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Before Mr. Justice Bayley and Mr. Justice Farran.

MIRALI RAHIMBHOY (*Original Plaintiff*), *Appellant v.* REHMOOBHOY HABIBBHOY AND OTHERS (*Original Plaintiff and Defendants*), *Respondents.** [10th April, 1891.]

Decree—Fraud—Setting aside decree—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), ss. 11, 462 and 623—Infant—Minor—Suit by infant plaintiff against executors for administration—Compromise of suit by guardian—Objection to executors' accounts withdrawn by guardian—Fraud—Coercion—Decree afterwards impeached by infant—Decree how set aside.

An administration suit filed in 1870 against executors on behalf of three infant plaintiffs was referred to the Commissioner to take accounts of the administration of the estate by the defendants. In August, 1876, and before the taking of accounts was concluded, the plaintiff's guardian withdrew certain surcharges and objections which had been filed to the defendants' accounts and compromised the suit. The Commissioner then made his report, which, with the consent of all parties to the suit, was confirmed by the Court on the 13th January, 1885. One of the plaintiffs attained his majority in December, 1887, and on the 15th March, 1888, obtained a rule calling on the defendants to show cause why the proceedings in the Commissioner's office subsequent to August, 1876, should not be set aside, and why he should not be at liberty to proceed with the accounts filed in the Commissioner's office. He alleged that the enquiry before the Commissioner had not been conducted in the interest of himself and the other infant plaintiffs; that their guardian had been induced to withdraw objections and surcharges by the threats and coercion of the defendants, and that the compromise had not been sanctioned by the Court. He contended that the proceedings before the Commissioner had been a sham.

Held that the rule should be discharged. The decree was regular in itself and on the face of it correct, and it could only be set aside by a regular suit.

Per FARRAN, J.—The only modes of setting aside a decree prescribed by the Indian Code of Civil Procedure (Act XIV of 1882), are by review under s. 623 and by suit under s. 11.

[R., 19 B, 571 (576, 577); 36 B. 77=13 Bom. L.R. 573=11 Ind. Cas. 568; 3 C.L.J. 119 (130); 10 C.L.J. 420=13 C.W.N. 1197=2 Ind. Cas. 129; 17 C.P.L.R. 147 (154); 37 P.R. 1903.]

APPEAL against the order of Scott, J., dated 6th September, 1888: see the case reported under the name of *Karamali Rahimbhoy* v. *Rahimbhoy Habibbhoy*, in I. L. R., 13 Bom., 137.

This suit was filed in 1870 by Rahimbhoy Dharamsey, as the father and guardian of the appellant and his two brothers, Karamali and Ibrahim, against the defendants, as executors of the will of Khan Mahomed Hubibbhoy, to recover the arrears of a certain monthly allowance which they claimed under the will. The suit [595] was referred to the Commissioner to take accounts of the administration of the estate by the defendants. Accounts were duly filed by the defendants in February, 1874, and in June, 1874, objections and surcharges to the accounts were filed on behalf of the infant plaintiffs (Karamali, Ibrahim and Mirali). In November, 1875, Rahimbhoy Dharamsey died, and on the 4th April, 1876, his mother, Kajbai (grand-mother of the infant plaintiffs) was appointed guardian of the plaintiffs.

The Commissioner made his report on the 31st March, 1884, and it was confirmed by the Court on the 13th January, 1885. The appellant

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attained his majority in December, 1887, and on the 15th March, 1888, took out a rule calling on the defendants to show cause why the proceedings in the suit subsequent to August, 1876, should not be set aside and why he should not be at liberty to proceed with the accounts filed in the office of the Commissioner. He alleged that the inquiry before the Commissioner had not been conducted in the interest of himself and the other infant plaintiffs, but had been compromised by the parties; that his guardian, Kajbai, had been induced by the threats and coercion of the defendants to withdraw objections and surcharges which had been lodged to the defendants' accounts; and that the compromise had not been sanctioned by the Court. He contended that the proceedings before the Commissioner had been a sham.

The rule was argued before Scott, J., who held, upon the evidence, that the plaintiff would have been "entitled to impeach the decree and to re-open the accounts if he had proceeded in a proper manner by an application for review or by an original suit." He was of opinion, however, that he was "precluded by authority from such a decision on account of the irregularity of his (the appellant's) present procedure." He accordingly discharged the rule (see I. L. R., 13 Bom., 137).

The plaintiff appealed against the order of discharge.

Badrudin Tyabji and *Kirkpatrick*, for the appellant.

Latham (Advocate-General), for the respondents.

The following authorities were cited:—Simpson on Infants, p. 512; Daniell's Chancery Practice, Vol. I, p. 180 (6th ed.); *Rajagopal* [596] *Takkaya Naiker* v. *Muttupalem Chetti* (1); *Eshan Chundra Safooi* v. *Nundamoni Dassee* (2); *Bibee Solomon* v. *Abdool Azeez* (3); *Sharat Chunder Ghose* v. *Kartik Chunder Mitter* (4); *Keisall* v. *Kelsall* (5); *Morison* v. *Morison* (6); *Davenport* v. *Stafford* (7); *Brooke* v. *Lord Mostyn* (8); *Flower* v. *Lloyd* (9); *In re Hoghton*; *Hoghton* v. *Fiddey* (10).

JUDGMENT.

BAYLEY, J.—This is an appeal from an order of Mr. Justice Scott discharging the rule calling on the defendants to show cause why the proceedings in the suit subsequent to the month of August, 1876, should not be set aside and why the plaintiff should not be at liberty to proceed with the accounts in the Commissioner's office. That is the form of the rule taken out by the plaintiff. It does not allude to the decretal order, made on the 13th January, 1885, with the consent of all the parties by which the Commissioner's report was confirmed. It is clear, however, that, if a rule were admissible, the rule taken out by the plaintiff ought to have been a rule to set aside that decree and to re-open the accounts.

The mode in which an infant may impeach such a decree as this is laid down in Daniell's Chancery Practice (6th ed.), Vol. I, p. 180, and in the passage cited by Mr. Justice Scott from the case of *Morison* v. *Morison* (6). These authorities state clearly that in such a case as the present, *viz.*, where the decree is regular in itself and on the face of it correct, it can only be set aside by suit.

(1) 3 M. 103. (2) 10 C. 357 (367). (3) 6 C. 687.
(4) 9 C. 810. (5) 2 M. & K. 409. (6) 4 My. & Cr. 215.
(7) 8 Beav. 503. (8) 2 De G.J. & S. 373. (9) L.R. 6 Ch.D. 297.
(10) L.R. 18 Eq. 573.

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The following paragraphs of the plaintiff's affidavit indicate the nature of the relief he asks for in the present proceeding. He says :—

"I have carefully examined the accounts filed by the defendants, as well as the surcharges filed by my father the said Rehmoobhoy Dharamsey, and I am able to say that if my guardian had properly proceeded with the surcharges, and had they not been withdrawn under the arrangement and in collusion with the defendants, a major portion of the surcharges to a very large extent would have been proved, and the estate in the hands of the defendants would have been found to be [597] considerably greater than the Commissioner was with the evidence before him compelled to find.

"28. I say my guardian, Kajbai, was a mere dupe in the hands of the defendants, Rehmoobhoy Habibbhoy and Ahmedbhoy Habibbhoy, and that the objections and surcharges which had been filed by my father as aforesaid during his lifetime were withdrawn by her under the pressure and influence of the said Rehmoobhoy Habibbhoy and Ahmedbhoy Habibbhoy and in collusion with them, and that the arrangement to abandon the enquiries aforesaid was a fraud upon me and my brothers and sister; and I therefore pray that the defendants' accounts be re-opened and that I may be allowed to proceed with the objections and surcharges, and that the Commissioner may be directed also to go into the enquiry as to the non-conversion of the testator's property and the consequent loss to the estate, which enquiry was abandoned as aforesaid by my guardian."

He complains that his guardian, Kajbai, withdrew the objection to the accounts in consequence of pressure brought to bear upon her by the defendants. In other words, he alleges that he has discovered that his interests were sacrificed and that he was defrauded by the decree of the 18th January, 1855. If these allegations are proved, the decree ought to be set aside; but we think that the proper mode of impeaching the decree is by a regular suit and not by an interlocutory proceeding such as this.

There appears to be no case directly in point. The passage which has been cited from *Eshan Chundra Safooi* v. *Nunda Lall Dassee* (1) seems apparently to favour the plaintiff's contention, but it appears only to have been a *dictum* not relevant to the question decided in the case, and upon a point which had not been argued.

With regard to s. 462 of the Civil Procedure Code (Act XIV of 1882), I do not think that section has any application to the point arising here. I am not prepared to say there was any compromise between the parties. What was done was done under the advice of counsel, and would seem to amount to this; that being very uncertain whether there was evidence sufficient to prove the objections lodged to the accounts, the objecting parties abstained from pressing those objections.

I am of opinion that the order appealed from is right, and ought to be affirmed.

[598] FARRAN, J.—I am of the same opinion. The allegations made by the plaintiff, upon which he bases this application, are, in effect, that his guardian, Kajbai, was coerced by the defendants to withdraw the surcharges and objections which otherwise she might and could have substantiated.

Now it is true that the proceedings referred to were proceedings in the office of the Commissioner for taking accounts. That circumstance,

(1) 10 C. 357 (367).

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however, does not affect the matter; and the question which arises here is to be considered and decided in precisely the same manner as if the proceedings had taken place in Court. A decree has been duly passed in proper form, which *prima facie* is in all respects correct, but the plaintiff's case is that important evidence was withheld from the Court which made this decree, and that it was withheld because of coercion and pressure brought to bear upon one of the parties to the suit.

It is to be observed that this application is not made under the Civil Procedure Code. By that Code a decree may be set aside by review. This application, however, cannot be regarded as an application for review, for the plaintiff does not allege that he has evidence to produce which, if taken, would result in a different decree from that which has been passed. He does not do that. He contents himself with simply alleging that the decree complained of has been obtained by fraud. It is clear, therefore, that if we consider it as made under s. 623 of the Code, this application must fail.

The only other method of procedure provided by the Code is a suit under s. 11. These are the only two courses open to the plaintiff under the Code which prescribes the procedure to be followed by the Courts in India. It is plain that the course adopted by the plaintiff in making the present application is different from either of these two, and does not fall within any of the provisions of the Code of Civil Procedure.

But if that is the case, we are then thrown back for guidance on English practice and English authority. It is clear, however, that in England a decree attacked for fraud must be attacked by suit, and if for error by bill of review. *Flower* v. *Lloyd* (1) is [599] conclusive upon that point, but all the English cases are to the same effect.

The only Indian authority to which we have been referred is the case of *Eshan Chundra Safo* v. *Nundamoni Dassee* (2). But the passage relied on in the judgment delivered in that case is not clear. It is possible, as Mr. Justice Scott observes, that the application referred to by Garth, C.J., is an application for review. If, however, that is not so, the passage is merely a *dictum* and is not to be regarded as an authority.

Then we have been referred to the case of *Rajagopal Takkaya Naike* v. *Muttupalem Chetti* (3). But in that case there was error on the face of the proceedings. A review should have been applied for, and I imagine the Court did treat the application as one for review. The cases of *Bibee Solomon* v. *Abdool Azeez* (4) and *Sharat Chunder Ghose* v. *Kartik Chunder Mitter* (5) show that in India, as in England, the practice in such cases as the present is to proceed by regular suit. I think the appeal fails.

Appeal dismissed.

Attorneys for the appellant:—Messrs. *Payne, Gilbert and Sayani.*
Attorneys for the respondent:—Messrs. *Tobin and Roughton.*

(1) L.R. 6 Ch.D. 297. (2) 10 C. 357. (3) 3 M. 103.
(4) 6 C. 637. (5) 9 C. 810.