Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1915
July, 7.

RAM RATAN LAL AND OTHERS (DEFENDANTS) *v.* BHURI BEGAM AND ANOTHER (PLAINTIFFS) AND MUHAMMAD YUSUF KHAN AND OTHERS (DEFENDANTS) *

Suit to set aside decree on the ground of fraud—What constitutes fraud—Act No. IV of 1882 (Transfer of Property Act), section 90—Application for a decree under section 90 without informing court of previous refusal to grant such a decree.

Certain mortgagees instituted a suit for sale on a mortgage and also asked in their plaint for a personal decree against the mortgagors under section 90 of the Transfer of Property Act, 1882. The court in that suit granted the plaintiffs a decree for sale, but refused them the decree asked for under section 90. Some years afterwards the plaintiffs again applied for a decree under section 90. Notice of this application was duly served upon all the judgement-debtors. They did not appear, and the court granted a decree, but limited it to the assets of the deceased mortgagor. The judgement-debtors then filed a suit to have this decree set aside on the ground of fraud, the fraud alleged being mainly that the decree-holders had not brought to the notice of the court the fact that they had once before applied for and been refused a decree under section 90.

Held that the neglect to inform the court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, could not amount to fraud which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act.

THE facts of this case were as follows :—

The defendants brought a suit for sale upon a mortgage executed by the predecessors in title of the plaintiffs. To that suit, among other defendants, the plaintiffs were impleaded as defendants. The defendants had not only asked for a decree for sale of the mortgaged property but also for a simple money decree. The latter prayer was refused and a decree for sale was passed. The decree-holders, some years afterwards, after exhausting the mortgaged property, applied for a decree under section 90 of the Transfer of Property Act. Notice of the application was served on the judgement-debtors, but no one appeared to oppose the application. A decree under section 90 was therefore passed against all the judgement-debtors. The decree-holders proceeded to attach a house. The male judgement-debtors appeared and objected on the ground that they were agriculturists and the house could

* Second Appeal No. 1009 of 1914 from a decree of F. S Tabor, Additional Judge of Farrukhabad, dated the 14th of April, 1914, confirming a decree of Muhammad Ali Ausat, Munsif of Kaimganj, dated the 22nd of May, 1913.

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not be sold in execution of the decree. The objection was disallowed. Thereupon the present suit was instituted by the present plaintiffs on the ground that they had no notice of the application for a decree under section 90 of the Transfer of Property Act, which as a matter of fact could not be passed, being barred by limitation. The further ground was that it had also been disallowed once and the decree was therefore obtained by fraud. The courts below gave the plaintiffs a decree. The defendants appealed to the Hight Court.

Dr. *Surendra Nath Sen*, for the appellants, submitted that no fraud was proved in the case. The interests of the plaintiffs and other judgement-debtors were the same and the latter at least had knowledge of the application for decree under section 90 of the Transfer of Property Act. The judgement-debtors in this case allowed an *ex parte* decree to be passed and did not appeal against it. The present suit was brought upon the ground that the decree was obtained by fraud. When, however, the decree was put into execution no such plea was taken. The fraud alleged was that the decree was barred by limitation. Even assuming this was so the mere presentation of a time-barred application does not constitute fraud. This suit was therefore a suit to contest the validity of a decree passed by a competent court and if entertained would make the provisions of sections 11 and 47 of the Code of Civil Procedure nugatory. The right procedure was followed when the application was made and the suit therefore is barred by the rule of *res judicata*; *Mahomed Golab* v. *Mahomed Sulliman* (1), *Nil Madhab Roy* v. *Naba Das* (2), *Munshi Mosuful Huq* v. *Surendra Nath Ray* (3), *Marochain* v. *Parsuram Maharaj* (4), *Janki Kuar* v. *Lachmi Narain* (5), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (6), *Flower* v. *Lloyd* (7). No application having been made to set aside the decree, a suit did not lie; *Mungul Pershad Dichit* v. *Girja Kant Lahiri* (8), *Behari Singh* v. *Mukat Singh* (9),

(1) (1894) I. L. R., 21 Calc., 612.
(2) (1908) 12 C. W. N., 28 Notes.
(3) (1912) 16 C. W. N., 1002.
(4) (1911) 10 Indian Cases, 905
(5) (1915) I. L. R., 37 All., 535.
(6) (1914) I. L. R., 41 Calc., 990.
(7) (1879) 10 Ch. D., 327.
(8) (1881) I. L. R., 8 Calc., 51.
(9) (1905) I. L. R., 28 All., 273.

Sheoraj Singh v. *Kameshar Nath* (1), *Kastura Kunwar* v. *Gaya Prasad* (2), *Ram Kirpal* v. *Rup Kuari* (3).

Dr. *S. M. Sulaiman*, for the respondent, submitted that the decree in the first suit could only be challenged by means of a separate suit and not by an application; *Radha Raman Shaha* v. *Pran Nath Roy* (4), *Kalian Singh* v. *Jagan Prasad* (5). In the present case the decree for money had once been refused and that fact was concealed from the court. The fact was very material and its suppression amounted to fraud; *Rajmohun Gossain* v. *Gourmohun Gossain* (6), *Subbaiyar* v. *Kallapvian Pillai* (7), *Madari Singh* v. *Ram Ratan* (8), *Lakshmi Narain Saha* v. *Nur Ali* (9), *Kedar Nath Das* v. *Hemanta Kumari Debi* (10). Other grounds were also taken, viz. that the respondents were kept in the dark about the application for a decree under order XXXIV, rule 6; but these questions had not been gone into.

RICHARDS, C.J.—This appeal arises out of a suit in which the plaintiffs sought to set aside a decree which the defendants had obtained under section 90 of the Transfer of Property Act on the allegation that the same was obtained by fraud. The material facts are practically undisputed. The defendants or their representatives brought a suit upon foot of a mortgage dated the 25th of October, 1893, and obtained a decree. They had asked in that suit not only for a decree for sale of the mortgaged property but also for a personal decree. This latter part of their claim was disallowed. Some years afterwards the decree-holders applied to the court for a decree under section 90 of the Transfer of Property Act. Notice of the application was duly served on all the judgement-debtors. They did not appear, and the court granted the decree, but limited it to the assets of the deceased mortgagor. This is the decree which it is sought in the present suit to set aside. Later on, in execution of this decree, a house of the judgement-debtors was attached. The male judgement-debtors objected that the house could not be sold on the ground that they were agriculturists.

(1) (1902) I. L. R., 24 All., 282.
(2) Weekly Notes, 1907, p. 29.
(3) (1883) I. L. R., 6 All., 269.
(4) (1901) I. L. R., 28 Calc., 475.
(5) (1915) 18 A. L. J., 162.
(6) (1859) 8 Moo. I. A., 91.
(7) (1914) 22 Indian Cases, 500.
(8) (1914) 23 Indian Cases, 976.
(9) (1911) I. L. R., 38 Calc., 936
(10) (1913) 18 C. W. N., 447.

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This objection was overruled. There was an appeal by the judgement-debtors, which was dismissed. Both the courts below have granted the plaintiffs a decree, setting aside the decree obtained by the defendants under section 90 of the Transfer of Property Act. The judgement of the court of first instance is a little misleading unless one reads it as a whole. When carefully considered, it is clear that the defendants practised no fraud on the plaintiffs to the present suit in respect of the service of notice of the application for the decree under section 90. The plaintiffs are *pardah nashin* ladies. It is quite impossible for any litigant to serve process of the court in any way which would violate the *pardah* of such ladies. When the court of first instance says that these ladies knew nothing about the decree under section 90, it does not mean that the defendants in the present suit were in any way responsible for their want of knowledge. The ladies were duly served with the notice, so also were the male members of the family. No objection was taken to the granting of the decree under section 90 and no application was ever made to set it aside. The male members, who were equally interested with the ladies in opposing the decree, evidently thought that there would be no chance of success. We find, however, when the house was attached in execution of that decree they opposed the sale on the ground that they were agriculturists.

We now come to the only fraud which is suggested in the present case. The fraud is that the defendants, (who then occupied the position of decree-holder) did not inform the court that, when the preliminary decree was being granted on foot of the mortgage, they had asked for a personal decree and that this had been refused upon the ground that having regard to the date of the mortgage and the position of the judgement-debtors a personal decree ought not to be granted. Two questions arise. First, whether it is open to a party to challenge an order which has been made between the decree-holder on the one side and the judgement-debtor on the other, even where no fraud is alleged or proved. It seems to me impossible to contend that where (in the absence of fraud) a matter has been decided in execution proceedings relating to the satisfaction of the decree, it is open to the parties to re-open matters which have been so decided by an independent suit. This

has been settled by numerous decisions of the various courts in India and also by their Lordships of the Privy Council.

Some attempt has been made to distinguish between what is called an *ex parte* decree or order and a decree or order after contest. I do not think there is any just ground for such a distinction. Assuming a party to have been duly served with notice, if he neglects to come forward and avail himself of the opportunity of preventing a wrong order being made against him I cannot conceive upon what possible ground he should be placed in a better position than the party who comes forward and informs the court (in the manner provided by law) of his rights and prevents (so far as he can) a wrong order being made In my judgement the party who after due notice allows the decree or order to be made without opposition is in the same position as a person who had a decree or order made against him after contest.

The next question is as to the nature of the fraud which must be alleged and proved in order to entitle the plaintiffs to have the decree set aside. On this part of the case Dr. Sulaiman admitted, as I think he was bound to admit, that he could not claim to have a decree under section 90 set aside on any ground of fraud which would not have been sufficient to have a decree in a suit set aside.

A large number of cases have been cited on each side. On the part of the appellant the following cases were relied upon. *Mahomed Golab* v. *Mahomed Sulliman* (1), *Nil Madhab Roy* v. *Naba Das* (2), *Munshi Mosuful Huq* v. *Surendra Nath Ray* (3), *Marochain* v. *Parsuram Maharaj* (4), *Janki Kuar* v. *Lachmi Narain* (5), and *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (6).

In the case of *Mahomed Golab* v. *Mahomed Sulliman* (1), PETHERAM, C. J., quotes, at page 618, from the case of *Flower* v. *Lloyd* (7).

"Assuming all the alleged falsehood and fraud to have been substantiated," is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgement obtained in an action fought out adversely

(1) (1894) I. L. R., 21 Calc., 612.
(2) (1908) 12 C. W. N., p. 28, Notes.
(3) (1912) 16 C. W. N., 1002.
(4) (1911) 10 Indian Cases, 905.
(5) (1915) I. L. R., 37 All., 535.
(6) (1914) I. L. R., 41 Calc., 990.
(7) (1879) L. R., 10 Ch. D., 327.

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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 on one side or other wilfully and corruptly perjured. In this case if the plaintiffs had sustained in this appeal the judgement in their favour, the present defendants in their turn might bring a fresh action to set that judgement aside on the ground of perjury of the principal witness and subornation of perjury ; and so the parties might go on alternately *ad infinitum*."

In the case of *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (1), JENKINS, C. J., quotes with approval SIR JOHN ROLT, L. J,, in the case of *Patch* v. *Ward* (2) : —

"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 ".

In an earlier part of the judgement the learned Chief Justice says :—

"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 judgement 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."

On the other side also a number of cases have been cited, including a decision of their Lordships of the Privy Council in the case of *Rajmohun Gossain* v. *Gourmohun Gossain* (3). That was a case in which a party having expressly agreed not to appeal, in contravention of his agreement, presented an appeal and obtained a decree which he afterwards sought to set up against the other side. It is quite clear that this case was decided entirely upon its own facts and circumstances. The general law as to what constitutes sufficient allegation and proof of fraud to justify the setting aside of a decree in a previous suit was not discussed.

Special reliance was placed on a ruling of the Calcutta High Court in the case of *Lakshmi Narain Saha* v. *Nur Ali* (4). This decision was cited with approval by another Bench of the Calcutta High Court in the case of *Kedar Nath Das* v. *Hemanta Kumari Debi* (5). In this case a decree had been obtained against the

(1) (1914) I. L. R., 41 Calc., 990.
(2) (1867) L. R., 3 Ch. App., 203.
(3) (1859) 8 Moo. I. A., 91.
(4) (1911) I. L. R., 38 Calc., 936.
(5) (1913) 18 C. W. N., 447.

plaintiff *ex parte*. The plaintiff succeeded in having the *ex parte* decree set aside but another *ex parte* decree was passed against him. The plaintiff then brought a suit to set aside that decree on the ground that the same had been obtained by means of false evidence. It would appear that the court held that on the mere allegation that the decree was obtained by false evidence the plaintiff was entitled to re-open the litigation. If we assume that no just distinction can be drawn between a person against whom a decree has been obtained without contest after due notice and a person who has appeared after notice and has been defeated after making the best fight he can, it seems to me that the decision of the learned Judges in the case cited omits to consider the great danger pointed out by THESIGER, L. J., in the case of *Flower* v. *Lloyd* (1). As the result of the decree of the learned Judges, if the plaintiff had succeeded in setting aside the decree on the ground that the evidence advanced by the plaintiff in that suit was false, what was there to prevent the defeated defendant instituting another suit to set aside that decree on exactly similar grounds? This decision does not appear to have met with the universal approval of the Calcutta High Court: see *Munshi Mosuful Huq* v. *Surendra Nath Ray* (2).

I would here like to point out that it is open to question whether a decree or order which has been obtained after due notice is very accurately described as "*ex parte*." It is hardly necessary to remark that an order obtained after notice is very different from an order obtained without notice.

In the present case it seems to me that the neglect to inform the court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, could not amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act. The present suit is in reality an "appeal" against the decree of the court long after limitation. I would allow the appeal.

MUHAMMAD RAFIQ, J.—I find that the questions argued at the bar do not arise in this case. The arguments have proceeded on the

(1) (1879) L. R., 10 Ch. D., 327. (2) (1912) 16 C. W. N., 1002.

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assumption that a personal decree under section 90 of Act IV of 1882 was obtained by the defendant appellant against the plaintiffs respondents. On reference to the record I find that no personal decree was passed against them, but a decree against them was passed in their representative capacity against the estate of Imtiaz Ali, deceased, one of the mortgagors. The contention for them challenging the decree as having been fraudulently obtained is based on the assumption of a personal decree and as no such decree was passed their contention fails. I would therefore allow the appeal.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of both the courts below are set aside and the suit is dismissed with cost in all courts.

Appeal allowed.

APPELLATE CRIMINAL.

1915
July, 13.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

EMPEROR v. BRIKHBHAN SINGH AND OTHERS.*

Criminal Procedure Code, section 165—Warrant for search of house—Resistance to police—Legality of warrant.

In the course of an investigation into a dacoity which had occurred in the Agra district, a circle inspector of the Mainpuri district sent a sub-inspector to the circle inspector concerned with a suggestion that the house in which one Nihal Singh lived in the Mainpuri district might be searched. The Agra circle inspector thereupon gave, as he said, written instructions to the sub-inspector who had been sent to him from Mainpuri to the effect that "the house of Nihal Singh be searched in connection with the dacoity at Nagla Murli, that he might be arrested for the sake of identification, and that the houses of those persons should also be searched who were suspected by the sub-inspector of receiving stolen property." Nihal Singh was not directly implicated by any one in the dacoity under investigation. When the police in pursuance of this order attempted to search the house where Nihal Singh was living, which belonged to Brikhbhan Singh his father-in-law, they were assaulted by Brikhbhan Singh and his relations and friends and prevented from conducting the search or arresting Nihal Singh.

Held that the authority under which the police had attempted to make the search was invalid and the persons resisting them could not be convicted under section 332 of the Indian Penal Code. Whether or not these persons

* Criminal Appeal No. 450 of 1915, by the Local Government from an order of Piare Lal Katara, Assistant Sessions Judge of Mainpuri, dated the 19th of April, 1915.