

CASE NO.:
Appeal (civil) 3768 of 2000

PETITIONER:
A.C. Ananthaswamy & Others

RESPONDENT:
Boraiah (dead) by LRs

DATE OF JUDGMENT: 20/08/2004

BENCH:
ASHOK BHAN & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

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.

The facts giving rise to this appeal are as follows:\027

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 favour of Boraiah. Hence, this Civil Appeal.

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, 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 making such representation. [See: Pollock & Mulla on Indian Contract & Specific Relief Acts \026 (2001) 12th Edition page 489].

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. Purshottamdas 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 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.