
(1954) 12 OHC CK 0001
In the Orissa High Court
Case No : Second Appeal No. 376 of 1949

Niranjan Samal

APPELLANT

Vs

Tirilochan Kuar

RESPONDENT

Date of Decision : 17-12-1954

Acts Referred:

Contract Act, 1872 — Section 17, 19
Evidence Act, 1872 — Section 92

Citation : AIR 1956 Ori 81 : (1955) 21 CLT 146

Hon'ble Judges : Narasimham, J; Mohapatra, J

Bench : Division Bench

Advocate : D. Mohanty and G. Jena, for the Appellant; G. Dhal and P.K. Dhal, for the Respondent

Final Decision : Dismissed

Judgement

Mohapatra, J.—Plaititiff's suit, for setting aside a compromise decree obtained in O.S. No. 292/44 of the Court of Munsif of Jaipur having been decreed by both the Courts below, the defendant has brought this second appeal. Sadhu Charan Bal, Nrusingh Charan Bal and others were the co-sharer-Sarbarakars in respect of three mouzas.

As they fell into arrears of rent, the landlord obtained a decree for rent and in execution of the said decree for rent, the Sarbarakari tenure was put to sale -- the plaintiff being the purchaser on 29-9-1942. According to the plaintiff's case, after his purchase, Sadhu Charan Bal, simply with the intention of harassing the plaintiff, brought several civil suits and criminal cases in the names of different persons as against the plaintiff.

O.S. No. 103 of 1945 was instituted by Sadhu's wife Manorama claiming eight annas interest in the Sarabarabari purchased by the plaintiff on the allegation that the plaintiff was merely a benamdar-purchaser for her to that extent, O.S. No. 289 of 1945 was instituted in the name of Nrusingh Charan Bal as the plaintiff claiming seven pies interest in the Sarabarakari on the ground that the

decree was merely a money decree, and he not being a party, his interest has not "passed by the sale.

O.S. No. 292/44 was instituted in the name of Niranjana Samal as the plaintiff for specific performance of contract for sale of eight annas interest in the Sarabarakari on the basis of an alleged contract between the present plaintiff and Niranjana, There were also several criminal cases filed at the instance of Sadhu Charan Bal in some of which the present plaintiff was an accused.

The further case of the plaintiff is that at the intervention of a respectable man of the locality, that is, p. W. 3 (Gokulananda Mohanty) it was agreed between the present plaintiff on the one hand and Sadhu and Niranjana on the other that all the criminal cases would be withdrawn, the two other civil suits, that is, O.S. No. 103/45 and O.S. No. 289/45, also would be withdrawn, and the suit for specific performance of contract would be decreed in respect of the eight annas interest in the Sarabarakari according to the terms of the compromise. The compromise petition was filed in O.S. No. 292/44 on 31-1-1946.

On that very day Monorama's O.S. No. 103/45 was also withdrawn (Ex. 2). A withdrawal petition was also written out and signed by the pleader for Nrusingh in O, S. No. 289/45 on that very day, that is, 31-1-46; but it could not be filed in Court that, day as Nrusingh was not present and it was to be filed in Court on 7-2-1946 to which date the case was posted.

But in spite of the fact that, a compromise petition was filed in O.S. No. 292/44 and a decree was passed in accordance with the compromise petition, O.S. No. 289/45 was not withdrawn and the criminal cases also were not withdrawn. The plaintiff further avers that he was duped to file the compromise petition in O.S. No. 292/44 with empty promises of Sadhu and Niranjana (the present defendant) who made promises without any intention of performing them. On these allegations he filed the present suit for setting aside the compromise decree on the ground of fraud played upon him.

2. The defence is that in fact the compromise was entered into bona fide by the parties to the suit and the defendant had nothing to do with the criminal cases or the other civil suits. In fact, according to the defence there was no such agreement between the parties for the withdrawal of Nrusingh's suit or other criminal cases.

3. Both the Courts below have accepted the plaintiff's case and decreed the suit on the finding that in fact the plaintiff has been subjected to a fraud. It will be pertinent to quote the finding of the lower appellate Court:

"The oral and the documentary evidence adduced from the side of the plaintiff-respondent proves very satisfactorily that Sadhu Charan Bal was the man at whose instance all the civil suits and the criminal cases against the plaintiff-respondent had been filed; that he was present at the time of the compromise and practically dictated the terms; that he and the appellant held out assurance

that O.S. No. 103 of 1945, O.S. No. 289 of 1945 and all the criminal cases would be withdrawn if respondent would agree to suffer a decree in favour of the appellant in O.S. No. 292 of 1944 and that Sadhu Charan Bal and the appellant did take oaths in the local Kali temple to abide by their representations."

The trial Court besides coming to the above conclusion had also found:

"It is also clear though Sadhu Charan did not figure as a party in all the cases he was behind them and practically the guiding factor".

To come to this finding they had also relied upon the evidence of the respectable man of the locality that is P. W. 3 (Gokulnanda Mohanty) at whose intervention the compromise was effected; his evidence is substantially corroborated by the evidence of P. W. 2. (Birupakshya Kar, a senior member of Jaipur Bar) and also by the evidence of P. W. 4 (the Sebak of Kali Temple of Jaipur where the parties took oath to abide by the terms and conditions agreed between the parties).

They had also relied upon the circumstance that on that very day, that is, on 31-1-46, withdrawal petition was in fact filed in O.S. No. 103/45 (Ex. 2) and that in fact Ex. 1, the withdrawal petition in Nrusingh's case was also written out, signed by the pleader and kept in the custody of Sri Birupakshya Kar. We are in complete agreement with the Courts below in respect of the finding quoted above.

It is also clear to us that while the present appellant and Sadhucharan had held out the above assurances they intended not to fulfil them and played a trick on the present plaintiff in order to snatch the compromise decree (Ex. 3).

4. Mr. Mohanty, appearing on behalf of the defendant-appellant, takes up the point that the terms of the contract between the parties to the compromise decree can be referred to only as appearing in the compromise petition filed and any other evidence in respect of any terms or conditions which will have effect of contradicting or varying or adding to the terms of the compromise petition (Ex. 3) is barred under the provisions of Section 92, Evidence Act.

The argument seems to have no force as cases of this nature fall within the saying clauses provided for under provisos (1) and (3) of Section 92. Provisos (1) and (3) are as follows:

"Section 92 x x x x Proviso (1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as, fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

XX XX XX Proviso (3) The existence of any (sic) oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved."

From the story presented on behalf of the plaintiff, it is clear that the

understanding between the parties was to the effect that the compromise, filed in O.S. No. 292/44, according to the terms embodied in the decree itself, would have force or effect only on condition that all other civil and criminal litigations were withdrawn.

Withdrawal of other cases manifestly appears to be a condition precedent to the attaching of any obligation under the contract of the compromise as contemplated under Proviso (3). Furthermore this is a case where the plaintiff impugns the terms of the compromise on the ground of fraud. In most of the cases of fraud it can be established only by introducing extraneous conditions and circumstances.

The present case is exactly similar to a case decided by Fazl Ali C. J. and Agarwala J. (as they then were) of the Patna High Court reported in -- Ullasmoni Dasi and Others Vs. Sukhomani Dasi, . The plaintiff in that case brought the suit on the basis of a surrender which was being impeached by the defendant on the ground of fraud on the allegation that the surrender deed was executed as it was held out at the time of surrender that she would be paid Rs. 300 and half the lands would be settled to her grandson.

She was therefore duped under empty promises to execute the deed. Their Lordships came to the conclusion that such a case would fall within the language of Provisos (1) and (3) of Section 92, Evidence Act, and extraneous evidence is admissible for the purpose of proving fraud.

5. The next point of law that, is urged by Mr. Mohanty is based upon the Exception to Section 19, Indian Contract Act. His contention is that the plaintiff cannot avoid the contract as he had the means of discovering the truth with ordinary diligence; and he is guilty of not having exercised ordinary diligence in not waiting for Nrusingh (the plaintiff in O.S. No. 289/45) to come and sign the petition of withdrawal; nor did the plaintiff ascertain from Nrusingh as to whether he would agree to the withdrawal of the suit.

Section 19, Contract Act makes provisions for avoiding agreements caused by coercion, fraud or misrepresentation. The Exception to Section 19 runs as follows:

"Exception--If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence."

In our view, the present case does not come within the mischief of the Exception as it is a case of fraud under Clause (3) of Section 17, Contract Act defining the word "fraud".

Clause (3) is to the effect that "fraud" means and includes..... .."promise without intention of performing it".

Here the basis of the plaintiff's case is that he was agreed to compromise the

suit (O.S. No. 292/44) with the defendant only on the assurance that the other civil and criminal cases would be withdrawn and that the assurance given by the present defendant and Sadhucharan was empty assurance with the intention of not fulfilling it. Mr. Mohanty however contends that even if it be a case of fraud and not mere misrepresentation it could be covered by the Exception.

According to him the clause "fraudulent within the meaning of Section 17" qualifies both "by silence" or "by misrepresentation". If his contention is to be accepted all cases of fraud either by active misrepresentation" or by silence will be demanding ordinary diligence of the promisor; but nevertheless no ordinary diligence will be necessary if the case is one of mere active misrepresentation.

This interpretation seems to be most unreasonable. The matter is clarified by reference to the feature that the word "by" is used both before misrepresentation and also silence. The question seems to have been settled by judicial decision. We will refer to the decision of their Lordships of Sulaiman and Young JJ. in the case of -- Niaz Ahmad Khan and Another Vs. Parsottam Chandra and Another , where their Lordships on the above considerations laid down the principle that ordinary diligence is necessary if it is a case of active misrepresentation or silence amounting to fraud and eases of fraud by active misrepresentation as defined u/s 17, Clause (3), Contract Act will not be covered by the Exception.

This view also has been accepted by other High Courts: vide "-- "Venkataratnam v. Sivaramudu" AIR 1940 Mad 560 (C) and -- "J. M. Apar v. L. C. Malchus" AIR 1939 Cat 473 (D); apart from the above position of law, we find on a scrutiny of the circumstances of the case that the plaintiff cannot be said to be guilty of not having exercised ordinary diligence.

The fact remains, as found by the Courts below, that Sadhucharan was the prime mover who was responsible for having brought these cases. Nrusingh happens to be a very close relative of Sadhu he being the brother-in-law. When the withdrawal petition was actually written out and signed by the pleaders, the plaintiff could accept the assurance given by Sadhu and the present appellant and sign the present compromise petition.

6. Lastly it has been urged by Mr. Mohanty that a substantial part of the promises has been fulfilled & the non-compliance of the assurances is only in respect of Nrusingh's suit which was only a negligible part of the entire Sarabarakari, that ts, seven pies. On perusing the evidence we find that in fact the criminal cases were not withdrawn in accordance with the promises made.

One of the criminal cases ended in conviction which was set aside in appeal. The other three criminal cases were withdrawn only after the present plaintiff had filed a separate criminal case. It appears to us that substantial part of the consideration for the compromise was the withdrawal of Nrusingh's case and the withdrawal of all the criminal cases pending at the instance of Sadhucharan Bal.

7. In conclusion we agree with the view taken by the Courts below who have

rightly decreed the plaintiff's suit and set aside the compromise decree. The appeal therefore fails and is dismissed with costs.

Narasimham, J.

8. I agree.