LETTERS PATENT APPEAL.

Before Jenkins C. J., and D. Chatterjee J.

1914
March 26.

NANDA KUMAR HOWLADAR

v.

RAM JIBAN HOWLADAR.*

Fraud—Decree—Decree, when can be set aside for fraud—Onus of proof—Res Judicata—Evidence Act (I of 1872) s. 44.

It is beyond question that the jurisdiction to impugn a previous decree for fraud exists. But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation.

The fraud used in obtaining a decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated.

One who seeks to impugn a decree passed after contest takes on himself a heavy burden, and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous. Nor can a prior judgment be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where and in what way the fraud was committed. The fraud must be actual, positive fraud,—a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance.

Shedden v. Patrick et Al. (1) *Ochsenbin v. Papelier* (2) and *The Duchess of Kingston's Case* (3) followed.

The character of fraud vitiating a decree would vary with the circumstances of each class of decree.

LETTERS PATENT APPEAL by Nanda Kumar Howladar, the plaintiff No. 1, from the judgment of Chapman J.

*Letters Patent Appeal No. 47 of 1913, in Appeal from Appellate Decree No. 182 of 1911.

(1) (1854) 1 Macq. 535. (2) (1875) L. R. 8 Ch. App. 695.
(3) (1776) 2 Sm.L. C. 11th Ed., 731.

The plaintiffs were the holders of six- annas share of a tenure, called *howla*. The tenure had been partitioned. The plaintiffs' case was that they were in immediate possession of all the lands allotted to their six-annas share and that in spite of this, the defendant No. 1 fraudulently obtained an entry in the Settlement Record to the effect that the defendant No. 1 held a sub-tenure (*nim-howla*) under the plaintiffs and that the plaintiffs were in cultivating possession of the land as his, the defendant No. 1's, tenants, as *karsha raiyats*. After obtaining this entry in the Settlement Record, the defendant No. 1 sued the plaintiffs for rent and obtained a decree. The present suit was for a declaration that the rent-decree obtained by defendant No. 1 was inoperative and that the plaintiffs were in possession of the land, not as the tenants of defendant No. 1, but in their own right as tenure-holders (*howladars*). The Munsif held that the plaintiffs had failed to prove that there was no *nim-howla* under the *howla* of the plaintiffs, as alleged by the defendant, and dismissed the suit. On appeal, the Subordinate Judge decreed the plaintiffs' suit. Defendant No. 1 appealed and contended that the suit was barred by reason of the previous decision in the suit for rent. Chapman, J., sitting singly, heard the second appeal, and upheld the contention of the defendant-appellant. The result was that the appeal was decreed and the suit dismissed with costs in all courts. Plaintiff No. 1 thereupon preferred an appeal under cl. 15 of the Letters Patent.

Babu Brajendra Nath Chatterji, for the appellant. If the decree in the previous rent-suit was obtained by fraud, it cannot operate as *res judicata* : *vide*, section 14, Indian Evidence Act. Fraud vitiates everything, even the most solemn proceedings of a

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Court of law. The fraud consisted in getting the decree in the previous rent-suit by means of documents known to be forged and on evidence known to be false. The plaintiff in the rent-suit used an entry in the Settlement Record which he had obtained fraudulently by suppressing two decrees which had declared that the plaintiff had no *nim-howla* right under the 16-annas *howladar*. When a man gets a decree by suppressing evidence and by means of false evidence and by means of forged documents he commits a gross fraud upon the Court. A decree obtained by means of perjured evidence is liable to be set aside: *Kedar Nath Das* v. *Hemanta Kumari Debi* (1), *Lakhmi Churn Shaha* v. *Nur Ali* (2), and *Venkatappa Naick* v. *Subba Naick* (3). In this case, the Subordinate Judge has found that the defendant brought a rent-suit against me for *karsa* tenancy which had no existence at all, that his alleged *nim-howla* did not exist, that the rent-receipts produced by him were forgeries, and the *kabuliyats* by means of which he proved the existence of the *nim-howla* were sham documents. These are findings of fact arrived at by the lower appellate Court and not assailable in second appeal. These findings are sufficient to prove that the previous rent-decree was obtained by fraud.

[JENKINS C. J. *Munshi Mosuful Huq* v. *Surendra Nath Ray* (4), *Mahomed Golab* v. *Mahomed Sulliman* (5), *Abdul Huq Chowdhry* v. *Abdul Hafez* (6) are against you.]

Abdul Huq Chowdhry v. *Abdul Hafez* (6) is not against me. It holds that fraud gives a cause of action for a suit for setting aside a decree obtained by fraud and so far it is in my favour. The observations in

(1) (1913) 18 C. W. N. 447.
(2) (1911) 15 C. W. N. 1010.
(3) (1905) I. L. R. 29. Mad. 179.
(4) (1912) 16 C. W. N. 1002.
(5) (1894) I. L. R. 21 Calc. 612.
(6) (1910) 14 C. W. N. 695.

Munshi Mosuful Huq's case (1) and in *Mahomed Golab's case* (2) are obiter. If they are held not to be so, I submit they do not lay down good law.

[JENKINS C.J. Have you got any reported case to show that a decree in a contested suit is liable to be set aside for fraud ?]

There are no Indian cases. But see *Cole* v. *Langford* (3), *Abouloff* v. *Oppenheimer* (4) and *Vadala* v. *Lawes* (5). Once it is admitted that an *ex parte* decree obtained by fraud is liable to be set aside by a subsequent suit, it necessarily follows that a suit does lie for setting aside a decree in a contested suit if obtained by fraud : *see* Civil Procedure Code, s. 9. It is a suit of a civil nature and unless its cognizance is barred by some provision of law, a Civil Court has jurisdiction to entertain such a suit. Fraud is none the less a fraud even in a contested suit. The only difference is that a plaintiff who gets such a decree in a contested case is a very clever deceiver. Halsbury in the "Laws of England," Vol. XVIII, p. 316, draws no distinction between an *ex parte* and contested decree as to the effect of fraud practised in obtaining the decree. Here the final Court of fact has found fraud. No doubt, in a contested suit, very strong evidence is needed to set aside the decree.

The English cases I have cited are of course cases of foreign judgments. But the same principles apply as observations in those judgments would show. *See* also sections 11 and 13 of the Civil Procedure Code.

[JENKINS, C. J. But in section 13 we have the provision that only foreign judgments obtained by fraud are not binding.]

(1) (1912) 16 C.W.N. 1002.
(2) (1894) I.L.R. 21 Calc. 612.
(3) [1898] 2 Q.B. 36.
(4) (1882) 10 Q.B.D. 295.
(5) (1890) 25 Q.B.D. 310.

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Yes. There is a similar provision in section 44 of the Evidence Act in respect of all judgments.

Of course, multiplicity of actions and prolongation of litigation should be avoided as far as possible, but no wrong-doer should be allowed to gain an advantage by his own wrong. The Privy Council decisions in *Radha Raman Shaha* v. *Pran Nath Roy* (1) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (2) show that prolongation of litigation is not at all to be considered when a suit is brought for setting aside a decree obtained by fraud. In those two cases, the litigation was very much more prolonged than in this case. In my case, I only want a declaration that the defendant had no *nim-howla* and it is only by way of anticipation that I plead that the decree obtained by the defendant in the rent-suit, which might be supposed to be *res judicata*, is inoperative, having been obtained by fraud. I question the decree in the same way under section 44, Indian Evidence Act, as was done in the case of *Benode Behari Bose* v. *Nistarini Dassi* (3).

I do not know whether I can bring another suit. I submit no separate suit is needed : *Bansi Lal* v. *Dhapo* (4) and *Mir Mozaffer Ali* v. *Kali Proshad Saha* (5). The other side may say it is a contested decree.

[JENKINS C. J. And you were one of the contesting parties.]

But there are four plaintiffs now. Two of these were not represented before. I do not know which two.

If I fail in my contention that the decree in the rent-suit cannot operate as *res judicata* because it has

(1) (1901) I.L.R. 28 Calc. 475.
(2) (1902) I.L.R. 29 Calc. 395; L.R. 29 I.A. 99.
(3) (1905) I.L.R. 33 Calc. 180; L.R. 32 I.A. 193.
(4) (1902) I.L.R. 24 All. 242.
(5) (1913) 18 C.W.N. 271, 274.

been obtained by fraud, I would contend that even if that decree stands it can't be *res judicata* on the question of the landlord's title to the land, *i.e.*, the existence or non-existence of the *nim-howla*. It is only when the tenant sets up his own title as against the landlord that the judgment can be *res judicata*. A mere denial of relationship of landlord and tenant cannot give rise to a consideration of title to land, for that question cannot be directly and substantially in issue.

The Legislature has not allowed appeal or second appeal in many rent suits where there is no conflict of title. It would be disastrous if the decision of the Munsif in a petty rent case could operate as *res judicata* on the question of the landlord's title to the land. Formerly these suits were tried by Revenue Courts, and such Courts could not decide questions of title. The transference of such cases to the Munsif's Court has not changed the old law on this point: see Bengal Tenancy Act, section 153 and *Dwarka Nath Roy* v. *Ram Chand Aich* (1), *Nitya Nunda Sarkar* v. *Ram Narain Das* (2), and *Sahadev Dhali* v. *Ram Rudra Haldar* (3), where all important cases were considered. The case of *Radhamadhub Holdar* v. *Monohur Mukerji* (4) referred to in the judgment of the Lower Appellate Court in this case is clearly distinguishable. That was not a case of rent.

Lastly, I submit that in order to plead *res judicata*, the pleadings in the previous suit, the judgment of which is said to act as *res judicata* have to be proved. This has not been done here: *Gurdeo Singh* v. *Chandrikah Singh* (5).

Babu Gunada Charan Sen, for the respondent. In a rent suit, the issue will no doubt be whether

(1) (1899) I.L.R. 26 Calc. 428.
(2) (1901) 6 C.W.N. 66.
(3) (1906) 10 C.W.N. 820.
(4) (1888) I.L.R. 15 Calc. 756; L.R. 15 I.A. 97.
(5) (1907) I.L.R. 36 Calc. 193.

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the relationship of landlord and tenant subsisted between the parties. But if the question of title of a third party has actually been decided, the judgment will certainly operate as *res judicata*. My learned friend never raised the objection of want of proof of pleadings before this. It has been found that my *nim-howla* did exist. The question of fraud is also negatived by the judgment in the rent suit. See *Lilabati Misrain* v. *Bishun Chobey* (1) and cases cited therein. The question whether the entry in the settlement record was correct or not was also decided in the rent suit and it is not now open to the appellant to prove that that entry was wrong and was obtained by fraud. As regards fraud, the whole basis of their case is that the defendant No. 1 secretly had the *nim-howla* entered by the Settlement Officer. Their case was really that it was not fraud on the Court, but collusion with the Settlement Officer. The Subordinate Judge based his decision on this point, though he found that the materials on record on this point were scanty. The question of fraud was, moreover, gone into by the Munsif in the rent suit. That must operate as *res judicata* in this case. The tenant could have appealed from the rent-decree, if he were so advised to do. He did not. The decree has become final: see *Rambehari Sarkar* v. *Surendra Nath Ghose* (2), *Munshi Mosuful Huq* v. *Surendra Nath Ray* (3), *Abdul Huq Chowdhry* v. *Abdul Hafez* (4) and *Mahomed Golab* v. *Mahomed Sulliman* (5) on the question as to how far a decree may be set aside on the ground of fraud. I do not, however, dispute the effect of fraud, but I say that fraud has not been established in this case.

(1) (1907) 6 C.L.J. 621.
(2) (1913) 19 C.L.J. 34, 39.
(3) (1912) 16 C.W.N. 1002.
(4) (1910) 14 C.W.N. 695.
5 (1894) I.L.R. 21 Calc. 612.

On the question of *res judicata*, besides the cases cited by my learned friend, see *Panchu Mandal v. Chandra Kant Saha* (1), where cases of this nature have been classified and discussed carefully by Mookerjee J.

On fraud, the English and Indian cases cited on the other side are all distinguishable.

Babu Brajendra Nath Chatterji, in reply. The scope of the present suit and of the rent suit are quite different. The question of *res judicata* was not decided in any Court. The real question in issue was 'Has the defendant No. 1 any *nim-howla* right to the disputed land?' What was decided was did the *nim-howla* exist, and not whether the defendant had a *nim-howla* under my *howla*. I was the *karshadar* and also the *howladar*. It was decided in the rent suit that I was the *howladar*. Will that ever afterwards preclude me from proving whether I created a *nim-howla* or not? The English cases already cited by me give a complete answer to the contention of the respondent.

JENKINS C. J. By this suit the plaintiffs seek to establish their title to land. The first defendant contends that the validity of this title has been decided adversely to the plaintiffs by the decree of a competent Court in a previous suit between the same parties, and so cannot now be tried.

The plaintiffs reply that the previous decree cannot support the plea of *res judicata*, and alternatively, that it was obtained by fraud. Mr. Justice Chapman, reversing the decree of the lower Appellate Court, held that the decree in the previous suit supports the plea of *res judicata* and that there is no evidence that the decree was obtained by fraud.

(1) (1909) 14 C. L. J. 220.

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JENKINS C.J.

From this judgment the present appeal has been preferred. The jurisdiction to impugn a previous decree for fraud is beyond question: it is recognised by section 44 of the Evidence Act and is confirmed by a long line of authority. But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated: Mitford on Pleadings, 113. Decrees may be (i) by consent; (ii) *ex parte*, or (iii) after contest, apparent or real; and though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case. One who seeks to impugn a decree passed after contest takes on himself a very heavy burden, and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous. A prior judgment, it has been said, cannot be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where, and in what way the fraud was committed: *Shedden* v. *Patrick et Al.* (1). Sir John Rolt L. J. in *Patch* v. *Ward* (2), discussing what is meant by fraud when it is said that a decree may be impeached for fraud, said, "the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance." And Lord Selborne, in *Ochsenbein* v. *Papelier* (3), quotes as sound law

(1) (1854) 1 Macq. 535. (2) (1867) L. R. 3 Ch. App. 203.
(3) (1873) L. R. 8 Ch. App. 695, 698.

the dictum of Chief Justice De Grey in the *Dutchess of Kingston's Case* (1), that a judgment, "like all other acts of the highest judicial authority, is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled."

Both suits now under consideration turn on the existence or non-existence of an alleged *nim-howla*, a question of fact to be determined largely by the appreciation of evidence. The Munsif in the former suit affirmed the existence of the *nim-howla*, and from his decision no appeal was preferred.

In this suit the Court of first instance came to the same conclusion on the evidence in this case. The lower Court of Appeal, however, for some reason did not agree with this appreciation of the evidence and therefore held the decree in the former suit fraudulent. There is, however, no suggestion that the decree in the previous suit was fictitious, or that the plaintiffs in this suit were prevented by contrivance from placing before the Court in the former suit any material relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit. In effect, when analysed, the judgment of the lower Appellate Court is no more than a retrial of the merits of the original suit and a determination that the Judge who decided that suit was mistaken. But the Court in this suit has no jurisdiction to decide on the merits of the former judgment; its function is to decide whether that judgment was vitiated by fraud.

There, therefore, was an error of law committed by the lower Appellate Court, and Chapman J. rightly reversed its decree, for, as fraud was not proved,

(1) (1776) 2 Sm. L. C., 11th Ed., 731.

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the prior decree sufficiently supports the plea of *res judicata*.

The appeal must, therefore, be dismissed with costs.

D. CHATTERJEE, J. The fraud alleged in this case was the wrongful procurement by the defendant of the entry of the *nim-howla* in the record-of-rights. The same allegation was made in the rent suit, and the matter was adjudicated upon in the presence of both parties. It was a matter substantially in issue in that case, and I think it would be clearly offending against the rule of *res judicata* to allow the plaintiff to re-open that question. I agree, therefore, in dismissing this appeal.

S.M. *Appeal dismissed.*

CIVIL RULE.

Before Mookerjee and Beachcroft, JJ.

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BATA KRISHNA RANO

v.

JANKI NATH PANDE.*

Deposit in Court—Putni rent—Bengal Tenancy Act (VIII of 1885) ss. 54, 61, 62 (2), 195 (c)—Putni Regulation (VIII of 1819).

Section 61 of the Bengal Tenancy Act is applicable to a *putnidar*, as it does not in any way affect the Regulation VIII of 1819 relating to *putni* tenures, and it is open to him to deposit the *putni* rent in Court.

RULE obtained by Bata Krishna Rano, the plaintiff.

The facts are briefly as follows. The plaintiff

* Civil Rule No. 1478 of 1913, against the order of Chandra Bhushan Banerjee, Small Cause Court Judge, Berhampore, dated Sept. 27, 1913.