(1957) 08 CAL CK 0020

In the Calcutta High Court

Case No : Appeal No. 23 of 1957

Atul Chandea Sarkar APPELLANT

Vs

East Bengal Commercial Bank Ltd. RESPONDENT

Date of Decision : 14-08-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 7 Rule 11, Order 9 Rule 13, 108

Citation : (1959) 2 ILR (Cal) 524

Hon'ble Judges : K.C. Das Gupta, C.J;G.K. Mitter, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

G.K. Mitter, J.—This is an appeal from a decree dismissing the Plaintiff''s suit on the preliminary ground that the suit is not maintainable.

2. The first Defendant herein, East Bengal Commercial Bank Ltd., obtained a decree in this Court against the Plaintiff and the second Defendant, Oriental Trading Syndicate, a partnership firm, on an overdraft account on July 20, 1948. The suit was filed on February 21, 1948, and was decreed ex parte. The Plaintiff Atul Chandra Sarkar did not make an application for setting aside the said decree or prefer an appeal therefrom. He filed this suit on January 21, 1949, claiming a declaration that the said decree of July 20, 1948, was void and of no effect and asked for setting aside the same. His allegations in the plaint are-

(a) On March 16, 1946, an agreement was entered into by and between the bank on the one hand and the Plaintiff and the second Defendant (hereinafter referred to as the firm) on the the other, whereby the bank was to lend to the firm the sum of Rs. 5,000 against the securities of bills drawn or to be drawn by the firm, such loan to be guaranteed by the Plaintiff.

(b) In pursuance of this agreement various sums of money were advanced by the bank to the firm and bills deposited by the firm were collected by the bank and appropriated towards its dues.

(c) On May 31, 1946, the Plaintiff revoked the said guarantee by notice in writing.

(d) On the last mentioned date a sum not exceeding Rs. 3,581-6-9 was due by the firm to the bank and a number of bills drawn by the firm and exceeding the abovementioned sum remained with the bank for collection and appropriation.

(e) Thereafter the firm deposited various bills with the bank which were duly collected by the bank thus wiping out the liability of the firm. In November, 1948, the bank purported to execute the decree made on July 20, 1948, and caused to be attached various properties belonging to the Plaintiff.

(f) The writ of summons was never served upon the Plaintiff who had no opportunity to defend the suit filed by the bank "and the said decree was obtained "ex parte fraudulently by suppression of the summons "and by perpetrating a fraud upon the court by "suppression of material facts, in particular, by suppression of the fact as to revocation of the guarantee "by the Plaintiff as aforesaid".

3. By the written statement filed herein the bank denied the allegations made in the plaint and contended that the writ of summons in the former suit was duly served by affixation after three unsuccessful attempts and the Plaintiff had knowledge of the same at all material times. The bank also described the story of revocation of the guarantee as untrue.

4. The suit came on for hearing before S.R. Das Gupta, J., on June 13, 1956. It appears that no issues were settled and the suit was dismissed on the preliminary ground mentioned above. By his judgment the learned Judge held that "it was well "established that a suit to set aside an ex parte decree was only "maintainable if there was a fraudulent suppression of the "summons and that mere non-service of the summons was not "a ground on which such a suit could be maintained". He relied on the judgment of Roy, J., in Tarunanganath Banerjee v. Premnarayanlal Raizada ILR (1933) Cal. 98. The learned Judge observed that as the Plaintiff had given no particulars of the fraud, namely, fraudulent suppression of the summons, the suit must fail on the averment made in the plaint. In effect, the learned Judge came to the conclusion that a mere allegation that there has been fraudulent suppression of the summons without any other particulars would not be enough to maintain a suit.

5. The grounds of appeal taken are, inter alia,-

(1) That sufficient particulars of fraud had been given in the plaint, and

(2) that the learned Judge should have given the Plaintiff an opportunity to substantiate the averment made therein by evidence. It will be noticed that there is no allegation that the Plaintiff had offered to give particulars or that he had asked for an opportunity to amend the plaint by giving particulars. The learned advocate for the Appellant was asked as to what particulars his client could give;

to this the reply was that the client would have to look into the evidence adduced in the former suit and then tell the court in what manner the fraud had been perpetrated.

6. It cannot be disputed that a decree will not be reopened on the ground that it was obtained by means of perjured evidence. If a decree is allowed to be attached in this manner there would never be any finality to any litigation. It was so held by Petheram, C.J. and Ghosh, J., in the case of Mahomed Golab v. Sulliman ILR (1893) Cal. 612.

7. As early as 1897 this Court held in Fran Nath Ray v. Mahesh Chandra Moitra ILR (1897) Cal. 546, 549 that

the Plaintiff could not bring a suit to set aside the decree on the bare ground that the summons was not served, or that he was prevented for some good reason from defending the suit and that would be so whether he had or had not availed himself of the remedy provided by Section 108.

8. That section corresponds to Order 9, Rule 13 of the present Code. In that case the Subordinate Judge summarily dismissed the suit. The High Court held that the Plaintiff''s case was that the suit in which the decree was obtained was a fraud in its inception and throughout and he ought to recover the property of which he had been deprived by means of fraudulent decree.

9. The Judges further observed,

It is not correct to say that the only fraud alleged is in the non-service of the summons. This was part of the scheme and the means or one of the means by which the fraud was committed.

10. The fraud there alleged consisted in making false returns of service of summons and the processes in execution of the decree and in not giving, a proper description and valuation of the property sold. The High Court reversed the judgment of the Subordinate Judge. In appeal the Judicial Committee observed that the High Court had taken correct view of the matter. See Radha Raman Saha and Ors. v. Pran Nath Roy and Ors. ILR (1901) Cal. 475.

11. A similar case Khagendra Nath Mahata v. Ram Nath Roy ILR (1902) Cal. 395 went up to the Judicial Committee. In this case the Plaintiff averred in his plaint that the Defendant had procured a person to institute a groundless suit for monies which were not due and in order to get him out of the way by a collusive suit got him declared a lunatic and by threats forced him to leave his home and stay in secrecy, that they concealed the money suit, got a false return of service and carried through the decree and sale of the properties behind the back of the Plaintiff. The Board observed that

these allegations are plainly an attack not on the regularity or sufficiency to the service or the proceedings, but on the whole suit as a fraud from beginning to end.

12. Referring to Section 108 and Section 311 the Board observed that

those sections limited the attention of the tribunal to specific matters and instead of subjecting to radical enquiry the question now involved they assumed the existence of a real suit.

13. In Narsing Das v. Rafikan ILR (1910) Cal. 197 where the Plaintiff merely alleged non-service of summons in the prior suit, the court held that this could not be done and relied on the observations of the Judicial Committee in the cases mentioned above in support of their conclusion.

14. The learned advocate for the Appellant relied on the following observation of Division Bench in Kunjabehari Chakravarty v. Krishnadhan Majumdar (1940) 44 C.W.N. 912.

To us it seems that to sustain an action for setting aside a decree on the ground of fraud the fraud alleged 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 * * * But when the fact of non-service of summons is proved by the Plaintiff in the later action and the claim on which a decree was passed is proved to be a false one, the court may and should ordinarily infer deliberate and hence fraudulent suppression, for the last mentioned circumstance supplies the motive for the suppression and indicates that the suppression is itself fraudulent.

15. The above case and specially the observation set forth came up for consideration in the recent case of Neemchand Tantia v. K.C. (India) Ltd. (1959) 63 C.W.N. 740 where the above dictum was approved of with the qualification that the words "should ordinarily" were better omitted and the discretion of the court left unfettered.

16. The above clearly shows that this Court has consistently held that mere non-service of summons is not enough to found a cause of action for setting aside a decree. Where mere non-service is the complaint, the remedies available are (i) an application under Order IX, Rule 13, (ii) an appeal from the ex parte decree and (iii) an application for review under Order 47, Rule 1 of the Code of Civil Procedure.

17. In this case the learned trial Judge held no particulars having been given, the allegation of fraud could not be taken notice of It has always been held the general allegations of fraud, however strong the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice Walling ford v. Mutual Society (1880) L.R. 5 A.C. 697.

18. In my opinion the expression "suppression of summons" by itself does not amount to a sufficient averment of fraud. "To "suppress" means "to keep secret", "not to reveal", "to with-"hold". Suppression of summons, therefore, means keeping the summons secret or not revealing it or withholding it. By itself means little more than not serving it. If in this case the learned Judge had allowed the

issue to be raised in the general form "was the writ of summons suppressed?" The Defendant would have no idea as to the particular case of fraud the Plaintiff would going to make. Something more would be necessary; there would have to be an averment that there was collusion between the process-server and the identifier or that there was a deliberate misleading of the process-server or other similar allegations.

19. In my opinion the learned Judge was right in holding that there was no sufficient averment of fraud and if the case was only one of non-service of summons, as the learned Judge held it to be, the suit was not maintainable. It would certainly have been better if he had indicated that the plaint did not disclose cause of action and unless the plaint was amended by supplying proper particulars he would have to reject the same under Order 7, Rule 11 of the Code of Civil Procedure. The learned Judge does not seem to have adopted this course. In fairness to him it must be said that there appears no request on the part of the Plaintiff''s lawyers for an opportunity to cure the lacuna in the plaint. But even if the learned Judge had returned the plaint, another suit could not have been filed because seven years had elapsed in-between the institution of the suit in 1949 and the trial of it in 1956.

20. The appeal should, therefore, be dismissed, -a course which was adopted by the Judicial Committee in the case of Ganganarayan Gupta v. Tiluckram Choudhury (1880) L.R. 5 A.C. 697. The Respondent will have the costs of the appeal.

21. The liquidator will retain his costs as between attorney and client in the first instance out of the assets in his hands.

Das Gupta, C.J.

22. I agree.