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DIN SHIU PARSHAD

v.

PARBHUDAS KALYANJI BHINDI

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[SUPREME COURT, 1967 (Mills-Owens C.J.), 26th April, 16th May]

Civil Jurisdiction

Action—action to set aside judgment allegedly obtained by fraud—necessity of showing discovery of new facts manifesting fraud—action stayed as vexatious where mere attempt to re-litigate.

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Court — jurisdiction—Supreme Court may in a proper case set aside earlier judgment obtained by fraud—action to set aside must be based on facts discovered since original hearing.

The Supreme Court has power, in an action brought for the purpose, to set aside an earlier Supreme Court judgment if that judgment be shown to have been obtained by fraud.

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The court will, however, refuse to set aside an earlier judgment alleged to have been obtained by perjury or other fraud unless new facts have been discovered since the hearing in which the judgment was given.

Where the plaintiff in the second action is simply seeking to re-litigate a matter of which he had ample notice and every opportunity to meet

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and deal with in the previous proceedings the second action will be stayed as vexatious and frivolous and an abuse of the process of the court.

Cases referred to: *Boswell v. Coaks* (1894) 86 L.T. 365: *Kennedy v. Dandrick* [1943] Ch. 291; [1943] 2 All E.R. 606: *Jonesco v. Beard* [1930] A.C. 298; 142 L.T. 616: *Flower v. Lloyd* (1878) 10 Ch.D. 327; 39 L.T. 613: *Birch v. Birch* [1902] P.130; on appeal (1902) 86 L.T. 364; 18 T.L.R. 485: *Everett v. Ribbands* (1946) 175 L.T. 143.

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Action to set aside Supreme Court judgment on the ground of fraud: hearing of preliminary points by consent.

T. J. McNally for the plaintiff.

R. I. Kapadia for the defendant.

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The facts sufficiently appear from the judgment.

MILLS-OWENS C.J. : [16th May, 1967]—

In these proceedings an order made by consent provides for the hearing of the following preliminary points —

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(1) Has this Court any power to rehear, review, alter or vary the judgment entered in Civil Action No. 55 of 1963?

(2) Is the fraud alleged in this case of such a nature that it would, if established, afford adequate grounds for setting aside the judgment in that action?

Civil Action No. 55 of 1963 was an action in which the present plaintiff was the defendant, and the present defendant was one of the plaintiffs. It was for a claim of recovery of possession of certain premises from the present plaintiff on the ground that he was a trespasser, and for damages for trespass. Judgment was given against the present plaintiff, for possession and for damages at the rate of £139 per month for the period 8th March 1963 to 11th May 1963, with costs. He appealed to the Fiji Court of Appeal (Civil Appeal No. 21 of 1964) against the whole of the judgment and on the 9th June 1965 his appeal was dismissed. On the 8th December 1966 he issued the writ in the present proceedings claiming to have the judgment set aside on the ground that it was obtained by the fraud of the present defendant. The statement of claim in these proceedings recites the judgment obtained in Civil Action No. 55 of 1963 and, in paragraph 6, says that the damages were based on a valuation of the premises in dispute, then given by the present defendant in evidence, in the sum of £13,788.0.0. It is alleged that this testimony as to the value of the premises was fraudulent and excessive. The statement of claim contains the following further allegations of fraud —

"9. The Defendant so knowingly falsely and fraudulently gave a false valuation to the Supreme Court Civil Action No. 55 of 1963 when he on oath said that the Building is approximately 28 ft x 79 ft = 2212 sq. ft. in the nature of a double storey = 4424 s. ft. at 45/- a sq. ft. = £9954 less allowance for opening gap 15 ft x 30 ft = 450 sq. ft., at 7/5 sq. ft = £166 Value of building £9788-0-0 when in fact the building is about 28 ft x 79 ft = 2212 sq. ft. nature of single storey open hall at 45/- sq. ft. = £4977-0-0 plus part of the opening gap 1372 sq. ft. at 7/5 a sq. ft = £508 total value of the building is £4585-0-0.

10. The Defendant in Supreme Court Civil Action No. 55 of 1963 knowingly fabricated the evidence on oath said that the opening gap of the mezzannine floor is 15 ft x 30 ft = £450 sq. ft. in fact the said opening of the mezzannine floor is 56 ft x 15 ft = 840 sq. ft.

11. The rental was assessed on the basis of the user of the premises as a shop whereas in fact it was being used as bulkstore. There was no evidence to indicate in the circumstances the rental should be assessed at a lower rate.

12. The Defendant falsely said on oath that they had suffered damage at £139-0-0 per month in fact the Defendant admitted that they were paying rent monthly at £40-0-0 per month elsewhere and in fact the Defendant as Bhindi and Patel Limited Provident Fund did not paid rent elsewhere at all.

13. The Defendant knowingly falsely and fraudulently fabricated the evidence on oath said that he obtained a completion certificate that any further work being done for use as a shop and store wherein in fact the Defendant only obtained permission from the Suva City Council to use the building as a bulkstore.

14. The building acquired no rental value until the certificate was given by the Suva City Council permitting the occupation of the building and the certificate was granted only on 31st August, 1963. There was no evidence adduced to show when application

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was in fact made to the Suva City Council and the delay in granting the certificate was totally unexplained.

15. The Defendant falsely and fraudulently gave false testimony on oath in Supreme Court Civil Action No. 55 of 1963 said that they were prevented from user from the 6th March, 1963 until 11th May, 1963 when in fact the Defendant made application to the Suva City Council for the use of the said Building on the 17th day of May, 1963 and the Suva City Council gave permission to use as a bulkstore only on the 13th day of August, 1963 such facts were known to the Defendant but were not disclosed on the hearing of the action.

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16. The Defendant in knowingly falsely and fraudulently fabricated the evidence on oath said that he obtained completion certificate when in fact no completion certificate had been issued by the Suva City Council at all."

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At the outset of the present hearing it was agreed that reference should be made by this Court to the record of the proceedings in Civil Action No. 55 of 1963 and to the judgment of the Court of Appeal in Civil Appeal No. 21 of 1964. This was a course which, as it appeared to me, counsel were entitled to take. In effect, as I see it, I am being asked to rule whether the present proceedings are vexatious or frivolous or otherwise an abuse of the process of the Court, and, if so, to exercise the inherent powers of the Court. For the purpose of determining whether proceedings are an abuse of the process of the Court evidence is always admissible of the circumstances in which it is so alleged; as I have said, the parties agree that I may look at and consider those circumstances in the present case, without the formality of affidavit evidence.

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On point (1) it is argued by Mr. Kapadia that the principles of res judicata applies and that accordingly the plaintiff is estopped from obtaining any judgment in the present proceedings; he refers to 22 *Halsbury's Laws of England* (3rd Edn.) para. 1660 at pp. 780-1. In effect, it is argued, the present plaintiff is endeavouring to re-litigate the issues that were determined in Civil Action No. 55 of 1963. It is submitted further that some doubt must exist whether a judgment can be set aside where it is founded on facts determined in the course of the proceedings which are now being impeached; 22 *Halsbury* (op. cit.) para .1669. The present proceedings, it is submitted, amount merely to a complaint of exaggeration of the value of the premises; the plaintiff is a building contractor and had in fact built the building himself, and thus was in as good a position as the defendant to provide evidence of its rental value. It was abundantly clear that damages were being claimed in those proceedings; and "at the rate of £139 per month being the rental value per month of the said property". The defence did not challenge this figure, nor was it attacked in the course of the hearing. There had in fact been an adjournment in those proceedings from the 11th August to the 17th September and thus the present plaintiff had had ample time in which to prepare himself with evidence to rebut the evidence as to area and value given by the defendant. If the value alleged was false the present plaintiff had ample notice of it. The judgment refers to the evidence of value as uncontradicted and containing no inherent improbability and that was upheld by the Court of Appeal.

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In the present proceedings the plaintiff is not alleging that he was not a trespasser and thus must be taken to accept that he was liable for damages for his trespass. One of the grounds of the appeal to the Court of Appeal was that the trial Judge erred in the assessment of evidence and that the damages awarded were excessive; that in effect is what is alleged in the present proceedings. It was open to the plaintiff to have adduced fresh evidence on the matter of value on the appeal, but he did not do so or seek to do so.

Secondly, it is argued for the present defendant, the allegations now made by the plaintiff do not amount to allegations of fraud; to add the word "fraudulently" is not enough; to say that the defendant gave an exaggerated version of values in his evidence is not to impute fraud. Further, a judgment is not to be set aside on the ground of fraud as to collateral matters; the matter of the amount of damages in a claim for trespass is a collateral matter; vide *Halsbury* para. 1669. Finally, regard ought to be made to the fact that the plaintiff has waited more than two years from judgment, and more than one year from the decision on appeal, before bringing these present proceedings. It is submitted that they are frivolous and vexatious and ought to be dismissed with costs on a solicitor and client basis (vide *Boswell v. Coaks* (1894) 86 L.T. 365). The foregoing summarises, I trust correctly, the case for the present defendant in these proceedings.

Mr. McNally for the plaintiff refers to *Kennedy v. Dandrick* [1943] 2 All E.R. 606, particularly at p. 608 where it is said, citing *Jonesco v. Beard* [1930] A.C. 298 at p. 300, —

> "It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires."

Mr. McNally relies in particular on para. 9 of the statement of claim in the present proceedings and submits that the matter of the actual area of the premises is not res judicata; the plaintiff is entitled to be allowed to prove the actual area and to demonstrate the falsity of the evidence given by the defendant on the point in the previous proceedings; it is not a case of adducing fresh evidence but of adducing evidence to prove fraud. He agreed that there was power in the Court to award increased costs.

In reply Mr. Kapadia referred to *Birch v. Birch* (1902) P. 150 according to which, he said, in order to have a judgment set aside on the ground of fraud the applicant must adduce evidence of facts ascertained or discovered since the judgment.

On point (1), as it appears to me, the answer must necessarily be in the affirmative in the sense that an action lies, and this Court has jurisdiction, to set aside a judgment obtained by fraud (*vide Jonesco v. Beard* (supra) and, generally, *Kerr on Fraud and Mistake* (8th Edn.) pp. 416 et seq.).

Turning to point (2), the allegations of fact made by the plaintiff fall, substantially, into two parts: first, that the defendant falsely and fraudulently stated in the previous proceedings that he might lawfully occupy

the premises, and, secondly, that the defendant fraudulently gave false evidence in those proceedings as to the actual area of the premises. The
A qustion of lawful occupation was raised in the previous proceedings by the present plaintiff himself; he called an employee of the Suva City Council as a witness and also gave some evidence on the point himself. The evidence adduced on both sides was before the Court at the trial and formed part of the record before the Court of Appeal. No new fact has emerged or is suggested. It is plain, in my view, that the plaintiff
B cannot possibly, if he is now allowed to go to trial, succeed upon the first ground of his complaint; he is simply endeavouring to litigate the same matter afresh. The second ground of his complaint stands on a different footing. I must proceed on the basis that, prima facie, the present defendant gave false evidence of the area and rental value of the premises for the purpose of inflating his claim for damages, that is to say I must make that assumption for the purpose of deciding whether he should be
C allowed to proceed to trial. The initial question is whether this complaint would amount, if proved, to the obtaning of a judgment by fraud. The award of damages, of course, followed upon the judgment for recovery of possession, and formed part only of the judgment; it might be said, only an ancillary part. I will assume, without deciding, that the Court has power to set aside a part only of a judgment, and I will assume also, without deciding, that the giving of false evidence as to quantum amounts
D to obtaining a 'judgment' by fraud.

I am not, of course, saying that the defendant did give false evidence, or that there is any foundation at present for suggesting that he did. I merely make that assumption for the purpose of clearing the ground before proceeding to the next step, which is that there is clear authority for stating that the Court will refuse to set aside a judgment alleged to
E have been obtained by perjury or other fraud unless new facts have been discovered since the hearing in which the judgment was given. Thus, in *Boswell v. Coaks* (supra) Lord Selborne, in the House of Lords, said (at p. 366) —

> "I will not lay stress upon its being a judgment of this House in the
> F present case, because I think it right to assume that, if a judgment of the Court of Chancery, or of the High Court, is in a proper way proved at the hearing of the cause to have been obtained by fraud, it is one which the court can remedy. I say that, not by any means dissenting from the spirit of the observations made in *Flower v. Lloyd* (37 L.T. Rep. 419; 6 Ch. Div. 297; 39 L.T. Rep. 613; 10 Ch. Div. 327) by that great judge James, L.J. and concurred in by Thesiger, L.J.
> G that the court ought to be even more than usually cautious how it attends to all sorts of reasons which may be brought forward, plausible upon the face of them, for disturbing such a solemn judgment, having regard to the enormous mischief of unsettling the principle on which the doctrine of res judicata is established. Upon that point I will only add this, that it seems to me that in every case of this kind, if a motion to stay an action is so made, the court ought to
> H receive such evidence pro and con. as is material to the question whether there has really been, since the former judgment, a new discovery of something material in this sense, that prima facie it would be a reason for setting the judgment aside if it were established by proof."

The judgment in *Birch v. Birch* at first instance, reported at [1902] P. 130, does not bear on the matter but the judgment of the Court of Appeal in the same case, reported at (1902) 86 L.T. 364, does. Thus, Williams L.J., at p. 368, said — A

> "And I think the court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the judgment which raise a reasonable probability of the action succeeding."

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(See also *Everett v. Ribbands* (1946) 175 L.T. 143 C.A.)

Obviously the plaintiff in the present case was in a position, in the proceedings in Action No. 55 of 1963, to challenge and to rebut the evidence of the defendant on the matter of area and consequently on the matter of value. No-one could have been in a better position to challenge and rebut the evidence as to area than the plaintiff himself. He puts forward no case of facts discovered since the trial as a basis for having the judgment set aside. C

Turning to the wider aspects, it is undoubtedly a strong rule that a party is not to be shut out from making his case except for the plainest reasons. Against that is the rule *'interest reipublicae ut sit finis litium'*, a most salutary rule as recent cases in England have served to illustrate very forcibly. Here, in my judgment, the plaintiff is simply seeking to re-litigate a matter which he had ample notice of and every opportunity to meet and deal with in the previous proceedings, and consequently these present proceedings are such that they ought not to be allowed to proceed. D

For the foregoing reasons, in my view, the present proceedings are vexatious and frivolous and an abuse of the process of the Court. To hold otherwise in this type of case would mean that a party could, by the use of appropriate tactics at the trial, ensure a re-hearing on any point of substance that goes against him. My formal answers to the preliminary points are: — E

(1) Yes, to set aside the judgment if it was obtained by fraud;

(2) No.

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It follows that the present action ought to be stayed. I therefore hereby make an order staying the proceedings herein, and for the payment by the plaintiff to the defendant of all costs of and incidental thereto, from the commencement thereof up to and including the present hearing and decision.

Action stayed.