Fatmabai Vs. Sonbai

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Court : Mumbai

Decided On : Jan-24-1911

Reported in : (1911)13BOMLR573

Judge : Beaman, J.

Appeal No. : O.C.J. Suit No. 952 of 1909

Appellant : Fatmabai

Respondent : Sonbai

Judgement :

Beaman, J.

1. At the end of last term Mr. Lowndes appeared for defendant No. 3 and asked for a rule calling upon all the other parties to the consent decree to show cause why that decree should not be set aside on grounds of forgery and fraud

2. alleged particularly against the second defendant. I then intimated to Mr. Lowndes that I did not think any rule of that kind even if granted could be productive of any useful result or even could be made absolute, as in my opinion he had chosen the wrong procedure. Mr. Lowndes, while admitting that he entertained some doubt upon the point, pressed for the rule in order that it might be argued when due return had been made to it.

3. It has come before me to-day and has been well argued on both sides, Mr. Setalvad representing Mr. Lowndes; but I remain of the same opinion. Nothing that has been said in the course of the argument for defendant No. 3 has in the slightest degree shaken the opinion, which I was disposed to hold from the first, that a consent decree once duly obtained cannot be set aside by any rule of this kind, but if it is sought to impeach it upon grounds of fraud, that must be done in a regular suit. The only alternative which our law allows is an application for review of judgment, but such an application in the present suit would clearly be time-barred.

4. In the course of the argument, I have been referred to various authorities; but the principle appears to me to be so plain as hardly to stand in need of authority. True, there may conceivably be cases, extreme cases, as indicated by Lord Cottenham in Morison v. Morison (1818) 4 M. & C. 215, where the impeached decree is so defective that the Court treats it as a nullity, then possibly it may be got rid of by motion. But where upon the face of it there is nothing defective or irregular in the decree but a party thereto seeks to have it set aside alleging that it was obtained by fraud, then the Legislature provides a special and formal remedy. I cannot see any distinction between the English and the Indian law in this respect; and the procedure to be followed in England was well and clearly laid down by Jessel M.R. in Flower v. Lloyd (1877) 6 Ch. D. 297. That case might be distinguished from the case before me in respect of the ultimate ground of the decision but Jessel M.R.'s exposition of the principle appears to me to be applicable in the present case. He insists that where there is a remedy, and a regular remedy, provided by the Legislature for a party considering himself to be aggrieved on account of fraud, that remedy ought to be availed of, and to use his language the decree must be got rid of by an original bill, which is the same thing as saying in our Courts that a party situated as defendant No. 3 is situated now must have recourse to a regular suit. So it was held in our own Court in Karmali v. Rahimbhoy ILR (1883) 13 Bom. 137, confirmed in appeal in Mirali Rahimbhoy v. Rehmoobhoy Habibbhoy ILR (1891) 15 Bom. 594; and the latest decision to which I have been referred, Ainsworth v. Wilding [1896] 1 Ch. 673, is a clear and conclusive authority in support of the view I have expressed throughout. There is also good reason why questions of this kind should not be opened by motions in

which the Court ordinarily has to rest its decision upon affidavits. Very serious allegations are made against defendant No. 2. Certainly no Court would care to decide questions of forgery and fraud upon affidavits. So that the law evidently contemplating the materials available to the Courts when different lines of procedure are followed has advisedly restricted inquiries, of which the content is so grave and the consequences so serious, to the form of a regular suit.

5. When I mentioned this as an additional reason only upon the ground of general expediency for refusing to go further with a rule of this kind, Mr. Setalwad, admitting the force of the consideration, suggested that the difficulty might be overcome by calling for oral proof upon this rule. That would make the rule assume for all practical purposes the form and dimensions of a regular suit, though it might be less costly.

6. It is not, however, merely upon this broad general ground of discretion as to what relief a Court will be disposed to give in particular matters that I rest my decision. I am very sure that the Court has really no jurisdiction to entertain a rule of this kind. The decree of the Court was duly sealed some months ago and that put an end to the litigation so far as this Court was concerned, unless it were properly re-opened within the period prescribed by the Limitation Act for presenting an application for review. That, however, has not been done, and the only way, by which the law now leaves it open to defendant No. 3 to obtain the relief he apparently hoped to obtain by this rule is to bring a regular suit praying to have the decree set aside for fraud. It is not as though he were deprived of all relief, for then as Jessel M.R. said in Flower v. Lloyd (1877) 6 Ch, D, 297, I too should be slow to believe that the Court had no power to correct a miscarriage had there indeed been one. But there is a right and a wrong way of obtaining that relief, and I have no doubt that defendant No. 3 by pressing on this rule has chosen the wrong way.

7. I may further add that whether the allegations which defendant No. 3 makes against defendant No. 2 be true or false, there do not appear to be any substantial merits in the defendant No. 3's grievance so far as the result of the former litigation is alone considered. Defendant No. 2 indeed is so indifferent that he was very near

consenting that the consent decree should be set aside, and whatever rights defendant No. 3 may possess apart from that decree against defendant No. 2 are apparently already being litigated, while defendant No. 2 has not set up this consent decree as any bar to that litigation. I cannot help thinking it a pity that this rule has been brought on and a considerable amount of time taken up in arguing it. But after hearing the correspondence which passed between the solicitors of defendant No. 3 and defendant No. 2 read, I do not much wonder that matters were not arranged. I do not know who the attorneys were, but I cannot refrain from remarking that the tone of defendant No. 2's letters contrasts very favorably in. deed with that of those addressed to him by the attorneys of defendant No. 3. The latter are couched in provocative and offensive language, which I cannot help thinking is often used' with a deliberate intention of goading the addressee into further litigation; and whenever I hear a correspondence of that kind read from whatever firm it emanates, I shall always express my strong reprobation of it.

8. This rule will now be dismissed with all costs.