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years after the order for payment of costs had been made by Mr. Leeds, and that Mr. Babonau was justified in refusing to make an order to realize those costs. The rule is discharged.

C. S. *Rule discharged.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1894 *March* 30.

MAHOMED GOLAB (DEFENDANT) *v.* MAHOMED SULLIMAN (PLAINTIFF).*

Fraud—Suit in Recorder's Court to set aside for fraud decree obtained in Small Cause Court—Perjury.

A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story.

Where a decree has been obtained by a fraud practised on another, by which that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed. But it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other side (which is fraud of the worst description) that he can obtain a rehearing of the questions in dispute in a fresh suit, by merely changing the form in which he places it before the Court, and alleging in his plaint that the first case was obtained by the perjury of the person in whose favor it was against.

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In this case a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Court of Small Causes at Rangoon on the ground that it had been obtained by fraud was held under the circumstances of the case to be not maintainable.

THIS was a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Judge of the Rangoon Court of Small Causes, on the ground that it was obtained by fraud. The plaintiff alleged that he, having been informed by one Molla Sulliman that he was about to go to his country and that

* Regular Appeal No. 307 of 1892 against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated 13th September 1892.

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a debt was due to him, Molla Sulliman, by one Ismail Khan, was asked by Molla Sulliman to take a promissory note from Ismail Khan for the amount due for the purpose of recovering payment on behalf of Molla Sulliman. This the plaintiff agreed to do, and in the month of December 1891 Ismail Khan executed in favor of the plaintiff a promissory note for Rs. 2,000 on demand, which was given in lieu of a note executed on the 21st May 1891 by Ismail in favor of Molla Sulliman. The plaintiff then alleged that subsequently to this Molla Sulliman informed him that he was not going to his country, and asked the plaintiff to endorse the note over to one Mahomed Golab, which was done. Mahomed Golab then sued Ismail Khan and the plaintiff in the Small Cause Court on the promissory note. The day before the suit came on for hearing Molla Sulliman and Mahomed Golab (the defendant in this suit) and one Abdool Kader took the plaintiff to the house of Mr. Vertannes to whom the plaintiff admitted that he had endorsed the note. The plaintiff further alleged that he was told that he was required in the Small Cause Court as a witness only.

On the day of hearing the plaintiff attended at the Small Cause Court, when Ismail Khan admitted the execution of the note, and the present plaintiff admitted his endorsement. The present plaintiff was then told that a decree had been made against him; he protested, and the Judge then stated that the case would be taken up as a contested case later on in the day. The plaintiff alleged that he was then told by Molla Sulliman and Abdool Kader that a release would be executed freeing him from all liability, and he was then taken to the Registration Office, and subsequently elsewhere with the object of finding Mahomed Golab. Golab was not ever found, and the present plaintiff alleged that he was driven from one place to another with Molla Sulliman and Abdool, until late in the afternoon (and on this point he was to some extent corroborated by other witnesses), and on reaching the Court he found that the decree, now sought to be set aside, had been passed against him in his absence.

Subsequently the present plaintiff applied to the Small Cause Court for stay of execution, stating that he was about to bring a suit to have the decree set aside. This application, however, was refused, and the plaintiff then brought the present suit on the

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allegations above mentioned to have the decree of the Small Cause Court set aside on the ground of fraud.

At the hearing and in the plaintiff's cross-examination the plaintiff admitted that when at Mr. Vertannes' house he had told that gentleman that he had received consideration for the note, and that he had then stated that he would confess judgment in the Small Cause Court. These facts he however subsequently later on in his cross-examination stated were untrue. The defence set up by Mahomed Golab was that Ismail Khan had borrowed on a promissory note a sum of Rs. 2,000 from the plaintiff, and that subsequently the plaintiff, being in want of the money, asked the defendant Mahomed Golab to lend him Rs. 1,900 on the security of this note, and that the defendant sent Rs. 1,900 to Ismail and the note was endorsed over to him. A further contention was that the plaintiff had in the Small Cause Court offered to pay Rs. 1,000 on account to the plaintiff in the Small Cause Court suit.

The learned Recorder disbelieved the story told by the defendant, and though of opinion that the plaintiff's story was a remarkable one, considered that he had made out his case, and therefore decreed the suit in favor of the plaintiff, setting aside the decree of the Judge of the Small Cause Court so far as it affected him.

The defendant appealed.

Mr. *Braunfeld* (with him Babu *Sita Nath Das*) for the appellant.—If fraud was practised, plaintiff should have moved the Small Cause Court Judge for a review. See *Prudham* v. *Philipps* (1). The suit was not decided *ex-parte*, because the plaintiff (then defendant) had put in an appearance, but left the Court when he should have waited. The suit is not maintainable; there is no authority for the proposition that a defendant against whom a suit has been decreed in a Small Cause Court can come into another Court as a plaintiff and sue to set aside the judgment of the Small Cause Court, on the ground that that Court had decided against him owing to the plaintiff in the Small Cause Court having practised a fraud upon him. The proper course was to apply to the Small Cause Court. *Prudham* v. *Philipps* (1); *Rex* v. *Duchess of Kingston* (2); Kerr on Fraud (2nd edition), 327.

(1) 2 Ambl., 763. (2) 2 Sm. L. C., 593: 20 How. St. Tr., 544.

There is no evidence of fraud having been practised by the defendant on the plaintiff, and no evidence of a conspiracy between the defendant and others. See *Patch* v. *Ward* (1) ; *Carew* v. *Johnston* (2) ; *Flower* v. *Lloyd* (3).

The plaintiff had admitted to Mr. Vertannes receiving consideration, and also admitted his endorsement. His language before Mr. Vertannes was that of a debtor and not that of an accommodator. His admission in Court and his subsequent departure showed he was a real debtor ; he ought not to be allowed to blow hot and cold ; a person who makes contrary allegations is not to be believed on the maxim *contraria allegans non est audiendus.*

When the plaintiff was asked to endorse the note Ismail was present. Why did he not tell Molla Sulliman to take a fresh note instead of endorsing, inasmuch as the object for which the note was taken by plaintiff did not require the plaintiff's help, as Molla Sulliman did not go to his country after all? If the money had been Molla Sulliman's he would not have witnessed the note, as there were others present to do so. If there was a conspiracy against plaintiff it would not have been carried out before so many people. The plaintiff's own witness proves that the plaintiff was aware that the summons was affixed on plaintiff's door. The plaintiff was in want of money at the time of the note as he was building a house.

Moulvi *Shamsool Huda* for the respondent contended that there was a conspiracy against the plaintiff in which the defendant was involved.

The following judgments were delivered by the Court (PETHERAM C.J , and GHOSE, J.) :—

PETHERAM, C.J.—Early in the year 1892 a suit was brough Mahomed Golab, the present defendant, in the Small Cause of Rangoon, against Ismail Khan and Mahomed Sullim present plaintiff, on a promissory note dated the 21st 1891, made by Ismail Khan in favour of Mahomed Sul[illegible]d by him endorsed to the plaintiff.

The suit came on for hearing on the 17th of Febr[illegible]y 1892, when it appears from the record of the proceedings that Ismail

(1) L. R , 3 Ch., 203. (2) 2 Sch. & Lef , 308.
(3) L. R., 10 Ch. D., 227.

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Khan confessed judgment and Mahomed Sulliman, the present plaintiff, admitted his endorsement, and a decree was made in the plaintiff's favour against them both. On the 15th of March 1892, Mahomed Sulliman petitioned the Small Cause Court to stay execution on the ground that the decree had been obtained by fraud, and in his petition stated that he was about to take proceedings to have the decree set aside, and such further or other proceedings as he might be advised. This petition was rejected with costs on the 25th of March, and the plaint in the present suit was filed on the 28th of the same month in the Court of the Recorder of Rangoon. The nature of the relief sought, and the stories both of the plaintiff and the defendant, are so fully and accurately described in the first three paragraphs of the learned Recorder's judgment, that it is only necessary for me to refer to those paragraphs here. The learned Recorder then goes on to say that he cannot believe the story told by the defendant, and that though the story told by the plaintiff is a remarkable one, he thinks on the whole he has made out a case ; but, if I understand him rightly, his principal reason for thinking so is that in his opinion the plaintiff had a good defence to the action on the note, and the decree ought not to have been made against him in the first action on the merits.

The question whether a suit will lie to set aside a decree of a Court of Justice on the ground that it was obtained by fraud is dealt with in the following cases :—

Raj Mohun Gossain v. *Gour Mohun Gossain* (1) was decided by the Privy Council in 1865. It was there held that a decree of an Appellate Court having been obtained after a compromise not to prosecute, the appeal was an adjudication obtained, not only with an impropriety but in effect by fraud and not binding upon the who had been defrauded.

In *Patch* v. *Ward* (2) Lord Cairns, L.J., states the law as follows :—Now it is necessary to bear in mind what is meant, and what is to be meant, by fraud, when it is said that you may impeach a decree, signed and enrolled, on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject—*The*

(1) 4 W. R., 47 : 8 Moo. I. A., 91. (2) L. R., 3 Ch., 203.

Duchess of Kingston's case (1), where the Judges, being consulted by the House of Lords, replied to one of the questions: 'Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.' The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens*, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. And that that is so is, I think, further illustrated by looking at the form of decree which this Court is in the habit of making when a bill to impeach on the ground of fraud a decree signed and enrolled is successful. In *Carew* v. *Johnston* (2), Lord Redesdale made a declaration in these words: 'Declare that the several decrees and proceedings in the said cause instituted by the said late defendant, John Pine, deceased, against the said Thomas Pyke, deceased, and others, appear to have been erroneous and unjust, and to have been fraudulently obtained and had by the said John Pine, and by the defendant Johnston (who was the assignee of the said John Pine of the benefit of such suit, and the person really interested therein) by taking advantage of the real imbecility of mind of the said Thomas Pyke, and the embarrassed state of his affairs in Ireland, and the negligence and misconduct of those who, by reason of the incapacity of the said Thomas Pyke, took upon them the care and custody of his person and fortune, and treated him as a person of unsound mind and incapable of managing his affairs, without obtaining any authority to do so by suing out any Commission either in England or Ireland in the nature of a writ to inquire of the idiotcy or lunacy of the said Thomas Pyke.' I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled."

(1) 2 Sm. L. C., 593, 601. (2) 2 Sch. & Lef., 308.

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In *Flower* v. *Lloyd* (1), decided on appeal by James, Baggallay and Thesiger, L.JJ., the suit was dismissed on the ground that the fraud was not proved, but James, L.J., on his own behalf and that of Thesiger, L.J., said: "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 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 on one 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 subornation 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 Court 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." Baggallay, L.J., said: "I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it would be proper to deal with cases if and when any such shall arise, in which it shall be clearly proved that a judgment has been obtained

(1) L. R., 10 Ch. D., 327.

by the fraud of one of the parties, which judgment, but for such fraud, would have been in favour of the other."

The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of Justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed, but I am not aware that it has ever been suggested in any decided case; and in my opinion it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a rehearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to *res judicata* as well. The reasons why this cannot be the case are very clearly stated by James, L.J., in the passage I have quoted, and it is because the reports in which those cases are to be found may not be accessible to some of the judicial officers in this country that I have quoted his remarks and those of Lord Cairns as fully as I have done.

The question then is: Does it appear from the evidence on this record that the plaintiff Mahomed Sulliman was prevented by the fraud of the defendant Mahomed Golab from placing his defence to this claim before the Small Cause Court Judge on the 17th of February 1892? The story which the plaintiff himself tells is that one day Sulliman Molla, Ismail Khan, who was the maker of the note, the defendant, who was the person to whom the plaintiff had endorsed it, and two other persons took him to the house of Mr. Vertannes, an Advocate at Rangoon, and the person who appeared for Mahomed Golab both in the Small Cause Court and in the Recorder's Court; and that when there he by the direction of Abdul Kader

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and Sulliman Molla told Mr. Vertannes that he had signed the note, had received the money, and would confess judgment in Court; that about fifteen days after Molla Sulliman said "I am going to sue Ismail Khan, come and give evidence;" that afterwards Sulliman Molla, Abdul Kader and the defendant took him to the Court, and upon his complaining that he had not received his *subpœna* or subsistence allowance, Sulliman Molla said that the money was with the peon and that he would be paid, and paid him Re. 1 out of his pocket; that the case was called on and the Judge asked him if he had signed the note, and when he said he had, the interpreter said "if Ismail Khan fails to pay, you will have to do so;" that he said he had not received any money but was merely asked to sign the document and did so; that thereupon all four cried out that a decree had been made against him, that he himself cried out and the Judge turned him out of Court. He does not say who were the four who cried out.

He then says that when he came out he spoke to Abdul Kader and Sulliman Molla and said: "I have given evidence according to your instructions and now I am told I shall have to pay," and they said that they would give him a registered release, and that he was not to be afraid if he kept quiet; that a little after Abdul Kader said "come home in a *gari* I will get money and write the release," and that this took place in front of the Registration Office where they took him; that then Abdul Kader called a *gari*, and he and the plaintiff drove to 33rd Street. Abdul Kader went to the house and left the plaintiff in the *gari*. He brought with him Sulliman Molla and Ismail Khan. Then Abdul Kader sent the plaintiff, Molla Sulliman, and Ismail Khan to the back of the Pagoda to No. 3 guard house on the Kokul side to bring defendant to have a deed of release written as the plaintiff was crying; that they drove out there and went to Minegoang, and that Molla Sulliman and Ismail Khan told the plaintiff to wait and they would search for and bring defendant. The plaintiff waited; that then a constable came to speak to the *gariwalla* and the constable asked why the plaintiff was crying, to which he said that a fraudulent case had been brought against him by two persons, and that they had gone out and he was waiting for them. At about 5 or 5-30 those persons returned; that the plaintiff waited

from 2 P. M. They left at 1 or 1-30 and got back at 6. They all came together. He says that Sulliman Molla, Abdul Kader, Ismail Khan, defendant, Fakir Ahmed and Saimulla, the writer of the note, Mahomed Ismail and Fareed Sahib were all present when Ismail signed the note ; that after the decree was made, the plaintiff spoke to these people about the release ; he spoke to defendant. They did not give it to him and he consulted a lawyer and instituted this suit.

The learned Recorder has accepted this story—first, because he thinks it is corroborated by other witnesses ; and, secondly and mainly, as I understand him, because he does not believe that the defendant gave value for the note, and he has decreed the suit. I am unable to agree with him in his view of the facts.

I cannot find in this record any evidence which would corroborate the statement of the plaintiff, if he had made such a statement which is by no means clear, that he was induced by the fraud of the defendant not to defend the action. There is no doubt independent evidence that he was at the places he mentioned in the company of Abdul Kader and Sulliman Molla, but this may quite well have been the case, and still there may be no truth in the statement that he had been defrauded by the defendant. On this question of corroboration it will be useful to study the case of *Queen-Empress* v. *Ram Saran* (1) in which Straight, J., collects the English cases.

It is an elementary principle that a person who charges another with fraud must himself prove the fraud, and it is very certain that the plaintiff is not relieved from this obligation because the defendant has himself told an untrue story. In the present case it is quite likely that the learned Recorder may be right in his view of the defendant's evidence, but whether that is true or not I find myself unable to believe that of the plaintiff, and if he is not believed his case must fail. He admits that when it suited him to do so he told Mr. Vertannes that he endorsed the note and received the money. He now says that was untrue, and that he did not receive it. For my part I see no more reason for believing one story than the other, and I think it impossible to act on the unsupported testimony of a man who admits that he tells what-

(1) I. L. R., 8 All., 306.

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ever story suits him at the moment without reference to its truth.

For these reasons I am of opinion that the action cannot be maintained, and that this appeal must be allowed and the suit dismissed with costs in both Courts.

GHOSE, J.—I agree with the Chief Justice in thinking that the suit should be dismissed. Upon the evidence, I do not think it has been satisfactorily proved that the decree of the Small Cause Court was obtained by the fraud of the defendant Mahomed Golab.

T. A. P.

Appeal allowed.

CRIMINAL REFERENCE.

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March 31.

Before Mr. Justice Prinsep and Mr. Justice Hill.

MAHMUDI SHEIKH (COMPLAINANT) *v.* AJI SHEIKH (ACCUSED.)*

Recognizance to keep peace—Criminal Procedure Code, 1882, ss. 106, 349—Procedure to be followed by Magistrate trying a case when he is not empowered to bind the accused down under 106 of the Criminal Procedure Code.

An Honorary Magistrate exercising third class powers tried an accused on a charge of criminal trespass and convicted and sentenced him to pay a fine of Rs. 10, or in default to suffer seven days' rigorous imprisonment. He further submitted the case to the District Magistrate with a recommendation that the accused should be bound down to keep the peace under section 106 of the Criminal Procedure Code, and the District Magistrate ordered the accused to furnish security.

Held, that the order of the District Magistrate was illegal and must be set aside.

Before an order under section 106 can be properly passed the conviction must be by a Magistrate of the class mentioned in the section and not by a third class Magistrate, and the order must be passed by the Magistrate who convicts and passes the sentence.

THIS was a reference by the Sessions Judge of Mymensingh under section 438 of the Code of Criminal Procedure.

It appeared from the letter of reference that the complainant, on the 20th November 1893, filed a complaint against the accused

* Criminal Reference No. 74 of 1894 made by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 5th March 1894.