
(1992) 11 MP CK 0014
In the Madhya Pradesh High Court
Case No : S.A. No. 35 of 1983

Naraindas (since deceased) by LRs.	APPELLANT
Vs	
Bhagwandas (since deceased) by LRs. and Others	RESPONDENT

Date of Decision : 20-11-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 21, Order 47 Rule 1, Order 5 Rule 2, Order 9 Rule 13
Contract Act, 1872 — Section 23

Citation : (1993) 38 MPLJ 1005 : (1993) MPLJ 1005

Hon'ble Judges : S.K. Dubey, J

Bench : Single Bench

Advocate : H.D. Gupta, for the Appellant; K.K. Lahoti, for the Respondent

Judgement

S.K. Dubey, J.

This is a defendant's second appeal against the Judgment and decree which set aside the ex parte decree dated 29-3-1976, for eviction, as obtained by fraud, passed in civil suit No. 121-A/76 by Civil Judge Class-II, Lahar.

Brief facts leading to this appeal are thus : Landlord Naraindas and his son Balkrishan instituted a civil suit against the respondent/tenant for ejectment and arrears of rent of Rs. 600/- and mesne profits alleging therein that the respondent is a tenant in the suit accommodation on a monthly rent of Rs. 60/-, who has defaulted in making payment of rent due in spite of notice of demand and has not handed over the possession of the accommodation after the termination of the tenancy. The Court ordered to issue summons in the ordinary manner as well as by registered A/D post (R.A.D.) specifying the date of appearance as 19-9-1972. The summons (Ext. P-3) without the seal of the Court and a copy of the plaint was issued on 12-9-1972 for sending it by R.A.D. which was delivered at the post office on 19-9-1972. This R.A.D. envelope (Ext.P-4) was delivered to the tenant on 23-9-1972. As the summons was not received back on the date fixed, i.e., on 19-9-1972, the Court adjourned the case to

30-9-1972 awaiting service. On 30-9-1972 too service was not received back, hence, the case was adjourned to 18-10-1972, on that date the Presiding Officer was on leave, the Court Reader recorded in the proceeding that notice after R.A.D. service has been received, and fixed the case for orders on 19-10-1972. The Presiding Officer accepted the service and ordered to proceed ex parte. After recording ex parte evidence the suit was dismissed. Aggrieved of that landlord preferred an appeal No. 32/73, of which notice was issued to the tenant. Appellate Court allowed the appeal and remitted the case to the trial Court with a direction to give an opportunity to the appellant/landlord to prove notice of termination of the tenancy. The appellate Court while remitting the case neither directed the tenant to appear in the suit nor appointed any date for appearance of the parties to the suit before the Court, to which the case was remitted. After remand the Court after re-registering the suit ordered issue of summons to the parties to the suit, fixing the date as 24-2-1976 for appearance but, of this date no summons was issued. On 24-2-1976 the counsel of the landlord appeared, then, the Court fixed the case for recording of ex parte evidence on 18-3-1976 observing that the tenant is already proceeded ex parte. The Court after recording of ex parte evidence passed a decree on 29-3-1976 for eviction and arrears of rent.

The aforesaid decree was put in execution. Having received the notice the tenant instituted a civil suit No. 87/80 (Old No. 41/78) in the Court of Additional Civil Judge Class-II, Lahar, against the landlord for setting aside the ex parte decree, as obtained by fraud by the plaintiffs misleading the Court by suppressing the fact of non-service of summons so as to keep the defendant in ignorance of the suit and deprive him of his legitimate right to defend the suit. The landlord challenged the maintainability of the suit contending that the tenant having not applied under Order 9, Rule 13, CPC the suit is not maintainable, as no fraud was practised on Court, mere irregularity of service in summons is no ground for setting aside the ex parte decree, as the defendant had the knowledge of the suit after service of summons by R.A.D., and was also noticed in appeal. The trial Court after appreciating the material and evidence adduced by the parties negated the defence of the landlord and passed the decree dated 20-11-1980 setting aside the ex parte decree, as obtained by fraud. Against this the landlord/defendant preferred an appeal No. 100-A/80 which was dismissed on 11-9-1982 by the Second Additional Judge to the Court of District Judge, Bhind.

Against this decree the second appeal was admitted on the following substantial questions of law :--

- (i) Whether the plaint does not disclose the cause of action inasmuch as except the bald statement that fraud was committed, the particulars of fraud are not given, which is necessary?
- (ii) Whether on the facts and circumstances of the case, as found, no case of fraud is made out in law, and

(iii) Even accepting the evidence as led by the plaintiff, the remedy was only by way of an application under Order 9, Rule 13 of the Code of Civil Procedure?

During the pendency of the appeal the landlord died whose legal representatives were brought on record.

Shri H. D. Gupta, counsel for appellant and Shri K. K. Lahoti, counsel for respondent heard.

Learned counsel for the appellant placing reliance on Bai Chanchal Vs. Ganpatram Jadavji and Others, , Raman Narayanan Vs. Chathunny, Raman Narayanan v. Chathunny, contended that the defendant had the knowledge of the suit, therefore, mere non-service of summons in the previous suit is not sufficient to render a decree nullity, as there was no motive of wilful and fraudulent suppression of the notice or summons in order to obtain the decree based on the claim which was not false, as there is no finding that fraud was practised on Court, hence, the Courts below erred in not holding the suit as not maintainable, as remedy to the tenant was only to apply under Order 9, Rule 13, Civil Procedure Code. Alternatively it was contended that in any case, when the ex parte decree is set aside in the subsequent suit, as there was no decision on merits of the claim, the parties were relegated to their former position in the original suit, the original suit ought to have been ordered to be revived or re-tried for enquiring into the claim of the plaintiff in that suit and to dispose of the same in accordance with law. Counsel pressed into service a Full Bench decision of Patna High Court in case of (Rani) Parygag Kumar Devi and Another Vs. Bhudhar Mal Chaudhury, and two decisions of Assam and Madras High Courts in Chandi Charan Pandit and Ors. v. Sarat Chandra Sarma and Ors. AIR 1955 Assam 231 ; and A.S. Sankara Pandia Thevar Vs. Syed Abdul Rahman Rowther,

The law is settled that when an ex parte decree is passed, a defendant to get rid of the said decree can avail either of the four remedies, he may pray for review; or he may apply for setting aside of the ex parte decree under Order 9, Rule 13, CPC on the ground of existence of sufficient cause for his non-appearance or because of the non-service or defective service of summons; or he may file an appeal; or he may also institute a suit on limited ground of fraud. To get rid of ex parte decree, as obtained by fraud, if a suit is instituted, such a suit would be maintainable notwithstanding the fact that it has not been preceded by an application under Order 9, Rule 13, Civil Procedure Code.

Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. Fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. But fraud in public law is not the same as fraud in private law. Nor can the ingredients which establish fraud in commercial transaction be of assistance in determining fraud in Administrative Law. Present day concept of fraud on statute

has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administrative law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is, misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions nondisclosure of every fact does not vitiate the agreement. In public law the duty is not to deceive. See a decision of the Apex Court in case of Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers,

The Gujarat High Court, while considering a case of setting aside ex parte decree procured on fraud, in case of Choksi Bhidarbhai Mathurbhai Vs. Purshottamdas Bhogilal Shah, in para 13 observed thus :--

"Fraud vitiates the most solemn transaction, and if a plaintiff suppresses a vital fact on the basis of which the Court is induced to pass ex parte order and obtains the decree in his favour, it would amount to fraud in relation to the proceedings of the Court. A suit to set aside such a decree is maintainable notwithstanding the fact that it has not been preceded by an application under Order 9, Rule 13, Civil Procedure Code. Where, however, the only fraud alleged is a bare non-service of summons, such a suit would not be maintainable. But it is quite a different matter where the whole suit is attacked on the ground of fraud, and the incident of improper or defective service is relied" on as one indicia of fraud. A fraudulent suppression in the matter of service of summons can afford a sufficient ground for setting aside an ex parte decree and the jurisdiction of the Court to set aside a decree on the ground of fraud cannot in such cases be denied, though it is to be exercised with care and reserve. Of course, the fraud must be actually positive amounting to an intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by such a contrivance. The fraud must also be extrinsic to the proceedings of the Court, that is, it must be in the conduct of the suit by keeping the defendant out of Court by a deliberate employment of the machinery of the Court in such a way that the defendant is prevented from placing his case before the Court. In suits to set aside an ex parte decree on the ground of fraud, it is the plaintiff's mental approach to the suit which is material, and the mere proof of non-service of summons or falsity of the claim by themselves will not be sufficient to sustain an action unless they form part of the scheme of effecting a general design to commit fraud. A decree can be reopened by a new action when the Court passing it had been misled by fraud, but it cannot be reopened when the Court is simply mistaken. There is thus a substantial difference between a mere mistake of the Court and the Court being misled and in the case of ex parte decrees where the

defendant had never appeared in Court the attempt to mislead the Court by suppressing the summons, would itself be the contrivance and really an effective one for keeping the defendant in ignorance of the suit and depriving him of his legitimate right of defending the suit."

In case of Bhojai Vs. Salim Ullah and Others, Allahabad High Court has observed that when there is a deliberate suppression of summons or notice issued to a person on a false report relating to service of summons or notice upon him is secured from the process server, and the Court is thus led to pass an ex parte decree or order against such person without his acquiring knowledge of the suit or proceeding against him, the decree or order must be regarded as vitiated by fraud.

The Bombay High Court in case o Vali Mohamed Jamal Mansuri Vs. Vali Mohamed Suleman, in a suit for setting aside ex parte decree of eviction obtained u/s 41, while considering the provisions of Section 49 of the Presidency Small Cause Courts (Maharashtra Amendment) Act 1963, which contains a bar to a suit in case of an order for recovery of possession except a suit in which relief is claimed on basis of title other than title as tenant, has held that the bar of Section 49 will not come into, play, when a plaintiff comes to the Court with the allegation that any order or decree of a competent Court of law has been procured by practising fraud, the Judgment and decree, if the said fraud is established, cannot be permitted to stand and shall have to be declared a nullity.

Judged in the background of the law for setting aside an ex parte decree obtained by fraud, from the facts, it is abundantly clear that on the date specified in the summons for appearance of the defendant, summons not accompanied with the copy of the plaint was sent by R.A.D., in violation of mandatory requirement of Order 5, Rule 2, Civil Procedure Code, which lays down that every summons shall be accompanied by a copy of plaint, or if so permitted, by a concise statement. Therefore, service of such summons cannot be said to be a due and valid service, and the irregularity is not such which may attract the second proviso to Rule 13 of Order 9, Civil Procedure Code, that is the consistent view of this Court; if any authority is needed, see a Division Bench decision in case of Chhutbai@ Chhotibai Hiralal and Anr. v. Madanlal Prahadas and Anr., 1989 MPLJ 705.

The mental approach of the landlord in the original suit, since the beginning, was to mislead the Court and to deprive the defendant/tenant of his legitimate right to defend the suit, which would also be clear from the fact that the summons was served without a copy of the plaint after expiry of the specified date, even then the landlord did not get fresh summons issued but obtained order of awaiting service, knowing full well that the summons sent cannot be served prior to expiry of the specified date. As the summons was served on 23-9-1972, the tenant was well within his right to wait for issue of fresh summons, as Order 5, Rule 1, CPC speaks that when a suit has been duly instituted a summons may be issued to the defendant to appear and to answer the claim on a day to be therein

specified. Learned counsel for the appellant could not point out any authority, rule or law or procedure that if a summons is issued for appearance on a date specified, which expires before service of summons, a party summoned should appear on the next following date of the service of summons to find out the next date for appearance. In any case, even for argument sake the defendant was bound to appear and did not appear, the suit of the plaintiff was dismissed, notice of appeal was served on the defendant and ultimately, the appeal was allowed. Here too, the appellate Court neither considered the fact of non-service of summons nor directed the defendant to appear before the Court nor fixed a date for appearance of the parties. After remand the Court acted rightly to the suit, but, as the plaintiff wanted to obtain the decree by depriving the defendant to defend the suit, again got an order of proceeding ex parte so as to invoke the exercise of powers of the trial Court for passing ex parte decree which otherwise would not have been passed.

As a result of the above discussion, I am of the opinion that the two Courts have rightly recorded the finding that the ex parte decree of eviction was obtained by the landlord by practising fraud on Court. A finding of fraud is essentially a question of fact, therefore no interference in second appeal can be made, as no perversity was pointed out or detected by this Court.

Coming to the next contention of revival of the original suit, in my opinion has got a force. Looking to the nature of the plaint allegations, issues and the findings arrived at it is clear that the actual decision in the subsequent suit has not touched the falsity or tenability of the claim of the landlord on merits nor it has been adjudicated upon, so as to put an end to the chum of the landlord/plaintiff in the original suit. The Courts below have set aside the decree only on the ground that it was obtained by practising fraud on Court, and that the tenant/defendant in the original suit was prevented from appearing in the suit and defending it by reason of the fraud so committed. In such a situation the original suit has to be revived and the plaintiff in that suit is entitled to re-try for seeking disposal of the suit in accordance with law. See (Rani) Parygag Kumar Devi and Another Vs. Bhudhar Mal Chaudhury, and A.S. Sankara Pandia Thevar Vs. Syed Abdul Rahman Rowther,

In the result, the appeal is partly allowed, the decree of the two Courts setting aside the ex parte decree of eviction is maintained with modification that the original suit is revived and the parties are relegated to their position when the ex parte order was passed for proceeding with the case against the defendant in that suit. A decree be drawn up accordingly.

As the suit was instituted as long as back in the year 1971, the parties are directed to appear on 24-6-1992 before the trial Court in the original suit No. 121-A/76; for that no fresh notice shall be issued by the trial Court to the parties, as they have been noticed here. The plaintiff, if so advised, may amend his plaint for adding the grounds which may be available to him, and then defendant may file the written statement thereafter on a date to be fixed by the

trial Court. The trial Court shall see that the suit is disposed of expeditiously in accordance with law as far as possible and practicable within a period of 6 months from the date of filing of written statement. As the appeal has been partly allowed, the parties to bear their own costs of this appeal. Let the records of the concerned Courts should go immediately so as to reach the concerned Courts before the date fixed, for that, registry shall take all steps.