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18 B. 142.

[143] The opponent Sitaram Atmaram Vagh brought a suit against Francis Pedru and his mother Manaku in the Court of the First Class Subordinate Judge of Karwar, in its Small Cause jurisdiction, to recover Rs. 476-9-0 due upon a promissory note jointly passed by them. At the hearing only the first defendant appeared and resisted the claim. The second defendant, Manaku, was absent. The Subordinate Judge passed a decree against both the defendants. Subsequently Manaku (defendant No. 2) applied to set aside the decree, and the question arose as to whether, if the application were granted, the case would be re-opened with respect to defendant No. 1. The Subordinate Judge referred the question as follows:—

“Whether an application by a co-defendant praying for setting aside an *ex-parte* decree in a Small Cause suit, if granted, re-opens the case against the defendant or defendants who were present and who conducted the defence in the original trials in cases where there is a common cause of action against all the defendants.”

The opinion of the Subordinate Judge was in the negative. He referred to the following cases:—*Brojonath Surmah v. Anund Moyea Debia* (1); *Huro Krishno Doss v. Motee Chand Baboo* (2); *Dookhee Khan v. Rajessuree Rane* (3); *Nistarinee Dasse* v. *Debnath Bose* (4).

*Purushotam Parashuram Khare* (*amicus curiæ*), for the petitioner.  
*Vasudeo Gopal Bhandarkar* (*amicus curiæ*), for the opponent.

#### OPINION.

SARGENT, C. J.—Having regard to the language of ss. 106 and 108 of the Civil Procedure Code (Act XIV of 1882) the question must be answered in the negative.

*Order accordingly.*

18 B. 144.

#### [144] APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

KRISHNAJI (*Original Plaintiff*), *Appellant v. WAMNAJI* (*Original Defendant*), *Respondent*.\* [9th February, 1893.]

*Fraud—Plaint—Form of plaint—Charges of fraud—Amendment of plaint—Practice—Procedure.*

Where a plaintiff seeks relief on the ground of fraud, and the plaint contains general allegations, but no specific instances, of the alleged fraud, it ought to be immediately, on presentation, rejected or returned for amendment, as it does not disclose a cause of action.

The plaintiff sued to recover damages caused by the defendant's fraud during his management of the plaintiff's estate from 1870 to 1884. The plaint disclosed no specific instances of the fraud imputed to the defendant. The Court of first instance, without going into evidence, rejected the plaintiff's claim, on the preliminary ground that the plaintiff had no right to sue during the lifetime of his adoptive mother. In second appeal, the respondent objected that the plaint was defective. The plaintiff's pleader asked for leave to amend it by specifying certain instances of the alleged fraud.

\* Second Appeal No. 656 of 1891.

(1) 7 W. R. C. R. 237.

(2) 8 W. R. C. R. 260.

(3) 15 W. R. C. R. 371.

(4) 20 W. R. C. R. 286.

*Held*, that the amendment could not then be allowed, and the suit must fail. When fraud is charged, the evidence must be confined to the allegations.

[R., 19 B. 593 (601) ; 5 Ind. Cas. 179 (180).]

SECOND appeal from the decision of J. Fitzmaurice, Acting District Judge of Ratnagiri, in appeal No. 270 of 1889.

The plaintiff sued to recover Rs. 3,000 as damages sustained by him by reason of defendant's fraud and misconduct whilst acting as agent under plaintiff's adoptive mother in the management of his estate.

The plaint was as follows:—

"One Ramchandra Bapuji Thakur adopted me (the plaintiff) and died in March, 1870, whilst the plaintiff was a minor.

"Ramabai, the plaintiff's mother, carried on the management of the whole estate through the defendant. Therein he committed a good many frauds, and misappropriated considerable property, and removed the documents. And with a view to escape the consequences of his fraud he gave up the management in July, 1884, and fraudulently obtained a release from Ramabai by misrepresenting and misstating matters therein.

"[145] Subsequently in August, 1884, Ramabai delivered over to me, the plaintiff, all the management, the letters and documents, &c., received by her. Thereafter on my examining the said letters, documents and accounts relating to the management of the defendant, I found that he had not faithfully carried on the management of my property as my agent from March, 1870, to August, 1884, but had greatly benefited himself by fraudulently misappropriating the said property and writing false accounts.

"The plaintiff seeks to recover the damages caused by the defendant's fraud and breach of trust."

Defendant denied the alleged fraud and contended that the plaintiff had no right to sue during the lifetime of his adoptive mother, inasmuch as his adoptive father had left a will under which an absolute right of management was conferred on her during her lifetime.

Both the lower Courts rejected the plaintiff's claim on the preliminary ground that, under the will of plaintiff's adoptive father, Ramabai (the adoptive mother) was absolute owner and manager of the estate during her lifetime; that defendant was accountable to Ramabai alone; and that as she did not come forward to complain of his mismanagement, plaintiff had not the right to do so.

Against this decision the plaintiff preferred a second appeal to the High Court.

*Mahadeo Chimnaji Apte*, for the respondent, took the objection that the plaint disclosed no cause of action and ought not to have been accepted. It did not mention any specific instances of fraud. It contained merely general allegations of fraud—*Gunga Narain Gupta v. Tiluckram Chowdhry* (1).

*Manekshah Jehangirshah*:—I admit that the plaint is defective. But I ask to be allowed to amend the plaint by specifying certain instances of fraud, which are proved in the case. A plaint can be amended even at this stage—*Joseph v. Solano* (2) and *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer* (3).

#### JUDGMENT.

[146] FULTON, J.—We think that the objection, taken by Mr. Apte, that the plaint discloses no specific instances of fraud, must be allowed.

(1) 15 C. 533.

(2) 9 B.L.R. 441.

(3) 11 M.L.A. 468.

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The decision of the Privy Council in *Ganga Narain Gupta v. Tiluckram Chowdhry* (1) shows that "with regard to fraud, if there be any principle, which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." Such being the case the plaint ought, immediately on presentation, to have been rejected or returned for amendment, as it did not disclose a cause of action. Mr. Manekshah admits the defective nature of the plaint, but asks to be allowed to amend it by specifying certain instances alluded to in the Commissioner's reports, and offers to pay the costs of both appeals. Had the evidence on both sides, regarding these alleged frauds, been taken, this course might, perhaps, have been adopted; but the Subordinate Judge dismissed the suit on another point without taking the evidence for the defendant, or finishing the evidence for the plaintiff. The frauds are alleged to have taken place before 1884, and the effect of the amendment would be that now, in the year 1893, the defendant would be required to give evidence to defend himself from charges of fraud which have never yet been clearly specified, and which were not embodied (and could not on the pleadings be embodied) in the issues in the Court of first instance. Under these circumstances, we think the amendment should not now be allowed.

We were referred to the decisions in *Joseph v. Solano* (2) and *Mohumud Zahoor Ali Khan v. Mussumat Thakooraanee Rutta Koer* (3) as showing at how late a stage amendment may be allowed; but in the latter case (which was followed in the former), it appears that there was a total misconception of the nature of the suit. In the present case this does not seem to have occurred. Either the plaintiff when he presented his plaint, knew the instances of fraud alleged to have been committed by the defendant, in which case his omission to specify them suggests the belief that he [147] preferred not to do so, with a view to keeping it open for himself to shape his allegations as he went along to meet the evidence; or he did not know of them and began a suit without any ground to go upon and simply in the hope that he would be able to make out a ground by evidence later on. In either alternative, it does not seem desirable now, nine years after the alleged frauds, to allow the amendment of the plaint. Without such amendment, however, it is clear that the suit must fail, as it is well settled that when fraud is charged, the evidence must be confined to the allegations.

On these grounds, then, we confirm the decree of the Courts below with costs.

*Decree confirmed.*

(1) 15 C. 533.

(2) 9 B.L.R. 441 (453).

(3) 11 M. I. A. 468.