APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

KADIRVELU NAINAR (PLAINTIFF), APPELLANT,

v.

KUPPUSWAMI NAIKER (DEFENDANT), RESPONDENT.*

1917, December, 10 and 1918, January, 8 and April, 9.

Fraud—Judgment obtained by perjured evidence—Suit to set aside, whether maintainable.

A suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence.

Venkatappa Naick v. *Subba Naick* (1906) I.L.R., 29 Mad., 179, overruled.

APPEAL against the decree of C. R. THIRUVENKATA ACHARIYAR, the Madras City Civil Judge, in Original Suit No. 498 of 1916.

The facts are given in the first two paragraphs of the ORDER OF REFERENCE OF SADASIVA AYYAR, J.

K. S. Ganapathy Ayyar for the appellant.

K. Venkataraghava Achariar for the respondent.

This appeal coming on for hearing, in the first instance, before WALLIS, C.J., and SADASIVA AYYAR, J., the following ORDERS OF REFERENCE TO A FULL BENCH were made by

SADASIVA AYYAR, J.—The plaintiff is the appellant. The present defendant had brought a suit against the present plaintiffs in the Presidency Small Cause Court for money due by the plaintiff to a chit fund of which the defendant was the stakeholder and in which the plaintiff had four shares, the plaintiff having executed a promissory note in favour of the defendant. The defendant obtained a decree for Rs. 117-2-0 in the suit filed in the Presidency Court of Small Causes against the plaintiff notwithstanding certain defences raised by the plaintiff. The decree is dated the 5th February 1914. The present suit was brought on the 14th December 1916 in the City Civil Court, (*a*) for a declaration that the decree in Small Cause Suit No. 1492 of 1914 is null and void, and (*b*) for a decree directing

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the defendant to pay the plaintiff Rs. 399-12-0 (the damages incurred by the plaintiff through the defendant's fraud in obtaining the unjust decree) with interest thereon and costs of suit. The grounds alleged as the foundation of this claim are found in paragraphs 8 to 10 of the plaint as follows. "The defendant falsely swore in that suit that he paid only ten monthly instalments" (to the chit) and that certain receipts were passed only for instalments paid in respect of the chit fund transaction, and not for independent loans advanced by the plaintiff to the defendant, "that the defendant also dishonestly suppressed the fact that he was bound to give credit for Rs. 68 due to the plaintiff as premia in the chit and that the decree of the Small Cause Court which was obtained by the plaintiff's wilful perjury and suppression of material facts was obtained in fraud of the Court".

The plaintiff's suit was dismissed by the learned City Civil Judge on the ground that his Court cannot be converted into a Court of Appeal on a question of fact from the decision of the Small Cause Court. In *Venkatappa Naick* v. *Subba Naick*(1), BODDAM and MOORE, JJ., purported to follow the English cases in *Abouloff* v. *Oppenheimer*(2), and in *Vadala* v. *Lawes*(3), and held that a judgment obtained by perjury is a judgment obtained by fraud committed upon the Court and could be set aside in a separate suit. The learned Judges evidently thought that the decision in the well-known case of *Flower* v. *Lloyd*(4) was overruled by the two later English decisions referred to by them. The decision in *Venkatappa Naick* v. *Subba Naick*(1) has been afterwards considered in at least two cases in this Court. In *Kamaraswami Chetty* v. *Kamakshi Ammal*(5), which came before SUNDARA AYYAR, J., and myself, I said :—

"I also wish to add that I should not be understood as admitting that a plaintiff can maintain a suit to set aside a decree on the ground of fraud simply because the decree had been obtained on perjured testimony. I know it has been so held in *Venkatappa Naick* v. *Subba Naick*(1) but I have grave doubts as to the correctness of that decision."

(1) (1906) I.L.R., 29 Mad., 179. (2) (1882) L.R., 10 Q.B.D., 295.
(3) (1890) L.R., 25 Q.B.D., 310. (4) (1878) 10 Ch.D., 327.
(5) (1912) 23 M.L.J., 187.

SUNDARA AYYAR, J., agreed with my above observations. Then there is a reported case *Chinnayya* v. *Ramanna*(1), in which BENSON and SUNDARA AYYAR, JJ., dealt elaborately with the same point. At page 206 it is said—

"It is indisputable that the decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and to prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusions both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not, with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated. . . . .

. . . . The test to be applied is, is the fraud complained of not something that was included in what has already been adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent *from conducting his case properly by tricks or misrepresentation*, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect his duty and afterwards claim to show that the allegation of his opponent was false." (Page 208).

Then the learned Judge refers to Black's article on Judgments in 23, Cyclopædia of American Law and Procedure, as regards the acts which can be relied on as constituting the fraud which would vacate a judgment, namely, things which are collateral to the matters which have been adjudged by the Court. Then the

(1) (1915) I.L.R., 38 Mad., 203.

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passages from the judgment of the Lord Justice JAMES in *Flower* v. *Lloyd*(1) are quoted:

"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very great consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories or a misleading production of documents or of a machine, or of a process had been given?" . . . . "There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be one on side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subordination of perjury; and so the parties might go on alternately *ad-infinitum*. There is no distinction in principle between the old common law action and the old Chancery suit and the Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments, supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Courts must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds." (Pages 211, 212).

The learned Judge declined therefore to follow *Venkatappa Naick* v. *Subba Naick*(2). As regards the two English cases *Abouloff* v. *Oppenheimer*(3) and *Vadala* v. *Lawes*(4) they were cases of suits brought upon foreign judgments. In *Nanda Kumar Howladar* v. *Ram Jiban Howladar*(5), JENKINS, C.J., says at page 998 that the jurisdiction to set aside a decree for fraud

"is 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."

(1) (1878) 10 Ch. D., 327.
(2) (1906) I.L.R., 29 Mad., 179.
(3) (1882) 10 L.R., Q.B.D., 295.
(4) (1890) 25 Q.B.D., 310.
(5) (1914) I.L.R., 41 Calc., 990.

In *Ram Ratan Lal* v. *Bhuri Begam*(1), RICHARDS, C.J., quotes with approval passages from *Flower* v. *Lloyd*(2), dissents from *Lakshmi Charan Saha* v. *Nur Ali*(3) which was disapproved of in the Calcutta High Court itself in *Munshi Mosuful Huq* v. *Surendra Nath Ray*(4) and approves of JENKINS, C.J.'s observations in *Nanda Kumar Howladar* v. *Ram Jiban Howladar*(5). In *Janki Kuar* v. *Lachmi Narain*(6) also, *Venkatappa Naick* v. *Subba Naick*(7) was expressly dissented from and the learned Judges say that the weight of authority is in support of the view taken in *Nanda Kumar Howladar* v. *Ram Jiban Howladar*(5) and in *Munshi Mosuful Huq* v. *Surendra Nath Roy*(4), that is, in favour of the view taken in *Flower* v. *Lloyd*(2) and in the Madras case *Chinnayya* v. *Ramanna*(8). I think that in India the considerations mentioned by JAMES, L.J., in *Flower* v. *Lloyd*(2) apply with very great force as it is dangerous to allow a fresh suit to be brought by an unsuccessful litigant to set aside the decree passed against him on the ground that his opponent had imposed on the Court by letting in perjured evidence. The two cases relied on in *Venkatappa Naick* v. *Subba Naick*(7) and the latter case in *Chandler* v. *Blogg*(9) merely follow old English precedents and do not attempt to tackle with the weighty reasons given in *Flower* v. *Lloyd*(2). The passion for litigation wherever it exists in this country is likely to turn into almost incurable mania and the doctrine of *res judicata* would become practically useless if *Lakshmi Charan Saha* v. *Nur Ali*(3) is followed in Indian Courts.

Having regard, however, to the conflict of views found in the decisions in *Venkatappa Naick* v. *Subba Naick*(7) and in *Chinnayya* v. *Ramanna*(8) I would refer the following question to the Full Bench :—

"Was the question of law considered in *Venkatappa Naick* v. *Subba Naick*(7) rightly decided in that case ?"

WALLIS, C.J.—I concur in the ORDER OF REFERENCE. WALLIS, C.J.

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(1) (1916) I.L.R., 38 All., 7.
(2) (1878) 10 Ch.D., 327.
(3) (1911) I.L.R., 38 Calc., 936.
(4) (1912) 16 C.W.N., 1002.
(5) (1914) I.L.R., 41 Calc., 990.
(6) (1915) I.L.R., 37 All., 535.
(7) (1906) I.L.R., 29 Mad., 179.
(8) (1915) I.L.R., 38 Mad., 203.
(9) (1898) 2 Q.B., 36.

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ON THIS REFERENCE—

K. S. Ganapati Ayyar for the appellant.—The suit is maintainable—*Obiter dictum* in *Flower* v. *Lloyd*(1) which has been followed in India has been dissented from in later English cases, the last of which is *Robinson* v. *Smith*(2): see also *Vadala* v. *Lawes*(3), *Arunachellam Chetty* v. *Sabapathy Chetty*(4) and Halsbury's Laws of England, volume 18, page 216. The fact that a review can be applied for is no answer, for a review can lie only on very limited grounds. A suit is the better remedy: *Priestman* v. *Thomas*(5), *Chandler* v. *Blogg*(6). *Baker* v. *Wadsworth*(7) is against this view. It does not matter whether the former decision is of a foreign Court or of an English Court: *Abouloff* v. *Oppenheimer*(8), *Ex parte Alice Cockerell*(9). Section 44 of the Indian Evidence Act gives a right of suit to set aside a judgment for fraud. Fraud includes suppression of evidence and perjured evidence; see Contract Act, section 17, as in this case and in the case of *Venkatappa Naick* v. *Subba Naick*(10). Reference was made to *Chinnayya* v. *Ramanna*(11), *Lakshmi Charan Saha* v. *Nur Ali*(12), *Nanda Kumar Howladar* v. *Ram Jiban Howladar*(13), *Munshi Mosuful Huq* v. *Surendra Nath Roy*(14), *Radha Raman Shaha* v. *Pran Nath Roy*(15), *Khagendra Nath Mahata* v. *Pran Nath Roy*(16) and *Subbaiyar* v. *Kallapiran Pillai*(17). The last two cases also hold that the existence of other remedies is no bar to the suit.

K. Venkataraghavachariar.—The suit does not lie. *Janki Kuar* v. *Lachmi Narain*(18), *Ram Ratan Lal* v. *Bhuri Begam*(19) and *Abdul Huq Chowdry* v. *Abdul Hafez*(20).

The following OPINION of the Court was delivered by

WALLIS, C.J. WALLIS, C. J.—In *Venkatappa Naick* v. *Subba Naick*(10), the Court decided that a suit could be instituted to set aside a

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(1) (1877) 6 Ch.D., 297 (C.A.).
(2) (1915) 1 K.B., 711 (C.A.).
(3) (1890) 25 Q.B.D., 310, at p. 316.
(4) (1918) I.L.R., 41 Mad., 213.
(5) (1884) L.R., 9 Pro, D., 210.
(6) (1898) 2 Q.B., 36.
(7) (1898) 67 L.J.Q.B., 301.
(8) (1882) 10 Q.B.D., 295.
(9) (1878) L.R., 4 C.P.D., 9, at p. 39.
(10) (1906) I.L.R. 29 Mad., 179.
(11) (1915) I.L.R. 38 Mad., 203.
(12) (1911) I.L.R., 38 Calc., 936.
(13) (1914) I.L.R., 41 Calc., 990.
(14) (1912) 16 C.W.N., 1002.
(15) (1901) I.L.R., 29 Calc., 475 at p. 488 (P.C.).
(16) (1902) I.L.R., 29 Calc., 395 P.C.
(17) (1914) 22 I.C., 500.
(18) (1915) I.L.R., 37 All., 535.
(19) (1916) I.L.R., 38 All., 7.
(20) (1910) 14 C.W.N., 695.

decree on the ground that it had been obtained by false evidence tendered at the trial and by the suppression of evidence. On reference, however, to the printed papers it appears that the alleged suppression of evidence consisted merely in the non-production of a promissory note the very existence of which the defendant denied when giving evidence in the case. There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained by perjured evidence. In India the weight of authority appears to be in favour of holding that such a suit will not lie for the reasons given by SUNDARA AYYAR, J., in *Chinnayya* v. *Ramanna*(1) by the Calcutta Court in *Munshi Mosuful Huq* v. *Surendra Nath Roy*(2) and by the Allahabad Court in *Janki Kuar* v. *Lachmi Narain*(3). We are therefore of opinion that *Venkatappa Naick* v. *Subba Naick*(4) was wrongly decided and must be overruled.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Spencer.

THE MIDNAPORE ZEMINDARI COMPANY, LIMITED (FIRST DEFENDANT), APPELLANT,

v.

APPAYASAMI NAICKER AND ANOTHER (FIRST PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

1918, January, 16, 17, 18, 21 and 22 and February, 18.

Unsettled Palayam, alienability of, for debts of holder for the time being—Lands held on service tenure, alienability of—Enfranchisement of service tenure, effect of, on alienation, prior and subsequent—Regulation XXV of 1802, *effect of—Private Police service, abolition of, by legislation—Military service, imposition of, on landed proprietors—Abolition of—Limitation Act (IX of* 1908), *Schedule II, articles* 120, 142 *and* 144*—Madras Regulation XI of* 1816 *—Madras Regulation VI of* 1831*—Madras District Police Act XXIV of* 1859 *—Madras Act III of* 1895.

Lands held on service tenure are, even apart from statute, inalienable by the Common Law of India beyond the life-time of the holder for the time being.

(1) (1915) I.L.R., 38 Mad., 203. (2) (1912) 16 C.W.N., 1002.
(3) (1915) I.L.R., 37 All., 535. (4) (1906) I.L.R., 29 Mad., 179.

* Appeal No. 282 of 1916.