APPELLATE CIVIL.

Before Kulwant Sahay and Allanson, JJ.

1927.

RAMCHANDRA PRASAD

v.

Jan. 24, 25, 26; Feb. 8.

FIRM PARBHU LAL RAMRATAN.*

Ex-parte decree, suit to set aside on the ground of fraud—Court, whether can enter into the merits of the previous suit.

In a suit to set aside an ex-parte decree on the ground of fraud, it is open to the court, after non-service of the summons is proved, to enter into the merits of the previous suit with the object of determining whether there was any motive for the fraud and whether fraud was actually perpetrated, or whether, if opportunity had been given to the defendant, he could have produced evidence which might have led the court to come to a different decision.

Kedar Nath Das v. *Hemanta Kumari Debi* (1), *Damodar Prasad* v. *Ramsarup Kumar* (2) and *Maharani Janki Kuer* v. *Babu Thakur Rai* (3), followed.

Manindra Nath Mittra v. *Hari Mondal* (4), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (5), *Mahanth Ramrup Ghoshain* v. *Mahabir Singh* (6), *Maharani Janki Kuer* v. *Mahabir Singh* (7) and *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (8), distinguished.

Lakshmi Charan Saha v. *Nur Ali* (9) and *Munshi Mosaful Huq v. Surendra Nath Ray* (10), referred to.

Ram Narain Lal Shaw v. *Tooki Sao* (11), explained.

Appeal by the plaintiffs.

This was an appeal by the plaintiffs against the decree of the District Judge of Patna, dated the 15th

* Second Appeal no. 1182 of 1926, from a decision of A. C. Davies, Esq., I.C.S., District Judge of Patna, dated the 15th July, 1926, reversing the decision of Babu Raj Narain, Subordinate Judge, 3rd Court, Patna, dated the 31st July, 1925.

(1) (1913-14) 18 Cal. W. N. 447.
(2) (1923) 4 Pat. L. T. 102.
(3) (1924) 5 Pat. L. T. 37.
(4) (1920) 54 Ind. Cas. 626.
(5) (1914) I. L. R. 41 Cal. 990.
(6) (1923) I. L. R. 2 Pat. 833.
(7) (1920) 58 Ind. Cas. 317.
(8) (1920) 56 Ind. Cas. 270.
(9) (1911) I. L. R. 38 Cal. 936.
(10) (1911-12) 16 Cal. W. N. 1002.
(11) (1920) 5 Pat. L. J. 259.

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July, 1926, whereby he set aside the decree of the Subordinate Judge and dismissed the plaintiffs' suit. The suit was for a declaration that a decree obtained by the defendant no. 1 from the court of the District Judge at Agra was without jurisdiction, fraudulent and null and void and incapable of execution against the plaintiffs.

The plaintiff no. 1 was one Ramchander Prasad and the second plaintiff was a firm Gauri Lal Ramchander Lall carrying on business at Barh in the District of Patna. The first defendant was a firm Parbhu Lal Ramratan which carried on business at Agra, and the second defendant was one Ram Prasad, also a resident of Agra. The plaintiffs' case was that there were two firms at Agra, one known as Parbhu Lal Ramratan and the other as Ramratan Ganga Prasad, both of which were owned by one Bankey Lal and his brothers. The plaintiff firm used to work as commission agents at Barh, and a part of their business was to purchase and sell grains. According to the plaintiffs the second defendant Ram Prasad, who was alleged to be a partner of the firm Ramratan Ganga Prasad, came to Barh and negotiated with the plaintiffs on behalf of his firm Ramratan Ganga Prasad for purchase of grains to which the plaintiffs agreed, and dealings between the parties were opened. The plaintiff firm alleged that they used to purchase grains for the firm of Ramratan Ganga Prasad and to despatch the same to Agra, that money used to come from the Agra firm to Ram Prasad at Barh and he used to make payments from time to time to the plaintiff firm, that Ram Prasad returned to Agra after sometime and a consignment of grains sent by the plaintiff firm to Agra was not taken delivery of by the firm Ramratan Ganga Prasad whereupon the plaintiff firm wrote to the firm Ramratan Ganga Prasad at Agra about it and gave notice to them, in reply whereof Ramratan Ganga Prasad stated that they had no transaction with the plaintiff firm and that they did not know them.

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On the 24th of May, 1919, a suit was instituted by the other firm at Agra, known as Parbhu Lal Ramratan against Ram Prasad who was defendant no. 2 in the present suit and against the plaintiff firm who were described in the plaint as Gauri Lal Ramchander. According to the plaintiffs this suit was instituted by Parbhu Lal Ramratan on the allegation that money was due to them from Ram Prasad on account of loans advanced to him, and that the plaintiff firm Gauri Lal Ramchander were sought to be made liable on the allegation that the loans were advanced to Ram Prasad on the writing and assurance of the firm Gauri Lal Ramchander. This suit was dismissed by the Subordinate Judge on the 28th of February, 1920, on the finding that the defendant no. 1 in the suit, viz., Ram Prasad was not a debtor of the firm but a partner thereof, and that no loan had been advanced to him. Against this decree there was an appeal before the District Judge of Agra which was dismissed on the 29th of June, 1921. Thereafter there was an application before the District Judge for review of judgment. This review was granted and the suit was ultimately decreed against the plaintiff firm Gauri Lal Ramchander alone. The decree of the District Judge of Agra was dated the 16th January, 1922. It was this decree which was sought to be avoided in the present suit on the ground of want of jurisdiction and of fraud on the part of the plaintiffs in the suit at Agra.

The decree appeared to have been transferred to the Patna Court for execution; and an execution was first applied for at Patna with a prayer for arrest of the plaintiff no. 1 Ramchander Prasad. This application appeared to have been dismissed; and a second application then appeared to have been made for execution by attachment and sale of certain properties belonging to the plaintiff Ramchander Prasad.

The plaintiffs asserted that no summons was served upon them in the suit, nor any notice of the appeal or of the application for review was served

upon them, that the said summons and notices were fraudulently suppressed by the plaintiffs, that there was no foundation for the claim as against the plaintiffs, and that the decree was obtained against them by fraud on wilful suppression of summons and notices, and was based on a false claim.

The defence of the defendant no. 1 was that there was no fraud in obtaining the decree, and that the claim was a just claim. The defendant no. 2, Ram Prasad, did not appear in the suit either in the Subordinate Judge's Court or before the District Judge on appeal, nor did he appear in the High Court.

The Subordinate Judge framed a number of issues, and he found them in favour of the plaintiffs and decreed the suit. His findings were: First, that the description of the present plaintiffs, as given in the plaint in the Agra suit, was incorrect they having been described therein as Gauri Lal Ramchand; second, that the summons was not served on the present plaintiffs; third, that the service of the summons by publication in the "Searchlight" newspaper was not a proper service; fourth, there was no service of notice of the appeal or of the application for review upon the plaintiff firm; fifth, that the summons and the notices were fraudulently suppressed with the object that the present plaintiffs may get no opportunity to contest the suit or the appeal or the review application and with the motive to mislead the court to pass an ex parte decree.

After coming to these findings, the Subordinate Judge observed as follows:

"To see whether the defendant no. 1 was actuated by fraud to take such steps we have to go into the facts to a certain extent".

The Subordinate Judge then proceeded to consider the case on the merits, and he came to the finding, on a consideration of the entire evidence and circumstances of the case, that the claim of the plaintiff in the Agra suit was false and unfounded. He, therefore, decreed the suit and made a declaration that the decree passed

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by the District Judge at Agra after review was illegal and void, and was obtained by fraud, and that it was not binding on the plaintiffs.

When the matter went in appeal before the District Judge, he came to the finding that it was not open to the Subordinate Judge to go into the merits of the suit instituted at Agra. He was of opinion that the decision of the District Judge at Agra operated as res judicata, and that the only way to attack the correctness of that decision was by means of appeal or review and that no separate suit was maintainable to contest the correctness of the decision of the District Judge of Agra on merits. He, therefore, refused to consider the question as to whether the claim of the plaintiffs in the Agra suit was well founded or not, and he confined himself to a consideration of the question whether there was fraud in the service or non-service of the summons. In considering this question he was of opinion that he was not trying the question whether there was a proper service of the summons or whether the procedure of the Agra Court was in accordance with law. He laid down that the only question for consideration was whether the procedure adopted by the Agra Courts was a result of fraud practised on them by the plaintiffs in the suit in the Agra Court. The District Judge was of opinion that the allegations of fraud made in the plaint were mostly vague and that there was only one definite allegation of fraud, viz., that the defendant no. 1 of the present suit with the fraudulent intention of obtaining a fraudulent ex parte decree intentionally misdescribed the plaintiffs in order to facilitate the suppression of summonses and notices. The District Judge was, therefore, of opinion that the only ground of fraud alleged in the plaint was a misdescription of the defendant firm in the Agra suit. He came to the finding that the misdescription was not fraudulent but was due to an innocent mistake. The District Judge, therefore, was of opinion that no fraud had been made out and he set aside the decree of the Subordinate Judge.

P. K. Sen (with him *Rai Guru Saran Prasad* and *Chowdhury Mathura Prasad*) for the appellants:— The court can go into the merits of the previous suit in order to determine whether any irregularity in the service of summons in the former suit was caused by fraud or otherwise. The failure to serve summons on a defendant may be accidental or deliberate, and where the court finds as a fact that there was no foundation for the suit itself, it is open to the court to hold that the suppression of smumons was deliberate. See *Maharani Janki Kuer* v. *Babu Thakur Rai* (1).

Similarly in *Damodar Prasad* v. *Ram Sarup Kumar* (2) it was held that the plaintiff can show that the claim was false so as to lead to an inference as to the fraudulent suppression of sommons. *Jangal Chowdhury* v. *Laljit Pasban* (3) is distinguishable. In that case an application under Order IX, rule 13, Code of Civil Procedure, had been dismissed and then a suit was brought to set aside the decree on the same allegation. It was rightly held that the matter was res judicata. In *Ram Narain Lal Shaw* v. *Tooki Sao* (4), as the defendant, after filing his written statement, had withdrawn from the suit, it was pointed out that the matter was no longer open. In *Munshi Mosuful Huq* v. *Surendra Nath Ray* (5) the fraud alleged was such as could have been a matter of defence for the previous suit. *Kedar Nath Das* v. *Hemanta Kumari Debi* (6) supports my contention and distinguishes *Munshi Mosuful Huq* v. *Surendra Nath Ray* (5).

Ram Prasad (with him *Dhinesh Chandra Verma*) for the respondent:

My first submission is that where there is a finding of fact that there was no fraud in the service of summons, this Court is precluded in second appeal from going into the question whether the claim in the former suit was false or not.

(1) (1924) 5 Pat. L. T. 37.
(2) (1923) 4 Pat. L. T. 102.
(3) (1921) 6 Pat. L. J. 1.
(4) (1920) 5 Pat. L. J. 259.
(5) (1911-12) 16 Cal. W. N. 1002.
(6) (1913-14) 18 Cal. W. N. 447.

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[*Kulwant Sahay, J.*—But when in coming to that finding the court has excluded an important piece of evidence by not going into that question, his finding cannot be sustained.]

Ram Narain Lal Shaw v. *Tooki Sao* (1) is not against me. In that case it was held that the duty of the court in the first instance should be to investigate whether or not there was a fraud in the service of process and then, in order to find whether the fraud, if any, was deliberate or accidental, the court may enter into the merits of the claim in the previous suit. If, therefore, as in the present case, there is a finding that there was in fact no suppression of the processes the court cannot go into the subsidiary question of intention. I rely on *Damodar Prasad* v. *Ram Sarup Kumar* (2) which supports my interpretation of *Ram Narain Lal Shaw* v. *Tooki Sao* (1). The same view was taken in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (3) where it was laid down that fraud must first be proved before such investigation can be held by the court. Where there is no finding that fraud was at all practised, the decree cannot be set aside merely on the ground that it was obtained by perjured evidence. See *Manindra Nath Mittra* v. *Hari Mondal* (4).

[*Kulwant Sahay, J.*—These cases do not lay down as a proposition of law that in order to find out whether there has been fraud, a court cannot go into the merits of the previous claim.]

I rely on *Maharani Janki Kuer* v. *Mahabir Singh* (5).

[*Kulwant Sahay, J.*—In that case the ex parte decree was sought to be set aside on the ground that it was obtained on a false claim; there was no allegation of fraud with regard to the suppression of summons.]

(1) (1920) 5 Pat. L. J. 259.
(2) (1923) 4 Pat. L. T. 102.
(3) (1914) I. L. R. 41 Cal. 990.
(4) (1919-20) 24 Cal. W. N. 133.
(5) (1920) 58 Ind. Cas. 317.

In *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (1) it was held that if the plaintiff cannot prove that the decree was fraudulently obtained he cannot succeed whether the original claim against him was true or false. *Munshi Mosuful Huq* v. *Surendra Nath Ray* (2) and *Abdul Huq Chowdhury* v. *Abdul Hafez* (3) have been considered in *Kedar Nath Das* v. *Hemanta Kumari Debi* (4) where the apparent conflict has been reconciled.

P. K. Sen, replied.

Cur. adv. vult.

S. A. K.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): The important question for decision is whether in a suit to set aside an ex parte decree on the ground of fraud, it is open to the court to consider the question as to whether the claim of the plaintiff in the previous suit was a true or a false claim. The learned District Judge seems to be of opinion that it is not at all open to the court in which the suit to set aside the decree on the ground of fraud is instituted to look into the merits of the previous suit, that the only thing which it can enquire into is as to whether any fraud was perpetrated by the plaintiff in the previous suit in the service of the summons or notices upon the defendant.

I am of opinion that the view taken by the learned District Judge was erroneous. The plaintiffs have in the first place to show that there was no service of summons or notice of the appeal or of the application for review of judgment. They have then to show that the non-service of the summons or the notices was due to a fraud practised by the plaintiff in the previous suit with the object of keeping the defendant in that suit in ignorance of the suit and of preventing him from placing his case before the court. A decree

(1) (1920) 56 Ind. Cas. 270. (3) (1909-10) 14 Cal. W. N. 695.
(2) (1911-12) 16 Cal. W. N. 1002. (4) (1913-14) 18 Cal. W. N. 447.

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passed by a competent court cannot be set aside by a suit simply on the ground that the decree passed was based on a false claim, nor can a decree be set aside simply on the ground that there was no service of summons or notices. But, once it is established that there was no service of summons or notices, it is in my opinion open to the plaintiff in the subsequent suit to show that the claim in the previous suit was a false claim and the court can go into the question with the object of determining as to whether there was a wilful and fraudulent suppression of the notices and summons in order to obtain a decree based on a false claim by preventing the defendant from placing his case before the court. In other words, after non-service of the summons is proved it is open to the court to go into the question as regards the merits of the previous suit with the object of finding as to whether there was any motive for the fraud and as to whether fraud was actually perpetrated, and as to whether, if opportunity had been given to the defendant, he could have produced evidence which might have led the court to come to a different decision. The learned Subordinate Judge in the present case first came to the finding that there was no service of summons or notices and then, as he expressly stated in his judgment, he looked incidentally into the merits of the case in order to see whether the plaintiffs in the Agra suit were actuated by fraud.

The view taken by me is supported by authority. In *Kedar Nath Das* v. *Hemanta Kumari Debi* (1) the findings of the court of appeal below were (*1*) that the fact of the previous suit was not known to the plaintiff, and (*2*) that the said suit was in fact a false suit. From these two findings the third finding was arrived at that the decree obtained in the previous suit was obtained by fraud. Fletcher, J., considered the two apparently conflicting decisions of the Calcutta High Court in *Lakshmi Charan Saha* v. *Nur Ali* (2) and in

(1) (1913-14) 18 Cal. W. N. 447. (2) (1911) I. L. R. 38 Cal. 936.

Munshi Mosuful Huq v. *Surendra Nath Ray* (1) and the learned Judge pointed out that the two decisions could be reconciled when closely looked at. It was pointed out by the learned Judge that the only point decided in *Mosuful Huq* v. *Surendra Nath Ray* (1) was that a decree obtained in a suit could not be set aside in a subsequent suit brought for the purpose on the mere proof that the previous decree was obtained by perjured evidence. It was further pointed out that the mere fact that a decree had been obtained by perjury is not a sufficient ground for setting it aside and that this proposition was never challenged. The learned Judge thereafter proceeded to observe as follows :—

"A different consideration arises where a false case is placed before the court. We have got the decisions in *Abouloff* v. *Oppenheimer* (2) and *Vedala* v. *Lawes* (3) which show quite clearly that, if the case which was placed before the court was a false one, the court has jurisdiction in a subsequent suit to set aside the decree which was obtained by fraud practised on the court ".

The learned District Judge in the present case referred to *Lakshmi Charan Saha* v. *Nur Ali* (4) and to *Mosuful Huq* v. *Surendra Nath Ray* (1). But these decisions were explained in the case of *Kedar Nath Das* v. *Hemanta Kumari Debi* (5) just referred to, and I respectfully agree with the view expressed by Fletcher, J., in the said case.

In *Damodar Prasad* v. *Ramsarup Kumar* (6) a Division Bench of this Court held that in a suit to set aside a decree on the ground of fraud, if the court comes to the conclusion that summons was not in fact served upon the defendant, it is at liberty to examine the evidence with a view to find out whether there was any foundation for the previous suit, but that it was

(1) (1911-12) 16 Cal. W. N. 1002. (4) (1911) I. L. R. 38, Cal. 936.
(2) (1882-83) L. R. 10 Q. B. D. 295. (5) (1913-14) 18 Cal. W. N. 447.
(3) (1890) L. R. 25 Q. B. D. 310. (6) (1923) 4 Pat. L. T. 102.

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only for the purpose of enabling it to decide whether the failure to serve the summons was accidental or deliberate that the court could do so. The same view was taken in *Maharani Janki Kuer* v. *Babu Thakur Rai* (1).

The learned District Judge has referred to *Ram Narain Lal Shaw* v. *Tooki Sao* (2) where it is stated that the test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in court by which the defendant in the original suit was prevented from placing his case before the court, and that until this was found, the court in which the second suit was instituted was not entitled to investigate the question whether the original suit was a false suit or not. Das, J., who was one of the Judges who decided this case, was a party to the decisions in both the subsequent cases of *Damodar Prasad* v. *Ramsarup Kumar* (3) and *Maharani Janki Kuer* v. *Babu Thakur Rai* (1), and the learned Judge has explained his view in the later cases. Once it is established that there was fraud practised whereby the defendant was prevented from placing his case before the court, it is no longer necessary to go further into the question and to investigate the question whether the original suit was a false suit or not. Such investigation is necessary only where the non-service of the summons is not sufficient by itself to prove fraud.

Reliance has been placed by the learned Advocate for the respondents upon the following cases:— *Manindra Nath Mittra* v. *Hari Mondal* (4), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (5) *Mahanth Ramrup Ghoshain* v. *Mahabir Singh* (6), *Maharani Janki Kuer* v. *Mahabir Singh* (7) and *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (8).

(1) (1924) 5 Pat. L. T. 37.
(2) (1920) 5 Pat. L. J. 259.
(3) (1923) 5 Pat. T. T. 259.
(4) (1920) 54 Ind. Cas. 626.
(5) (1914) I. L. R. 41 Cal. 990.
(6) (1923) I. L. R. 2 Pat. 833.
(7) (1920) 58 Ind. Cas. 317.
(8) (1920) 56 Ind. Cas. 270.

In *Manindra Nath Mitra* v. *Hari Mondal* (1) the defendant in the previous suit appeared, filed a written statement and then absented himself on the adjourned date of hearing. There was, therefore, no fraud committed by the plaintiff in the previous suit whereby the defendant in that suit was prevented from placing his case before the court, and the suit was really to set aside the decree in the previous suit only on the ground that the claim in the previous suit was not a true claim. It is clear that under those circumstances the court could not investigate the question as regards the merits of the previous suit. In *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (2) the decree in the previous suit was passed after contest and, therefore, there was nothing to show that the defendant in that suit was prevented by fraud from contesting the suit. Jenkins, C.J., in that case observed that the character of fraud vitiating a decree would vary with the circumstances of each class of decree, and there is nothing in the decision of this case which would go to show that the court is prevented in a subsequent suit from examining the merits of the previous suit in order to come to a finding on the question of fraud. In *Mahanth Ramrup Ghoshain* v. *Mahabir Singh* (3) there was an application to set aside the previous ex parte decree under the provisions of Order IX, rule 13, Civil Procedure Code, which had been dismissed, and in the subsequent suit the same allegations were made as regards fraud as in the application under Order IX, rule 13, and there is nothing in the decision in that case which goes to show that the truth or falsity of the claim in a previous suit ought not to be enquired into in the subsequent suit, when fraud was alleged. In *Maharani Janki Kuer* v. *Mahabir Singh* (4) the whole foundation of the second suit was that the ex parte decree in the previous suit was obtained upon a false claim: no other fraud was alleged. In *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain* (5) there was an application under Order IX,

(1) (1920) 54 Ind. Cas. 626.
(2) (1914) I. L. R. 41 Cal. 990.
(3) (1923) I. L. R. 2 Pat. 833.
(4) (1920) 58 Ind. Cas. 317.
(5) (1920) 56 Ind. Cas. 270.

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rule 13, Civil Procedure Code, to set aside the ex parte decree which failed and it was found that there was no fraudulent suppression of processes. These cases, therefore, do not help the respondents upon the question now for decision.

After a review of the authorities, I am of opinion that the view taken by the learned District Judge was erroneous. He has come to no distinct finding as to whether or not there was no service of summons or notices, as was found by the Subordinate Judge. He merely came to a finding that the misdescription of the defendant in the Agra suit was not a fraudulent misdescription. To my mind it is necessary for a proper decision of the case to come to a finding on the question of fraud as alleged by the plaintiffs on a consideration of the entire evidence in the case. There were specific allegations of fraud in the plaint and they must be investigated into on a consideration of the entire evidence. If the learned District Judge finds that there was no service of summons or notices, it would be open to him to see on the evidence whether the claim in the suit in the Agra Court was a true or a false claim in order to arrive at a finding as to whether there was fraud perpetrated by the plaintiffs in the Agra suit in obtaining the decree. Both sides have referred to portions of the evidence in the case on the question as to whether the claim in the previous suit was a false claim or not. We cannot go into that evidence and decide the point here. It is necessary to look into the whole evidence in the suit in order to come to a finding as to whether there was fraud committed and as to whether the decree was passed with or without jurisdiction

The decree of the learned District Judge must, therefore, be set aside and the appeal remanded to him for re-hearing after consideration of the entire evidence in the case. Costs will abide the result.

ALLANSON, J.—I agree.

Appeal remanded.