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been in lawful possession for eight years was suddenly dispossessed by the defendants. If the defendants could make out that they had a title to the tree in question then I think undoubtedly the plaintiff would not be able to recover but as the defendants have no title whatsoever to the tree as appears from the facts found by the lower appellate court then the situation is this :—as between two persons who are unable to make out a valid title one is in possession and has been in possession for several years. He is suddenly dispossessed by another who has no better title than the person whom he dispossesses, in fact he has no title at all. In these circumstances it seems to me that the plaintiff is entitled to be restored to possession of this tree. The defendants had no right whatever to dispossess him and, if they do, whatever may be his title he clearly can seek the aid of the court to be put back in such possession as he had before being dispossessed by those who had no title. The judgment of Ross, J., will be set aside and the plaintiff will be given a decree declaring that he is entitled to recover possession from the defendants. The plaintiff is entitled to his costs here and before Ross, J.

FOSTER, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Ross and Macpherson, JJ.

1926.

May, 28, 31.

RAJ GOPAL ACHARJYA

v.

UPENDRA ACHARJYA GOSWAMI.*

Chota Nagpur Tenancy Act, 1908 (*Ben. Act of* 1908), *section* 258—*Minor, ex parte decree against—suit for*

*Appeal from Appellate Decree no. 1117 of 1923, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Manbhum-Sambalpur, dated the 11th of August, 1923, confirming a decision of Babu Sachindra Nath Ganguli, Munsif of Raghunathpur, dated the 30th of April, 1923.

declaration that decree is inoperative whether maintainable—gross negligence, finding as to, whether amount to finding of fraud.

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Where an ex parte rent decree has been obtained against a minor properly represented by his guardian, a suit by the minor for a declaration that the ex parte decree is invalid and inoperative, on the ground of gross negligence on the part of the guardian in the rent suit, is barred by section 258 of the Chota Nagpur Tenancy Act, 1908, which provides that "no suit shall be entertained in any court to vary or modify or set aside, whether directly or indirectly", inter alia, "any rent decree, except on the ground of fraud or want of jurisdiction".

Where the lower appellate court found that there had been gross negligence, and following *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*(1) and *Chunduru Pynnayyah* v. *Rajam Viranna*(2), held that gross negligence amounts to fraud, *held*, that this was not a finding of fact as to fraud.

Raghubardayal Sahu v. *Bhikya Lal Misser*(3), referred to.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Ross, J.

S. M. Mullick and *S. N. Palit*, for the appellant.

S. C. Mazumdar, for the respondent.

May, 31.

Ross, J.—The appellant contends that this suit was barred by the provisions of section 258 of the Chota Nagpur Tenancy Act. The plaintiff-respondent brought the suit for a declaration that an ex parte rent decree which had been obtained against him under the guardianship of his maternal uncle was invalid and inoperative. The ground on which the suit was brought was that there was a good defence open which was not taken, namely, that the holding was rent-free and on the findings arrived at by the courts below it must be taken that that was so. But section 258 imposes an absolute bar against suits of this kind

(1) (1895) I. L. R. 22 Cal. 8. (2) (1922) I. L. R. 45 Mad. 425.
(3) (1886) I. L. R. 12 Cal. 69.

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ROSS, J.

unless they are founded on fraud or want of jurisdiction. The question is whether it has been properly found that the ex parte rent decree was obtained by fraud.

The findings of the Munsif were that the [illegible] nal uncle of the plaintiff was his lawfully constituted guardian and that he was not guilty of fraud or collusion, but that he was guilty of gross laches in conducting the defence. Dealing with section 258 of the Act the Munsif said that " the law herein enacted contemplates that the judgment was obtained in an action, fought out adversely between two litigants, sui juris and at arms length " and that these elements were lacking in the ex parte order in question. I do not know what authority the learned Munsif had for this statement; and the learned District Judge did not proceed on this ground. The learned Munsif further found that there was no reasonable distinction between the case of fraud and gross negligence since it equally jeopardised the interest of the minor. Finding the plaintiff's case established on the merits, he passed a decree in his favour.

The learned District Judge dealing with the plaintiff's allegation that his uncle was guilty of such gross negligence as amounted to fraud, sai[illegible] contention had been accepted by the learned M[illegible] and was the first point raised in the appeal. He then referred to certain decisions and followed those in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*(1) and *Chunduru Pynnayyah* v. *Rajam Viranna*(2), in which it was held that gross negligence in not defending where a valid defence is available amounts to fraud. He is of opinion that he should follow these rulings and hold that gross negligence amounts to fraud; and, dealing with the case itself, he found that there was gross negligence and that the plaintiff was entitled to succeed on the merits.

(1) (1895) I. L. R. 22 Cal. 8. (2) (1922) I. L. R. 45 Mad. 425.

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The contention on behalf of the appellant is that there is no finding here that the ex parte decree was obtained by fraud. I think this contention is sound. It can hardly be said that the District Judge has come to a finding of fact that there was fraud. It is true that the negligence may be so gross as to be evidence of fraud; and, if the District Judge had found that that was the case here, he might have come to a positive finding that there had been fraud, although, in doing so, he would have had to set aside the finding of the Munsif that there was no fraud in the matter: that finding has not been dealt with at all. But in fact the learned District Judge has not taken this course. He has followed a decision which he thinks entitles him to say that gross negligence amounts to fraud. This is, therefore, not a finding of fact.

It is difficult to see how negligence, however gross, could amount to fraud.

"Negligence and fraud are in truth mutually exclusive conceptions; although the same facts may be evidence either of one or of the other."

The reason why gross negligence came to be treated as evidence of fraud or even equivalent to fraud was the historical reason that at first the Court of Chancery did not claim to deal with legal titles except in cases of trust, fraud and accident; and, on the question of notice, they had to hold that while mere negligence would not affect the conscience, yet acts of negligence were sometimes so gross and culpable that it could be inferred that the person concerned was deliberately shutting his eyes. In the circumstances therefore he was affected with notice of what he ought to have seen on the ground of fraud. Now, none of these considerations are present here. The question is a question of procedure. The learned District Judge has followed the decision in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*(1), where it was held that there

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was no res judicata where the next friend of a minor plaintiff has been guilty of gross negligence in the original suit. Now this decision is not inconsistent with the law laid down in *Raghubardayal Sahu* v. *Bhikya Lal Misser*(1) where the question of procedure has been explicitly dealt with. Their Lordships there laid down that an infant is bound by judgment as much as if he was of full age, unless gross negligence, laches or fraud and collusion appear in the prochein ami, then the infant might open it by a new bill, according to the Chancery practice; while in India the procedure in cases of gross laches was to apply for a review or, if the decree was ex parte, to get the ex parte decree set aside. Their Lordships distinctly laid down that "If it be sought to set aside a decree obtained against an infant, properly made a party, and properly represented in the case, and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can succeed only upon proof of fraud or collusion". In this matter, therefore, fraud and gross laches are not identical; and it is fraud, not gross laches, which removes the bar imposed by section 258. It is argued on behalf of the respondent that where the infant has lost a valuable property through the gross negligence of his guardian, he is entitled to bring a suit; but, in my opinion, the proper procedure was laid down in the decision in *Raghubardayal Sahu* v. *Bhikya Lal Misser*(1); and, so long as fraud, as distinct from gross negligence, is not established (and it has not been established or found as a fact in this case), section 258 of the Chota Nagpur Tenancy Act is a bar.

I would therefore allow this appeal with costs and dismiss the plaintiff's suit with costs throughout.

MACPHERSON, J.—I agree.

Appeal allowed.

(1) (1886) I. L. R. 12 Cal. 69.