

Present : Mr. Justice Middleton and Mr. Justice Wood Renton. July 29, 1910

BUYZER v. ECKFERT.

C. R., Colombo, 15,522.

*Surveyor's license cancelled by District Court on petition of defendant—Action in the Court of Requests by surveyor against defendant for damages on the ground that defendant had placed false documentary evidence before District Court—Action not maintainable—Jurisdiction of inferior court to set aside decree of superior court on the ground of fraud—Evidence Ordinance. s. 44.*

Plaintiff's license to practise as surveyor was cancelled by the District Court on proceedings instituted by the Surveyor-General on the petition of the defendant. Plaintiff subsequently instituted the present action in the Court of Requests, claiming damages against the defendant, on the ground that he had maliciously placed false documentary evidence before the District Court, and claiming also a declaration of the invalidity of the documentary evidence so adduced.

*Held*, that the action was not maintainable. An action cannot be prosecuted in an inferior court with the direct object of setting aside a decree of a superior court.

THE Surveyor-General, acting on a petition sent to him by the defendant charging the plaintiff—a surveyor—with gross misconduct in the preparation of a survey, instituted proceedings against the plaintiff in D. C., Colombo, 377, Special, for the cancellation of the surveyor's license. For the purpose of proving the inaccuracies of plaintiff's plan the defendant got the land surveyed by two surveyors and had the plans produced in evidence. The plaintiff's license was cancelled by the District Court. He thereupon brought this action in the Court of Requests, Colombo, claiming damages against the defendant, on the ground that he maliciously placed false survey plans before the District Court in 377, Special, and claiming also a declaration of the invalidity of the documentary evidence so adduced.

At the trial the following issues, *inter alia*, were framed:—

- (1) Can a judgment of the District Court, affirmed in appeal by the Supreme Court, be impeached on the ground of fraud in an action *inter partes* in this Court, where such judgment is pleaded as *res judicata* by the party in whose favour it has been given?
- (2) Can a plea of fraud be set up in such circumstances?

July 29, 1910

*Buyzer v.  
Eickert*

- (3) Does an action for damages lie against the party, relying on the impeached judgment on an allegation that he had maliciously and fraudulently put false and misleading documents, through the acts of others, before the Court?

The learned Commissioner of Requests (M. S. Pinto, Esq.) dismissed plaintiff's action, relying on *Abdul Azeez Marikar v. Abdul Caffoor*<sup>1</sup> and *Templeton v. Louries*.<sup>2</sup> The plaintiff appealed. Wood Renton J., before whom the case was first argued, sent the case for argument before a Bench of two Judges.

*Sansoni*, for the plaintiff, appellant.—A decree which has been obtained by fraud practised on the Court may be impeached. But the present action is not one to set aside the decree, but for damages against the person who had practised fraud upon the Court and thereby caused the cancellation of the plaintiff's license as a surveyor. The defendant's plea of *res judicata* may be met by section 44 of the Evidence Ordinance, which enables the plaintiff to lead evidence to prove the fraud.

A court of inferior jurisdiction may treat as a nullity the decree of a court of superior jurisdiction if the decree of such court be impeached on the ground of fraud, and if the inferior court is otherwise competent to deal with the action. All that the appellant asks is that the decree of the District Court be ignored and not taken notice of for the purpose of this action. He does not ask the Court of Requests to set aside the decree of the District Court, but only asks the Court of Requests to state (if proved) that the District Court was imposed upon and a fraud practised upon it. Counsel cited the following authorities: *Sanjiva Row's Civil Procedure Code*, vol. I., p. 201; *Amir Ali's Evidence Act*, pp. 286 and 288; *Nistarini Dassi v. Nundo Lall Bose*;<sup>3</sup> *Rajib Panda v. Lakkan Sendh Mahapatra*;<sup>4</sup> *Barkat Un Nissa v. Fazl Haz et al.*;<sup>5</sup> *Bansi Lal v. Dhapo*;<sup>6</sup> *Krishnabhupati v. Ramamurti*;<sup>7</sup> *Hubibhoy v. Cassimbhoy*;<sup>8</sup> *Naick v. Naick*;<sup>9</sup> *Khagendra Nath Mahata v. Prau Nath Roy*;<sup>10</sup> *Radha Raman Shaha v. Prau Nath Roy*.<sup>11</sup>

*F. M. de Saram*, for the defendant, respondent.—The plaint clearly shows that the object of the plaintiff is to get the decree of the District Court set aside. He pleads the District Court decree in his plaint, avers that the decree has been obtained by fraud, and

<sup>1</sup> (1908) 1 S. C. D. 76.<sup>2</sup> (1900) 25 Bom. 230.<sup>3</sup> (1899) 26 Cal. 891 (898).<sup>4</sup> (1899) 27 Cal. 11 (13).<sup>5</sup> (1934) 26 All. 272.<sup>6</sup> (1902) 24 All. 242.<sup>7</sup> (1892) 16 Mad. 198.<sup>8</sup> (1882) 6 Bom. 703 (707).<sup>9</sup> (1905) 16 Mad. L. J. R. 59.<sup>10</sup> (1902) 29 Cal. 395.<sup>11</sup> (1901) 28 Cal. 178.

claims damages. The Indian cases quoted by the counsel for the appellant would apply if the judgment in the District Court action was not referred to in the plaint, and was pleaded for the first time by the defendant in his answers. Section 44 of the Evidence Ordinance would in that case apply, and it would be open to the plaintiff, after that judgment had been proved by the defendant, to show that the judgment had been obtained by fraud. But in the present case section 44 has no applicability. Plaintiff bases his claim for damages on the result of the inquiry in the District Court action, and he seeks to show that the decree of the District Court was void on the ground of fraud.

July 29, 1910

Buyzer v.  
Eckert

The defendant cannot in this manner set aside the judgment of a superior court. So long as that judgment stands, it can be pleaded as *res judicata*; and the defendant, in his answer, did in fact plead it as *res judicata*.

Plaintiff's remedy, it is submitted, should be either to institute an action in a court of concurrent jurisdiction to set aside the decree of the District Court on the ground of fraud, or to apply to the Supreme Court for *restitutio in integrum*.

In *Flower v. Lloyd*<sup>1</sup> it was held that a separate action could be brought to set aside the decree on the ground of fraud, or where there was no fraud, but discovery of fresh evidence, by a Bill of Review. Our Courts have recognized such actions being brought on the ground of fraud. (*Perera v. Ekenaike*.<sup>2</sup>) The proceedings by way of a Bill of Review would be analogous, it is submitted, to an application for *restitutio in integrum*. (*Gooneratne v. Dingiri*,<sup>3</sup> *Sinnatamby v. Nallatamby*,<sup>4</sup> *Silindu v. Akura*.<sup>5</sup>)

Cur. adv. vult.

July 29, 1910. MIDDLETON J.—

The plaintiff here brings his action in the Court of Requests, waiving any right he may have to recover damages beyond the amount of the Court's jurisdiction, on the plaint alleging fraud and conspiracy in the preparation and use of two plans used against him by the defendant in certain proceedings in the District Court, by the decree in which the plaintiff was struck off from the roll of land surveyors. He nominally claims for damages, but it is perfectly clear, upon reading the plaint, that it is directed to the annulling of the aforesaid decree of the District Court.

The plaintiff's counsel relied on section 44 of the Evidence Act and many Indian decisions, amongst which was a case cited at page 201 of Sanjiva Row's Indian Code of Civil Procedure, said there

<sup>1</sup> (1877) 6 Ch. D. 297.<sup>2</sup> (1897) 3 N. L. R. 21.<sup>3</sup> (1898) 4 N. L. R. 249.<sup>4</sup> (1904) 7 N. L. R. 139.<sup>5</sup> (1904) 7 N. L. R. 296.

July 29, 1910

MIDDLETON  
J.*Buyzer v.  
Eckert*

to be reported in *11 Calcutta Weekly Notes* 579, to the effect that a court of inferior jurisdiction is competent to declare a decree of a superior court to be a nullity on the ground of fraud if otherwise it has jurisdiction to entertain the suit. The original report could not be produced, but I strongly suspect that the case went no further than holding that if in an inferior court it was proved by evidence that a decree of a superior court set up against one of the parties was obtained by fraud. It was open to the inferior court to hold, as regards the parties to the action, that the decree of the superior court was not binding on them, and might be ignored.

I think, however, that this is a very different thing to holding that an action may be prosecuted in an inferior court with the direct object of setting aside a decree of a superior court.

In the present case it seems to me that the plaintiff's action has no other object than the avoiding of the decree of the District Court, by which he was debarred from practising his profession, while he seeks to veil his object by shrouding it in a claim for damages. Section 44 may equally support a case such as I have considered to be the one in *11 Calcutta Weekly Notes*, or an action directly brought for the purpose of annulling a decree on the ground of fraud or collusion. Section 44 does not however give the power the plaintiff's counsel in effect contends for, of bringing an action in an inferior court for the purpose of setting aside the decree of a superior court. It may be done incidentally as I have indicated, but it is not to be countenanced when directed obviously to that object. The contention of counsel for the plaintiff is based on section 9 of the Indian Act of 1908, which is practically the same as section 11 of Act 14 of 1882, the old Code; but even under it or the old Code I doubt if any action can be maintained in an Indian inferior court which has the object of setting aside a decision in an action obtained in a superior court. The court must be one of concurrent jurisdiction (*26 Calcutta 898*).

The proper course in such a case as this is laid down by this Court in *Gunaratne v. Dingiri Banda*<sup>1</sup> and in *Sinnetamby v. Nallatamby*,<sup>2</sup> by proceedings by way of *restitutio in integrum*, or even, as I said in my judgment in the latter case, an action in the District Court might be brought on the ground of fraud to set aside the judgment.

On the ground that this action is brought for the purpose of setting aside a judgment of a superior court, I would hold that the proceedings do not lie in their present form, and would dismiss the action with costs, without prejudice to any right the plaintiff may have to raise the question in the manner I have indicated, either by substantive action in the District Court for fraud or by way of *restitutio in integrum*.

Where a decree has been obtained by fraud of one of the parties, the plea of *res judicata* may be met with a replication alleging fraud

<sup>1</sup> (1898) 4 N. L. R. 249.<sup>2</sup> (1904) 7 N. L. R. 139.

in its obtainment, and, as has been stated by Lord Walsingham in the Duches of Kingston's case,<sup>1</sup> "Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice." See also *Indian Law Reports*.<sup>2</sup>

July 29, 1910

MIDDLETON  
J.Buyzer v.  
Eckert

The appeal must be dismissed with all costs in this Court and the Court below.

WOOD RENTON J.—

This is an appeal against a judgment of the Commissioner of Requests, Colombo, dismissing an action brought by the plaintiff-appellant, who is a surveyor, in the Court of Requests, claiming damages against the defendant-respondent, on the ground that he had maliciously placed false documentary evidence before the District Court of Colombo, in special case No. 377 of that Court, and claiming also a declaration of the invalidity of the documentary evidence so adduced. The special case to which I have just referred consisted of proceedings instituted by the Surveyor-General on the petition of the respondent for the cancellation of the surveyor's license, and it resulted, in fact, in that license being cancelled. We were informed by counsel at the argument that the appellant had brought the present action in the Court of Requests, reducing his claim for damages to an amount which would give that Court jurisdiction, so as to save himself the expense of suing in the District Court, or of applying to the Supreme Court itself for *restitutio in integrum*. The decree of the District Court, which was affirmed by the Supreme Court in appeal, cancelling the appellant's license, still stands unreversed. That being so, two questions arise for consideration: (1) whether such an action as the present will lie at all; and (2) whether it can be brought in a court of inferior jurisdiction. After careful consideration of all that was urged before us at the argument of the appeal by counsel on both sides on this point, I think that while the appellant's action sounds in damages, it is in substance an action to obtain a reversal of the decree of the District Court in the special case. It would clearly have been open to the appellant to have applied to the Supreme Court on an allegation that the decree against him in the special case had been obtained by the fraudulent production of false evidence, for an order of *restitutio in integrum*, and I am not prepared to say, on the materials before me at present, that an action to set aside the decree directly might not perhaps have been brought in a Court whose jurisdiction is concurrent with that of the Court which pronounced it. But I do not think that such an action as this, which is in fact, as the appellant himself stated in his petition of appeal, an action impugning the decree of the District Court in the special case, can be brought in a Court of Requests. No English

<sup>1</sup> *Smith's Reading Cases*, 9th edition 812/177.      <sup>2</sup> (1882) 6 Bom. 703.

July 29, 1910

WOOD  
RENTON J.

Buyzer v.  
Eckert

authority was cited in support of the argument that such an action would lie, and it seems to me that the provisions of section 44 of the Evidence Ordinance, and of all the cases cited to us under that section, as to the right of any party to a suit or other proceedings, to show that any judgment, order, or decree, which is relevant under the earlier sections of the Ordinance, and which has been proved by the adverse party, was obtained by fraud or collusion, contemplate cases where that issue arises incidentally in a suit or proceeding, otherwise competent, and not where, as here, the section is really one to set aside the decree of a higher Court. It would be inconvenient in the highest degree if it were competent for a Court of Requests to entertain an action of that kind, and I am glad to be able to come to the conclusion that section 44 of the Evidence Ordinance confers upon it no power to do so. On these grounds I think that the present appeal must be dismissed with the costs of appeal and with all costs of the action in the Court below.

*Appeal dismissed.*

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