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execution might proceed as against them. It was also suggested that the appellant's application for execution, directed as it was against other persons than the respondents, was calculated to put them off their guard and to lead them to suppose that as only a small sum of money belonging to them had been attached and a much larger sum had been attached as against other persons, they had only to allow the small sum of Rs. 28-8-0 to be paid to the respondents in order to be rid of the whole business. The answer to this is that the respondents were in no way misled by the appellant's application. They came in at once with a petition of objections and their failure to press it is not explained.

I am reluctantly driven to the conclusion that the decision of 1910 neutralised the previous decisions and left the respondents liable for the balance, of the decree for costs. I would therefore allow this appeal set aside the order of the court below dismissing the application for execution, and direct that the application be restored to the pending file and disposed of according to law. Costs of this appeal should be costs in the cause.

PIGGOTT, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the court below is set aside with this direction that the application for execution be restored to the pending file and disposed of according to law.

Appeal decreed, cause remanded.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Rafique.

JANKI KUAR (PLAINTIFF) *v.* LACHMI NARAIN AND OTHERS (DEFENDANTS). * 1915 *May*, 28.

Fraud—Decree—Decree based on perjured evidence—Suit to set aside—Onus of proof—Res judicata.

Held that a suit to set aside a decree on the ground that the decree had been obtained by perjured and false evidence is not maintainable. *Held* further, that where a decree was impeached on the ground of fraud, the fraud alleged must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and the obtaining of the decree by that contrivance.

* Second Appeal No. 458 of 1914, from a decree of Austen Kendall, District Judge of Cawnpore, dated the 12th of January, 1914, confirming a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 26th of March, 1913.

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Nanda Kumar Howaldar v. *Ram Jiban Howaldar* (1) *Munshi Mosuful Huq* v. *Surendra Nath Ray* (2) followed. *Chinnayya* v. *Ramanna* (3), *Baker* v. *Wadsworth* (4), *Patch* v *Ward* (5) *Vadala* v. *Lawes* (6), *Abouloff* v. *Openheimer & Co.* (7) referred to. *Venkatappa Naik* v. *Subba Naik* (8), not followed.

THE facts of this case were as follows :—

The plaintiff alleged in her plaint that one Balak Ram was possessed of four houses and eleven shops, that one of these houses was known as the "residential house" and that there were two more shops besides the eleven shops mentioned above, which formed part of and appertained to the "residential house." By a deed of trust Balak Ram dedicated the three houses and eleven shops to Thakurji and appointed trustees and he gave the "residential house" to his two wives with a right of survivorship *inter se*. On the 2nd of November, 1903, Musammat Tulsha Kuar, the surviving widow of Balak Ram, transferred the residential house by a deed of gift to her son-in-law Bindeshri Prasad. In 1907, the defendants, trustees of the *Waqf*, brought a suit for possession of the residential house against Bindeshri Parshad on the allegation that the widows of Balak Ram had only a life-estate in the house and on their death the house became part of the *waqf* property. The court held that the widows had an absolute right to transfer and the gift as to the main house was valid; but the court found that the two shops appurtenant to the house were really two out of the eleven shops originally dedicated to Thakurji, and that the widows had no right thereto, and in that view the court by decree, dated the 4th of June, 1907, decreed possession of two shops in favour of the trustees. There was no appeal from that decree and it became final. The plaintiff, who was a transferee from the son of Bindeshri Parshad, now alleged that the defendants trustees, (plaintiffs in the former litigation) had, in order to deceive and impose upon the court made two out of the eleven main shops into one, and turned another into a staircase, and thus made it appear as if there were only nine shops and that they fraudulently and falsely said and deposed in court that the two shops, appurtenant

(1) (1914) I. L. R., 41 Calc., 990.
(2) (1912) 16 C. W. N., 1002.
(3) (1915) I L. R., 38 Mad., 203.
(4) (1898) 67 L. J., Q. B. D. 301.
(5) L. R., 3 Ch. A., 203.
(6) (1890) L. R., 25 Q. B. D., 310.
(7) (1882) L. R., 10 Q. B. D., 295.
(8) (1905) I. L. R., 29 Mad, 179.

to the residential house, made up the total eleven shops dedicated to Thakurji. The defendants denied all the allegations set forth in the plaint.

Both the lower courts held that the allegations in the plaint, assuming they were true, disclosed no cause of action for the relief claimed, viz., that the former decree should be set aside on the ground of fraud and dismissed the suit. The plaintiff appealed to the High Court.

Pandit *Kailas Nath Katju* (with him Dr. *Satish Chandra Banerji*), for the plaintiff.

Under section 44 of the Evidence Act it was open to a party, against whom a decree was produced to show that it had been obtained by fraud. The plaintiff alleged that the former decree was obtained by prejured evidence and by suppression of real facts on the part of the defendants. The defendants knowningly set up a false case in the previous suit, and supported it by perjured evidence and misled the court. *Venkatappa Naik* v. *Subba Naik* (1), *Lakshmi Charan Saha* v. *Nurali* (2), *Kedar Nath Das* v. *Hemanta Kumari Debi* (3). The case of *Mahomed Gulab* v. *Mahomed Sulliman* (4) referred to by the lower appellate court was no doubt against the appellant. But that case was entirely founded upon the supposed authority of *Flower* v. *Lloyd* (5) and had been expressly dissented from in the case in I.L.R. 38 Calcutta. Moreover *Flower* v. *Lloyd* had been disapproved of on this point in numerous cases in England and was no longer good law. *Abouloff* v. *Oppenheimer & Co.* (6), *Vadala* v. *Lawes* (7), *Cole* v. *Langford* (8). The first two cases no doubt related to suits on foreign judgements; but that made no difference. A foreign judgement was also conclusive unless it had, *inter alia*, been obtained by fraud. These cases as far as they ruled what was covered by the term 'fraud' would apply equally to all judgements alike, whether foreign or domestic. A decree obtained by fraud was an absolute nullity. *Nistarini Dassi* v. *Nundo Lall Bose* (9), *Bansi Lal* v. *Dhapo* (10).

(1) (1905) I. L. R., 29 Mad., 179.
(2) (1911) I. L. R., 38 Calc., 936.
(3) (1913) 18 C. W. N., 447.
(4) (1894) I. L. R., 21 Calc., 612.
(5) (1882) 10 Ch. D., 327.
(6) (1882) 10 Q. B. D., 295.
(7) (1890) 25 Q. B. D., 310.
(8) (1898) 2 Q. B., 36.
(9) (1899) I. L. R., 26 Calc., 891.
(10) (1902) I. L. R., 24 All., 242.

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[RAFIQ, J.—There is no allegation in your plaint that Bindeshri Prasad, your predecessor-in-title, who was defendant in the former suit, was deceived by the alleged fraud of the then plaintiffs.]

The whole tenor of the plaint showed that the plaintiff did mean to allege that. That was the whole foundation of his suit. Plaints prepared in the Mufassil should be liberally construed. The lower courts should have allowed him to adduce evidence to prove the fraud set up.

Dr. *S. M. Sulaiman*, for the defendant.

A decree cannot be set aside merely on the ground that it was obtained by perjured evidence. If that were so, there would be no end to litigation. The present suit clearly offended against the rule of *res judicata*; *Mahomed Gulab* v. *Mahomed Sulliman* (1), *Munshi Mosuful Huq* v. *Surendra Nath Ray* (2), *Mohendra Narain Chukerbutty* v. *Shashi Bhushan Chatterjee* (3), *Tika Ram* v. *Daulat Ram* (4), *Kishorbhai Revadas* v. *Ranchodia Dhulia* (5), *Baker* v. *Wadsworth* (6). Fraud must consist in something extrinsic to the litigation. It was not the plaintiff's case that Bindeshri Parshad was, by fraud of the defendants, prevented from properly placing his case before the court. He never complained against the decree and it had now become final and binding on all parties.

Pandit *Kailas Nath Katju*, in reply referred to *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (7), *Chinnayya* v. *Ramanna* (8).

BANERJI AND RAFIQ, JJ.—This appeal arises out of a suit brought by the plaintiff appellant for possession of two shops and the rooms on the upper storey of these shops and for a declaration that a decree, dated the 4th of June, 1907, of the court of the Additional Judge of Cawnpore is null and void and ineffectual. The property in question along with other property originally belonged to one Balak Ram. He made an endowment of portions of his property and left the remainder to his two widows. The survivor of them made a gift in favour of one Bindeshri Prasad in 1903. The

(1) (1894) I. L. R., 21 Calc., 612.
(2) (1912) 16 C. W. N., 1002.
(3) (1910) 7 I. C., 764.
(4) (1910) I. L. R., 32 All., 145.
(5) (1914) I. L. R., 38 Bom., 427.
(6) (1893) 67 L. J. (Q. B.) 301.
(7) (1914) I. L. R., 41 Calc., 990.
(8) (1915) I. L. R., 38 Mad., 203.

plaintiff is the successor-in-title of Bindeshri Prasad. In the year 1907 the defendants, the trustees of the endowment, brought a suit against Bindeshri Prasad to set aside the gift on the ground that the property comprised in it was part of the endowed property and that the donor had no power to make the gift. That suit related to a residential house and apparently to two shops situated in front of the house together with the loft or *bala khana* on the shops. There was a dispute also in that suit in regard to the passage leading to the residential house. On the 4th of June, 1907, the Additional Judge of Cawnpore made a decree in favour of the plaintiffs to that suit in respect of the two shops and the loft on the top of them, and dismissed the remainder of the claim. Subsequently to this the present plaintiff obtained an assignment from the son of Bindeshri Prasad and thus acquired title. He brought the suit out of which this appeal has arisen on two grounds. First, that the court acted *ultra vires* in the former suit in deciding the question relating to the two shops as there was no dispute in that suit in respect to them, and, secondly, that the decree in the former suit was procured by fraud. The court of first instance dismissed the suit and its decree was affirmed by the lower appellate court. The plaintiff has preferred this appeal and the contentions raised in the plaint have been reiterated in the appeal before us. The case has been argued ably on both sides and a large number of rulings, English and Indian, have been cited.

As regards the first ground stated above, we are of opinion that the plaintiff, who stands in the shoes of Bindeshri Prasad who was a defendant to the former suit, cannot set up a higher right than Bindeshri himself could have done. There can be no doubt that Bindeshri could not have maintained a separate suit to set aside the decree on the ground that the decree passed was in contravention of the pleadings and was therefore erroneous. His remedy was an appeal and no appeal having been preferred, the decree, whether right or wrong, has become final between the parties and a fresh suit to set it aside on the ground that it was erroneously passed, offends against the well-known rules of *res judicata*. As regards the second ground, section 44 of the Evidence Act provides that a decree obtained by fraud is not binding.

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It may also be taken as settled by authority that a separate suit may be brought to set aside a decree on the ground of fraud. The question is what is the nature of the fraud which the plaintiff must allege and establish in order to obtain relief. It is contended on behalf of the plaintiff appellant, that a plaintiff can maintain his suit on the ground that the decree in the former suit was obtained by producing fabricated evidence, and in support of this contention the ruling in the case of *Venkatappa Naik* v. *Subba Naik* (1) was mainly relied upon. Other rulings also were cited. In the case mentioned above the head-note runs thus:—"A suit will lie to set aside a judgement on the ground that it was obtained by fraud committed by the defendant upon the court by committing deliberate perjury and by suppressing evidence. The law on this point is the same in India as in England." The facts of that case are not fully stated in the judgement, but reliance is placed by the learned Judges on two English cases, namely, *Abouloff* v. *Oppenheimer & Co.* (2), and *Vadala* v. *Lawes* (3). We may mention that those were cases in which a suit was brought either to enforce or to set aside a foreign judgement, and in both instances the ground upon which the judgement was sought to be set aside was the ground of fraud. As pointed out by JENKINS, C.J., in *Nanda Kumar Howaldar* v. *Ram Jiban Howaldar* (4), Sir JOHN ROLT in *Patch* v. *Ward* (5), discussing what is meant by fraud when it is said that a decree may be impeached for fraud, said, "the fraud must be actual positive fraud, or meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtaining that decree by that contrivance." Following these observations the learned Chief Justice remarked as follows:—"There is, however, no suggestion that the decree in the previous suit was fictitious or that the plaintiffs in this suit were prevented by contrivance from placing before the court in the former suit any material relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the court was misled in the former suit." He held that an error of fact or an error of law committed in the previous suit

(1) (1905) I. L. R., 29 Mad., 179.
(2) (1882) L. R., 10 Q. B. D., 295.
(3) (1890) L. R., 25 Q. B. D., 310.
(4) (1914) I. L. R., 41 Calc., 990.
(5) L. R., 3 Ch. App., 203.

would not entitle a party to have the decree in that suit set aside on that ground. The same view was taken by the same court in *Munshi Mosuful Huq* v. *Surendra Nath Ray* (1). In that case the learned Judges differed from the decision of the Madras Court to which we have referred above, and held that a decree in a suit can not be set aside in a subsequent action brought for that purpose on mere proof that the previous decree was obtained by perjured evidence. The learned Judges followed the case of *Baker* v. *Wadsworth* (2). We think that the weight of authority is in support of the view taken by the Calcutta High Court in the two cases mentioned above, and we are of the same opinion. The reasoning of the learned Judges in both these cases commends itself to us. In the present suit the only fraud alleged is that stated in paragraph 3 of the plaint, namely, that the defendants made alterations in the eleven shops and the stable appertaining to the *Thakurdwara* in such a way that they converted two shops into one shop, and one shop into a staircase room, and that owing to this circumstance and to the false evidence which was adduced to prove it, the court was misled into holding that the two shops now in dispute were part of the endowed property. The present suit, therefore, is a suit based on the ground that a decree in the previous suit had been obtained by perjured and false evidence. That in our opinion is not a sufficient ground which would justify a party, who or whose predecessor-in-title was a party to the previous suit, to bring a subsequent suit with the object of setting aside the decree in the former suit. It was open to the defendants to prove by evidence that the allegations made and the evidence adduced on behalf of the plaintiffs were untrue. Agreeing, as we do, with the view taken by the Calcutta High Court in the cases mentioned above we do not feel ourselves justified in following the decision of the Madras High Court referred to above and we deem it unnecessary to refer to the various other rulings cited at the hearing. The learned vakil for the appellant has very properly drawn our attention to the recent decision of the same court in *L. Chinnayya* v. *Ramanna* (3) in which the view taken in that case

(1) (1912) 16 C. W. N., 1002. (2) (1898) 67 L. J., Q. B. D., 301.

(3) (1915) I. L. R., 38 Mad., 203.

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does not appear to have been approved. It is true that in the present case the plaintiff was not allowed to adduce evidence in regard to what was alleged by him to be fraud, but this is immaterial, as in our opinion the allegations in the plaint as to the nature of the alleged fraud would not justify a court in setting aside a decree passed between the parties in a previous suit, even if the allegations were established. We agree with the conclusion of the court below and dismiss the appeal with costs.

Appeal dismissed.

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June, 1.

Before Sir Henry Richards, Knight, Chief Justice and Justice, Sir Pramada Charan Banerji.

DAUD ALI AND OTHERS (PLAINTIFFS) *v.* RAM PRASAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1882)—*Execution of decree—Attachment, withdrawal of—Striking off of execution case—Alienation.*

In execution of a decree passed against H, his property was attached under Act XIV of 1882. The application for execution was struck off on default by the decree-holder in the payment of process fees. H then made a gift of the said property in favour of his mother who sold it to the defendants. *Held*, that the attachment must be presumed to have subsisted and the gift was void.

THE facts of this case were as follows :—

The plaintiffs came into court on the allegation that a decree for mesne profits was passed on the 28th of August, 1905, in favour of their predecessors-in-title by the Subordinate Judge of Meerut against one Hayat Ali Shah and others and that it was transferred for execution to Aligarh. In execution of that decree a certain share in the village Tatarpur, in the district of Bulandshahr, was attached. One of the judgement-debtors preferred objections which were allowed by the Subordinate Judge. An appeal was preferred to the High Court and the record was sent up there. In the meantime on the 18th of April 1907, the court struck off the execution case as the decree-holders had not paid the costs of sale. On the 22nd of April, 1908, the appeal was disposed of by the High Court. On the 16th of July, 1909, the decree-holders made a fresh application for execution but in the meanwhile, viz. on the 18th of August, 1908, the judgement-debtor Hayat Ali Shah had executed a deed of gift of

*First Appeal No. 220 of 1913, from a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 18th of March, 1913.