

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

GOPATAR AND ANOTHER

v.

ABDUL AZIZ.*

1931

Jan. 26.

Fraud—Suit to set aside decree on ground of fraud—Specific allegation of fraud essential.

If a suit is brought to set aside a decree upon the ground that it was obtained by fraud, the plaintiff must clearly and specifically set out the fraud that is alleged. The previous decree cannot be set aside on a mere general allegation of fraud or collusion, thus enabling a party to reargue in the subsequent suit issues in the original suit in which the decree had been passed against him.

Nanda Kumar Howladar v. Ram Jiban Howladar, I.L.R. 41 Cal. 990—referred to.

Ghose for the appellants.

Doctor for the respondent.

PAGE, C.J.—This appeal must be dismissed.

It is an attempt on the part of the defendants by filing a regular suit to obtain what is in substance the decision of the High Court as a Court of Appeal from an *ex-parte* decree of the Township Court of Prome. Such a proceeding is not one to which this Court would lightly give its support.

The suit was brought in the Township Court of Prome against the appellants by the respondent to recover a sum of Rs. 889 alleged to be due on a promissory note. In default of appearance by the appellants an *ex-parte* decree in favour of the respondent was passed by the learned Township Judge.

At least three courses were open to the appellants. They might have applied for a review of the decree; they might have appealed against the decree, or they might have applied for an order setting aside the decree under Order IX, rule 13. The appellants

* Civil First Appeal No. 174 of 1930 from the judgment of the Original Side in Civil Regular No. 168 of 1930.

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refrained from taking either of the first two courses, but applied to the Township Court of Prome under Order IX, rule 13. In the circumstances obtaining in this case that was the reasonable and proper course for the appellants to have taken, because their real complaint was that they had not been served with the summons in the suit.

Notwithstanding the application which had been made under Order IX, rule 13 to the Township Court of Prome, however, the appellants thought fit to institute the present suit on the Original Side of the High Court praying "for a declaratory decree that the *ex-parte* decree passed in Civil Regular No. 264 of 1929 of the Township Court of Prome be declared null and void."

The appellants urged before the learned trial Judge and also on appeal before us that if the plaint was taken as a whole it amounted to a claim to set aside not only the *ex-parte* decree but the whole of the proceedings in the Township Court of Prome upon the ground that the suit was radically vitiated by fraud.

Now, it is unnecessary to determine whether the present suit as framed would lie in the High Court ; for this appeal can be determined upon a narrower ground. If a regular suit is brought to set aside a decree upon the ground that it was obtained by fraud the plaintiffs must clearly and specifically set out the fraud that is alleged. As Jenkins, C.J., observed in *Nanda Kumar Howladar v. Ram Jiban Howladar* (1): "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

(1) (1914) I.L.R. 41 Cal. 990 at p. 998.

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." Every word of these observations is applicable to the present suit. The learned Chief Justice further observed: "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."

If the law were otherwise the result would be that in any case in which a defendant is dissatisfied with the decree that had been passed against him all that he need do would be to make file another suit setting out general allegations of fraud against the plaintiff in connection with the suit, and this would enable him to re-agitate in the subsequent suit questions at issue in the original suit in which the decree had been passed against him.

Now, in the present suit (assuming that it lies in the High Court), the principal complaint of the plaintiffs is that the decree was passed without any service of summons having been made upon them. In paragraph 9 of the plaint the appellants allege in general terms that a false case had been launched against them, without condescending to any particulars of the fraud, or even specifically alleging that their case was based upon the fraudulent conduct of the respondent. A plaint in these terms is not one upon which the relief sought or any kindred relief would be granted in the present suit.

The learned trial Judge dismissed the plaintiff's suit. We think that his decision was correct, and that there is no substance in this appeal, which must be dismissed with costs.

DAS, J.—I agree.

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