It is not necessary to cite many authorities in support of the proposition that the present case belongs to a class to which Article 181 is applicable; but the following cases are in point and will suffice: *Keramat Ali* v. *Nagendra Kishore Ray* (1) and the decision of their Lordships of the Privy Council in *Maharaja Rameshwar Singh* v. *Homeshwar Singh* (2).

The result is that the decree of the District Judge is affirmed and the appeal is dismissed with costs.

BUCKNILL, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Mullick and Bucknill, J.J.

MAHANTH RAMRUT GOSHAIN

v.

MAHABIR SHAH.*

1923.

June, 27.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 11, *Order IX, rule* 13—Ex parte *decree, application to set aside on ground of suppression of summons—dismissal of application—suit for declaration that decree is void for fraud, maintainability of.*

Where an application to set aside an *ex parte* decree on the ground of non-service of summons has been dismissed the defendant is not entitled to institute a suit for a declaration that the decree is null and void on the ground of fraud unless he can show that there were other grounds of fraud apart from the service of processes.

* Appeal from Appellate Decree No 1173 of 1921, from a decision of Babu Jatindra Chandra Bose, Subordinate Judge of Saran, dated the 27th May, 1921, reversing a decision of Babu Atal Bihari Saran, Munsif of Chapra, dated the 23rd August, 1920.

(1) (1916-17) 21 Cal. W. N. 571. (2) (1920-21) 25 Cal. W. N. 337.

1923.

MAHANTH RAMRUP GOSHAIN v. MAHABIR SHAH.

Radha Raman Shaha v. *Pran Nath Roy*(1) and *Khagendra Nath Mahatta* v. *Pran Nath Roy*(2), distinguished.

Khirode Chandra Roy v. *Srimati Ashtullabu*(3), *Puran Chand* v. *Sheodut Rai*(4), *Nadar Mal* v. *Rasnak Husain*(5) *Yogamba Boi Ammani* v. *Arumuga Mudaliar*(6) and *Manindra Nath Mittra* v. *Hari Mondal*(7), followed.

Ram Narain Lal v. *Tooki Sao*(8), referred to.

Appeal by defendant No. 1.

The facts of the case material to this report were as follows :—

The plaintiff instituted this suit on the 10th May, 1919, in the Court of the Munsif of Chapra for a declaration that a decree obtained by defendant No. 1 in suit No. 231 of 1916 against defendant No. 2 and against the plaintiff was null and void as against the plaintiff on the ground of fraud. It appeared that the plaintiff purchased from defendant No. 2 a house for Rs. 725 on the 22nd March, 1916, of which defendant No. 2 was alleged by the plaintiff to have been the ostensible owner. On the 16th January, 1919, defendant No. 1, who claimed to be the proprietor of a certain religious endowment, instituted suit No. 231 of 1916 against defendant No. 2 and the plaintiff and others for a declaration that the transfers made by defendant No. 2 on the footing that he was the real *mahant* of the endowment were invalid and for confirmation of possession of the properties so transferred. The result of that litigation was that the defendant No. 1 succeeded in getting his declaration both in respect of his title and his possession. It was alleged that the service of processes in that suit were fraudulently suppressed by the defendant No. 1 in collusion with defendant No. 2 and the decree of the 4th August, 1918, was wholly void on the ground of

(1) (1901) I. L. R. 28 Cal. 475, P.C.
(2) (1902) I. L. R. 29 Cal. 395; L. R. 29 I. A. 99
(3) (1915-16) 20 Cal. W. N. 845.
(4) (1907) I. L. R. 29 All. 212.
(5) (1907) I. L. R. 29 All. 608.
(6) (1916) 36 Ind. Cas. 128.
(7) (1919-20) 24 Cal. W. N. 133.
(8) (1920) 5 Pat. L. J. 259.

fraud. The plaintiff stated in his plaint that on the 14th April, 1919, he became aware of the *ex parte* decree against him and that he applied thereafter to the trial Court for the restoration of the case. That application was dismissed and the present suit was brought on the ground that notwithstanding such dismissal, a suit to set aside the decree, was maintainable.

The Munsif dismissed the suit holding that the finding on the question of service of processes was *res judicata* and that the plaintiff could not maintain the suit.

In appeal the Subordinate Judge was of a contrary opinion and he set aside the Munsif's decree and remanded the suit for trial.

Lachmi Narain Sinha and *Bipin Behari Saran*, for the appellant.

H. P. Sinha (for *Jadubans Sahay*), for the respondents.

MULLICK, J. (after stating the facts, as set out above, proceeded as follows) :—

The learned Subordinate Judge's judgment is very summary and scanty. He does not particularize the grounds upon which he holds that the scope of the present suit is different from the proceeding to set aside the *ex parte* decree in suit No. 231 of 1916. We have, however, had the advantage of reading the pleadings in the suit and we think that the learned Munsif took a correct view of the case.

There is no difficulty as to the law. The plaintiff relies upon the decision of their Lordships of the Privy Council in *Radha Raman Saha* v. *Pran Nath Roy* (1). The facts of that case are not fully reported and it would seem, from the judgment of their Lordships, that the scope of the subsequent suit was different from the scope of the proceedings in the matter of setting aside the *ex parte* decree. The other case upon

(1) (1901) I. L. R. 28 Cal. 475, P. C.

1923.

MAHANTH RAMRUP GOSHAIN v. MAHABIR SHAH.

MULLICK, J.

which the plaintiff relies is *Khagendra Nath Mahata* v. *Pran Nath Roy* (1) and our attention has been drawn to the words of Lord Robertson where he says that "sections 108 and 311 of the Civil Procedure Code limit the attention of the tribunal to specific matters, and, instead of subjecting to enquiry the radical question involved, they assume the existence of a real suit". His Lordship then proceeds: "But here the suit itself is attacked as a fraud; and the fraudulent and violent incidents of its progress as, for instance, at the stage of service and in the abduction of the respondent, while they may individually have founded an application under sections 108 and 311, are here treated as parts and *indicia* of a whole." It is clear that upon the facts narrated in the plaint before the learned Judges there were matters of fraud involved independent of and outside the scope of the proceedings for setting aside the *ex parte* decree. One of these matters evidently was the allegation that service of notice was made in respect of a minor defendant upon a person who was not his guardian at all. It is clear that a subsequent suit can only be maintained if the plaintiff proves that, apart from the fraud alleged in the previous proceedings, there are other grounds of fraud which remain to be investigated, that is the purport also of the rulings upon which the defendant-appellant before us relies, namely, *Khirode Chandra Roy* v. *Srimati Ashtullabu* (2), *Puran Chand* v. *Sheodat Rai* (3), *Niadar Mal* v. *Raunak Husain* (4), *Yogamba Boi Ammani* v. *Arumuga Mudaliar* (5) and *Manindra Nath Mittra* v. *Hari Mondal* (6).

The question, therefore, is what is the fraud that is alleged in the present suit? Giving the fullest margin to the learned Vakil for the respondent, it does not appear to me that the plaint is founded on any other ground of fraud than that in the matter of

(1) (1902) I. L. R. 29 Cal. 395; L. R. 29 I. A. 99
(2) (1915-16) 20 Cal. W. N. 845.
(3) (1917) I. L. R. 29 All. 212.
(4) (1907) I. L. R. 29 All. 603.
(5) (1916) 36 Ind. Cas. 128.
(6) (1912-20) 24 Cal. W. N. 133.

the service of processes, and that being so, the suit, in my opinion, cannot lie.

The matter may be tested in another way. Supposing the suit is permitted to proceed, what will be the effect of the previous finding as to the service of the processes. It is contended on behalf of the respondent that the finding will not be *res judicata* although it may be strong evidence. Whether it is *res judicata* or not will depend upon the question whether a proceeding under Order IX, rule 13, Code of Civil Procedure, is a suit within the meaning of section 11 of the Civil Procedure Code. If it be held that the proceeding being a summary proceeding is not a suit then the rule of *res judicata* will not apply. In that case evidence will be adduced by the parties upon the question of service. What will be the effect of a finding in favour of the defendants that service was in fact made as found in the previous proceeding? In my opinion the finding will be a complete answer to the suit which will then have to be dismissed on the ground that the plaintiff, having been duly served with summons and not having appeared to contest the claim of the defendant No. 1, cannot now be heard to urge that the decree was improper unless he can show that by some contrivance on the part of the defendant he was prevented from placing his case fully before the Court. In other words he must show that owing to some subsequent overreaching on the part of the plaintiff he was prevented from showing that the claim was fraudulent. It will not be sufficient to say that the claim was unfounded because every invalid claim is not necessarily a fraud upon the Court.

A somewhat similar view was expressed by a division bench of this Court in *Ram Narain Lal* v. *Tooki Sao* (1). It is true that in that case the point

(1) (1920) 5 Pat. L. J. 259.

1923.

MAHANTE RAMRUP GOSHAIN v. MAHABIR SHAH.

MULLICK, J.

was whether obtaining a decree by purjured evidence was fraud which vitiated the decree but the principle upon which the Court proceeded was that the fraud necessary to the success of the plaintiff must be a fraud practised upon the Court by a contrivance such as I have referred to above.

Therefore unless the plaintiff can show that there were other grounds of fraud, apart from the service of processes, I think the suit cannot be allowed to proceed. Now upon this point the plaint is entirely silent and we have not been shown by the learned Vakil for the respondent anything which would justify us in supporting the order of remand passed by the Subordinate Judge and in thus protracting the litigation.

It is, however, urged by the learned Vakil for the respondent that leaving aside the prayer on the ground of fraud, he is entitled to maintain the suit on the ground that the decree does not in fact give any relief against the plaintiff. That is not one of the declarations asked for in the prayer portion of the plaint and having regard to the fact that the decree was one for declaration of title and confirmation of possession against all the defendants in the suit, it is difficult to see how the plaintiff can say that he is not in any way touched by the decree and that it is of no effect against him. It is quite clear that his suit is a suit to set aside a decree on the ground of fraud and it was accepted as such in the Courts below. It is too late now to assert that a different relief was asked for.

The result is that the appeal is decreed with costs.

BUCKNILL, J.—I agree.

Appeal dismissed.