

## LETTERS PATENT APPEAL.

*Before Sir Laurence H. Jenkins, K.C.J.E., Chief Justice,  
and Mr. Justice Doss.*

1910  
May 17.

RAJENDRA KUMAR BOSE

v.

GANGARAM KOYAL.\*

*Pleadings—Fraud, sole ground of relief—Alteration of ground of relief by picking out facts from allegations in the plaint—Defendant's duty in cases based on fraud.*

Where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the plaint facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief.

A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward.

*Hickson v. Lombard* (1) and *Guthrie v. Aboul Mozuffer Nooroodin Ahmed* (2) referred to.

APPEAL by the defendant, Rajendra Kumar Bose.

The defendant in this suit had brought a suit for partition against the plaintiffs, and had in that suit also asked for mesne profits on the allegation of dispossession by the latter from the property—the subject-matter of that suit. The plaintiffs in this suit (defendants in the former) had filed a written statement denying the allegation of dispossession. A preliminary decree for partition was, however, passed by the Court with the consent of the parties to that suit, and the Court reserved for future decision the question of costs and mesne profits. Subsequently, the parties filed a compromise-petition, and the suit was finally decreed against the defendant in that suit (plaintiff in the present one) with mesne profits. The present plaintiffs' case is that it had been agreed between the parties to the

\* Letters Patent Appeal No. 71 of 1909, in Appeal from Appellate Decree No. 1729 of 1907.

(1) (1866) L. R. 1 H. L. 324.

(2) (1871) 15 W. R. P. C. 50.

previous suit that there would be no decree for mesne profits, but that the present defendant misled the Court and fraudulently got it to pass a decree with mesne profits; that as the present plaintiffs were under the impression that a decree had been passed in terms of the compromise-petition, they did not make any enquiry about the matter, but came to know about it all after the present defendant had applied in execution-proceedings for ascertainment of mesne profits, etc., under the decree. The present plaintiffs, therefore, brought this suit to set aside a portion of the compromise-decree, on the ground that, in the petition of compromise, there was no mention of any mesne profits, but that the Court by a mistake and without jurisdiction awarded mesne profits to the defendant.

1910  
 RAJENDRA  
 KUMAR  
 Bose  
 v.  
 GANGARAM  
 KOYAL

The defendant denied having agreed to give up his claim for mesne profits, denied having misled the Court or having fraudulently got it to pass the decree, and urged that the decree was not against the terms of the compromise-petition that had been filed. He further contended that the Court had jurisdiction to award mesne profits, and that the suit was not maintainable to set aside the decree.

The Munsif decreed the suit. The Subordinate Judge, on appeal, confirmed the decision of the Munsif, although not agreeing with the Munsif on all the points. The second appeal was heard by Carnduff J., sitting alone, and his Lordship confirmed the judgments of the Courts below.

Thereupon, the defendant preferred this appeal under section 15 of the Charter Act.

*Babu Dwarkanath Mitter (Babu Sailendranath Palit with him)*, for the appellant. A suit to rectify mistake in a decree, as in the present case, does not lie in the courts of India; and the plaintiffs having based their case on fraud, and fraud having been negatived by both the Courts below, they should not have been allowed to succeed on the ground of mistake. The case-law in India uniformly, except in one case, lays down that such a suit does not lie: *Chand Mea v. Asima Banu* (1), *Surjan*

(1) (1906) 10 C. W. N. 1024.

1910  
 RAJENDRA  
 KUMAR  
 BOSE  
 "GANGARAN"  
 KOYAL.

*Rao v. Bhikari Rao* (1), *Sadho Misser v. Golab Singh* (2). See also *Khuda Baksh v. Aziz Alam* (3). The case of *Jogeswar Atha v. Ganga Bishnu Ghattack* (4) is the exception. There are cases in the courts of England where the decree has been set aside, but only where the agreement on which the decree was made was based on mutual mistake: *Ainsworth v. Wilding* (5), *Neale v. Lennox* (6). The decision of Mookerjee J. in *Gulab Koer v. Badshah Bahadur* (7) is an *obiter* on this point. In the next place, I contend that the plaintiffs should not have been allowed to make a new case of mistake.

*Babu Pravash Chandra Mitter*, for the respondent, conceded that the decree could not be set aside on the ground of unilateral mistake, but where there was mutual mistake on both sides a decree could be set aside. The case-law is consistent both in England and in India: see *Gulab Koer v. Badshah Bahadur* (7) where all the English and American authorities are reviewed. There was no investigation into the question of mesne profits before the preliminary decree was passed, and it is clear that the decree-holder did not waive his rights to the mesne profits. It is not correct to say that a new case has been made of mistake. In the plaint there are distinct allegations of mistake.

[JENKINS C.J. But where you have based your case on fraud only, you cannot give up fraud and base your claim on mistake: see *Hickson v. Lombard* (8).]

But here, it would seem, there was an alternative claim founded on mistake. In any event, when the question of mesne profits have not been determined, there should be a remand.

JENKINS C.J. This appeal arises out of a suit brought to rectify a decree passed in a previous suit No. 830 of 1904. If regard be had to the allegations of the plaint, it is apparent that the plaintiffs' case rested wholly on fraud, and the Munsif has correctly described the position when he said—"The plaintiffs' case is that the decree was vitiated by fraud, which consisted in

(1) (1893) I. L. R. 21 Cal. 213.

(2) (1897) 3 C. W. N. 375.

(3) (1904) I. L. R. 27 All. 194.

(4) (1904) 8 C. W. N. 473.

(5) [1896] 1 Ch. 673.

(6) [1902] A. C. 465.

(7) (1909) 13 C. W. N. 1197.

(8) (1866) L. R. 1 H. L. 324, 336.

the present defendant having misled the Court to pass the decree." The fraud was negatived, and thereupon a case of mistake was set up, and on this ground the Munsif passed a decree in the plaintiffs' favour. This was confirmed by the lower Appellate Court, and also by the judgment of this Court on appeal when the case was heard by a single Judge. From this judgment the present appeal is preferred.

1910  
 RAJENDRA  
 KUMAR  
 BOSE  
 v.  
 GANGARAM  
 KOYAL.  
 JENKINS  
 C.J.

I take it to be well-established that where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the plaintiff facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives : see *Hickson v. Lombard* (1). This statement of the law has been treated by the Privy Council as applicable in India : see *Guthrie v. Abool Mozuffer Nooroodin Ahmed* (2), and the present case falls precisely within it ; for the charge was one of fraud, and that having failed, the plaintiffs by picking out stray allegations from their plaint have endeavoured to make good a case entitling them to rectification on the ground of mistake. I refrain from discussing the question as to how far the Courts in India can entertain a separate suit to rectify a consent-decree on the ground of mistake, as for the reason I have already stated, the decree of the lower Appellate Court should be set aside and the suit dismissed with costs throughout.

Doss J. I agree.

*Appeal allowed.*

S. M.

(1) (1866) L. R. 1 H. L. 324, 336.

(2) (1871) 15 W. R. P. C. 50, 54.