

M/S.Arvind Syndicate, Prop:Smt. ... vs M/S Rajesh Exports Limited on 13 September, 2012

Author: N.Ananda

Bench: N. Ananda

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IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 13TH DAY OF SEPTEMBER 2012

BEFORE

THE HON'BLE MR.JUSTICE N. ANANDA

CRP No.341/2012 c/w
CRP Nos.342/2012, 343/2012 & 344/2012

CRP.No.341/2012 & 342/2012

BETWEEN:

M/s.Arvind Syndicate
Prop : Smt.Bhawari Bai
W/o late Sri Dungarmalji
Aged about 76 Years
Shop No.797, Mohan Building
A.M.Lane, Chickpet Cross
Bangalore - 560 053.

... Common Petitioner in
CRP.No.341/2012 & 342/2012

(By Sri Paras Jain, Advocate)

CRP.No.343/2012

BETWEEN:

Sri Narendra Kumar
Prop : M/s.Sha Mittalal Narendra Kumar & Co.,
A Proprietary concern carrying
on business at Shop No.314,
Mohan Buildings, Chickpet,
Bangalore - 560 053.

... Petitioner

(By Sri Paras Jain, Advocate)

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CRP.No.344/2012

BETWEEN:

Sri Bhawarlal
S/o late Sri Mohanlalji
Aged about 52 Years
Prop : M/s.M.B.Silk Centre
Shop No.313, A.M.Lane
Chickpet Cross,
Bangalore - 560 053. ... Petitioner

(By Sri Paras Jain, Advocate)

AND:

M/s.Rajesh Exports Limited
A Public Limited Company
Incorporated under the provisions
of the Company's Act, having its
Registered Office at No.4
Batavia Chambers
Kumara Krupa Road East
Bangalore - 560 001. ...Common Respondent

(By Sri G.S.Kannur, Advocate)

CRP.No.341/2012 is filed under section 115 CPC, against the order dated 21.08.2012, passed in Ex. No.25060/2012, on the file of the 26th Additional City Civil Judge, Mayohall, Bangalore, allowing the Execution Petition and etc.

CRP No.342/2012 is filed under section 115 CPC, against the order dated 21.08.2012, passed in Ex. No.25080/2012, on the file of the 26th Additional City Civil Judge, Mayohall, Bangalore, allowing the Execution Petition and etc.

CRP No.343/2012 is filed under section 115 CPC, against the order dated 21.08.2012, passed in Ex. No.25082/2012, on the file of the 26th Additional City Civil Judge, Mayohall, Bangalore, allowing the Execution Petition and etc.

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CRP No.344/2012 is filed under section 115 CPC, against the order dated 21.08.2012, passed in Ex. No.25081/2012, on the file of the 26th Additional City Civil Judge, Mayohall, Bangalore, allowing the Execution Petition and etc.

These petitions having been heard and reserved for orders on 30.08.2012, coming on for pronouncement this

day, the court made the following:-

ORDER

These revision petitions are filed by the judgment debtors in Execution No.25060/2012, 25080/2012, 25082/2012 and 25081/2012.

2. The respondent namely M/s.Rajesh Exports Limited is the common decree holder in aforesaid execution petitions. The decree holder M/s.Rajesh Exports Limited had obtained decree for possession in O.S.No.17424/2006, O.S.No.17469/2006, O.S.No.17425/2006 and O.S. No.17387/2006 in respect of different shops, which forms part and parcel of building called 'Mohan building', situate at Chickpet, Bangalore. The decree holder M/s.Rajesh Exports Limited had filed the aforesaid execution petitions. The petitioners (judgment debtors) in aforesaid execution petitions resisted execution of decree inter alia contending that decrees made in O.S.No.17424/2006, O.S.No.17469/2006, O.S.No.17425/2006 and O.S.No.17387/2006 are nullity in the eye of law and they are vitiated by fraud. The learned judge of the Execution court has rejected their objections. Therefore, they are before this court.

3. In the circumstances, following point would arise for determination:

Whether the Execution Court was justified in rejecting the contention of petitioner in CRP No.341/2012 (defendant in O.S.No.17424/2006 and Judgment Debtor in Execution No.25060/2012), petitioner in CRP 342/2012 (defendant in O.S.No.17469/2006 and judgment debtor in Execution No.25080/2012) and petitioner in CRP 343/2012 (defendant in O.S.No.17425/2006 and judgment debtor in Execution No.25082/2012) and petitioner in CRP 344/2012 (defendant in O.S.No.17387/2006 and judgment debtor in Execution No.25081/2012), that decrees made in original suits are nullity in the eye of law and they are vitiated by fraud ?

4. I have heard Sri.Paras Jain, learned counsel for petitioners and Sri.G.S.Kannur, learned counsel for common respondent.

5. The learned counsel for petitioners has made following submissions:

I That the aforesaid suits were filed by common respondent (common plaintiff in the aforesaid suits) by suppressing memorandum of understanding dated 20.05.2006 entered into between petitioners and respondent in respect of shops, which are in occupation of petitioners in Mohan building, situate at Chickpet, Bangalore. In terms of memorandum of understanding dated 20.05.2006, petitioners ceased to be the tenants and they were in possession of respective shops as intending purchasers. The respondent herein had suppressed memorandum of understanding before the trial court, therefore, judgment is vitiated by fraud.

II The aforesaid suits were instituted on the file of 26th Addl. City Civil Judge, Mayohall, Bangalore. The court of 26th Addl. City Civil Judge, Mayohall, Bangalore did not have jurisdiction to

try the suits, therefore, decrees made in the aforesaid suits are void-ab-initio. The Execution Court should have dismissed the execution petitions on this ground.

6. The learned counsel for respondent has contended that memorandum of understanding dated 20.05.2006 was not only brought to the notice of the trial court, it was also considered in RFA No.1478/2010 c/w 1480, 1484 & 1485/2010 wherein, this court has exhaustively dealt with rights of petitioners under the memorandum of understanding dated 20.05.2006 and this court has held that, notwithstanding memorandum of understanding dated 20.05.2006, petitioners continued to be tenants under the respondent.

The learned counsel would further submit that against the judgment made by this court in RFA No.1478/2010 c/w 1480, 1484 & 1485/2010, petitioners herein were before the Supreme Court in Special Leave to Appeal (Civil) No.31656- 31657/2011. The Supreme Court on 20.01.2012 has made the following order :

"Special leave petitions are dismissed. Needless to say that the petitioners shall be at liberty to enforce their rights, if any, pursuant to Memorandum of Understanding dated May 20, 2006."

7. The learned counsel for respondent would submit that, aforesaid suits were filed for ejectment, arrears of rent and damages. The court of 26th Addl. City Civil Judge, Mayohall, Bangalore, had inherent jurisdiction to try the suits. Therefore, the contention of learned counsel for petitioners that judgment and decree are vitiated by fraud and lack of jurisdiction are untenable.

8. The learned counsel for parties have taken me through judgments made in O.S.Nos.17424/2006, 17469/2006, 17425/2006 and 17387/2006 and judgment of this court in RFA No.1478/2010 c/w 1480, 1484 & 1485/2010 and order of Supreme Court in SLP (Civil) No.31656-31657/2011.

9. After going through the judgments made in O.S.Nos.17424/2006, 17469/2006, 17425/2006 and 17387/2006, I find that the trial court has granted decree for ejectment and also damages at the rate of Rs.500/- per month till the date of handing over vacant possession of petition schedule premises to the plaintiff. The petitioners herein have contended that they had perfected their title by adverse possession. The trial court has rejected such contention. The trial court has rejected the contention of petitioners that by virtue of memorandum of understanding dated 20.05.2006, defendants ceased to be tenants and there was no jural relationship of Landlord and tenant.

10. The learned trial judge has held that, memorandum of understanding was entered into between Mohan Building Tenant's Association and plaintiff. The memorandum of understanding dated 20.05.2006 stipulates that separate agreements will have to be executed to each of the tenants in occupation of different shops in Mohan building. Therefore, memorandum of understanding dated 20.05.2006 is not an agreement of sale or concluded contract and notwithstanding such memorandum of understanding, petitioners herein continued to be tenants in occupation of respective shops of Mohan building.

11. The petitioners had filed RFA Nos.1478/2010 c/w 1480, 1484 & 14 85/2010 against decree made in O.S.Nos.17424/2006, 17469/2006, 17425/2006 and 17387/2006 This court by judgment dated 14.06.2011 dismissed the regular first appeals. This court while dealing with contention relating to memorandum of understanding and the proceedings leading to memorandum of understanding dated 20.05.2006 has held:

"32. The learned trial Judge has adverted to all these admitted facts and has recorded a finding to the effect that there exists landlord- tenant relationship between the parties and the trial court also took note of the several decisions in this regard. Even in the sale deed Ex.P5, it has been clearly mentioned that though the purchaser i.e., the plaintiff herein acknowledges having taken actual possession of schedule property, the purchaser is entitled to direct all the tenants to attorn the tenancy and to regulate all the tenancy affairs with the purchaser M/s.Rajesh Exports Limited. Therefore, when the appellants and other tenants failed to challenge the auction in favour of the plaintiff and the writ petition was dismissed and writ appeal was also withdrawn by them, though on the basis of the MoU entered into between the parties, all through the appellants were aware and by their conduct also confirmed that they continued to be the tenants.

33. The very fact that some of the tenants even filed a suit for specific performance based on the MoU also goes to indicate that the tenants who had approached the trial court in the said suit for specific performance also did not dispute the fact of they being the tenants under the plaintiff. Though in the instant appeals before this Court, the appellants contend that they had not filed any suit for specific performance, the filing of suit for specific performance by some of the tenants has not been denied by the present appellants.

34. Under the aforesaid circumstances, if the appellants by their own conduct accept implicitly the execution of sale deed as per Ex.P5 in favour of the plaintiff by the Income Tax Department and do not challenge the said sale deed in any proceedings, but on the other hand, questioned the very auction itself and also made a bid to purchase the commercial complex, all these would go to show that the appellants did project themselves and also conducted themselves as tenants and nothing else. Therefore, the decisions referred to by the learned counsel Sri Paras Jain for the appellants touching upon the status of tenants as tenants at sufferance will not come to the aid of the appellants in the instant cases before us.

35. Once it is held that the appellants are the tenants under the respondent-plaintiff, the next aspect is as to the plaintiff failing to comply with the requirement of Section 106 of the Transfer of Property Act. The suit is one for ejectment of the appellants. The notice that was required to be issued was issued by the plaintiff and the trial court has also taken note of the date of issuance of notice and receipt of the same by the appellants and found that the requirement of Section 106 of the T.P.Act has been fully complied by the plaintiff. In fact, even in the course of the arguments, learned

counsel for the appellants also did not dispute the factum of notice having been duly issued to the appellants and no infirmity in the notice is also pointed out. As such, the plaintiff has made out a case for ejectment of the appellants from the respective shop premises."

The judgment of this court made in RFA Nos.1478/2010 c/w 1480, 1484 & 1485/2010 was challenged before the Supreme Court in SLP (Civil)

No.31656-31657/2011. On 20.01.2012, the Supreme Court has dismissed the special leave petitions in terms of following order:

"Special leave petitions are dismissed.

Needless to say that the petitioners shall be at liberty to enforce their rights, if any, pursuant to Memorandum of Understanding dated May 20, 2006."

12. It is not in dispute that petitioners herein have filed suits for specific performance to enforce their rights under the memorandum of understanding dated 20.05.2006. Therefore, the contention of petitioners that decrees made in O.S.Nos.17424/2006, 17469/2006, 17425/2006 and 17387/2006 are vitiated by fraud cannot be accepted.

13. The learned counsel for petitioners has relied on following decisions:

- 1) AIR 2003 SC 4149
- 2) AIR 2009 KAR 88
- 3) (2005) 7 SCC 605
- 4) AIR 1994 SC 853
- 5) (2007) 4 SCC 221 to contend that decrees in execution are vitiated by fraud.

The learned counsel would submit that, if memorandum of understanding dated 20.05.2006 had been brought to notice of the trial court, the suits would have been dismissed.

14. The learned counsel for petitioners has relied on following decisions:

- 1) AIR 1954 SC 340
- 2) (1977) 2 SCC 662

3) AIR 1987 SC 535

4) 1969 (1) SCC 59

5) AIR 1996 SC 1819 to contend that the court of 26th Addl. City Civil Judge, Mayohall, Bangalore, had no jurisdiction to try the suits.

The aforesaid suits were filed for ejectment. The plaintiff has made necessary averments to found a cause of action for ejectment and recovery of damages. The petitioners were well aware of their rights under the memorandum of understanding dated 20.05.2006. The defendants had brought the memorandum of understanding dated 20.05.2006 to the notice of the trial court. The defendants had also contended that they have perfected their title by adverse possession.

15. The learned trial judge on consideration of memorandum of understanding dated 20.05.2006 has held that, the document was entered into between Mohan Building Tenant's Association and plaintiff namely M/s.Rajesh Exports Limited. The memorandum of understanding dated 20.05.2006 provides that tenants will have to enter into separate agreements with M/s.Rajesh Exports Limited (respondent herein). The learned trial judge has held that, memorandum of understanding is not an agreement of sale and it is not a concluded contract.

16. In Para 11 of this order, I have restated the findings of this court on the memorandum of understanding dated 20.05.2006 in RFA Nos.1478/2010 c/w 1480, 1484 & 1485/2010. I have also extracted the order of the Supreme Court wherein, the Supreme Court has held that, the petitioners herein are at liberty to enforce their rights, if any, pursuant to memorandum of understanding dated 20.05.2006. In the circumstances, petitioners cannot be heard to say that there was suppression of memorandum of understanding dated 20.05.2006 before the trial court, this court and the Supreme Court and the decrees made in O.S.Nos.17424/2006, 17469/2006, 17425/2006 and 17387/2006 are vitiated by fraud.

In the discussion made supra, I have held that plaintiff had made necessary averments to seek the relief of possession and also for recovery of arrears of rent and damages. Therefore, the court of 26th Addl. City Civil Judge, Mayohall, Bangalore, before which the suits were filed had inherent jurisdiction to try the suits.

17. The petitioners herein have contended that they ceased to be tenants after execution of memorandum of understanding dated 20.05.2006. The petitioners had also contended that they have perfected their title by adverse possession. Therefore, they cannot be permitted to contend that their possession is protected by the provisions of Karnataka Rent Act. It is not a situation where the petitioners had admitted that they are in possession of shops as tenants and their rights are protected by the provisions of Karnataka Rent Act. Therefore, contention of petitioners that the court of 26th Addl. City Civil Judge, Mayohall, Bangalore, did not have inherent jurisdiction to try the suits cannot be accepted.

18. Now, let me advert to the decisions relied upon by the learned counsel for petitioners.

In a decision reported in AIR 2003 SC 4149 (in the case of R.Kanthimathi and Other Vs. Mrs.Beatrice Xavier), the Supreme Court has held:-

"6. Any jural relationship between two persons could be created through agreement and similarly could be changed through agreement subject to the limitations under the law. Earlier when appellants were inducted into tenancy it only means both agreed that their relations is to be that of a landlord and tenant. Later when landlord decides to sell this property to the tenant and tenant agreed by entering into agreement they by their positive act changed their relationship as purchaser and seller. When seller-landlord accepts sum he actually acts under this agreement. This acceptance preceded by agreement of sale changes their relationship. This is how they intended. Once accepting such a change then their relationship of landlord tenant ceases."

19. In a decision reported in AIR 2009 Karnataka 88 (in the case of B.Paramashivaiah & Anr. -vs- M.K.Shankar Prasad & Anr.) this court has held that:

"If the tenant is put in possession by virtue of an agreement to sell and does certain acts in furtherance of said agreement, relationship of landlord and tenant would cease from the date of agreement. Section 53-A enables such tenant/purchaser in possession of premises by virtue of agreement or contract to defend his possession."

20. In a decision reported in (2005) 7 SCC 605 (in the case of Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Others), the Supreme Court has held :

"9. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. (See *Vimla (Dr.) v. Delhi Admn.* and *Indian Bank v. Satyam Fibres (India) (P) Ltd.*)

10. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Chengalvaraya Naidu v. Jagannath*).

11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other

person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud.

Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi⁶).

12. In *Shrisht Dhawan v. Shaw Bros.*⁷, it was observed as follows : (SCC p.553, para 20) "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Camus, who exulted in his ability to, "wing me into the easy hearted man and trap him into snares". It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Law Dictionary, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. *Derry v. Peek*⁸ what constitutes "fraud" was described thus: (All ER p. 22 B-C) "Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or

(iii) recklessly, careless whether it be true or false".

But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in administrative law. It has been aptly observed by Lord Bridge in *Khawaja v. Secy. of State for Home Deptt.*⁹ that it

is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute.

'If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope'. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. 'In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain'. In public law the duty is not to deceive". (See *Shrisht Dhawan v. Shaw Bros.* 7, SCC p.554, para 20.)

21. In a decision reported in AIR 1994 SC 853 (in the case of S.P.Chengalvaraya Naidu (dead) by L.R.'s -vs- Jagannath (dead) by L.R.'s and others) the Supreme Court has held:

"that withholding of vital document relevant to litigation is an act of fraud on the court."

22. In a decision reported in (2007) 4 SCC 221 (in the case of A.V.Papayya Sastry & Others -vs- Government of A.P. and Others) the Supreme Court has held that:

"Judgment, decree or order obtained by fraud has to be treated as non est and nullity, whether by court of first instance or by the final court. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings."

23. In a decision reported in AIR 1954 SC 340 (in the case of Kiran Singh and others -vs- Chaman Paswan and others) the Supreme Court has held:

"that a decree passed by a court without jurisdiction is a nullity, and that and its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings."

24. In the discussion made supra I have held that memorandum of understanding upon which the petitioners bank upon, has been considered by the trial court and also by this court in RFA Nos.1478/2010 c/w 1480, 1484 & 1485/2010. The Supreme Court has held:

"Special leave petitions are dismissed. Needless to say that the petitioners shall be at liberty to enforce their rights, if any, pursuant to Memorandum of Understanding dated May 20, 2006."

Therefore, the contention of petitioners that respondent was guilty of suppression of memorandum of understanding has no basis.

25. In the discussion made supra, I have held that the court of 26th Addl. City Civil Judge, Mayohall, Bangalore, before which the suits were instituted, which granted decree, had inherent, pecuniary and territorial jurisdiction to try the aforestated suits. Therefore, contention of petitioners that the court, which passed the decrees, had no jurisdiction and decrees are nullity in the eye of law cannot be accepted.

26. In view of the above discussion, what has been held in the decisions relied upon by the learned counsel for petitioners has no bearing on the facts of the instant case.

27. In the result, I pass the following:

ORDER The petitions are dismissed.

Sd/-

Np/ -

JUDGE