

BOMBAY HIGH COURT

Guddappa Chikkappa Kurbar

Vs

Balaji Ramji Dange

(John Beaumont, Kt., C.J. Divatia and Macklin, J.)

06.02.1941

JUDGMENT

John Beaumont, Kt., C.J.

1. This is a second appeal from a decision of the Assistant Judge of Dharwar, which has been referred to a full bench, because it raises the question whether the decision of this Court in *Sidlingappa v. Hirasa*¹ is correct.

2. The facts as found by the lower Courts are that in 1923 there was a decree passed against defendants Nos. 1 and 2, who are the present appellants, which decree was in process of being executed. Then on January 3, 1928, the defendants executed in favour of the present plaintiff what purported to be a sale-deed, and on that deed the plaintiff sues for possession. Both the lower Courts have held that in fact no consideration passed on that sale-deed, that it was part of a fraudulent attempt on the part of the defendants to defeat their creditors, and that the deed on which the plaintiff sues was in effect a benami transaction. On those findings, which bind us in second appeal, the learned Subordinate Judge dismissed the plaintiff's suit on the ground that to grant a decree in favour of the plaintiff would be to assist him in perpetrating a fraud. The defendants are still in possession, and the plaintiff, unless he can get a decree for possession from the Court, will not be able to gain any advantage from this alleged sale-deed. In appeal the learned Assistant Judge overruled the decision of the trial Court on the authority of *Sidlingappa v. Hirasa* (supra).

3. The principles, which must govern cases of this sort are in my opinion clear. No Court will allow itself to be used as an instrument of fraud, and no Court by the application of rules of evidence or procedure, can allow its eyes to be closed to the fact that it is being used as an instrument of fraud. The legal maxim is *ex turpi causa non oritur actio*. Once the Court finds that the plaintiff is seeking its assistance to enable him to get the benefit of what is a fraud, the Court refuses to assist him. If, as a result of such refusal, the defendant is left in possession of some

advantage derived from his own fraud, that is not due to any action on the part of the Court. It is a fraud for a plaintiff to claim beneficial title under a deed in respect of which he was a mere benamidar, and the Court cannot refuse to allow the defendant to prove the benami nature of the transaction, even though in doing so the defendant may have to rely on his own wrong doing.

4. In *Sidlingappa v. Hirasa* (supra) the facts were substantially the same as in the present case, and the Court there held that the defendant could not be allowed to defeat the plaintiff's case by alleging his own fraud. It was pointed out that the deed on which the plaintiff sued was ostensibly a valid conveyance, and it was held that the defendant could not be allowed to show that it was not what it purported to be, a conveyance on sale, by setting up his own fraud. The leading judgment was given by Sir Lawrence Jenkins, and I should never differ from any decision of his without very great diffidence, but, in my opinion, his decision in that case cannot be supported. The judgment resulted in the Court decreeing possession to a man who, on the facts proved, had no title whatever to possession, and was setting up a fraudulent claim. The case seems to postulate the existence of some sort of rule of estoppel, under which a defendant is never entitled to set up his own fraud; but, in my opinion, there is no such rule. An admission by a witness that he has been guilty of, fraud never comes gracefully, but at the same time such admissions cannot be said to be illegal. I think the true rule is stated by Sir Grimwood Mears in *Vilayat Husain v. Misran*² where he says (p. 398):--In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the court to look into the matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the court to give him some help) and that of the defendant, the duty of the court is not to assist either party; in other words, the duty of the court is to dismiss the claim, because the court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them.

5. In the present case the fraud which the plaintiff and the defendants perpetrated on the defendants' creditors is a thing of the past, and this Court is not asked, and would certainly refuse, to assist in that. The fact that such a fraud was perpetrated in the past cannot justify this Court at the present time in assisting the plaintiff to perpetrate a further fraud upon the defendant.

6. We have been referred to a considerable number of cases, and, except for the Madras High Court, all the other High Courts have not followed the principle laid down in *Sidlingappa v. Hirasa*. This High Court itself in two earlier cases, *Luckmidas Khimji v. Mulji Canji*³ and *Babaji v. Krishna*⁴ had adopted what I venture to think is the right principle, and said that in a case of

this sort the Court does not interfere to assist the plaintiff, but leaves the estate to lie where it falls. Unfortunately those cases were not discussed in *Sidlingappa v. Hirasa*, *Sidlingappa v. Hirasa* has been disapproved by the Allahabad High Court, by the Lahore High Court, and by the Calcutta High Court. In *Qadir Bakhsh v. Hakam*⁵ a full bench of the Lahore High Court went in considerable detail through all the cases on this subject in the High Courts in India, and arrived at the conclusion that the true principle is that the Court in a case of this sort would not interfere to help the plaintiff, even, though in proving the fraudulent nature of the plaintiff's claim it is necessary for the defendant to rely on his own earlier fraud. In the Madras High Court there are several cases which follow *Sidlingappa v. Hirasa*. The last of them, which is *Kotayya v. Mahalakshamma*⁶ merely rests the decision on the doctrine of stare decisis, though apart from the decisions of the Madras High Court itself, the balance of authority is heavily against the view taken. To my mind, the principle, which was acted upon in *Sidlingappa v. Hirasa*, is fundamentally wrong and offends against the rule that the Court must never allow itself to be used to assist in the perpetration of fraud, *Sidlingappa v. Hirasa* must be treated as overruled.

7. In my opinion, the decision of the learned trial Judge in this case was right, and the decision of the lower appellate Court was wrong. We must, therefore, allow the appeal, set aside the decree of the lower appellate Court, and restore that of the trial Court, with costs throughout.

Divatia, J.

8. The point arising for decision in this appeal is whether it is open to the defendants to prove a joint and successful fraud of themselves and the plaintiff to defeat the latter's claim for possession of property conveyed under a collusive and nominal transaction. The lower appellate Court has held, relying on a decision of our High Court in *Sidlingappa v. Hirasa*⁷ that the defendants cannot plead their own fraud as an effective answer to a claim to property conveyed by them to a benamidar. On this point the opinion of our own as well as other High Courts is not unanimous. In three previous decisions of our High Court the view adopted was that it was open to the defendant to defend his possession by proving that the transaction of sale between himself and the plaintiff was effected to defraud a third party: *Luckmidas Khimji v. Mulji Canji*⁸ *Babaji v. Krishna* (1893) I.L.R. 18 Bom. 372 (Supra), and *Honapa v. Narsapa*⁹ That view was based on the well-known maxim that when each party is equal in fault, the law favours him who is actually in possession. In *Sidlingappa v. Hirasa* it was, however, held that the defendant cannot plead his own fraud in answer to a claim which is ostensibly good in law and that it was a sounder policy to accept the rule that a party alleging his own participation in the fraud shall not be heard. The same view was expressed by Beaman J. in a later decision in *Sayad Nahannu v. Sabinibibi*¹⁰ In *Lakshman v. Vasudev*¹¹ the decision in *Sidlingappa v. Hirasa* was criticised but was sought to be distinguished on the ground that where the plaintiff, who was a purchaser from a fraudulent

party, had not proved his own good faith and due enquiry, he was not entitled to the assistance of the Court.

9. Among the other High Courts, the Madras High Court is the only one which has in its recent rulings, the last of which is in *Kotayya v. Mahalakshamma* (1933) I.L.R. 56 Mad. 646, adopted the same view as in *Sidlingappa v. Hirasa*, although its earlier decisions were to the contrary. The Calcutta, Allahabad, Lahore and Rangoon High Courts have dissented from the decision in *Sidlingappa v. Hirasa*, and held that the defendant is entitled to maintain his possession by proving the fraudulent nature of the transaction where the fraud is joint and successful: *Raghupati v. Nrisingha*¹² *Vilayat Husain v. Misran*¹³ *Qadir Bakhsh v. Hakam*¹⁴ and *Ma Nan Chaw v. Ma E.*¹⁵ It is to be noted that there is unanimity on the point that the plaintiff cannot be allowed any relief by way of declaration or possession based on a transaction initiated by his own fraud whether with or without the defendant as his accomplice; the diversity of opinion is with regard to the defendant's right to plead the joint fraud in answer to the plaintiff's claim. In order to test the two different views on this point, it is necessary to examine the various ways in which the allegation of fraud can come before a Court. Fraud may be either unilateral or bilateral, i.e., it may be committed only by one party to the suit while the other party is innocent or it may be by both the parties conjointly and collusively to defeat a third person. In both cases it might be successfully effected, by the fraudulent object being accomplished or it might be ineffective in the sense that after the fraudulent transaction has been entered into, its object has been frustrated. In all cases of unilateral or bilateral fraud which has not been successfully accomplished, either party to it can repudiate the fraudulent transaction and can recover or maintain his possession relying upon his real title. That has been laid down in a number of authorities of which the principal ones are *Petherpermal Chetty v. Muniandi Servai*¹⁶ *Jadu Nath Poddar v. Rup Lal Poddar*¹⁷ and *Bai Devmani v. Ravishanhar Oghadbhai*¹⁸ That is also the rule underlying Section 84 of the Indian Trusts Act. Where, however, the fraudulent object is achieved, different results would follow according as the fraud is unilateral or bilateral. Where the fraud is unilateral, the fraudulent party cannot be allowed to plead his own fraud either as a plaintiff or as a defendant on the well-known maxim that no man shall be heard to plead his own fraud. Where the fraud is bilateral and both parties are equal in turpitude, neither of them can, as plaintiff, enforce his claim against the other relying upon the fraudulent nature of the transaction on the same principle that a right of action cannot arise out of fraud. So far the position is clear. But what would happen when the fraudulent plaintiff, suppressing the collusive and nominal nature of the transaction and relying on its outward legality, sues his accomplice in the fraud to obtain possession of property which he would not have been able to get if he had disclosed the fraud? The divergence of opinion emerges here. The decisions, of which *Sidlingappa v. Hirasa* is a type, are based on the view that the defendant is in no better position than the plaintiff and both are governed by the

same principle of incapacity of proving one's participation in fraud. Thus in a case where the defendant has purported to sell his property to the plaintiff by a formally good but really hollow and collusive deed without parting with possession, the plaintiff can obtain a decree for possession by relying on his outwardly good title and preventing the defendant from proving the fictitious nature of the transaction.

10. That is the actual decision in *Sidlingappa v. Hirasa*, and if it is correct that would be the result in the present case also. It is observed in that decision that in order to deter persons effectively from committing frauds, it is a sounder policy to act upon the rule of equity prohibiting a party from proving a fraud of which he is an accomplice than to act upon another rule of equity that the Court will not help a plaintiff where the litigants are parties to a common fraud. In arriving at this conclusion the Court mainly followed an old English decision in *Deo dem Roberts v. Roberts* (1819) 2 B. & Ald. 367(Supra). But, as observed in *Quadir Bakhsh v. Hakam and V ilayat Husain v. Misran*, that decision is not now considered an authority and the Courts act on the principle that where parties are of equal guilt, the estate will lie where it falls, and the defendant can, therefore, plead the fraud to maintain his possession. See *Broom's Legal Maxims* (9th edn.,) at pp. 465-6 and 478-9, and *Taylor on Evidence, Vol. I* (12th edn.,), p. 89. It may be further stated here that the rule applied in *Sidlingappa v. Hirasa* is also based on the principle of estoppel that the defendant being a party to the fraud is estopped from pleading his own fraud, but, as held in *Ram Surun Singh v. Mussamut Pratt Peary* (1870) 13 M.I.A. 551(Supra), there can be no estoppel in the case of joint fraud where the facts are known to both the parties.

11. As I stated before, all the Indian High Courts except the Madras High Court have dissented from the decision in *Sidlingappa v. Hirasa*. After that decision was reported, the Madras High Court changed its former view and adopted the reasoning of that decision. I may state here that in *Petherpermal Chetty v. Muniandi Servai* their Lordships quoted with approval a passage from *Mayne's Hindu Law* to the effect that where the fraudulent purpose has been effected by the colourable grant, the maxim "*In pari delicto potior est condition possidentis*" applies and the Court will help neither party.

12. Testing the matter on principle apart from authorities, it seems to me that the rule adopted in *Sidlingappa v. Hirasa* is less equitable than the other view. By preventing the defendant from establishing the real nature of the transaction, the Courts would encourage the plaintiff, who has already joined in one fraud, to practise another fraud on the Court by falsely posing as an innocent party and misleading the Court which would not have granted him any relief if he had himself alleged the true facts. There is much less reason in equity for allowing the plaintiff the relief which he seeks by suppressing his own fraudulent part and thereby gagging the defendant's mouth from telling the truth.

13. It might be said that if the plaintiff is not allowed to set up his fraud, why should a defendant be allowed to do so, but the answer to that is that the Courts will not allow a fraud being practised on them by the plaintiff and they will hear the defendant on any ground which would defeat a false and fraudulent claim. The defendant in possession does not ask for any relief from the Court but only tells the truth which the plaintiff is suppressing. It is that equitable principle that underlies the maxim that where each party is equal in fault, the law favours him who is actually in possession, thereby not assisting either party to the fraud by granting any executable decree. The rule that as between parties of equal guilt the law favours the party in possession is as good a rule in equity as the rule that no man can plead his own fraud and there is no conflict between them. They can both be worked consistently by applying the latter rule where fraud is pleaded for obtaining relief from Court and the former, where joint fraud is pleaded by the defendant to maintain his possession. Another reason pointing to the same conclusion is that a hollow as well as fraudulent transaction between the parties is void ab initio and as such unenforceable. In such cases, a defendant, by proving a common fraud, proves the void nature of the transaction which would otherwise have not been established.

14. As a result of this discussion the law on the subject can be summarized as follows:--I. In all cases of unilateral or bilateral fraud which has not been successfully effected, either party can repudiate the fraudulent transaction and can recover or maintain his possession by proving his real title.

II. In cases where fraud is accomplished--

(1) where only one party acts fraudulently, he cannot be allowed, either as plaintiff or as defendant, to plead his fraud, on the principle that no man shall be heard to plead his own fraud;

(2) where both parties are equally fraudulent, the Courts will refuse to enforce the fraudulent transaction on the principles that where each party is equal in fault, the law favours him who is actually in possession, and will give relief to neither, and that a right of action cannot arise out of fraud, with the result that--

(a) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed; and

(b) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim.

15. In the present case, the defendants having proved the successful fraud of both the parties, they are entitled to remain in possession and the plaintiff is not entitled to any relief. The appeal should, therefore, be allowed with costs throughout.

Macklin, J.

16. I agree.

Cases Referred.

- 1(1907) I.L.R. 31 Bom. 405, S.C. 9 Bom. L.R. 542
- 2(1923) I.L.R. 45 All. 396
- 3(1880) I.L.R. 5 Bom. 295
- 4(1893) I.L.R. 18 Bom. 372
- 5(1932) I.L.R. 13 Lah. 713, F.B
- 6(1933) I.L.R. 56 Mad. 646
- 7(1907) I.L.R. 31 Bom. 405, s.c. 9 Bom. L.R. 542
- 8(1880) I.L.R. 5 Bom. 295
- 9(1898) I.L.R. 23 Bom. 406
- 10(1911) I.L.R. 37 Bom. 217, S.C. 13 Bom. L.R. 1011
- 11(1930) 33 Bom. L.R. 356
- 12(1922) 36 C.L.J. 491
- 13(1923) I.L.R. 45 All. 396
- 14(1932) I.L.R. 13 Lah. 713, F.B
- 15(1926) I.L.R. 4 Ran. 429
- 16(1908) L.R. 35 I.A. 98, S.C. 10 Bom. L.R. 590
- 17(1906) I.L.R. 33 Cal. 967
- 18(1928) I.L.R. 53 Bom. 321, S.C. 31 Bom. L.R. 109