled to rescind the deed of the 11th November, 1921, since that deed was executed by the plaintiff on a fraudulent misrepresentation made to him by the defendant and it is asserted that the defendant was eager to have the dispute between Durga Prasad and the plaintiff settled and that he proposed to the plaintiff that he would pay Lal Durga Prasad whatever the latter might demand as a condition precedent to his withdrawing the proceeding then pending between him and the plaintiff and that it was on that assurance that the plaintiff actually executed the deed of the 11th November, 1921; but that having induced the plaintiff to execute the deed the defendant failed to make good his representation to the plaintiff with the result that Durga Prasad continued those proceedings and that the plaintiff himself had to pay Rs. 1,500 to Durga Prasad to induce the latter to withdraw the proceedings. Mr. Mallick contends that in these circumstances it was open to the plaintiff to rescind the deed of the 11th November, 1921. The defendant disputes the facts. He contends that the plaintiff himself offered to pay Rs. 1,500 to Durga Prasad and that he, the defendant, had performed his part of the contract when he induced Durga Prasad to take Rs. 1,500 from the plaintiff and withdraw the proceedings as against the plaintiff. Mr. Mullick contended before us that so far as the plaintiff is concerned, he was more or less indifferent in the matter since Durga Prasad's application for setting aside the sale had failed in the Court of first instance and might fail in the Appellate Court and that it was far more in the interest of the defendant to secure from the plaintiff an affirmance of the transaction of the 21st April, 1920, and that, therefore, it is more likely that the defendant should have agreed to pay Durga Prasad whatever Durga Prasad might demand as a condition precedent for withdrawing the proceedings as against the plaintiff. So far as the question of fact is concerned, it is undeniable that the plaintiff was not as indifferent in the matter as he pretends to be; for he undoubtedly paid Rs. 1,500 to Durga Prasad between the 11th November, 1921, and the 19th December, 1921, as a result of which Durga Prasad withdrew all the proceedings which had been started by him against the plaintiff. The question is, did the defendant agree to pay this money? In my opinion there is no reason to take the view that defendant agreed to pay whatever Durga Prasad might demand for that purpose; and since we know that the plaintiff did in fact pay Durga Prasad Rs. 1,500, what reason is there for assuming that it was agreed between the plaintiff and the defendant that the defendant should pay that money to Durga Prasad? The deed of the 11th November, 1921, proceeded on the hypothesis that the question as between Durga Prasad and the plaintiff had been settled, It seems to me impossible to hold that the plaintiff would have executed and registered a deed reciting the fact that matters had been settled between him and Durga Prasad if it was in face agreed that the defendant should pay the sum of Rs. 1,500 to Durga Prasad. Apart from any other consideration it is impossible to hold as a point of law that the plaintiff would be entitled to rescind the transaction of the 11th November, 1921, even if he were to establish before us that the defendant agreed to satisfy the claim of Durga Prasad and failed to do so. In order to give rise to a right to

rescind a contract for misrepresentation whether innocent or fraudulent, it appears that the following facts must be established : there must have been first, a false representation made as to some material fact; and secondly, there must be a representation, that is to say, a statement of fact either by words or by conduct. But it is well established that a collateral promise to do some act though it may effectively induce the promise to enter into a contract is not, properly speaking, a representation at all. In this case the plaintiff relies on no more than this that the defendant promised to pay Rs. 1,500 to Durga Prasad and prevail upon the latter to withdraw all proceedings as against the plaintiff. It may be that this collateral promise induced the plaintiff to enter into the transaction of the 11th November 1921; but in my opinion, though the plaintiff may have a remedy against the defendant for breach of his promise, he is not entitled to have the deed of the 11th November, 1921, rescinded because the defendant did not carry out his promise. But, in my view, the plaintiff has not established in this case that the defendant agreed to pay Rs. 1,500 to Durga Prasad.

21. I am of opinion that the learned Subordinate Judge should have dismissed this suit. I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below and dismiss the suit with costs in both the Courts as against the respondent. The cross-objection is dismissed.

Allangon, J.

22. I agree.