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MOHAMED SALAY v. R.M.V.V.M. CHETTYAR FIRM.

HEALD, J.

it should be bought on his behalf. There is therefore a presumption that appellant was a party to the plot and that he bought on Subramaniam's behalf. There is also in the present case direct evidence that this was so, and there was nothing to rebut either the evidence or the presumption except appellant's bare word.

In these circumstances I have no hesitation in finding that the learned Judge on the Original Side was right in holding that appellant was a party to the fraud and bought the house on Subramaniam's behalf, and that since the house still belonged to Subramaniam it was still subject to respondent's mortgage.

I would therefore dismiss the appeal summarily.

MYA BU, J.—I concur.

APPELLATE CIVIL

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

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May 17.

M. A. MAISTRY
v.
ABDUL AZIZ RAHMAN.*

Fraud, suit to set aside decree as obtained by—Dismissal of application to set aside an ex parte *decree when a bar to suit—Dismissal not on merits is not a bar.*

Held, that the dismissal of an application to set aside an *ex parte* decree for failure to furnish security does not bar a suit to set aside the decree as having been obtained by fraud.

K. E. Musthan v. *Babu Mohendra Nath Singh*, 1 Ran. 500—*distinguished.*

Radha Raman Saha v. *Pran Nath Roy*, 28 Cal. 475, P.C.—*followed.*

M. A. Maistry v. *Abdul Aziz Rahman*, 5 Ran. 46—*set aside.*

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* Civil First Appeal No. 18 of 1927.

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M. A. MAISTRY v. ABDUL AZ'Z RAHMAN.

N. N. Sen—for the Appellant.

Robertson—for the Respondent.

RUTLEDGE, C.J., AND BROWN, J.—The respondent Abdul Aziz Rahman obtained a decree in the Small Cause Court, Rangoon, on a promissory-note against the appellant, Munshruff Ally Maistry. The decree was passed *ex parte*. The appellant filed an application before the Small Cause Court to have the *ex parte* decree set aside on the ground that he had never been served with a summons. He was required to furnish security in accordance with the provisions of Rule 78 in Schedule 1 to the Rangoon Small Cause Court Act, but failed to do so and his application was finally rejected for default. He then filed a suit, out of which this appeal has arisen. The learned Judge on the Original Side of this Court has held that the suit as framed does not lie and has dismissed it without going into the merits.

It is contended on behalf of the appellant that this decision was wrong. For the purposes of this appeal it must be assumed that the facts as alleged in the plaint are correct. The plaint sets forth that the plaintiff never executed the promissory-note on which the decree was based, or borrowed any money from the defendant, and that the suit was absolutely false. The plaintiff further alleges that he was never served with a summons, and that the defendant's affidavit to the effect that the plaintiff had accepted the said summons was false. He therefore prayed for a declaration that the decree of the Small Cause Court was obtained by fraud, and for an injunction restraining the defendant from proceeding with the execution thereof. The learned trial Judge was of opinion that the suit was an attempt to evade the provisions of Rule 78 in Schedule I to the Rangoon Small Cause

Court Act, and after discussing various authorities came to the conclusion that the suit did not lie. With many of the observations of the trial Judge we are in entire agreement and we agree with him that the mere fact that perjured evidence has been given in the case is not sufficient cause for bringing a suit to have the decree in that case set aside. But the giving of perjured evidence at the trial is not the only fraud alleged in the present case.

It is further alleged that the fraudulent conduct of the defendant prevented the plaintiff from appearing to contest the suit. This is clearly fraud extrinsic to the facts of the original case, and the question is whether this fraud is sufficient to give him a cause of action. A somewhat similar case was dealt with by Mr. Justice Beasley in the case of *K. E. Musthan* v. *Babu Mohendra Nath Singh* (1). In that case an *ex parte* decree had been passed by the Small Cause Court. The defendant applied to have the *ex parte* decree set aside and failed, and then brought a regular suit to have the decree vacated. It was held that the suit did not lie. The circumstances of that case however differ from those of the present case in one important particular. In that case the plaintiff's application to have the previous decree set aside was dealt with on the merits by the Small Cause Court which Court found that the summons had in fact been served. That is not the case here. There has been no adjudication in the present case on the question whether the summons was or was not in fact served. On this point the learned trial Judge observes " That application was not tried on the merits so that, though it may be argued that it is not *res judicata*, still having moved the Small Cause Court for the purpose of

(1) (1923) 1 Ran. 500.

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setting aside the *ex parte* decree on the ground that summons was not tendered or served on him and having been given an opportunity of establishing his case, the plaintiff by non-compliance with the condition imposed by the Small Cause Court failed to get an adjudication on that point in that Court. It is therefore not open to him to come to this Court and ask for an adjudication on the same point. The result of allowing the plaintiff to prove these facts in this case would be merely to enable him to evade a statutory provision."

It does not, however, appear that the attention of the learned Judge was drawn to the decision of the Privy Council in the case of *Radha Raman Shaha and others* v. *Pran Nath Roy and others* (1). That case was an appeal from a decision of the High Court of Calcutta which is reported at page 546, Calcutta, Volume 24. An *ex parte* decree had been obtained and the judgment-debtor had applied to get the *ex parte* decree set aside under section 108 of the Code of Civil Procedure (corresponding to Rule 13, Order 9 of the present Code). His application was unsuccessful. His case was that the decree was obtained by fraud, and that he had never been served with summons. It was held by the High Court that there was nothing to prevent the unsuccessful defendant from bringing a regular suit to set aside the decree on the ground of fraud, and that the fact that he had failed in his application under section 108 made no difference. In the course of their judgment their Lordships remarked " If the decree was obtained by fraud, and the plaintiff was in consequence deprived of his property, the Court has full power to set aside the decree and restore his property, unless its

(1) (1901) 28 Cal. 475.

jurisdiction in the case of *ex parte* decrees is taken away ; but there is nothing in sections 108, 244, 311, or any in other provisions of law to which we have been referred which does take it away. Section 13 of the Code clearly offers no bar. The issues which arise are not the same the parties are not all the same and the Court which decided that the *ex parte* suit has no jurisdiction to decide this suit. The mere fact that the plaintiff failed to obtain relief on the narrow ground on which he might have obtained it under section 108 cannot prevent him from getting relief on the much wider grounds now put forward." Their Lordships of the Privy Council in a short judgment approved this decision. Lord Hobhouse who delivered the judgment remarked " Their Lordships are all agreed that the preliminary objection cannot be sustained, and that the High Court were right in overruling it. We have nothing before us, but the bare fact that the plaintiff endeavoured to get an *ex parte* decree set aside under section 108 of the Code of Civil Procedure, under which the Court may try whether the summons was served or whether the plaintiff was prevented by any sufficient cause from appearing. We are not told what went on before the Court upon that occasion, and it is impossible to say that the matter now alleged as fraudulent matter came in any way before the Court under the application which was made by virtue of section 108." In view of this pronouncement of their Lordships of the Privy Council we are unable to see how it can be held in the present case that the appellant's suit did not lie. There was not here, as in *K. E. Musthan's* case (1), any decision on the merits by the Small Cause Court, and it is clear from the judgment of their Lordships that the mere fact of an application to set aside the decree having been

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made under the provisions of Rule 13, Order 9, cannot deprive the plaintiff of his right to have the matter adjudicated in the regular suit. It was open to him to file the regular suit in the first instance without making his application to the Small Cause Court at all. He chose in the first instance to make an application under Rule 13, but his subsequent failure to furnish security amounted to failure on his part to proceed with that application. We are unable in the circumstances to hold that he was debarred from bringing the regular suit, and we are of opinion that the decision of the learned trial Judge was wrong.

It has been suggested on behalf of the respondent that the procedure adopted in coming before the High Court and asking for an injunction, instead of filing a suit in the Small Cause Court was wrong. This point has not yet been considered by the trial Court, and we leave it for the learned trial Judge to decide.

We set aside the decree of the trial Court and remand the case for decision by the trial Court on the merits. The respondent will pay the appellant his costs in this appeal. The appellant will be entitled to a refund of the court fees paid by him.