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the meaning of section 596, and these applications must therefore be dismissed with costs.

BANERJI, J.—I am entirely of the same opinion. I am unable to hold that the appeal to the Privy Council involves a substantial question of law, unless that question arises upon the facts as found by the concurrent judgments of this Court and of the Court below. The mere circumstance that a question of law is raised in the case would not, in my opinion, justify the inference that the appeal involves a substantial question of law if the findings upon the facts do not necessitate a decision of that question. In this case I agree in holding that the Court below, in fact and substance, decided that the decree of the 14th May, 1888, was obtained by collusion and fraud, and there can be no doubt that this Court affirmed that decision. There are thus concurrent judgments upon a question of fact, namely whether the decree of the 14th May, 1888, was a collusive and fraudulent decree. Having regard to this finding of fact and to the practice of the Privy Council, to which the learned Chief Justice has referred, no question of law arises, a determination of which would be called for in the appeal to Her Majesty in Council. The appeal therefore does not involve a substantial question of law within the meaning of the last paragraph of section 596 of the Code, and these applications must be dismissed.

Application dismissed.

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November 26.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

FAKHR-UD-DIN (DEFENDANT) *v.* GHAFUR-UD-DIN (PLAINTIFF).*

Civil Procedure Code, sections 89, 100, 104—*Ex parte decree—Appeal—Service of summons on defendant residing out of British India—Burden of proof.*

Where a defendant against whom an *ex parte* decree has been passed appeals against that decree, it is sufficient in the first instance to establish that in the Court which passed the *ex parte* decree the necessary proof of service of summons on the defendant was not given by the plaintiff. It is not incumbent on the appellant to show that the summons was in fact not duly served.

Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient proof

* First Appeal No. 59 of 1898, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th January 1898.

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of service to show that the summons was posted, but there must be some evidence of its having been received by the defendant.

Section 100 of the Code of Civil Procedure is not limited in its application to defendants residing within British India.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Mr. *Abdul Jalil* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

STRACHEY, C. J.—This is an appeal by the defendant against a decree of the Subordinate Judge of Bareilly passed on the 19th January, 1898. The decree was passed *ex parte*, the defendant not having appeared. The question is whether the Court was justified, under the circumstances, in proceeding with the hearing *ex parte*. The substantial ground taken in the appeal is that the Court was not, having regard to section 100 of the Code, justified in proceeding *ex parte*, inasmuch as it was not proved that the summons was duly served. It has been contended on behalf of the respondent that upon this appeal the *onus* lies on the defendant appellant of proving that the summons was not in fact duly served, as the defendant would have to do in the case of an application under section 108 to the Court by which the decree was made for an order to set it aside. It appears to me that in an appeal from an *ex parte* decree passed under section 100 of the Code, all that the appellant has to do is to prove that the requirements of section 100 were not complied with, and that an *ex parte* decree was therefore not legally made. An *ex parte* decree cannot legally be made under section 100 unless it is first proved that the summons was duly served, and therefore it is sufficient for the appellant, in my opinion, to establish that in the Court passing the *ex parte* decree that necessary proof was not given by the plaintiff. If the appellant establishes that the *ex parte* decree was wrong, it is not necessary for him to prove farther that the summons was not in fact duly served upon him. In the case of an application under section 108, a defendant against whom a decree has been passed *ex parte* has the privilege of a special summary remedy not open to other defendants, in addition to the ordinary remedy by way of appeal, and it is reasonable that, as a condition of that special

summary remedy, he should have to satisfy the Court, not merely that the proof required by section 100 was not given by the plaintiff, but that in fact the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. The question then is, whether the defendant appellant here has shown that the plaintiff at the *ex parte* hearing did not so prove the due service of the summons as to entitle the Court to proceed *ex parte*. The plaint, which was filed on the 15th March, 1897, set forth in the heading that the defendant was a "resident of Bareilly, at present residing in Medina, in Arabia." Apart from the heading of the plaint there was at the *ex parte* hearing no evidence adduced by the plaintiff, either by affidavit or otherwise, that the defendant was residing at Medina, or in any other specified place. But upon the statement that the defendant was at Medina summonses were, on the 1st April, 1897, issued by the Subordinate Judge, through the Court of the District Judge, and addressed to "Fakhr-ud-din, of Bareilly, at Medina," for appearance on the 2nd September, 1897, as the date fixed for the hearing. From the order of the Subordinate Judge it appears to have been intended that the summons should be served under section 90 of the Code, which provides for the service of summons upon a defendant in a foreign territory where there is a British Resident, Agent, Superintendent, or Court. Why the Subordinate Judge should have considered it necessary, in a case where a summons was to be served under section 90, to send that summons through the Court of the District Judge instead of sending it himself, I do not know. However, the summons appears to have been sent to the District Judge; but the Court of the District Judge, for some reason which does not appear, instead of sending the summons in the manner provided by section 90, caused it to be sent by registered post addressed direct to "Fakhr-ud-din, of Bareilly, at Medina"—apparently under section 89. The evidence as to all this is not very clear, but I infer that the summons was sent through the District Judge from a proceeding recorded by the Subordinate Judge on the 2nd September, 1897, and I infer that the summons was sent direct from the District Judge to Fakhr-ud-din, of Bareilly, at Medina, from the notices of receipt apparently issued

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by the Medina Post Office, and printed at pages 9 and 10 of the appellant's book. The acknowledgments returned through the Post Office purported to be signed by "Muhammad Fakhr-ud-din of Bareilly" on the 12th June, 1897. A copy of one of the summonses was received back by the Court of the Subordinate Judge on the 17th August, 1897. It bears an endorsement, dated the 5th July, 1897, purporting to be signed by Abdul Rahman, agent of Maulvi Fakhr-ud-din, and resident of Delhi, at present residing at Medina. But there is no evidence to show who this Abdul Rahman was, or that he had any connection with the defendant. That is the whole of the evidence as to the service of the summons upon the defendant, which was before the Court at the time when the *ex parte* decree was made. It appears to me impossible to hold that there was proof, such as section 100 requires, that the summons was duly served. Apart from the heading in the plaint, there was not one word to show that the defendant was in fact residing at Medina at the date of the suit, or at the time when the registered letter containing the summons was received at Medina. There is nothing to show that the acknowledgments dated the 12th June, 1897, were in the handwriting of the defendant, or any person authorized to sign for him. There was nothing before the Subordinate Judge showing that the defendant was aware of the institution of the suit. The facts of this case are therefore clearly distinguishable from those of *Aga Gulam Husain* v. *Sassoon* (1) (see the observations of Candy, J., at pages 418 and 419 of the Report). No doubt cases may arise in which it would be a denial of justice to hold that service of a summons upon a defendant in a foreign territory could not be established without direct proof of the receipt or refusal by the defendant of the registered cover containing the summons. In the case of a defendant unable to sign an acknowledgment, or seeking to put obstacles in the plaintiff's way by refusing to accept the cover, to hold that there was no proof of valid service, might operate very unjustly to the plaintiff. Sections 16 and 114 of the Evidence Act show that in considering whether the summons or other communication through the post has reached a person or not, one may have regard to the fact of its having been posted in due

(1) (1897) I. L. R., 21 Bom., 412.

course, and one may presume that the usual course of the post has been followed. But I think it would be dangerous to be satisfied by such proof of receipt where there was no sufficient evidence of any residence by the defendant in the place to which the registered cover was addressed at or about the time when the letter would reach that place in the due course of the post. It is only where that is shown, or where the defendant's knowledge of the suit is proved, that I think the presumptions in question arise, and that service can be held proved without direct proof of the cover having come into the hands of the defendant. Here I am not satisfied, and the Court proceeding *ex parte* ought not to have been satisfied on the materials before it, that the defendant was at Medina at the time when the summons arrived there, or that he knew of the institution of the suit.

It has been contended on behalf of the respondent that under section 89 of the Code, the summons was sufficiently served by being posted to the address of "Fakhr-ud-din, of Bareilly, at Medina," even in the absence of proof that the defendant was then at Medina, and that the expression "forwarded by post" is satisfied by proof of posting, and does not require proof that the defendant received the summons. In my opinion, "forwarded by post" does not mean merely put into the post; and considering that the whole object of service of summons is to give the defendant an opportunity of appearing to defend the suit, it is, I think, essential, in the case of service under section 89, to prove that the summons has been not merely posted, but received by the defendant, the proof required being of the nature which I have already explained.

We have been asked, under section 568 of the Code, to allow a document to be admitted in evidence which was not before the Court when the *ex parte* decree was made. That document consists of an endorsement upon one of the copies of the summons which was sent to Medina. It is admittedly in the handwriting of the defendant, but the date which it bears is the 18th of April, 1898, many months after the *ex parte* decree was passed. Assuming that such evidence might be allowed to be given under section 568, I do not think that substantial cause for its admission has been shown. It is fully consistent with the summons

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not having been served upon the defendant in 1897, that he should receive and return another copy of that summons in April, 1898. For these reasons it appears to me that the proceeding with the case *ex parte* was in contravention of the provisions of section 100 of the Code.

It has been contended on behalf of the respondent that section 100 has no application to the case of a defendant residing out of British India, but must be construed as limited to defendants residing within British India. It is said that in the case of the non-appearance of a defendant residing out of British India the proper procedure is that prescribed, not by section 100, but by section 104 of the Code, which does not, like section 100, require proof that the summons was duly served, but allows the Court to direct that the plaintiff be at liberty to proceed with his suit in such manner and subject to such conditions as the Court thinks fit. I do not think that this contention is well-founded. There is nothing in section 100 to limit its application to any defendants resident in British India, and there is nothing in section 104 to exempt the plaintiff, where the defendant resides out of British India, from proving the due service of the summons before the hearing can proceed *ex parte*. I am not aware of any case in which section 104 of the Code has been considered. But I am inclined to think that its provisions were intended as a special protection for defendants residing out of British India, who certainly, one would imagine, do not require less protection than defendants residing within British India, and in whose case the ordinary reasons requiring proper proof of service of summons are fully applicable. I am disposed to think that in addition to what section 100 requires, section 104 was enacted to enable a Court, in the case of defendants residing out of British India, to impose conditions upon the plaintiff before allowing him to proceed with the suit, even where due service of summons is proved. It may be added that in the present case no application under section 104 appears to have been made. The result is that I think this appeal must be allowed, and the *ex parte* decree set aside, and the cause remanded to the Court below, under section 562, for trial on the merits. All costs, including the costs of this appeal, to abide the result.

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BANERJI, J.—I also would make the order proposed by the learned Chief Justice. The question we have to determine in this appeal is whether the Court below acted legally in proceeding *ex parte* against the defendant appellant. I cannot accept the contention of the learned vakil for the respondent, that in the case of a defendant residing out of British India section 100 of the Code of Civil Procedure does not apply. That section, in my opinion, is applicable to the case of all defendants, and section 104 of the Code controls section 100 to this extent, that in the case of a defendant residing out of British India, it is competent to the Court to impose conditions upon the plaintiff when the plaintiff asks the Court to proceed against such defendant *ex parte*. I agree with the learned Chief Justice in the view that section 104 was enacted in the interests of the defendant, and not of the plaintiff, that that section does not dispense with the requirements of section 100, and that the Court may proceed *ex parte* only when it is proved that the summons was duly served on the defendant. I am also unable to accede to the contention of the learned vakil for the respondent that in the case of a defendant residing out of British India, it would be sufficient proof of service if it is shown that the summons was issued by post in the manner required by section 89. That section requires that the summons should be "forwarded" to the defendant. This evidently means that the summons must reach him, and therefore, in order to satisfy the Court that the summons was duly served, there must be proof from which the Court may reasonably conclude that the summons has reached the defendant. It is true that in the great majority of cases it will be difficult to prove that the registered cover actually reached the hands of the defendant, and I do not say that in every case such proof would be required. There must, however, be such evidence before the Court as would justify the inference that he actually received the cover; for example, that at the time when the cover was, in the ordinary course of business, to have been delivered by the post office the defendant was residing at the place to which the cover was sent, or that the acknowledgment of the cover is in the handwriting of the defendant. Such evidence is wanting in this case, and I fully agree with the learned Chief Justice in the reasons which he

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has given for coming to that conclusion. I think the Court below had not sufficient material before it to warrant its proceeding *ex parte* against the defendant, and the *ex parte* decree should be set aside.

*Appeal decreed and cause remanded.**

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November 28.

Before Sir Arthur Strachey, Knight Chief Justice and Mr. Justice Banerji.

BITHAL DAS AND ANOTHER (PLAINTIFFS) *v.* NAND KISHORE AND OTHERS (DEFENDANTS).†

Civil Procedure Code, section 295—*Execution of decree—Rateable distribution of assets—Hindu Law - Joint Hindu family—Effect of attachment of joint family property in keeping alive the remedy of the decree-holder.*

A decree-holder who held a decree against one member of a joint Hindu family consisting of two brothers, in execution of his decree attached his judgment-debtor's interest in a portion of the joint family property. Subsequently to the attachment, but before sale, the judgment-debtor died.

Upon the rights and interests of the judgment-debtor in attached property being brought to sale, certain persons who held decrees against the same judgment-debtor, or his representatives but had not attached any of the joint family property in his life-time, applied under section 295 of the Code of Civil Procedure to be allowed to share rateably in the assets realized by the sale. Their applications were granted; but on appeal in a suit by the decree-holder who had attached in the life-time of the judgment-debtor, it was *held* that the attachment enured only for the benefit of the decree-holder who had made it, and that the non-attaching decree-holders were not entitled by virtue of section 295 of the Code to share in the assets realized by sale under such attachment. *Suraj Bansi Koer* v. *Sheo Proshad Singh* (1), *Deendyal Lal* v. *Jugdeep Narain Singh* (2), *Maniklal Venilal* v. *Lakha* (3), *Gangadin* v, *Khushali* (4) and *Gurlingapa* v. *Nandapa* (5) referred to. *Sorabji Edulji Warden* v. *Govind Ramji* (6) distinguished.

THE facts of this case sufficiently appear from the judgment of Strachey, C. J.

Messrs. *W. K. Porter* and *W. Wallach*, and Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Moti Lal Nehru* and Munshi *Gokul Prasad*, for respondent No. 10.

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† First Appeal No. 95 of 1898 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares dated the 24th December 1897.

* Cf. Wray. v. Wray, 17 Times Law Reports, p. 242.

(1) (1878-79) L. R., 6 I. A., 88.
(2) (1877) L. R., 4 I. A., 247.
(3) (1880) I. L. R., 4 Bom., 429.
(4) (1885) I. L. R., 7 All., 702.
(5) (1896) I. L. R., 21 Bom., 797.
(6) (1891) I. L. R., 16 Bom., 91.