Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed.

The appellants must pay the costs.

Appeal dismissed.

Solicitor for the appellants: *Douglas Grant.*

Solicitors for the plaintiffs respondents : *Barrow, Rogers and Nevill.*

J. V. W.

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PADARATH HALWAI v. RAM NAIN UPADHIA.

RAJWANT PRASAD PANDE AND OTHERS (PLAINTIFFS) *v.* RAM RATAN GIR AND OTHERS (DEFENDANTS).

* *P.C.* 1915. *June*, 7, 8.

[On appeal from the High Court of Judicature at Allahabad.]

Res judicata—*Suit on mortgage—Ex parte decree against mortgagors, members of joint Hindu family—Decree set aside against one member for insufficient service while remaining against other members—Decree on retrial made against all the members—Decision that decree was a valid decree in suit on mortgage—Fresh suit to set aside decree on same grounds as in suit on mortgage and between same parties—Civil Procedure Code* (1882), *sections* 13 *and* 244—*Suit to set aside decree made with jurisdiction and allowed to become final—Valid decision unless fraudulent*

A mortgage was executed in 1884, by the manager of a Hindu joint family of which he and his two sons were the adult members, in favour of the predecessor in title of the respondents, and in a suit on a mortgage an *ex parte* decree was, on the 30th of April, 1897, made against the mortgagor and his two sons, one of whom was the appellant, and an order absolute for sale was made in September, 1900. In 1901, the *ex parte* decree was set aside as against the other son, on the ground of insufficient service on him ; and on the retrial of the suit the Subordinate Judge, on the 22nd of September, 1902, made a decree against all three members of the family, notwithstanding that the decree of the 30th of April, 1897, was still in existence against the appellant. In 1906, an order was applied for to make the decree of 1902 absolute against all the judgement-debtors. The appellant made objections which were overruled, and an order absolute for sale was made by the Subordinate Judge on the 3rd of November, 1906, which was affirmed by the High Court on the 26th of February, 1908.

Held that a fresh suit brought by the appellant against the respondents to have the decree of the 22nd of September, 1902, set aside, on the ground that he was not a party to it, and that the Court had therefore no jurisdiction to make it, was, on the principle of res judicata, not maintainable, as being between the same parties, and raising precisely the same grounds and objections as had been raised and disallowed in the former suit and proceedings on the mortgage.

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* *Present* :—Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE, and Mr. AMEER ALI.

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It is not open to suitors in India who have exhausted the remedies competent to them, to institute a fresh suit the object of which is to declare that a decree competently and with adequate jurisdiction obtained therein is not applicable to them, although they are named in the decree.

Even if the objections were wrongly decided, and the decree was erroneous, it must, when it has been allowed to become final, be taken as being valid if the Court had jurisdiction to make it, and provided, as was the case here, there was no fraud proved *Malkarjun* v. *Narhari* (1) followed.

APPEAL No. 114 of 1913, from a decree (23rd of February, 1911) of the High Court at Allahabad, which reversed a decree (17th of August, 1909) of the Court of the Subordinate Judge of Gorakhpur, and dismissed the appellants' suit.

The suit was brought under the following circumstances. The plaintiff Prag Dat Pande executed on the 10th of June, 1884, a mortgage in favour of the predecessor in title of the first respondent Ram Ratan Gir, on which mortgage, in 1897, a suit for sale was instituted against Prag Dat Pande, his two sons Rajwant Prasad Pande, and Bhagwant Prasad Pande, and against the sons of Rajwant and Bhagwant who all constituted a joint Hindu family of which Prag Dat Pande was the manager. The suit was defended by Rajwant and his sons, but the other defendants did not appear; and a decree was passed against all the defendants on the 30th of April, 1897, by the Subordinate Judge which, on appeal was affirmed by the High Court on the 8th of January, 1900.

On the 27th of April, 1900, an application was made for an order absolute for sale; Prag Dat Pande unsuccessfully applied for revision of that order; and then brought a suit to have the decree of the 30th of April, 1897, set aside on the ground of fraud, which suit was dismissed and the dismissal affirmed by the High Court.

In 1901, Bhagwant and his sons applied under section 108 of the Code of Civil Procedure (1882), to have the decree set aside on the ground that no proper service had been made on them. That application was granted on the 14th of December, 1901, and the case was re-opened as against those defendants. Prag Dat Pande applied for leave to file a written statement contesting the claim, but his application was refused, and an application to the High Court for revision of the order refusing leave to file a written statement was rejected, the Court saying that the decree as against

(1) (1900) I. L. R., 25 Bom., 337; L. R., 27 I. A., 216.

the defendants other than Bhagwant and his sons was a binding decree, and Prag Dat Pande therefore could not be allowed to re-open the case, which was thereupon heard and on the 22nd of September, 1902, a decree was passed in the suit under section 88 of the Transfer of Property Act, against all the defendants including Prag Dat Pande, his son Rajwant and the sons of Rajwant notwithstanding that they were already bound by the former decree. That decree was for a larger amount than the original decree of 1897, Bhagwant and his sons appealed to the High Court, but their appeal was, on the 19th of July, 1905, dismissed, in so far as the decree appealed from directed the sale of the mortgaged property and that decree was affirmed. On the 7th of July, 1906, an application was made for an order making the decree of the 22nd of September, 1902, absolute, to which application Prag Dat Pande and his son Rajwant and the sons of Rajwant preferred objections, which were disallowed and an order absolute for sale was made on the 3rd of November, 1906; and on the appeal of Prag Dat Pande and the others that order was affirmed by the High Court on the 26th of February, 1908. Subsequently an application was made for amendment of the decree of the 22nd of September, 1902, and that application was dismissed on the 11th of December, 1908.

Thereupon Prag Dat Pande, his son Rajwant, and the sons of Rajwant brought the present suit for a declaration that they were no parties to the decree of the 22nd of September, 1902, nor to the order absolute for sale. They based their claim on two grounds, first, that the decree was obtained against them by fraud; and secondly, that the court had no jurisdiction to make the decree.

The defendant Ram Ratan Gir filed a written statement the only plea now material being that the suit was barred as being *res judicata*.

Among the issues settled were "(2) was any fraud practised on the plaintiffs?" and "(3) is the suit barred by *res judicata* provided in section 11 of the Code of Civil Procedure, 1908?"

Both courts below negatived the existence of fraud.

The Subordinate Judge held on the other issue that the suit was not barred on the principle of *res judicata*; and that the

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decree of the 22nd of September, 1902, was made against the plaintiffs without jurisdiction. He consequently made a decree in favour of the plaintiffs with costs.

On appeal the High Court (Sir JOHN STANLEY, C.J., and BANERJI, J.) reversed the decision of the Subordinate Judge and held that the suit was not maintainable.

After finding that it had not been proved that any fraud had been practised on the plaintiffs, the judgement of the High Court continues :—

"The only other basis of the plaintiffs' claim, therefore, is that the court had no jurisdiction to pass the decree. It has been repeatedly held and it is not denied by the learned vakil for the respondents that in a suit for sale upon a mortgage there can be but one decree for sale The latest case in which this view was held is that of *Gauri Sahai* v. *Ashfaq Husain* (1) Therefore the decree which the Court finally passed in the cause, namely, the decree of the 22nd of September, 1902, was a proper decree for sale upon the mortgage of the 10th of June, 1884. It is contended on behalf of the plaintiff that as the earlier decree of the 30th of April, 1897, was not set aside on the application made by Prag Dat under section 108 of the Code of Civil Procedure, 1882, that decree must be held to have become final and must be deemed to be a subsisting decree, and the result therefore is that there are two decrees in the suit. We do not agree with this contention. As we have stated above, in a suit for sale upon a mortgage, as also in a suit for foreclosure of a mortgage, there can be but one decree, and that is the decree which was finally passed on the 22nd of September, 1902. The Court had full jurisdiction to pass that decree, and the effect of it was that the earlier decree of the 30th of April, 1897, was merged in it. Mr. *Abdul Majid*, the learned counsel for the appellant, concedes that his client does not profess to hold two decrees against the respondents, but only one decree, namely, the final decree of the 22nd of September, 1902. This decree, as we have already said, was made absolute as against the plaintiffs, and the order making it absolute was affirmed by this Court on the appeal of the plaintiffs. We are therefore unable to hold that it is now open to the plaintiffs to bring this suit to have the decree of the 22nd of September, 1902, set aside, which is in substance the object of the present suit. The learned Vakil for the appellant has referred us to the ruling of the Calcutta High Court, *Jogeswar Atha* v. *Ganga Bishnu Ghattak* (2). In that case it was held that a suit could be brought to rectify a mistake in a decree. That is not the case here This is not a suit to rectify a decree but to have it declared that the decree is not binding on the plaintiffs. In our opinion the suit is not maintainable, and the decree which was made on the 22nd of September, 1902, and was subsequently made absolute on the 3rd of November, 1906, is a decree properly made by a Court having jurisdiction to make it and is binding on the plaintiffs."

The High Court allowed the appeal and dismissed the suit.

(1) (1907) I. L. R., 29 All., 623. (2) (1904) 8 C. W. N., 473.

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On this appeal—

G. R. Lowndes for the appellants contended that neither Prag Dat Pande nor the appellants were parties to the re-trial of the mortgage suit, and that the court by which it was retried had no jurisdiction on the re-trial to pass any decree against them, and the appellants were therefore not bound by the decree made by the Subordinate Judge, on the 22nd of September, 1902. A binding decree having been passed in the mortgage suit against Prag Dat Pande and the appellants on the 30th of April, 1897, and an order absolute for sale of the mortgaged property having been made against them on the 22nd of September, 1900, it was not competent to any court to pass a second decree against them in respect of the same subject matter. The defence of the appellants has never been heard : the decree of the 30th of April, 1897, has never been set aside. The second decree was therefore wrongly passed. It is besides for a larger amount than the first owing to interest having been allowed up to realization contrary to the decisions in the cases of *Maharaja of Bhartpur* v. *Rani Kanno Dei* (1) ; and *Sundar Koer* v. *Rai Sham Krishen* (2). If the action of the courts in making two decrees against the same persons was a mistake there were remedies open to the appellants which they took by making, though unsuccessfully, objections in execution of the decree, and by applying for amendment of the decree. If they had failed to avail themselves of other remedies open to them, they can, it is submitted, maintain this suit notwithstanding sections 13 and 244 of the Code of Civil Procedure 1882, or sections 11 and 47 of the Code of 1908. There was no *res judicata*. A suit to correct a mistake in a decree has been held to lie ; *Jogeswar Atha* v. *Ganga Bishnu Ghattak* (3) ; and a suit to set aside an *ex parte* decree without appealing against the order rejecting an application made to set it aside under section 108 of the Code of 1882, is maintainable ; *Prannath Roy* v. *Mohesh Chandra Moitra* (4). The decree of the Subordinate Judge, was, it was submitted, correct that their omission to appeal or apply for a review did not disentitle the appellants to

(1) (1900) I. L. R., 23 All., 181 ; L. R., 28 I. A., 35.

(2) (1906) I. L. R., 34 Calc., 150 ; L. R., 34 I. A., 9.

(3) (1904) 8 C. W. N., 473.

(4) (1897) I. L. R., 24 Calc., 546.

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bring the present suit. The case *Ashfaq Husain* v. *Gauri Sahai* (1) went to shew that the first decree of the 30th of April, 1897, might have been executed against the appellants, and if so it was unnecessary to make a second decree and wrong to execute it without letting them make a defence.

De Gruyther, K.C., and *B. Dube* for the first respondent contended that the effect of the order of the 14th of December, 1901, granting the application of Bhagwant Prasad to set aside the *ex parte* decree, was to put the appellants in the same position they were in before it was made; it restored the case to the file and allowed Bhagwant to make his defence; the defence of the present appellant had been already heard. Reference was made to section 108, Civil Procedure Code, 1882. Whether rightly or wrongly the court held that a fresh decree against all the parties ought to be passed under section 88 of the Transfer of Property Act (IV of 1882). To make it only against the parties on whose application the first decree had been set aside would have been useless, as execution of it against the joint family and the property could not have been enforced. Nor could the first decree have been so executed. The second decree of the 22nd of September, 1902, was therefore rightly made against both sets of parties. The High Court has decided that the appellants were parties to that decree: if they had a right of appeal they should have exercised it. The question cannot be now raised by separate suit. Reference was made to section 13 of the Civil Procedure Code, 1882. Even if the decree was wrongly made, yet it must be taken as being valid, provided the court had jurisdiction to make it, and it has not been set aside within the period of limitation, and also provided there is no fraud proved; and there is no fraud shown here. Reference was made to *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2); *Ram Kirpal* v. *Rup Kuari* (3); and *Malkarjun* v. *Narhari* (4). The present suit, it was submitted, could not now be maintained: all the objections now raised had been, or ought to have been, raised and decided in the former suit. No second suit

(1) (1911) I. L. R., 33 All., 264; L. R., 38 I. A., 97.

(2) (1882) I. L. R., 8 Calc., 51 (59); L. R., 8 I. A., 123 (131).

(3) (1883) I. L. R., 6 All., 269 (274); L. R., 11 I. A., 37 (41).

(4) (1900) I. L. R., 25 Bom., 337 (347); L. R., 27 I. A., 216 (225).

could possibly lie in this case. Reference was made to *Ashfaq Husain* v. *Gauri Sahai* (1); Transfer of Property Act (IV of 1882), section 88; Civil Procedure Code, 1882, section 244, which it was submitted must be strictly construed; *Munna Lal Parrack* v. *Sarat Chunder Mukerji* (2); and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3).

Lowndes in reply. The order setting aside the first decree of the 30th of April, 1897, against one party, had not the effect of setting it aside altogether against both. The first decree is binding on the appellants and has not become merged in the second decree. The case of *Ashfaq Husain* v. *Gauri Sahai* (1), was referred to. If the first decree be not binding, the appellants were entitled to contend that the second decree was not binding on them as it was passed behind their backs: they were parties to the suit but were not allowed to take part in the proceedings.

1915, June 8th:—The judgement of their Lordships was delivered by Lord SHAW:—

This is an appeal from a decree of the 23rd of February, 1911, of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree dated the 17th of August, 1909, of the Court of the Additional Subordinate Judge of Gorakhpur. The court of first instance allowed the plaintiffs' claim. On appeal the claim was dismissed.

The object of the present suit is, by its terms, declared to be three-fold. But upon examination the substantial and only object is for a declaration in favour of the plaintiffs against the defendants to the effect that the plaintiffs are no party to a certain order which was passed *ex facie* against them on the 22nd of September, 1902. Further declarations are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a court of competent jurisdiction on the 22nd of September, 1902, and bearing to apply to the present appellants, does not in fact apply to them.

(1) (1911) I. L. R., 33 All., 264; L. R., 38 I. A., 37.

(2) (1914) I. L. R., 42 Calc., 776; L. R., 42 I. A., 83.

(3) (1892) I. L. R., 19 Calc., 683 (689); L. R., 19 I. A., 166 (169).

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The circumstances of the case are these. In 1884, Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor in title of the respondents. He had two sons, Rajwant Prasad and Bhagwant Prasad. In 1897, a suit for sale under the mortgage, and directed against, *inter alias*, these three persons, was instituted. It was heard *ex parte*, and on the 30th of April, 1897, a decree was made allowing the plaintiffs' claim. An order absolute was made on the 22nd of September, 1900.

In 1901, however (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant challenges made in the course of these litigations), Bhagwant and his two sons obtained an order under section 108 of the Code of Civil Procedure, 1882, to have the decree of the 30th of April, 1897, set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all of the joint family, but that one member thereof had been properly served with the suit and another had not. A certain embarrassment arose in consequence, and these proceedings, so protected, ensued.

So far as Rajwant, the present appellant, was concerned, the original suit was found to have been properly initiated, and the summons properly served. The courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application, Rajwant had no right of compearing. Their Lordships are of opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

On the 22nd of September, 1902, the Subordinate Judge delivered judgement, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April, 1897, he granted a complete decree to the respondents in this appeal, against all the members of the joint family. The

situation that thus arose was that in September, 1902, a decree was comprehensively directed against all the joint family of which Rajwant, the appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April, 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on the 23rd of June, 1903, namely, after the second and comprehensive decree had been obtained, an application was actually made for execution of the decree—not the second and comprehensive one of 1902—but the original decree of 1897. Their Lordships think it right to record that in that application this statement was made:—

"In the beginning the name of Bhagwant Parshad also is entered as a defendant, but on his application this decree was set aside against him, and consequently his name was not entered in the column of judgement debtors. Another decree has been passed as against him. It will be executed separately."

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to make the decree of September, 1902, absolute as against all the members of the joint family, the appellants took steps to have the situation cleared up. Accordingly, on the 7th of July, 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate Judge on the 3rd of November, 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgements of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on the 3rd of November, 1906, the objectors, the present appellants, appealed to the High Court, and did so upon the same arguments as they now propone in support of the present appeal to this Board. The grounds of judgement of the High Court make it clear beyond all questions that the very points which are now urged were points then taken. The objections were disallowed.

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It is contended before their Lordships, however, that this matter cannot be dealt with as *res judicata*; that it is open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated *seriatim*. The objections that are now taken are, first, that the decree of 1897 has never been set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was *res judicata*, and, therefore, they are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money, larger than the sum of money contained in the former. The answer is that the interest accounts for the difference, and, secondly, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgement of the court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgement now given no affirmance is given of the doctrine or application in the High Court of merger, either in a general sense or in the sense of a *vox signata*. The decree of the 26th of February, 1908, sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the court; it had jurisdiction to entertain them.

It is said that the court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of

the exercise of the jurisdiction of a court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of this case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgement of Lord Hobhouse in *Malkarjun* v. *Narhari* (1) is not a very remote example. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still, upon a new application to Courts of Justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordship's judgement, is equivalent to a suit for the rescission and destruction of a former decree of a competent court. That rescission and destruction could be obtained on the ground of fraud "practised on the courts below"; but fraud has been eliminated from this case. And accordingly these proceedings are in their Lordships' judgement, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants: *Douglas Grant.*

Solicitors for the first respondent: *Barrow, Rogers and Nevill.*

J. V. W.

(1) (1900) I. L. R., 25 Bom., 337 ; L. R., 27 I. A., 216.