

Kure Vs. Jhinguria

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Court : Allahabad

Decided On : May-03-1916

Reported in : AIR1916All93; 35Ind.Cas.847

Judge : Lindsay, J.

Appellant : Kure

Respondent : Jhinguria

Judgement :

Lindsay, J.

1. This appeal has arisen out of a suit brought by the plaintiff-respondent for the purpose of having a decree obtained against him in the Small Cause Court at Agra set aside, on the ground that it had been procured by fraud. The plaintiff also prayed that certain property of his which had been attached in execution of the decree should be released.

2. The facts are as follows:

In the year 1913 the present defendant sued the present plaintiff on a promissory note alleged to have been executed in November 1912 to secure a loan of Rs. 500. The suit was not defended. The officer deputed to serve the summons on the defendant reported that he had tendered the summons to him, the defendant

declined to receive it and the summons was then affixed to the door of the defendant's house. The Judge of; the Small Cause Court being satisfied with the service passed an ex parte decree on the 24th April 1913. Execution was taken out in August of that year and the judgment-debtor then applied under Order IX, Rule 13, to have the ex parte decree set aside. It is stated in the plaint that this application was refused on the ground that the security required by Section 17 of the Provincial Small Cause Courts Act was not furnished, but it appears that the merits of the application were considered, for in his order of the 17th September 1913 refusing the application the Judge of the Small Cause Court observed that the applicant had failed to discharge the burden of proving that there was any sufficient cause for his non attendance in Court when the ex parte decree was given against him.

3. Having failed to get the case re-heard, the defendant Jhinguria has now brought this suit to have the decree set aside. His case as set out in the plaint was that the promissory note upon which the decree was obtained was a forgery. It was alleged in the second paragraph of the plaint that the suit had been instituted fraudulently and that he (plaintiff) had been prevented by the present defendant's fraud from receiving the summons so as to enable him to file his defence. He claimed, therefore, that as the promissory note was a false document and as all the proceedings in the suit were fraudulent, he was entitled to have a declaration that the decree was of no effect and to have his property released from attachment.

4. The defendant joined issue. He stated that the promissory note was a genuine instrument, he also stated that the plaintiff had dishonestly avoided service of the summons and he finally pleaded that the plaintiff had no cause of action and that he was bound by the ex parte decree.

5. The Munsif framed three issues:

The first of these was whether the defendant had got service effected by fraud upon the plaintiff. After hearing the evidence he recorded his opinion that there was not a shred of proof that any fraud had been practised in the matter of the service. He referred to the report of the process-server, to the evidence given by the plaintiff and to that given by the defendant. He accepted the latter 'evidence as

true, the evidence being to the effect that the summons had actually been handed to the plaintiff in the presence of a witness and that he absolutely refused to receive it. On this finding the Munsif dismissed the suit. He held on the other issues that the decree was not liable to be set aside and that the plaintiff was entitled to no relief. The plaintiff then appealed to the District Judge, who on the 23rd June 1911 passed an order of remand* In this he observed that the Court of first instance had only considered the question of the service of the summons and went on to remark that he was not in a position to agree with the Munsif's finding, in the absence of material which would enable him to form an opinion on the merits of the case as a whole. He went on to remark that *prima facie* the suit filed by Kure on the promissory note was a false case, and he returned the record to the Munsif with orders to come to a finding regarding the genuineness or otherwise of the promissory note on which the decree had been obtained. The Munsif received further evidence given by both sides, which led him to the conclusion that the note was a fraudulent and fictitious document.

6. With this finding before him the learned Judge allowed the appeal and decreed the suit. He was satisfied for various reasons that the promissory note had been fabricated and considered that on this ground the plaintiff was entitled to a decree. He gave no finding whatever upon the issue relating to the fraud alleged in connection with the service of the summons. In short, what he did was to try *de novo* the suit which had been already disposed of in the Small Cause Court and to find in effect that the judgment upon which the decree was based was erroneous.

7. In second appeal it is argued that the lower Appellate Court was wrong in retrying the case on the merits, and setting aside the decree without coming to a finding that it had been obtained by fraud.

8. In my opinion this argument must prevail and the decree of the lower Appellate Court must be discharged. There has been a good deal of case-law upon the question of the nature of the fraud which must be alleged and proved by a plaintiff who asks a Court to set aside a decree on the ground that it has been fraudulently obtained against him. It is not necessary for me to refer to all the cases cited, as it appears to me that the question is concluded by authority in this Court. In the case

reported as *Janki Kuar v. Lachmi Narain* 30 Ind Cas. 789 : 13 A.L.J. 753 : 37 A. 535 it was held by a Bench of this Court that where a suit was brought to set aside a decree on the ground of fraud and the fraud alleged in the plaint was that certain false allegations were made in the former plaint by the plaintiffs who proved those allegations by means of perjured evidence, the suit was not maintainable. The learned Judges referred with approval to the statement of the law contained in the judgment of Jenkins, C.J., in *Nanda Kumar Howladar v. Ram Jiban Howladar* 23 Ind. Cas. 337 : 41 C. 990 : 18 C.W.N. 681 : 19 C.L.J. 457.

8. As remarked by the learned Chief Justice at page 998* of the report, 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. He went on to refer to the observations of Sir John Rolt, L.J. in *Patch v. Ward* (1867) 3 Ch. App. 203 : 18 L.T. 134 : 16 W.R. 441 which may be usefully reproduced here:

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.

9. In other words, it must be demonstrated that some fraud has been practised upon the Court in the course of the judicial proceedings which terminated in the decree complained of.

10. Dealing with the case before him Jenkins, C.J, remarked that the judgment of the lower Appellate Court was no more than a re-trial on the merits of the original suit and a determination that the Judge who decided that suit was mistaken. He went on to say:

But the Court in this suit has no jurisdiction to decide on the merits of the former judgment; its function is to decide whether that judgment was vitiated by fraud.

11. The learned District Judge in the present case has fallen into the error imputed to the lower Appellate Court by the learned Chief Justice, and it follows from what has been said that his order in appeal cannot be allowed to stand. It has been

suggested that this Calcutta case and the case of this Court which I have cited above are distinguishable from the present case: there the decrees were obtained after contest, here it was obtained ex parte in the absence of the defendant. But if there is this distinction in the facts there is no distinction in the principles to be applied. An ex parte decree properly obtained is just as much binding as a decree got after contest, It is no doubt a more difficult task for a plaintiff to establish fraud in the case where the decree has been won upon contest but whether it be such a decree or an ex parte one, the fraud must be clearly established; if it is not, the suit must fail.

12. We have it on the finding of the first Court that the plaintiff failed to make out the fraud which he alleged to have been committed in the obtaining of the decree. He was unable to show, as he stated in the plaint, that the defendant* had by fraud prevented due service of the summons; on the contrary the Munsif found that the summons had been actually tendered to and refused by the present plaintiff. If this finding is correct there is an end to the case of fraud. I have already mentioned that the learned Judge omitted to deal with the issue relating to fraud in the service of the summons. I do not think it necessary to refer the case back for a finding on this point, as I have all the evidence before me, both that taken before and after remand. The bulk of the evidence led by the plaintiff was directed to show that the promissory note was a false document. One witness, Purna, deposed that he had never seen any Civil Court peon come with Kure to serve any summons on Jhinguria, and this coupled with the plaintiff's own statement that he was not offered the summons, constituted the whole of the plaintiff's evidence on this issue. As opposed to this we have the evidence of Kure supported by the testimony of a witness, Muhammad Husain, in which it is definitely stated that the summons was offered to Jhinguria and was refused by him, with the results that the serving peon had to post the summons upon his house. It may be noted here that Muhammad Husain attested the return of service made by the peon.

13. I agree, therefore, with the Munsif that the plaintiff failed to prove that there had been any fraudulent service of summons.

14. The result is that the appeal is allowed, the decree of the lower Appellate Court is set aside and the decree of the first Court restored. The respondent will get his costs in the Court below and in this Court.

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