APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice N. R. Chatterjea.

1911

July 20.

LAKSHMI CHARAN SAHA

v.

NUR ALI.*

Fraud—Ex parte decree procured by fraud—Jurisdiction of another Court to set aside the ex parte decree—Investigation how far limited.

The defendant obtained an *ex parte* decree at Akyab upon a promissory note against the plaintiff who subsequently applied under section 108 of the Code of Civil Procedure to set aside the said decree. The *ex parte* decree was set aside and the suit was revived, but at the hearing the plaintiff could not appear and an *ex parte* decree was again passed.

The plaintiff then brought a suit in the Court to which the *ex parte* decree was transferred for execution, for a declaration that the said decree was not binding on him, it being based upon no cause of action and being frauduleut, inasmuch as he did not execute any promissory note in favour of the defendant, or receive any money from him. On an objection by the defendant that the Court had no jurisdiction to enter into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was whether the plaintiff had by the action of the defendant been prevented from placing his case properly before the said Court:—

Held, that the jurisdiction of the Court in trying a suit of this kind was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree.

SECOND APPEAL by the defendants, Lakshmi Charan Saha and another.

This appeal arose out of an action brought by the plaintiff for a declaration that the decree obtained by defendant No. 1 against him was not binding upon him as being fraudulent. It appeared that on the 1st of May, 1906, defendant

* Appeal from Appellate Decree, No. 1908 of 1909, against the decree of T. C. Das, Subordinate Judge of Chittagong, dated June 9, 1909, affirming that of Nagendra Nath Bhattacharya, Munsif of Hathazari, dated Jan. 25, 1909.

No. 1, Ismat Ali, obtained an *ex parte* decree based upon a promissory note against the plaintiff in the Court of the District Judge of Akyab. The decree was then transferred to the Court of the Munsif of Hathazari in the district of Chittagong, for execution. The plaintiff having come to know of this, made an application under section 108 of the Civil Procedure Code, 1882, to set aside the *ex parte* decree. The application was granted and the case was revived. On the date of hearing, the plaintiff could not appear and an *ex parte* decree was again passed. A notice having been served on him, the plaintiff came to know that the defendant No. 1 had again secured against him a fraudulent *ex parte* decree in collusion with defendant No. 4, to whom the decree was transferred by defendant No. 1. On this state of facts the plaintiff brought, in the Munsif's Court at Hathazari, this action for the aforesaid declaration alleging that he did not borrow any money from the defendant No. 1 on a promissory note at Akyab, and that the *ex parte* decree and the subsequent proceeding taken by the defendant No. 1 were all collusive and fraudulent.

The defendants Nos. 1 and 4 contested the suit and pleaded, *inter alia*, that the suit was not maintainable in the Hathazari Court, and that the decree was not fraudulent. The Court of first instance overruled the objections of the defendants and decreed the plaintiff's suit. On appeal by the defendants, the learned Subordinate Judge of Chittagong affirmed the decision of the Court of first instance.

Against this decision the defendants appealed to the High Court.

Babu Dhirendra Lal Khastgir (with him *Babu Khiteesh Chunder Sen*), for the appellants. Plaintiff brought this suit to set aside the decree of the District Judge of Akyab on the ground that the promissory note was a forged document and that he did not borrow any money. He had notice of the suit in Akyab, but he did not choose to contest it. The District Judge of Akyab found on the evidence that the promissory note was genuine and that money was due on the note and passed a decree. The Munsif's Court at Chittagong had no

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jurisdiction to enter into the question of the genuineness of the promissory note, which was found in favour of the present defendant by a competent Court. Plaintiff was not prevented by any fraud on the part of the defendant No. 1 from putting his case properly before the Akyab Court. The decision of the Akyab Court was not set aside by any Court having authority over the said Court. The cases of *Mahomed Golab* v. *Mahomed Sulliman* (1), and *Abdul Huq Chowdhry* v. *Abdul Hafez* (2), show that the lower Court had no jurisdiction to go into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was, whether the plaintiff had, by the action of defendant No. 1, been prevented from placing his case properly before the Akyab Court. The Chittagong Court had no jurisdiction to set aside the decree of the District Judge of Akyab. Further, the promissory note should have been produced before the Chittagong Court, as without it, the Court could not have pronounced any opinion about its genuineness.

Moulvi Syed Shamsul Huda (with him *Moulvi Abul Ahsan*), for the respondent. The Court below having found that the plaintiff never went to Akyab, and that he did not borrow any money from the defendant No. 1, it was fully justified in making a declaration that the decree was a nullity, and that it was not binding on the plaintiff. A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence: *Venkatappa Naick* v. *Subba Naick* (3). In cases of fraud there is no limitation to the jurisdiction of the Court.

Babu Dhirendra Lal Khastgir, in reply.

Cur. adv. vult.

D. CHATTERJEE J. The defendant No. 1 obtained at Akyab an *ex parte* decree upon a promissory note said to have been executed by the plaintiff at Akyab. The plaintiff had the decree set aside under section 108 of the Civil Procedure Code,

(1) (1894) I. L. R. 21 Calc. 612. (2) (1910) 14 C. W. N. 695.
(3) (1905) I. L. R. 29 Mad. 179.

but could not appear at the hearing of the revived suit so that an *ex parte* decree was again passed. The result is analogous to a case in which there is an *ex parte* decree after actual service of summons. The plaintiff brings the present suit on the allegation that he never went to Akyab, never received any money there from the defendant and never executed any promissory note in his favour, so that the decree was based on no cause of action and fraudulent, and praying for declarations to that effect. The lower Courts have held that the plaintiff never went to Akyab, never received any money from the defendant No. 1 there, and never executed the promissory note so that the whole proceeding was fraudulent. It has been argued in second appeal before us that the lower Court had no jurisdiction to go into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was whether the plaintiff had by the action of the defendant No. 1 been prevented from placing his case properly before the Akyab Court, and, secondly, that no decree should have been passed without calling for the promissory note impeached as a forgery.

In support of the first contention, the learned vakil for the appellant has relied upon the cases of *Mahomed Golab* v. *Mahomed Sulliman* (1) and *Abdul Huq Chowdhry* v. *Abdul Hafez* (2). In the first case, it appears to have been laid down by Sir Comer Petheram C.J. "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. . . 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 re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court." Mr. Justice Ghose agreed in the result on the

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ground that no fraud had been proved. The second case followed the above opinion. I think the proposition of law as laid down in these cases has the effect of restricting within too narrow limits the remedy of a man against whom a fraudulent decree has been obtained. It becomes necessary, therefore, to examine the authorities upon which those cases are based with some care. I may say at the outset that the opinion by Sir Comer Petheram, C.J. in the first case is an *obiter dictum*, as there was no fraud found and Mr. Justice Ghose did not join in the said view, but rested his judgment simply on the ground that no fraud has been proved: that opinion again was based on an *obiter dictum* of Lords Justices James and Thesiger in the case of *Flower* v. *Lloyd* (1), Lord Justice Baggallay reserved his opinion as the point did not arise, and said "I should much regret to feel myself compelled to hold that the Court had no power to deprive the successful, but fraudulent party, of the advantages to be derived from what he had so obtained by a fraud." In the case of *Abouloff* v. *Oppenheimer & Co.* (2) Lord Justice Brett said, "With one exception none of the authorities cited before us in the least militate against our decision; they all seem to show that the fraud of a party to a suit is an extrinsic and collateral act which will vitiate the judgment. That exception is to be found in the doubts expressed by James L.J. with the assent of Thesiger L.J. in *Flower* v. *Lloyd* (1), it seems to me that the fraud alleged in that action was probably fraud on the part of certain servants of the party and not fraud brought home to the party himself. Moreover, it was, as I understand, fraud committed not before the Court itself at the trial of the action, but previously to the case being brought to a hearing before the Court. If it is to be taken that the doubts of James and Thesiger L.J. related to a fraud of a party to the action committed before the Court itself for the purpose of deceiving the Court, I cannot after having heard the present argument agree with the doubts expressed by them." In the case of *Priestman* v. *Thomas* (1), we find that a probate having been

(1) (1879) L. R. 10 Ch. D. 327. (2) (1882) L. R. 10 Q. B. D. 295, 307.
(3) (1884) L. R. 9 P. D. 210.