

MANU/BH/0114/1931

Equivalent Citation: AIR1931Pat204a, (1931) ILR 10 PAT 516, 132Ind. Cas.355

IN THE HIGH COURT OF PATNA

Decided On: 19.01.1931

Appellants:**Nirsan Singh**

Vs.

Respondent:**Kishuni Singh**

Hon'ble Judges/Coram:

Jwala Prasad, Wort and Kulwant Sahay, JJ.

JUDGMENT

Jwala Prasad, J.

1. This reference has been made under the following circumstances. The opposite party, Kishuni Singh, brought a money Suit No. 208 of 1922 on the basis of a pro-note for Rs. 500 against the petitioner Nirsan Singh and obtained an ex parte decree on 28th June 1922. The defendant then applied under Order 9, Rule 13, Civil P.C. to set aside the decree. The application was dismissed for default. He then instituted Title Suit No. 174 of 1923 in the Court of the Munsif of Begusarai for setting aside the ex parte decree on the ground that it was obtained by fraud. That suit succeeded.

2. The opposite party Kishuni Singh, the plaintiff in the original suit, then applied to the Munsif of Begusarai to restore the case to its original file and to decide it on merits. The Munsif granted the prayer by his order, dated 27th May 1929. Against this order of the Munsif the petitioner came to this Court in Civil Revision No. 363 of 1929 which was heard by a Division Bench of this Court.

3. On account of divergence of judicial opinion as to the effect of setting aside an ex parte decree in a subsequent suit on the ground that that decree was obtained by fraud, the Division Bench, which originally heard the case, has formulated the following question and referred it to this Bench for decision:

What is the effect of setting aside an ex parte decree in a subsequent suit, based on a finding that the ex parte decree had been obtained by fraud, and that the suit itself was fraudulent? Is the previous suit revived and can it be reheard on merits?

4. Now as to whether, when an ex parte decree in a subsequent suit is set aside, the original suit in which that decree was obtained is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit. If upon an issue properly raised and tried in the subsequent suit it is held that the claim itself of the plaintiff in the original suit was false and fraudulent, the effect of such a decision is to put an end to that suit, and the suit cannot be revived and retried. If on the other hand, the ex parte decree is set aside on the ground that it was obtained by suppression of summons by means of fraud and the defendant in the original suit was prevented from appearing in the suit and defending it by reason of fraud committed by the plaintiff, the first suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of in accordance with law in spite of the fact that in the subsequent suit the Court went into the question as to the plaintiff's claim being false

as a ground for holding that there was reason for him to obtain stealthily a decree behind the back of the defendant by fraudulently keeping him out of the knowledge of the suit and preventing him from defending the action.

5. The remedy of the defendant to have an ex parte decree set aside is by an application under Order 9, Rule 13 or by a suit. In the former case he is entitled to have the ex parte decree set aside upon his satisfying the Court that the:

summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

6. Order 5, Civil P.C., lays down the rules and the methods for service of summons upon a defendant. It may be personal or in any other way provided for in the rules. Under Rule 6, Order 9, when the plaintiff appears and the defendant does not appear when the suit is called on for hearing the Court may proceed ex parte only upon proof that the "summons was duly served" and may pass an ex parte decree. Order 9, Rule 13 therefore entitles the defendant to have the ex parts decree set aside if he satisfies the Court that the summons "was not duly served" upon him. He will also be entitled to have the decree set aside if he succeeds in showing that he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing although on the face of it the summons appears to have been served in accordance with the rule laid down in Order 5, "Fraud" is not specifically mentioned in Rule 13, but the "sufficient cause" referred to in Rule 13 may be, amongst others, the suppression of the summons by means of fraud so as to prevent the defendant from having any knowledge of the suit against him and thus to enable the plaintiff to obtain an ex parte decree. It is open to the Court to go into the question as to the merits of the previous suit with the object of determining as to whether there was motive for wilful and fraudulent suppression of the summons in order to obtain a decree based on a false claim by preventing the defendant from placing his case before the Court. In this sense the falsity of the plaintiff's claim in the original suit may pertinently be gone into in a proceeding under Order 9, Rule 13; that is only for the purpose of enabling the Court to decide whether the failure to serve notice was fraudulent or deliberate.

7. If the decree is set aside under Order 9, Rule 13, the original suit is revived and the Court in the concluding words of the rule "shall appoint a day for proceeding with the suit" irrespective of the fact that the Court might have held that there was no foundation for the plaintiffs suit and that the claim was false, for the enquiry into that question was merely incidental to the real question of the defendant having been prevented from sufficient cause from appearing and defending the suit. That point has to be determined in the suit itself which by reason of the ex parte decree having been set aside is revived.

8. If the defendant does not succeed in having the ex parte decree set aside under Order 9, Rule 13, still he has a right to have it set aside by instituting a regular suit on the ground that it was obtained by fraud; vide *Pran Nath Roy v. Mohesh Chandra Moitra* [1897] 24 Cal. 546. The matter was taken twice to the Privy Council and the view taken by the Calcutta High Court was upheld: *Radha Raman Shaha v. Pran Nath Roy* [1901] 28 Cal. 475 and *Khagendra Nath Mahata v. Pran Nath Roy* [1902] 29 Cal. 395. In such a suit the defendant as plaintiff can succeed only upon proof that he was prevented from appearing and placing his case before the Court in the original suit by means of fraud practised upon him, such as, the suppression of summons by fraudulent means, etc. and as a motive for the fraudulent conduct of the plaintiff he

may attack the original suit in which the ex parte decree was obtained as being fraud from beginning to end and that the plaintiff's claim itself was false and there was absolutely no foundation for the suit.

9. Thus, whereas the principal issue in the subsequent suit is the obtaining of the ex parte decree by fraudulent means, such as, suppression of summons, etc., the question as to whether the claim of the plaintiff in the original suit was false and fraudulent may be gone into as affording a motive for the plaintiff in the original suit having stealthily obtained the ex parte decree against the defendant by preventing him from appearing in Court and exposing the falsity of the plaintiff's claim. The Court might have gone into that question only incidentally, or it might have formed the subject matter of a clear decision upon an issue raised and tried between the parties. In the former case simply the ex parte decree is set aside and the parties are relegated to their former position and the suit is restored and the plaintiff's claim enquired into and disposed of in accordance with law. If, on the other hand, the decree is set aside not only upon the ground of suppression of summons by fraud, but upon the ground that the original suit itself was fraudulent and the plaintiff's claim was false, the suit cannot be restored and retried for the issue, whether the plaintiff in the original suit had a right to obtain a decree against the defendant on the facts alleged in the plaint, has already been determined in the second suit and the same question cannot be agitated in any suit whether that suit in point of time was instituted before or was subsequently instituted. The principle of res judicata would bar the determination of the same question.

10. At the Bar the following authorities were cited: Chandi Prasad Misra v. Gobind Sahay [1917] 39 I.C. 791; Bhairo Prasad Sahu v. Ram Chandra Prasad [1918] 45 I.C. 253; Damodar Prasad v. Ram Sarup Kumar A.I.R. 1923 Pat. 327; Ram Narain Lal Shaw v. Tooki Sao [1920] 5 Pat. L.J. 259; Asharfi Lal Mahtha v. Surajmaya Misrain MANU/BH/0274/1924 : A.I.R. 1924 Pat. 758; Damodar Prasad v. Ramsarup Kumar A.I.R. 1923 Pat. 327; Ramehandra Prasad v. Parbhulal Ram Ratan MANU/BH/0214/1927 : A.I.R. 1927 Pat. 183; Lalji Thathra v. Ganga Thathra A.I.R. 1927 Pat. 396; Lilabati Misrain v. Bishun Chowbey [1907] 6 C.L.J. 621; Khajooroonissa v. Rowshan Jehan [1876] 2 Cal. 184; Khetra Mohan Barik v. Mangobinda Pal [1910] 6 I.C. 13 and Dharnidhar Aditya v. Hemnaga Chandra Jana [1917] 41 I.C. 956.

11. After having carefully considered them the above seems to be the correct view although in some of the cases there is some apparent expression of contrary views. Therefore the answer to the question under reference as to what is the effect of setting aside an ex parte decree in a subsequent suit based on fraud and whether the previous suit is revived or not depends upon the pleadings the issues and the actual decision in the subsequent suit as indicated above.

12. Now under the rules of this Court we have to decide the application in revision filed by the petitioner. The plaintiff no doubt alleged in the plaint in the subsequent suit No. 174 of 1923, that he had not taken any money from the defendant or executed any hand-note, but no relief was claimed by him upon this allegation. He claimed only the following reliefs:

- (1) That on determination of the above points it may be held by the Court that the defendant on "suppressing" the service of the summons to the defendant, i.e. without its service and without the knowledge and information of the plaintiff obtained an ex parte fraudulent decree in Small Cause Court

Suit No. 208 of 1922, against the plaintiff on 28th June 1922; (2) that on determination of the above facts the said ex parte decree may be held to be inoperative, ineffectual and illegal and be set aside.

13. The only issues raised were as follows:

(1) Is the suit barred by Section 11, Civil P.C.?

(2) Was the summons in Suit No. 208 of 1922 fraudulently and surreptitiously served as alleged by the plaintiff?

14. The Munsif decided both the issues against the petitioner. On appeal by him the Subordinate Judge by his decision, dated 13th July 1925, reversed the decision of the Munsif on both the points and decreed the plaintiff's suit. There was no issue framed as to the plaintiff's claim based on the hand-note being false or fraudulent. The appellate Court incidentally went into that question and made the following observation:

There can therefore be no doubt that in such a case the Court is not precluded from examining the circumstances in which the disputed decree was passed. That is to say, the Court has got the power in such a case to ascertain whether there was any foundation for the previous suit in which the decree in question was passed. I have therefore to look to the circumstances in which the said hand-note in question was executed.

15. Therefore the genuineness or otherwise of the hand-note was looked into by the appellate Court for the express purpose of finding out whether there was reason for the plaintiff to have the summons suppressed. The Court did not decide expressly and clearly that the hand-note was forged or that the plaintiff's suit was fraudulent. It simply says:

These facts and circumstances are indeed very suspicious. If there was really suppression of service of summons on the plaintiff in the said money suit this Court on the face of the aforesaid fact and circumstances must hold that the said suppression was deliberate and at the instance of the defendant with the object of enabling him to snatch a decree from the Court in the absence of the plaintiff.

16. Keeping this in view therefore the Court decided only in that case that

in such circumstances this is a fit case in which this Court must hold that plaintiff succeeded in establishing suppression of service on him. The said suppression of service, in view of the facts and circumstances, must be held to have been deliberate on the part of the plaintiff who did it with the object of getting a decree from the Court behind the back of the defendant.

17. The question therefore whether the hand-note on the basis of which the former suit was instituted was not decided in that case and has yet to be decided in the case in which the ex parte decree has been set aside by virtue of the subsequent suit No. 174 of 1923. The original suit is therefore revived and has been rightly restored by the Munsif to be disposed of in accordance with law. The result is that the petitioner's application to this Court in Civil Revision No. 363 of 1929 must be dismissed with costs: hearing-fee three gold mohurs.

Wort, J.

18. I agree.

Kulwant Sahay, J.

19. I agree.

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