(1915) 07 AHC CK 0025

Allahabad High Court

Case No: None

Bhuri Begam and Another		APPELLANT
	Vs	
Ram Ratan Lal and Muhammad Yusuf Khan and Others		RESPONDENT

Date of Decision: July 7, 1915

Acts Referred:

- Transfer of Property Act, 1882 - Section 90

Citation: (1916) ILR (All) 7

Hon'ble Judges: Henry Richards, C.J; Muhammad Rafiq, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Henry Richards, C.J.

This appeal arises out of a suit in which the plaintiffs sought to set aside a decree which the defendants had obtained u/s 90 of the Transfer of Property Act on the allegation that the same was obtained by fraud, The material facts are practically undisputed. The defendants or their representatives brought a suit upon foot of a mortgage Hated the 25th of October, 1893, and obtained a decree. They had asked in that suit not only for a decree for sale of the mortgaged property but also for a personal decree. This latter part of their claim was disallowed, Some years afterwards the decree-holders applied to the court for a decree u/s 90 of the Transfer of Property Act. Notice of the application was duly served on all the judgement-debtors. They did not appear, and the court granted the decree, but limited it to the assets of the deceased mortgagor. This is the decree which it is sought in the present suit to set aside. Later on, in execution of this decree, a house of the judgement-debtors was attached. The male judgement-debtors-objected that the house could not be sold on the ground that they were agriculturists. This objection was overruled. There was an appeal by the judgement-debtors, which was dismissed. Both the courts below have granted the plaintiffs a decree, setting aside

the decree obtained by the defendants u/s 90 of the Transfer of Property Act. The Judgment of the court of first instance is a little misleading unless one reads it as a whole. When carefully considered, it is clear that the defendants practised no fraud on the plaintiffs to the present suit in respect of the service of notice of the application for the decree u/s 90. The plaintiffs are pardah nashin ladies. It is quite impossible for any litigant to serve process of the court in any way which would violate the pardah of such ladies. When the court of first instance says that these ladies knew nothing about the decree u/s 90, it does not mean that the defendants in the present suit were in any way responsible for their want of knowledge. The ladies were duly served with the notice, so also were the male members of the family. No objection was taken to the granting of the decree u/s 90 and no application was ever made to set it aside. The male members, who were equally interested with the ladies in opposing the decree, evidently thought that there would be no chance of success. We find, however, when the house was attached in execution of that decree they opposed the sale on the ground that they were agriculturists.

2. We now come to the only fraud which is suggested in the present case. The fraud is that the defendants, (who then occupied the position of decree-holder) did not inform the court that, when the preliminary decree was being granted on foot of the mortgage, they had asked for a personal decree and that this had been refused upon the ground that having regard to the date of the mortgage and the position of the judgement-debtors a personal decree ought not to be granted. Two questions arise. First, whether it is open to a party to challenge an order which has been made between the decree-holder on the one side and the judgement-debtor on the, other, even where no fraud is alleged or proved. It seems to me impossible to contend that where (in the absence of fraud) a matter has been decided in execution proceedings relating to the satisfaction of the decree, it is open to the parties to re-open matters which have been so decided by an independent suit. This has been settled by numerous decisions of the various courts in India and also by their Lordships of the Privy Council.

3. Some attempt has been made to distinguish between what is called an ex parte decree or order and a decree or order after contest. I do not think there is any just ground for such a distinction. Assuming a party to have been duly served with notice, if he neglects to come forward and avail himself of the opportunity of preventing a wrong order being made against him I cannot conceive upon what possible ground he should be placed in a better position than the party who comes forward and informs the court (in the manner provided by law) of his rights and prevents (so far as he can) a wrong order being made In my Judgment the party who after due notice allows the decree or order to be made without opposition is in the same position as a person who had a decree or order made against him after contest.

4. The next question is as to the nature of the fraud which must be alleged and proved in order to entitle the plaintiffs to have the decree set aside. On this part of the case Dr. Sulaiman admitted, as I think he was bound to admit, that he could not claim to have a decree u/s 90 set aside on any ground of fraud which would not have been sufficient to have a decree in a suit set aside.

5. A largo number of cases have been cited on each'' side. On the part of the appellant the following cases were relied upon. Mahomed Golab v. Mahomed Sulliman ILR (1894) Cal. 612 Nil Madhab Roy v. Naba Das (1908) 12 C.W.N. 28 Notes, Munshi Mosuful Huq v. Surendra Nath Ray (1912) 16 C.W.N. 1002 Marochain v. Parsuram Makaraj (1911) 10 Ind Cas 905 Janki Kuar v. Laehmi Narain ILR (1915) All. 535 and Nanda Kumar Howladar v. Ram Jiban Howladar ILR (1914) Cal. 990.

6. In the case of Mahomed Golab v. Mahomed Sulliman ILR (1894) Cal. 612 Petheram, C.J., quotes, at page 618, from the case of Flower v. Lloyd (1879) L.R. 10 Ch. D. 327.

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 judgement obtained in an action fought out adversely between two litigants sui juris and at arm''s length, could be sot aside by a fresh action on the ground that perjury had been committed in the first notion, or that false answers had been given to interring stories, 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 in 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.

7. In the case of Nanda Kumar Howladar v. Ram Jiban Howladar ILR (1814) Cal. 990 Jenkins, C.J., quotes with approval Sir John Rolt, L.J., in the case of Patch v. Ward (1867) L.R. 3 Ch. App. 203:

The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtaining that decree by that contrivance.

8. In an earlier part of the Judgment the learned Chief Justice says:

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 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.

9. On the other side also a number of cases have been cited, including a decision of their Lordships of the Privy Council in the case of Rajmohun Gossain v. Gourmohun Gossain (1859) 8 M.I.A. 91. That was a case in which a party having expressly agreed not to appeal, in contravention of his agreement, presented an appeal and obtained a decree which he afterwards sought to set up against the other side. It is quite clear that this case was decided entirely upon its own facts and circumstances. The general law as to what constitutes sufficient allegation and proof of fraud to justify the setting aside of a decree in a previous suit was not discussed.

10. Special reliance was placed on a ruling of the Calcutta High Court in the case of Lakshmi Narain Saha v. Nur Ali ILR (1911) Cal. 936. This decision was cited with approval by another Bench of the Calcutta High Court in the case of Kedar Nath Das v. Hemanta Kumari Debi (1913) 18 C.W.N. 447. In this case a decree had been obtained against the plaintiff ex parte. The plaintiff succeeded in having the ex parte decree set aside, but another ex parte decree was passed against him. The plaintiff then brought a suit to set aside that decree on the ground that the same had been obtained by means of false evidence. It would appear that the court held that on the mere allegation that the decree was obtained by false evidence the plaintiff was entitled to re-open the litigation. If we assume that no just distinction can be drawn between a person against whom a decree has been obtained without content after due notice and a person who has appeared after notice and has been defeated after making the best fight he can, it seems to me that the decision of the learned Judges in the case cited omits to consider the great danger pointed out by Tkesiger, L.J., in the case of Flower v. Lloyd (1879) L.R. 10 Ch. D. 327. As the result of the decree of the learned Judges, if the plaintiff had succeeded in setting aside the degree on the ground that the evidence advanced by the plaintiff in that suit was false, what was there to prevent, the defeated defendant instituting another suit to set aside that decree on exactly similar grounds? This decision docs not appear to have met with the universal approval of the Calcutta High Court: see Munski Mosuful Huq v. Surendra Nath Ray (1912) 16 C.W.N. 1002.

11. I would here like to point out that it is open, to question whether a decree or order which has been obtained after due notice is very accurately described as "ex parte." It is hardly necessary to remark that an order obtained after notice is very different from an order obtained without notice.

12. In the present case it seems to me that the neglect to inform the court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, could not amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants u/s 90 of the Transfer of Property Act. The present suit is in reality an "appeal" against the decree of the court long after limitation. I would allow the appeal.

Muhammad Rafiq, J.

13. I find that the questions argued at the bar do not arise in this case. The arguments have proceeded on the assumption that a personal decree u/s 90 of Act XV of 1882 was obtained by the defendant appellant against the plaintiffs respondents. On reference to the record I find that no personal decree was passed against them, but a decree against them was passed in their representative capacity against the estate of Imtiaz Ali, deceased, one of the mortgagors. The contention for them challenging the decree as having been fraudulently obtained is based on the assumption of a personal decree and as no such decree was passed their contention fails. I would therefore allow the appeal.

14. The order of the Court is that the appeal is allowed, the, decrees of both the courts below are sot aside and the suit is dismissed with cost in all courts.