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by the Courts of this country before the Act was passed. In our judgment the consideration was not immoral. The annuity was created not in consideration of future cohabitation, which would be an immoral consideration, but to make provision for a woman for whom it was incumbent on the honour of the settlor to make some provision. Nor, as the law stood when the deed was executed, would it have been held that such a contract was void for want of consideration There remains, however, a plea which has not formed the subject of an issue in the Court below. Before the appellant can recover from the respondent, it must be shown that the respondent has received funds available to meet the claim from the profits of Lakhnaura or other property of the deceased. We remand this issue for trial under s. 354.

Cause remanded.

APPELLATE CIVIL.

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 August 3.

Before Mr. Justice Pearson and Mr. Justice Spankie.

MAN SINGH (DEFENDANT) v. NARAYAN DAS AND OTHERS (PLAINTIFFS)*

Res judicata—Act VIII of 1859 (Civil Procedure Code), ss. 2, 139—Trial and Determination of Issues.

A Court of competent jurisdiction, having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which in that suit was not required for its disposal. *Held* that such Court was not bound under the circumstances to refrain from trying and determining such last-mentioned issue, and that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit.

THIS was a suit on a bond for money charged on immoveable property. The bond was given on the 10th January, 1864, to one Tula Ram, and charged certain immoveable property. On the 28th January, 1864, the obligees of the bond sold the property

* Special Appeal, No. 681 of 1877, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 25th April, 1877, affirming a decree of Maulvi Abdul Razaq, Munsif of Bisauli, dated the 27th May, 1876.

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to Man Singh, defendant in this suit. On the 17th September, 1864, Tula Ram obtained a decree on the bond against the obligees, which declared the property liable to be sold in execution of the decree. On the property being attached in execution of this decree, Man Singh objected that it was not liable to be sold. His objection being disallowed, he brought a suit against Tula Ram and the obligees of the bond to establish that the property was not liable to be sold. On the allegations of the parties to this suit the Munsif fixed as issues whether the property was liable to be sold in execution of Tula Ram's decree or not, and whether the bond was collusive or not. On the first issue he determined that the property was not liable to be sold in execution of Tula Ram's decree, as that decree, so far as it affected the property, was passed without jurisdiction. On the second he observed as follows: "I am of opinion that, though an *ex-parte* decree was given in favour of Tula Ram on the bond, still as Tula Ram, defendant, could not prove the validity of the bond in this Court, the bond must be considered collusive. Had the bond been genuine the answering defendant would not have failed to prove it." He accordingly on the 12th December, 1873, gave Man Singh a decree. Tula Ram appealed against this decree to the Judge, and against the Judge's decree, which affirmed the Munsif's, to the High Court, which affirmed the Judge's decree; but neither before the Judge or the High Court did he take any exception to the determination on the issue respecting the bond. The present suit on the bond was brought against Man Singh by the heirs of Tula Ram. Man Singh relied on the finding respecting the bond in the first suit as a defence to the second suit. The Court of first instance gave the plaintiffs a decree which the lower appellate Court affirmed, both Courts overruling the defendant's contention that the suit was barred by the finding in the former suit that the bond was collusive. On special appeal to the High Court by the defendant it was again contended that the suit was barred by the finding in the former suit in respect of the bond.

Babu *Oprokash Chandar Mukarji* and *Mir Zahur Husain*, for the appellant.

Munshi *Hanuman Prasad* and *Lala Lalta Prasad*, for the respondents.

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The judgment of the Court was delivered by

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PEARSON, J.—The question whether the bond on which the claim in the present suit is founded was collusive or not was distinctly raised by the pleadings in the suit formerly brought by Man Singh against Tula Ram (now represented by the present plaintiffs), was made an issue for trial, and was determined in that suit adversely to Tula Ram. The lower appellate Court is of opinion that the finding on that issue in that suit does not preclude a re-adjudication of it in the present suit for two reasons; first, because the determination of the issue in that suit was not required for its disposal; and secondly, because the finding by which it was determined was imperfect. We are unable to concur in the opinion. It is true that the Munsif might have disposed of the former suit without adjudicating on that issue on the basis of his findings on the other issues tried by him; but it is also true that he was perfectly justified in laying down that particular issue for trial, as it arose out of the pleadings and an adjudication on it might have been necessary, and as his finding thereon rendered his decision in the case more firm and complete. We are not prepared to hold that he was bound to refrain from adjudicating upon it under the circumstances, or that his adjudication thereon can be treated as a nullity. His finding is regarded as imperfect by the lower appellate Court because it proceeded on the ground that Tula Ram had failed to prove the authenticity of the bond rather than on any absolute proof of fraud. But, if the finding were open to objection either on the score of irrelevancy or error, the objection might have been taken in the appeal preferred by Tula Ram against the decree passed by the Munsif on the 12th December, 1873, in Man Singh's favour. Tula Ram appealed to the Zila Judge and to this Court, but never took any such objection, and the finding remained undisturbed. This being so, the question determined by it must in our judgment be deemed to be a *res judicata* not open to re-adjudication. Allowing then the validity of the plea in appeal, we decree the appeal, reverse the decrees of the lower Courts, and dismiss the suit with costs in all Courts.

Appeal allowed.