Sita Ram

Vs

Radhabai and Ors.

Civil Appeal No. 961 of 1964

(J. C. Shah, S. M. Sikri, J. M. Shelat JJ)

16.10.1967

JUDGMENT

SHAH, J. -

Lachhmi Narain father of Sitaram appellant in this appeal - was the brother of Radhabai - respondent herein. On April 15, 1942, Radhabai - who will hereinafter be called 'the plaintiff' entrusted gold, pearl and diamond jewellery of the value of Rs. 32,379/6/- to Lachhmi Narain for safe custody. After the death of Lachhmi Narain in July 1943, the appellant was called upon by the plaintiff to return that jewellery. The appellant replied that Lachhmi Narain had during his life time returned the jewellery to the plaintiff. The plaintiff then instituted on action against Sita Ram, his son Ghanshyam and other members of the family, in the Court of the First Civil Judge, Kanpur, for a decree ordering delivery of the jewellery or for payment of its value. The Trial Court dismissed the action upholding the case of the appellant that the jewellery was returned to the plaintiff by Lachhmi Narain on April 23, 1942. In appeal, the High Court of Allahabad reversed the decree passed by the Trial Court and passed a decree directing that the jewellery be restored to the plaintiff within one month from the date of decree, and in the event of failure to comply with that direction the appellant and his son Ghanshyam to pay Rs. 32,379/6/- together with costs out of the estate of Lachhmi Narain in their hands. Against that decree, this appeal is preferred with certificate granted by the High Court, Ghanshyam who was at all material times a minor died unmarried during the pendency of the appeal before the High Court and his name has been struck off.

The plaintiff's case that on April 5, 1942 she entrusted to Lachhmi Narain her jewellery described in the plaint was not denied by the appellant. The appellant, however, submitted that the jewellery was returned to the plaintiff by Lachhmi Narain on April 23, 1942. The burden of proving that case lay upon the appellant. In support of that case the appellant relied upon a receipt Ext. A-4 which it was claimed the plaintiff had given acknowledging receipt of the jewellery. The Trial Court held that the receipt was "not genuine" and with that view of the High Court agreed. The receipt was not relied upon by the appellant before his Court. But the appellant also relied upon the following circumstances which he claimed established his plea :

> (1) On receiving a telegram on April 20, 1942, from Lachhmi Narain, the plaintiff and her son-in-law Radha Kishen proceeded to Kanpur and remained in that town till April 23, 1942.
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> (2) That on the plaintiff's admission, the steel box in which the jewellery was taken from Jhansi to Kanpur was even at the date of the trial with the plaintiff;

(3) That the plaintiff sent some jewellery to her daughter Shyamabai with the letter Ext. A-2, and in the list of jewellery some items of jewellery entrusted by the plaintiff to Lachhmi Narain are included;

(4) That the plaintiff did not make a demand for the jewellery during the lifetime of Lachhmi Narain and for two years thereafter.

The High Court held that these circumstances did not assist the case of the appellant, and we agree with the High Court in that view.

The plaintiff stated that she proceeded to Kanpur on receiving a telegram, for Lachhmi Narain that the padlock of her house at Rail Bazar, Kanpur, was broken, and that she returned to Jhansi by the evening train leaving Kanpur for Jhansi. She stated that the jewellery was not returned to her by Lachhmi Narain. It is true that the testimony of Dr. Mohan Lal who stated that he had medically treated the plaintiff on the 22nd and 23rd of April, 1942 at Jhansi was found by the Trial Court to be unrealised, and the record of his Dispensary untrustworthy. But from the presence of the plaintiff at Kanpur on April, 23, 1942, no inference may be raised that she received the jewellery for Lachhmi Narain on that day.

It was not the case of the plaintiff that she entrusted the jewellery to Lachhmi Narain in the steel-box; she stated that the jewellery was handed over to Lachhmi Narain in "baskets", and she carried the empty steel-box with her to Jhansi.

The letter Ext. A-2 is admitted to be written by the plaintiff, but it bears no date. Again similarity of name of individual pieces of jewellery commonly used by women in well-to-do families in Ext. A-2 and in the list of jewellery entrusted to Lachhmi Narain does not lead to the inference that after receiving the jewellery from Lachhmi Narain the plaintiff sent it to her daughter Shyamabai. Radha Charan with whom the jewellery was sent to Shyamabai has not been examined as a witness and the testimony of Banwari Lal - husband of Shyamabai - who deposed about the circumstances in which the jewellery was sent to Shyamabai goes against the case of the appellant.

In view of the confidence reposed by the plaintiff in Lachhmi Narain, absence of a demand for return of the jewellery during the lifetime of the letter is not significant. After the death of Lachhmi Narian it appears that the oral demands were made of return of the jewellery from the appellant : see the lawyer's notice Ext. 24.

The circumstances taken either individually or collectively do not make out the case for the appellant.

Counsel for the appellant contended that in any event the suit filed by the plaintiff was not maintainable, because on her own case the jewellery was left with Lachhmi Narian with the object of defrauding Gomti Bai - widow of the son of the plaintiff. The facts which have a bearing on the plea may be set out. Ram Sewak son of the plaintiff died in November 1941 leaving him surviving his wife Gomtibai. Between Gomtibai and the plaintiff there arose disputes, which were referred the arbitration, and during the pendency of the arbitration proceeding, the plaintiff entrusted the jewellery to Lachhmi Narain. The appellant contends that on the averments made in the plaint, the suit filed by the plaintiff was liable to be dismissed on the maxim "in pari delicto, portior est conditio defendentis".

In paragraph 5 of the plaint it was averred by the plaintiff that after the death of Ram Sewak, his

widow Gomtibai demanded partition of the property of the family, and she made a claim to the plaintiff's ornaments. In paragraph 6 it was stated that the plaintiff's brother Lachhmi Narain "gave her to understand and assured her" that it was not safe to keep her jewellery at Jhansi and that she should deposit the jewellery with him at Kanpur. In the plaint it was further stated :

> "Because of the dispute with Gomti Bai and political movement, and on the advice of defendants Nos. 1 to 7, the plaintiff also thought it proper to deposit her ornaments will Lachhmi Narain and defendants for their safety. Accordingly after coming from Jhansi City, the plaintiff on . . . 15 April, 1942, deposited her jewellery . . . . with Lachhmi Narain . . . and got a writing in respect of the deposit of the ornaments by Shyama Charan and Priya Charan in the presence of and in consulting with defendants Nos. 1 and 7 and also made a note on the same in his own hand with respect of the deposit of the ornaments. . . .".

In paragraph 7 it was stated that in the dispute between the plaintiff and Gomti Bai, Lachhmi Narain had been showing great sympathy with the plaintiff and ultimately, according to his desire and in consultation with him, an agreement was reached on June 27, 1942, between the plaintiff and Gomtibai, and it was settled that the plaintiff be declared owner of the jewellery in her possession and which was kept in deposit with Lachhmi Narain and that Gomti Bai be declared owner of the Jewellery in her possession.

In the written statement filed by the appellant it was stated :

> "(5) As regards para No. 5 of the plaint, it was admitted that there took place death of Ram Sewak son of the plaintiff, and certain disputes between the plaintiff, and widow of Ram Sewak. Rest is not admitted.
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> "(6) As regards para No. 6 of the plaint, it was admitted that the plaintiff kept some ornaments with her brother on 15th April, 1942 out of a certain policy. Rest is not admitted.
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> (7) As regards para No. 7 of the plaint, it is admitted that Lala Lachhmi Narain had sympathy with the plaintiff and that an agreement was arrived at between the plaintiff and Gomti Bai. Rest is wrong and not admitted. Lala Lachhmi Narain did not at all participate in the disputes between the plaintiff and Gomti Bai, nor was any agreement arrived at in consultation with Lala Lachhmi Narain."

Counsel for the appellant contends that the plaint contains clear admissions that the plaintiff and Lachhmi Narain colluded with the object of the defeating the claim of Gomtibai, that in furtherance of that object the plaintiff entrusted the jewellery to Lachhmi Narain, and that in consequence thereof Gomtibai was defrauded. It is clear that the appellant did not plead that with a view of defeat the claim of Gomti Bai the plaintiff and Lachhmi Narain entered into an arrangement under which the property belonging to Ram Sewak was handed over to Lachhmi Narain and that as a result of that arrangement the claim of Gomti Bai was defeated. No issue was raised at the trial that in consequence of the arrangement between the plaintiff and Lachhmi Narain, Gomtibai was defrauded of her rightful claim. From the averments made in paragraph 7 it appears that it was the plaintiff's case that Gomtibai knew that the jewellery in dispute in this suit was in the possession of the plaintiff, and by an agreement between her and the plaintiff she admitted that the jewellery was to belong to the plaintiff. It is clear that on the averments made in the plaint, the plaintiff did not plead

that she deposited the ornaments belonging to Gomtibai with Lachhmi Narain with a view to defeat the claim of Gomtibai and the latter was in fact defrauded. The Trial judge in his judgment observed :

> "The alleged entrustment of the ornaments of Lachhmi Narain was meant to save them from the clutches of Musammat Gomti Bai, the rightful owner's widow. The purpose was achieved, and Musammat Gomti Bai had not the scent of the ornaments, which do not seem to have been considered at the time of the adjustment by the arbitrators on the basis of which they made the award. The fraudulent intent of Lachhmi Narain and the plaintiff was thus successful. What the plaintiff now wants to claim really belonged to her son Ram Sewak and after him for life, to his widow Musammat Gomti Bai . . . . I do not think that the plaintiff return the ornament even if they had not been returned . . .".

In so observing, in our judgment, the learned Trial Judge determined an issue which did not arise on the pleading of the parties. If the plaintiff's case as set out in the plaint be accepted, Gomtibai knew that jewellery of the family was handed over by the plaintiff to Lachhmi Narain, and it was agreed between the contesting parties that the jewellery was to be retained by the plaintiff. No argument was apparently addressed before the High Court on the case which appealed to the Trial Court. There was no specific plea raised in the Trial Court on that part of the case, and the parties did not go to trial on that issue. Again, unless the parties were proved to be in pari delicto the plea that the action instituted by the plaintiff was not maintainable cannot succeed.

The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim in pari deucto portior est conditio defendentis. But as stated in Anson's 'Principles of the English Law of Contracts', 22nd End., p. 343 : 'there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered - cases to which the maxim does not apply. They fall into three classes : (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant. (c) Where the plaintiff does not have to rely on the illegality to make out his claim.'

There was in this case no plea by the plaintiff that there was any illegal purpose in entrusting the jewellery to Lachhmi Narain. It was also the plaintiff's case that Gomtibai knew that the Jewellery in dispute was entrusted by the plaintiff to Lachhmi Narain, and if the averments made in the plaint are to be the sole basis for determining the contest, Gomtibai did not suffer any loss in consequence of the entrustment. Assuming that the Trial Court was competent without a proper pleading by the appellant and an issue to enter upon an enquiry into the question whether the plaintiff could maintain an action for the jewellery entrusted by her to Lachhmi Narain, the circumstances of the case clearly make out a case that the parties were not "in pari delicto". It is settled law that 'where the parties are not in pari delicto, the less guilty party may be able to recover money paid, or property transferred, under the contract. This possibility may arise in three situations.

First, the contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one. . . . .

Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure. . . . .

Thirdly, there is some authority for the view that a person who is under a fiduciary duty to the plaintiff will not be allowed to retain property, or to refuse to account for moneys received, on the ground that the property or the moneys have come into his hands as the proceeds of an illegal transactions. See Anson's 'Principles of the English Law of Contract' p. 346. It was the plaintiff's case that it was at the persuation of Lachhmi Narain that the jewellery was entrusted to him.

Again on the plaintiff's case Lachhmi Narain was under a fiduciary duty to the plaintiff and he could not withhold the property entrusted to him on the plea that it was delivered with the object of defeating the claim of a third party.

Liability of the appellant was denied on one more ground. It was urged that Lachhmi Narain and the appellant were members of a joint Hindu Family and the appellant was not liable to pay out of the joint family property the debts of Lachhmi Narain which were avyavaharika or illegal. Counsel for the appellant submitted that since Lachhmi Narain had misappropriated the jewellery entrusted to him by the plaintiff, no liability to discharge the liability arising out of that misappropriation could be enforced against the joint family estate in the hands of the appellant. Reliance in this connection was placed upon the decision of the Judicial Committee in Toshanpal Singh & Ors. v. District Judge of Agra & Ors. (L.R. 61 I.A. 350). In that case the Secretary of a school committee who was in charge of a fund deposited at a Bank was authorised to draw upon it only for specific purposes connected with the school. The Secretary misappropriated the fund, and after his death the committee sued his sons to recover from them out of property left by their father, or out of the property of their joint Hindu family, the deficiency in the fund. It was held by the Judicial Committee that the drawings for unauthorised purposes were criminal breaches of trust, and under the Hindu law the sons to that extent were not liable to satisfy that liability out of the joint family estate. This case, in our judgment, does not support the contention raised by counsel for the appellant. A Hindu son governed by the Mitakshara law is liable to pay the debts of his father even if they are not incurred for purposes of legal necessity or for benefit to the estate, provided the debts are not avyavaharika or illegal. But there is no evidence that the appellant is sought to be rendered liable for a debt which is avyavaharika or illegal. In raising his contention counsel assumes that Lachhmi Narain had misappropriated the jewellery entrusted to him, but for that there is no support. Granting that the appellant was, after the death of Lachhmi Narain, unable to trace the jewellery entrusted by the plaintiff, it cannot be inferred that the jewellery was misappropriated by Lachhmi Narain. The burden of proving that there was a debt and that the debt was avyavaharika or illegal lay upon the appellant. There is no evidence to prove that the debt was avyavaharika or illegal.

The appeal fails and is dismissed with costs.

Y.P.

Appeal dismissed.

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