

Akina Bibi and ors. Vs. Mahammad Ali Shaha and ors.

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Court : Kolkata

Decided On : Jan-02-1941

Reported in : AIR1941Cal336

Appellant : Akina Bibi and ors.

Respondent : Mahammad Ali Shaha and ors.

Judgement :

ORDER

Henderson, J.

1. The question raised in this rule is whether the opposite party should seek his remedy by a suit or by an application under Section 151, Civil P.C. The relevant facts, are as follows: Petitioner 1 and opposite parties Nos. 1 to 5 instituted a partition suit in the Court of the Munsif, second Court, Dinajpur. The suit was amicably settled and a solenama was filed by the parties and a partition decree was made in terms of the solenama. Subsequently opposite party No. 1 instituted suit No. 107 of 1939 in connexion with the property. He alleged that he had come to learn from enquiries that a suit for partition had been instituted with himself and certain other persons as plaintiffs without their knowledge and that a false solenama was filed without their knowledge, on the basis of which a fraudulent decree was passed. He alleged that the partition suit was instituted without his knowledge and that the names of himself and his co-sharers were falsely inserted

in the plaint. Subsequently opposite party No. 1 filed an application under Section 151 of the Code with a prayer that the partition decree might be set aside. The learned Munsif heard argument on the point whether he had jurisdiction to proceed under that section and held in favour of the opposite party and adjourned the matter in order that the parties might produce evidence. The petitioners then obtained this rule. It will be apparent from what I have said that the fraud alleged by the opposite party No. 1 is a fraud on the Court.

2. In support of the rule I was asked to say that interference under Section 151, Civil P. C, is unnecessary because, if the allegation made by opposite party No. 1 is true, the partition decree is a nullity. Now that is not an objection which can properly be taken by the petitioners. Whether a decree obtained by fraud is a nullity, or whether it requires to be set aside is a question on which Courts may hold divergent views. Opposite party No. 1 may not be prepared to run the risk of treating the decree as a nullity, or the further risk of finding that his witnesses are all dead when the question may arise in some other suit. He is perfectly entitled to apply to the Court and his allegations must be inquired into. Mr. Gupta admitted that a suit is maintainable. The question for consideration, therefore, is whether cases involving a fraud on the Court are an exception to the ordinary rule that Section 151, Civil P. C, has no application when there is another remedy. I myself am not very clear on what grounds this exception should be made. But at any rate in *Peary Choudhury v. Sonoory Dass* ('15) 2 AIR 1915 Cal 622, the following observation was made:

3. Not only has the Court power, but it is its duty, to set aside a decree obtained by fraud practised upon the Court, when apprised of it.

4. Now I am bound to say that, if the matter was *res integra*, I should find it very difficult to hold that these cases ought to be an exception to the general rule. After all it is not a case of depriving a man of his remedy. The remedy by suit still remains and in my judgment it is the most appropriate remedy. In all these cases it is an important question of fact whether a fraud has been committed or not, and a suit provides the most satisfactory procedure for investigating such facts. In *Buresh Chandra v. Jogesh Chandra* : AIR1939 Cal658 , my learned brother

Mukherjea J. observed as follows:

It would certainly be hard on the losing party if he is convicted of fraud by a summary proceeding like this and yet had no remedy by way of appeal against that finding.

5. But inasmuch as I have reached the conclusion that the weight of the authorities in this Court supports the inherent jurisdiction of the Court to interfere in such cases, it is impossible for me to interfere with the proceedings of the Munsif in revision. It was not disputed by Mr. Gupta that in cases of fraud on a party the only remedy is a suit. I shall therefore only refer to those cases which are concerned with a fraud upon the Court. The view that in such cases there is inherent jurisdiction to interfere was very clearly taken in the case in *Peary Choudhury v. Sonoory Dass* ('15) 2 AIR 1915 Cal 622 to which I have already referred. Then again, the question was considered in the other case reported in *Buresh Chandra v. Jogesh Chandra* : AIR1939 Cal658 , already referred to. In that case the actual fraud was on the party but the question of a fraud on the Court was considered and the following observations were made:

All these decisions proceed on the footing that there is inherent power in a Court to correct its own proceedings when it has been misled into passing an order by the fraud of any party to the suit. A distinction is drawn between the factum of consent and its reality. It is stated that when an order is obtained from the Court on the allegation that the parties have assented to it and it is asserted by one party later on that he never gave his consent, it was open to the Court to investigate the matter and review its own order if it was satisfied that the party did not give his consent at all. But when there is apparent consent given by a party to the suit and he impeaches the decree afterwards on the ground that his consent was obtained by fraud, in such cases the Court has got no inherent jurisdiction to set aside the previous decree or order and the remedy of the parties would be by way of a suit. I need not dispute the correctness of this principle.

6. On the other hand, my attention has not been drawn to any decision of this Court in which it has been categorically laid down that in such cases the Court has no inherent jurisdiction to interfere. The result is that in view of these decisions the

rule must be discharged. Costs in this Court will abide the result. Hearing fee one gold mohur. In dealing with the matter, the Munsif will be at liberty to consider what order he ought to make, if in his view, some of the parties to the partition decree are not implicated in the alleged fraud and demand that the partition decree should remain intact.

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