

Ajablal Vs. Devilal and anr.

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Court : Rajasthan

Decided On : Feb-01-1963

Reported in : AIR1964Raj71

Judge : I.N. Modi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 and 100 - Order 9, Rule 13

Appeal No. : Second Appeal No. 25 of 1961

Appellant : Ajablal

Respondent : Devilal and anr.

Advocate for Def. : Sampatraj, Adv.

Advocate for Pet/Ap. : Krishan Murari, Adv.

Disposition : Appeal dismissed

Judgement :

I.N. Modi, J.

1. This is a civil regular second appeal by defendant Ajablal against the judgment and decree of the Civil Judge, Banswara, in a suit for setting aside the decree which was passed against the plaintiff in suit No. 37 of 1956.

2. The material facts leading up to this appeal are briefly these:

The defendant-appellant filed suit No. 37 of 1956 against the plaintiff-respondent for recovery of a certain amount of money. This suit was decreed against the latter. The plaintiff then filed the suit, out of which this appeal arises, with the prayer that that decree be declared to be inoperative against him. The allegation of the plaintiff was that the decree had been obtained by the defendant-appellant by fraud and this fraud was said to have subsisted in the fact that while the plaintiff was in an unsound mental condition at the time the service of the summons was said to have been effected on him, the defendant-appellant had represented to the court that, although the plaintiff had earlier been insane, he had recovered his mental faculties and therefore, the suit could proceed against him. It was under these circumstances that that suit came to be decreed against the plaintiff-respondent ex parte and the present suit has been brought for a declaration that that decree is not binding on the plaintiff because the plaintiff continued to be insane at the relevant time.

The suit was resisted by the defendant. Both courts below have held on evidence which was properly before them that the plaintiff-respondent was not in proper senses at the time the service of the summons was alleged to have been effected on him and, therefore, the proceedings which were taken against him in that suit without a proper guardian having been appointed to represent and safe-guard his interests were a nullity vide Order 32 Rule 15 of the Civil Procedure Code, and in this view of the matter the plaintiff's suit has been decreed by both courts below. Aggrieved by this decision, the defendant has now come up in second appeal to this court.

3. In this appeal, learned counsel for the appellant frankly conceded and, in my opinion quite rightly, that the finding of the courts below that the defendant-appellant had obtained the decree against the plaintiff-respondent by fraud was a finding of fact, and it was, therefore, not open to him to re-agitate this point in the present appeal. The only contention that he has then raised is that, even so, he is entitled to have it clarified that the original suit in which the decree was obtained should be allowed to be revived from the stage prior to that of the service of the

summons on the plaintiff-respondent This point does not appear to have been taken before the courts below when the case was argued before them and, therefore, they were not called upon to give any decision on it.

It may be stated however, that I have thought it fit and proper that this point should be allowed to be raised in all the circumstances of the case and in the interest of avoiding multiplicity of proceedings, as it is bound to be raised even if this court leaves it undecided at this stage. Nothing, in my opinion, therefore, will be gained by omitting to decide this point at the present stage, and it is best that it is decided here and now.

The short question, therefore, that arises for decision in this appeal is whether the defendant-appellant is entitled to have his suit revived on the decree obtained by him therein, having been set aside. A like question arose before a Full Bench of the Patna High Court in *Nirsan Singh v. Kishuni Singh*, AIR 1931 Pat 204(2) (FB). The decision of the Full Bench was that as to whether when an ex parte decree was set aside in a subsequent suit, the original suit, in which that decree was obtained, was revived or not depended upon the pleadings, the issues and the actual decision in the subsequent suit. Thus where the principal issue in the subsequent suit is that the ex parte decree had been obtained by the defendant by fraud, two types of cases may arise. One class of cases may be wherein not only the ground of suppression of summons by fraud is raised but a further ground is raised that the original suit was fraudulent and the plaintiff's claim was false, and in such a case the suit cannot be restored and retried for the simple reason that the merits of the plaintiff's claim would have already been determined in the second suit, and the same question cannot be allowed to be further agitated in another suit, whether that suit in point of time was instituted before, or subsequently instituted. The other class of cases arises where the only issue is that the ex parte decree had been obtained by fraudulent means, such as the suppression of summons, and the further question as to whether the claim of the plaintiff in the original suit is false or fraudulent is not raised at all, or it is raised merely incidentally as affording 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 his (plaintiff's) claim. In this type of

case, according to the view held by the Full Bench, the first suit is revived, and the plaintiff of that suit is entitled to have it tried and disposed of on merits according to law. I am in agreement with the principle laid down by the Full Bench, if I may say so with all respect.

4. Let us then apply this principle to the facts and circumstances of the present case. The plaintiff-respondent here brought this suit to have the ex parte decree set aside against him on the allegation that the defendant-appellant had resorted to fraud in representing to the court that the former had recovered his senses and was in a position to defend the suit while he was not, and on that sort of misrepresentation the suit had been proceeded with, and an ex parte decree passed against the plaintiff-respondent. That he had not further raised the point that the plaintiff's claim was false and fraudulent, is frankly conceded by learned counsel for the plaintiff. Thus, neither an issue was raised to the effect that the plaintiff's claim itself was false or fraudulent in this case, nor were the courts below called upon nor indeed have they given any finding to the effect that that was the character of the claim which the plaintiff had pressed against the defendant in the original case. In these circumstances, it seems to me that there is no reason either on principle or authority why the defendant-appellant should not be allowed to revive his case from the appropriate stage. I, therefore, hold that he would be entitled to revive his case accordingly.

5. I may here briefly notice the contention of learned counsel for the plaintiff-respondent that the prayer made by the plaintiff-respondent in this case was merely to have the decree passed against him being declared as inoperative and that he had not asked for the setting aside of the decree in the original suit. That in my opinion is a sort of distinction without any difference for whether a decree is set aside or whether it is declared to be inoperative in a case like the present that would make no difference to the substance of the matter. In either case, the decree is attacked, and the result of the attack is that the decree falls asunder and becomes inoperative and inexecutable.

6. Be that as it may, so far as the findings of the courts below are concerned, this appeal fails, and is hereby dismissed, though in the light of the observation made

above. The plaintiff-respondent will have his costs of this appeal.

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