

Before Mr. Justice Banerji and Mr. Justice Aikman.

DWARKA PRASAD (DEFENDANT) v. LACHHOMAN DAS (PLAINTIFF).^{*}
Civil Procedure Code, section 108—Decree ex parte—Suit to set aside as fraudulently obtained a decree ex parte—Application to set aside ex parte decree.

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An *ex parte* decree was passed against a defendant. The defendant judgment-debtor applied under section 108 of the Code of Civil Procedure to have such *ex parte* decree set aside, but his application was dismissed as barred by limitation. *Held*, that the defendant was not thereafter precluded from bringing a suit to set aside the *ex parte* decree as having been obtained by fraud. *Pran Nath Roy v. Mohesh Chandra Moitra* (1) followed.

THE facts of this case are as follows:—An *ex parte* decree was passed against the plaintiff respondent on the 27th March 1895. The plaintiff applied under section 108 of the Code of Civil Procedure to have that decree set aside, on the ground that he had never received notice of the suit. The Court (Munsif of Ghazipur) without taking any evidence dismissed the application as barred by limitation. From this order an appeal was preferred which was ultimately dismissed. Subsequently an application for review of the judgment was made under section 623 of the Code of Civil Procedure; but that application was rejected. The plaintiff then instituted a regular suit in which he prayed that the decree of the 27th March 1895 and all proceedings subsequent thereto might be set aside and declared null and void on the ground that the said decree had been obtained fraudulently by the defendant, (plaintiff in the former suit) without the plaintiff's knowledge on the basis of a fictitious bond, dated the 23rd May 1891. The Court of first instance (Munsif of Ghazipur) dismissed the suit on the ground that it was precluded by the plaintiff's former application under section 108 of the Code. The plaintiff appealed. The lower appellate Court (Subordinate Judge of Ghazipur) holding with reference to the case of *Pran Nath Roy v. Mohesh Chandra Moitra* (1) that the suit was not barred, set aside the decision of the Munsif and remanded the case,

^{*} First Appeal No. 134 of 1898, from an order of Maulvi Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 19th October 1898.

(1) (1897) L. L. R., 24 Calc., 546.

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under section 562 of the Code. From this order of remand the defendant appealed to the High Court.

Munshi *Gobind Prasad* for the appellant.

Babu *Bishnu Chandar Moitra* or the respondent.

BANERJI and AIKMAN, JJ.—The defendant-appellant obtained an *ex parte* decree against the plaintiff-respondent on the 27th March 1895. The plaintiff made an application under section 108 of the Code of Civil Procedure to have that decree set aside. That application was dismissed on the ground of limitation. He thereupon brought the present suit for a declaration that the *ex parte* decree and all the proceedings relating to it were null and void.

The ground upon which this suit was brought was that the defendant had fraudulently and collusively fabricated a bond purporting to be a bond executed by the plaintiff; that in furtherance of that fraud he had obtained an *ex parte* decree without the plaintiff's knowledge, and had secretly and without the knowledge of the plaintiff caused attachment orders to be issued in execution of that decree. The Court of first instance dismissed the suit, being of opinion that it was not maintainable.

The lower appellate Court has set aside the decree of the Court of first instance and remanded the case under section 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought. The view of the Court below is supported by the ruling in *Pran Nath Roy v. Mohesh Chandra Moitra* (1). The application under section 108 of the Code of Civil Procedure was never heard on the merits, and the ground upon which the present suit has been brought was never considered by the Court.

We are of opinion that no sufficient ground has been made out for interfering with the lower Court's order. The appeal is dismissed with costs.

Appeal dismissed.

(1) (1897) I. L. R., 24 Cal., 546.