

A.C. ANANTHASWAMY AND ORS.

A

v.

BORAI AH (D) BY LRS.

AUGUST 20, 2004

[ASHOK BHAN AND S.H. KAPADIA, JJ.]

B

Code of Civil Procedure, 1908 :

S. 9, Or. 9, r. 13—Suit for setting aside ex-parte decree, alleging fraud—Application under Order 9, r.13 filed earlier dismissed—Fraud neither alleged in the application nor in revision—Held, fraud is to be pleaded and proved—On facts, except a bare allegation there is no evidence of fraud and the matter being of non-service of summons, suit to set aside ex-parte decree on alleged ground of fraud not maintainable.

C

Order VI, Rule 4—Fraud—Held, is to be pleaded and proved—An ambiguous statement cannot per se make the representor guilty of fraud.

D

Predecessor-in-interest of the appellants, having remained unsuccessful, upto revisional stage, in getting an *ex-parte* decree passed against him set aside for non-service of summons, filed a suit under s.9 of the Code of Civil Procedure, 1908, for setting aside the said *ex-parte* decree and for permanent injunction restraining the decree-holder from executing the decree. It was contended that the *ex-parte* decree was obtained by practicing fraud and misrepresentation, as proper name and address of the defendant were deliberately not given in the earlier suit. The suit was decreed by the trial court, but dismissed by the High Court. Aggrieved, the appellants filed the present appeal.

E

F

Dismissing the appeal, the Court

G

HELD : Predecessor-in-interest of the appellants had earlier moved an application under Order 9, Rule 13 of the Code of Civil Procedure, 1908, for setting aside the *ex-parte* decree for non-service of summons, in which fraud was not alleged; nor was there any such allegation in the revision. Then, the suit was instituted to set aside the

H

A *ex-parte* decree on the ground of fraud and misrepresentation. Fraud is to be pleaded and proved. To prove fraud, it must be proved that the representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement cannot *per se* make the representor guilty of fraud. In the present case, except a bare allegation, there is no evidence of fraud. The present case being a matter of non-service of summons, the suit to set aside the decree on alleged ground of fraud was not maintainable. [652-A-E]

C *Choksi Bhidarbhai Mathurbhai v. Purshottamdas Bhogilal Shah*, AIR (1962) Gujarat 10, approved.

Pollock & Mulla an Indian Contract & Specific Relief Acts, (2001) 12th Edition page 489, referred to.

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3768 of 2000.

From the Judgment and Order dated 17.12.98 of the Karnataka High Court in R.F.A. No. 358 of 1989.

E P. Krishnamoorthy, G.V. Chandrashekar and P.P. Singh for the Appellant.

R.S. Hegde. Chandra Prakash, Ms. Savitri Pandey and K.R. Nagaraja for the Respondents.

F The Judgment of the Court was delivered by

KAPADIA, J. : This appeal by special leave is filed by the legal representatives of original plaintiff, Patel Chikkahanumaiah (since deceased), against the judgment and order dated 17.12.1998 delivered by High Court of Karnataka in Regular First Appeal No. 358 of 1989 whereby the High Court has dismissed the suit bearing no. O.S.4802/80 filed in the Court of Addl. City Civil Judge, Bangalore against Boraiah (since deceased). Respondents are the legal representatives of the said Boraiah.

H The facts giving rise to this appeal are as follows:—

On 26.7.1974, the said Boraiah instituted suit bearing O.S. No. 648 of 1974 for declaration and permanent injunction against Patel Chikkahanumaiah in the Court of Second Munsiff, Bangalore. On 18.8.1975, the suit was decreed in favour of Boraiah. It was an *ex-parte* decree. On 13.6.1977, Patel Chikkahanumaiah applied for setting aside the *ex-parte* decree under Order 9 Rule 13 of Code of Civil Procedure on account of non service of summons. Simultaneously, on the same day, he also preferred R.A. No. 54 of 1977 against the said *ex-parte* decree. On 8.3.1978, R.A. No. 54 of 1977 was dismissed as time barred. In the meantime, Boraiah applied for execution vide Execution Case No. 441/77. On 12.1.1979, Patel Chikkahanumaiah instituted the present suit bearing O.S. No.7 of 1979, subsequently renumbered as O.S. No. 4802/80, under section 9 CPC in the Court of Additional City Civil Judge (X), Bangalore, for setting aside the *ex-parte* decree dated 18.8.1975 and for permanent injunction restraining Boraiah from executing the said decree on the ground that the said decree had been obtained by fraud and misrepresentation. It was alleged that Boraiah had deliberately failed to give proper name and address and consequently Patel Chikkahanumaiah could not be served.

By judgment and decree dated 29.5.1989, the trial Court decreed the said suit by holding that fraud had been practiced by Boraiah by not giving proper name and address of Patel Chikkahanumaiah, who was a defendant in the suit bearing no. O.S.648/74. The trial Court also found fraud on the part of Boraiah in the service of the summons. In the circumstances, the trial Court cancelled the decree dated 18.8.1975.

Aggrieved by the judgment and decree passed by the trial Court, Boraiah preferred RFA No. 358 of 1989 in the Karnataka High Court. By the impugned judgment dated 17.12.1998, the High Court came to the conclusion that non service of summons did not constitute fraud or misrepresentation; that absence of the word Patel and mistake in the father's name did not evidence fraud or misrepresentation on the part of Boraiah. That no such allegation of fraud was made when Patel Chikkahanumaiah moved an application for setting aside the *ex-parte* decree for non service of summons under Order 9 Rule 13 CPC. That he did not make any allegation of fraud in RA No. 54/77. Consequently, the High Court reversed the judgment and decree passed by the trial Court and restored the *ex-parte* decree dated 18.8.1975 in suit no. O.S. 648/74 in

A favour of Boraiah. Hence, this Civil Appeal.

B We do not find any merit in this appeal. *Firstly*, in the present case, Patel Chikkahanumaiah had moved an application under Order 9 Rule 13 CPC for setting aside the *ex-parte* decree on the ground of non service of summons in which fraud was not alleged. As stated above, Patel Chikkahanumaiah had moved R.A. No.54 of 1977 in which there was no such allegation. *Secondly*, the present suit has been instituted to set aside the *ex-parte* decree on the ground that the decree was obtained by fraud and misrepresentation. Fraud is to be pleaded and proved. To prove fraud, C it must be proved that representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement cannot *per se* make the representor guilty of fraud. To prove a case of fraud, it must be proved that the representation made was false to the knowledge of the party D making such representation. [See: *Pollock & Mulla on Indian Contract & Specific Relief Acts* (2001) 12th Edition page 489].

E In the present case, there is no evidence of fraud. The present case is a matter of non-service of summons. In the present case, there is a bare allegation of fraud. In the case of *Choksi Bhidarbhai Mathurbhai v. Purshottamas Bhogilal Shah* reported in AIR (1962) Gujarat 10, it has been held that where the only fraud alleged is a bare non service of summons then such a suit to set aside the decree on alleged ground of fraud was not maintainable. *Lastly*, no substantial question of law arises in this F appeal.

For the aforesaid reasons, we do not find any merit in this civil appeal and the same is accordingly dismissed, with no order as to costs.

R.P.

Appeal dismissed.