

advise His Majesty accordingly. The appellants will pay to the respondent the costs.

A. M. T.

Appeal dismissed.

Solicitors for the Appellants: *Ranken, Ford & Chester.*

Solicitors for the Respondent: *Francis & Harker.*

APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Addison.

PUNJAB COMMERCIAL SYN- } (PLAINTIFFS)
DICATE AND ANOTHER } Appellants.

versus

PUNJAB CO-OPERATIVE } (DEFENDANTS)
BANK, LIMITED, IN } Respondents.
LIQUIDATION AND ORS.

Civil Appeal No. 2546 of 1921.

Ex-parte Decree—Suit by third parties to set it aside on the ground of fraud—necessity for setting forth particulars of the fraud alleged and for alleging and proving collusion directed against themselves.

The respondent Bank sued, in October 1917, B. D. and his 3 brothers on 2 promissory notes claiming an equitable mortgage on land measuring about 17 kanals. The proceedings were *ex-parte* throughout against B. D. In April 1919, on a compromise between the Bank and the 3 brothers the former gave up its claim against the brothers while they admitted that the decretal amount would be a charge on the land in question which was B. D.'s self-acquired property, and that certain other self-acquired property of B. D. and his one-fourth share of the ancestral property would also be liable for the debt. After this an *ex-parte* decree was passed against B. D. with a lien on the land.

On the 6th May 1918 the present Syndicate and K. L. appellants sued B. D. and his 3 brothers for recovery of Rs. 27,000. In this case also the proceedings were *ex-parte* against B. D. and on a compromise with the 3 brothers an *ex-parte* decree was passed in July 1919 against B. D. only,

1925

July 4.

making his $\frac{1}{4}$ th share in the ancestral property and his self-acquired property liable.

On the 24th February 1920 the Syndicate and K. L. brought the present suit for a declaration that the words "against the land mortgaged measuring about 17 kanals" in the Bank's decree should not affect the Syndicate, alleging that the Bank's decree had been obtained by fraud and collusion between the 3 brothers and the Bank. The lower Court dismissed the suit and the Syndicate and K. L. appealed to the High Court.

Held, that it is an acknowledged rule of pleading that, where fraud is alleged against the defendant, the plaintiff must set forth the particulars of the fraud which he alleges and cannot be allowed to go beyond his own statement of his case.

Gunga Narain Gupta v. Tiluckram Chowdry (1), followed.

Held also, that a fraud practised on the debtor is not itself any ground for interference by third parties. They must allege and prove collusion directed against themselves.

Maharani Janki Kuer v. Mahabir Singh (2), and *Kripasindhu Panigrahi v. Nandu Charan Panigrahi* (3), referred to.

Venkatarama Aiyar v. The South Indian Bank, Limited, (4), also referred to.

First appeal from the decree of Lala Chuni Lal, Senior Subordinate Judge, Rawalpindi, dated the 2nd July 1921, dismissing the plaintiffs' suit.

NAND LAL and AMOLAK RAM, for Appellants.

M. S. BHAGAT and AMAR NATH, Chopra, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—On the 4th October 1917 the Punjab Co-operative Bank in liquidation filed a suit for Rs. 27,950-15-9 against Baldeo Das and his three brothers. It was alleged that the defendants and their father, Kishan Chand, who died about 1909,

(1) (1888) I.L.R. 15 Cal. 533 (P.C.). (3) (1919) 56 I. C. 606.

(2) (1920) 58 I. C. 317.

(4) (1919) I. L. R. 43 Mad. 381,

1925

PUNJAB COM-
MERCIAL SYN-
DICATE
v.
PUNJAB
CO-OPERATIVE
BANK, LIMITED.

constituted a joint Hindu family, which also carried on contract work and a brick kiln business under the name of Kishan Chand and Sons. On the father's death the eldest son, Baldeo Das, became the manager of the joint family and the business carried on by it and in that capacity executed on the 11th October 1911, two promissory notes in favour of the plaintiff Bank, one for Rs. 16,300 with interest at 9 *per cent. per annum* and one for Rs. 3,700 with interest at 11 annas *per cent. per mensem*, and for the second promissory note (paragraph 4 of the plaint) deposited two sale-deeds of land by way of equitable mortgage. In paragraph 10 of the plaint, however, it was prayed that a decree for the full sum claimed should be passed against the mortgaged property as well as against the other property of the defendants and against them personally. There was thus a contradiction between the two paragraphs of the plaint, quoted above, in one place the allegation being that there was an equitable mortgage of land only as regards the second and smaller promissory note, while at the end the claim was that the total amount sued for should be a charge on the land in question. During the pendency of the suit, Thakar Das, who used to be the manager of the Bank before it went into liquidation, was examined as P. W. 3 on the 7th March 1918. He deposed that the title-deeds were handed over to the Bank when Rs. 2,000 were given to Baldeo Das, on the 21st October 1908, long before the promissory notes were taken. At that time the total advances made amounted to Rs. 12,200. He further said that the title-deeds were to be security for the whole loan advanced. The words "up to date" in the English record after "advanced" do not occur in the vernacular record. The proceedings were *ex-parte* throughout against Baldeo Das, but

the suit was contested by his three brothers, who finally entered into a compromise with the plaintiff Bank on the 7th April 1919. By this compromise the Bank gave up its claim against the three brothers while the brothers admitted that the decretal amount would be a charge on the 17 *kanals 4 marlas* of land in question which was Baldeo Das's self-acquired property and which was under equitable mortgage with the Bank and that his other self-acquired property including his shares in the plaintiff Bank and his one-fourth share of the ancestral property would also be liable. As against this, the plaintiff Bank admitted that the three brothers were not joint with Baldeo Das, and that their share in the ancestral property would therefore not be liable and that the suit as against them should be dismissed. After this compromise, a decree was passed *ex-parte* against Baldeo Das, and by that decree a charge was created on the land in question. As the presumption was that all four brothers were joint, it is obvious that *prima facie* the compromise was to the advantage of all the parties.

In the meantime, the Punjab Commercial Syndicate and Krishan Lal filed a suit on the 6th May 1918 against Baldeo Das and his three brothers for Rs. 27,000. The dealings in this case also had been by Baldeo Das who did not appear, but the suit was contested by his three brothers. The Syndicate compromised with them on the 18th July 1919 in exactly similar terms to those entered into by them with the Punjab Co-operative Bank except that there was no charge upon any land, as there was no mortgage. The three brothers admitted that Baldeo Das's one-fourth share of the ancestral property and his self-acquired property should be liable while a list of the known ancestral property was given. In return for

1925

PUNJAB COM-
MERCIAL SYN-
DICATE
v.
PUNJAB
CO-OPERATIVE
BANK, LIMITED.

1925

PUNJAB COM-
MERCIAL SYN-
DICATE

v.

PUNJAB
CO-OPERATIVE
BANK, LIMITED.

this the Syndicate released the three brothers and their shares of the ancestral property from liability and obtained an *ex-parte* decree against Baldeo Das only.

Then on the 24th February 1920, the above-named Syndicate and Krishan Lal sued the above-named Bank along with Baldeo Das and his three brothers for a declaration that the words "against the land mortgaged measuring about 17 *kanals*" in the decree obtained by the Bank in accordance with the compromise of the 7th April 1919 should not affect the Syndicate, that was to say, that the said land was not mortgaged with the Bank for the amount of their decree, and that the Syndicate could also execute its decree against the said land. It was mentioned in the plaint that according to paragraph 4 of the Bank's plaint (as already described) it was only alleged that there was an equitable mortgage of the land as regards the smaller promissory note of Rs. 3,700, but it was not mentioned that in paragraph 10 of the Bank's plaint it was prayed that the whole sum sued for should be a charge on the land. After alluding to the compromise of the 7th April 1919, it was stated that in accordance with it the Bank by fraud obtained a decree for Rs. 27,950-15-9 against Baldeo Das on the condition that he should be personally liable, and that the decretal amount should form a charge on the land in question. In this way the other defendants, that is, Baldeo Das's brothers, got themselves absolved from liability, while in reality the land was not mortgaged with the Bank and neither the whole amount claimed nor any part of it was a charge on the land. It was further alleged that Baldeo Das's brothers entered into a compromise affecting their brother to which he was not a party, and inserted therein conditions affecting him whereas they had no power to make a compromise encumbering the land in question. The plaintiff Syndicate, therefore, claimed that they as

decree-holders were also entitled to execute their decree against this land. These are the only allegations in the plaint. This suit has been dismissed and it is an appeal from its dismissal, which is now before us.

The defendant-Bank raised several preliminary questions and also pleaded that there was no fraud, as the land was mortgaged with them for the debt due to the Bank. The plaintiff-Syndicate in their replication stated that they could bring the suit as they suffered under the decree in question and that they had a cause of action because the Bank had obtained their decree by fraud and collusion. No attempt was made further to define what the fraud and collusion was.

The Senior Subordinate Judge, who tried the case, held *inter alia* that, as the money realised by the sale of the disputed land was lying in Court, a suit for a mere declaration lay because the effect of a decree, if given, would be to allow the Syndicate a rateable distribution in the net assets ; that Section 73, Civil Procedure Code, did not bar the suit; and that the decree which was attacked could only be avoided if there had been a fraud (*a*) either upon the Court or (*b*) upon the defendants in that case in the conduct of the proceedings as an extrinsic collateral act or (*c*) unless there had been fraudulent collusion directed against the alleged injured creditor.

On the issues of the merits, he held that the fraud alleged in the pleadings was that no land was in reality hypothecated with the Bank and that the defendants other than Baldeo Das, who was absent, colluded with the Bank to charge the land in order to extricate themselves from liability. He further held that there was no fraudulent collusion of this nature and that, in any case, if Baldeo Das's brothers

1925.

PUNJAB COM-
MERCIAL SYN-
DICATE
v.

PUNJAB
CO-OPERATIVE
BANK, LIMITED.

1925
 PUNJAB COM-
 Mercial SYN-
 DICATE
 v.
 PUNJAB
 CO-OPERATIVE
 BANK, LIMITED.

did agree to the charge on the land in consideration of the claim being given up against them, this would not give the plaintiff-Syndicate a cause of action, as it was necessary for them to show that the fraud was directed against them. He also held that there was no allegation in the pleadings that any fraud was directed against the plaintiff-Syndicate and that if there had been, there was no evidence to support it. Lastly he held that it was not alleged in the plaint that there was any fraud on the Court, and that, in any case, no fraud upon the Court had been made out.

The grounds of appeal are somewhat diffuse. Grounds 1, 5, 8, 9, 10, 11 and 12 are of a general nature and require no discussion. In ground 13 it was prayed that the distribution of the proceeds of the sale of the land should be stayed pending the decision of the appeal. This was not done so that the money must have been paid to the Bank. The other grounds taken amount to this (1) that there was a fraud upon the Court [ground No. 2 (a)] and (2) that there was a fraud directed against the plaintiff-appellants [ground 2 (b)], in that the compromise was designed with intent to defeat their claim [ground 2 (c)], their suit being then pending (ground 7), while (3) grounds (3), (4) and (6) go on to state that none of the land in suit was mortgaged by Baldeo Das with the Bank and that paragraph (4) of the Bank's plaint showed that in any case the hypothecation was only as regards the promissory note of Rs. 3,700, and that the decree was (therefore) obtained by fraud by the Bank in collusion with Baldeo Das's brothers.

It has been held by their Lordships of the Privy Council in *Gunga Narain Gupta v. Tiluckram Chowdhry and others* (1) that when fraud is charged

(1) (1888) I. L. R. 15 Cal. 533 (P.C.).

against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Now in the present case, if the pleadings are looked at, the only fraud alleged is that Baldeo Das's brothers and the Bank colluded together to obtain for the Bank a charge upon the disputed land which in reality was not mortgaged with them, this having been done in order that the brothers should escape liability. This is the best possible statement of the appellants' case. There is no allegation that there was a fraud upon the Court or directed towards the Syndicate though it is noted in the pleadings that the Syndicate was adversely affected by the decree in question but nothing more and that they for this reason had a cause of action. We would, therefore, hold that the appellants cannot be allowed to go beyond their own statement of their case, though, as we have heard appellants' counsel on all the grounds of appeal, we think it will be the best course to record our findings on all the points raised.

The case for the appellants, therefore, was that the Bank obtained their *ex-parte* decree with a charge on the disputed land against Baldeo Das by fraud in that, in reality, the land was not mortgaged with the Bank but Baldeo Das's brothers admitted that it was mortgaged and that it was their brother's self-acquired property in return for the Bank's releasing them from liability as members of a joint Hindu family with him. In order to establish their case, the appellants relied on the record of the previous case and examined two witnesses. The first witness was Lajpat Rai, one of Baldeo Das's brothers. He denied that there was any talk at the time of the compromise to the effect that the decree

1925

PUNJAB COMMERCIAL SYNDICATE
v.
PUNJAB CO-OPERATIVE BANK, LIMITED.

1925

PUNJAB COM-
MERCIAL SYN-
DICATE
v.
PUNJAB
CO-OPERATIVE
BANK, LIMITED.

should be made a charge on the disputed land in case other creditors should step in. It was not even mentioned at that time that there were other creditors. Though he and his two brothers, who contested the suit with him, disputed the hypothecation in their written statement, they admitted it later, he explained, when the sale-deeds were produced by the Bank and Thakar Das made his statement as a witness. The second witness knew nothing about the transaction. No further attempt was made to prove that the land in question was not hypothecated with the Bank or what the fraud was. The appellants' oral evidence was thus in favour of the Bank and against the appellants, whatever the fraud alleged be considered to be. This leaves to be considered only the circumstances. In connection with them appellants' counsel laid great stress on paragraph 4 of the Bank's plaint, and the fact that the Syndicate's suit was then pending. He also commented at great length on the statement of Thakar Das, P. W. 3, in the Bank's suit, and stated that it was not sufficient to enable the Court to pass an *ex-parte* decree in favour of the Bank against Baldeo Das. All this, however, amounts to little or nothing. At the time the Bank's suit was filed, it was in liquidation and its officials were dispersed. This might easily account for the statement in paragraph 4 of its plaint, which was contradicted by paragraph 10. The compromise in question might well have been entered into by the Bank and Baldeo Das's brothers, even if there had been no other creditor. There was a presumption against the brothers that they were joint with Baldeo Das. At the same time the contest was delaying the Bank from realising its debt. The brothers had seen that the title-deeds were produced by the Bank and they had heard the statement

of Thakar Das, who used to be its manager, to the effect that the title-deeds were deposited as a cover for the whole loan in 1908. It was thus quite reasonable on their part to admit that the land in dispute was the self-acquired property of Baldeo Das and was mortgaged with the Bank and that they had no concern with it, in return for the Bank giving up its claim against them. The Bank gained even more than that; for the brothers also admitted that Baldeo Das had a one-fourth share in the joint ancestral property and that the shares of the Bank held by him were his self-acquired property and not family property. In this way the brothers were estopping themselves from denying these facts in the subsequent execution proceedings. From these circumstances combined with the fact that the appellants have not even tried to establish that there was not an equitable mortgage with the Bank, it is impossible to draw the deduction that the Bank and the brothers of Baldeo Das colluded together to defraud Baldeo Das or to obtain a fraudulent charge on the disputed land for the Bank. There was an eminently reasonable compromise entered into between them and thereafter the Court, with the record and the evidence before it, passed the *ex-parte* decree in question against Baldeo Das and, on the basis of the compromise, dismissed the suit against his brothers. The mere fact that the appellants' suit was pending, does not make such a fair compromise appear even suspicious. As the alleged fraud was not established the suit was properly dismissed on this ground alone.

We would go further and hold that the present suit did not lie on the allegation of fraud made. It has been held in *Maharani Janki Kuer, v. Mahabir Singh* (1) that an *ex-parte* decree cannot be reopened

1925.

PUNJAB COMMERCIAL SYNDICATE
v.
PUNJAB CO-OPERATIVE BANK, LIMITED.

1925
 PUNJAB COM-
 MERCIAL SYN-
 DICATE
 v.
 PUNJAB
 CO-OPERATIVE
 BANK, LIMITED.

except on the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained and it is not sufficient to allege that it was obtained on a false claim. Even if an *ex-parte* decree is obtained on perjured evidence, it cannot be set aside on that ground, *Kripasindhu Panigrahi v. Nandu Charan Panigrahi and others* (1). The following passage from *Venkatarama Aiyar, v. The South Indian Bank Limited* (2) may be quoted *in extenso*:—

“ The passages relied upon in the books referred to lay stress on the fact that a fraud practised on the debtor is not itself any ground for interference by third parties. The defendant holds a decree which finally determines that the relation of creditor and debtor exists between him and his judgment-debtor and which is conclusive as to the amount of the debt as between the parties (and in the present case, as to there being a charge on the land). . . . The plaintiffs have failed to establish fraud or collusion against themselves. In these circumstances I think the principle of the decision above referred to applies and the plaintiffs are not entitled to attack the decree by showing that it is not based on a real debt.”

It follows from this that it was necessary for the appellants to allege that there was collusion directed against themselves and this they did not do. Their suit failed on this ground also.

Even if it be taken that the allegations in the pleadings amount to an averment of fraud directed against the appellants, it is obvious from the above discussion that there is no evidence of any such fraud or collusion. It is unnecessary to go over the same ground again as it has been shown that the compro-

(1) (1919) 56 I. C. 606.

(2) (1919) I. L. R. 43 Mad. 381, 389.

mise complained of would have been a fair and reasonable compromise as between the Bank and Baldeo Das's brothers, even if the appellants' suit had not then been pending. The burden was therefore heavy upon the appellants to establish that it was the result of collusion to injure them. The evidence led by the appellants did not help them. It has not been shown that the land was in fact not hypothecated with the Bank. It does not affect the case that the result was detrimental to the present appellants, though it must be noted that there is no evidence on the record to show that it was detrimental to their interests and that they could not execute their decree in full otherwise. Fraud and collusion against the appellants were not alleged nor have they been made out.

Obviously there was no fraud on the Court. That also was not alleged in the pleadings. The *ex-parte* decree against Baldeo Das was passed on evidence. It would not matter if that evidence was insufficient, or if the decree was obtained on perjured evidence. Before the decree could be vacated, it would have to be established that it was the result of collusion and fraud directed against the appellants. As to this there is neither direct nor indirect evidence.

We dismiss the appeal with costs.

A. N. C.

Appeal dismissed.

1925

PUNJAB COM-
MERCIAL SYN-
DICATE
v.
PUNJAB
CO-OPERATIVE
BANK, LIMITED.