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of the term as used in section 3 of Act XIV of 1920. The existence of the wakf being admitted, it was open to the District Judge to proceed under Act XLII of 1923. What was held by this Court in *Syed Ali Muhammad v. The Collector of Bhagalpur*⁽¹⁾ was that if it is denied that any property is wakf property, then the District Judge has no jurisdiction to proceed under Act XLII of 1923. Here the fact of the property being wakf property is admitted and upon that admission the learned District Judge was clearly entitled to proceed under Act XLII of 1923.

The result is that this application must be allowed, the order of the District Judge must be set aside and the case remanded to him for disposal according to law. The petitioner is entitled to his costs: hearing fee three gold mohurs.

MACPHERSON, J.—I agree.

Order set aside.

FULL BENCH.

Before Jwala Prasad, Kulwani Sahay and Wort, JJ.

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Ex parte decree—set aside in a subsequent suit based on fraud—effect of setting aside—question depends on the pleadings, issues and actual decision in the subsequent suit.

The question as to whether, when an ex parte decree in a subsequent suit is set aside, the original suit in which that decree was obtained is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit.

* Civil Revision no. 363 of 1929, from an order of Babu Brij Bilas Prasad, Munsif, 1st Court, Begusarai, dated the 27th May, 1929.

(1) (1927) 8 Pat. L. T. 233.

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If, upon an issue properly raised and tried in the subsequent suit, it is held that the claim in the original suit was false and fraudulent, the effect of such a decision is to put an end to that suit which cannot be revived and retried. If, on the other hand, the ex parte decree is set aside on the ground that it was obtained by suppression of summons by means of fraud and the defendant in the original suit was prevented from appearing in the suit and defending it by reason of fraud committed by the plaintiff, the original suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of in accordance with law, although in the subsequent suit the court may have gone into the question as to the plaintiff's claim being false as a ground for holding that there was reason for him to obtain stealthily a decree behind the back of the defendant by fraudulently keeping him out of the knowledge of the suit and preventing him from defending the action.

Pandit Chandi Prasad Misra v. Gobind Sahay(1), *Bhairo Prasad Sahu v. Ram Chandra Prasad*(2), *Damodar Prasad v. Ram Sarup Kumar*(3), *Ram Narain Lal Shaw v. Tooki Sao*(4), *Asharfi Lal Mahta v. Surajmaya Misrain*(5), *Ramchandra Prasad v. Firm Parbhulal Ram Ratan*(6), *Lalji Thathra v. Ganga Thathra*(7), *Lilabati Misrain v. Bishun Chowbey*(8), *Khajooroonissa v. Rowshan Jehan*(9), *Khetra Mohan Barik v. Mangobinda Pal*(10) and *Dharnidhar Aditya v. Hemangu Chandra Jana*(11), referred to.

Application in revision by the defendant.

The facts of the case material to this report will appear from the following Order of Reference :

KULWANT SAHAY, J.—This application is directed against the order of the Munsif of Begusarai directing a money suit to be restored to file in order that it may be heard on merits according to law, after an ex parte decree passed in that suit had been set aside in

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- (1) (1917) 1 Pat. L. W. 499.
 - (2) (1918) 4 Pat. L. W. 373.
 - (3) (1922) 4 Pat. L. T. 102.
 - (4) (1920) 5 Pat. L. J. 259.
 - (5) (1924) 6 Pat. L. T. 150.
 - (6) (1927) I. L. R. 6 Pat. 458.
 - (7) (1927) 9 Pat. L. T. 7.
 - (8) (1907) 6 Cal. L. J. 621.
 - (9) (1876) I. L. R. 2 Cal. 184, P. C.
 - (10) (1910) 14 Cal. W. N. 558.
 - (11) (1917) 21 Cal. W. N. 1087.

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a subsequent suit brought on the allegation that the ex parte decree had been obtained by fraud.

Mr. C. C. Das on behalf of the petitioner contends that the original suit cannot be revived and re-heard on merits inasmuch as the subsequent suit was based on the allegation that the previous suit was conceived in fraud and carried on in fraud, and that in the subsequent suit it was held that the claim in the previous suit was false and that the suit itself was fraudulent. There have been conflicting decisions as to the effect of setting aside an ex parte decree in a subsequent suit on the ground that the decree was obtained by fraud. Mr. C. C. Das contends that the original suit can be revived only in two cases, namely, where the decree set aside was obtained on compromise and it was held in a subsequent suit that the compromise was brought about by fraud, and, secondly, where there is no allegation in the subsequent suit that the previous suit was based on fraud but the fraud was alleged merely in suppression of summonses to the defendant. He contends that where a subsequent suit is based on the allegation that the entire suit was conceived in fraud and that allegation succeeds, the original suit including the plaint is dead and the suit cannot be revived. He relies upon the decision of the Calcutta High Court in *Pran Nath Roy v. Mohesh Chandra Moitra*(1) which was upheld on appeal by the Privy Council in *Radha Raman Shaha v. Pran Nath Roy*(2), and also on the decision of the Privy Council in *Khagendra Nath Mahta v. Pran Nath Roy*(3). He also refers to the decision of a Division Bench of this Court in *Chandi Prasad Misra v. Gobind Sahay*(4) and on another decision in *Damodar Prasad v. Ram Sarup Kumar*(5). On the other hand a contrary view was taken by this Court in *Asharfi Lal Mahtha v. Surajmaya Misra*(6) and in *Lalji Thathra v. Ganga Thathra*(7) which, however, was a decision of a single Judge. The same view was taken by Mookerjee and Walmsley, JJ. in *Dharnidhar Aditya v. Hemanga Chandra Jana*(8) where their Lordships observed that the fact that the suit terminated in an ex parte decree and not in a consent decree made no difference in point of principle. Having regard to the divergence of judicial opinion on the point and to the fact that the question raised is one of general importance, I am of opinion that the question should be referred to and finally decided by a Full Bench. The question that I propose to refer to the Full Bench is:—

“What is the effect of setting aside an ex parte decree in a subsequent suit, based on a finding that the ex parte decree had been obtained by fraud, and that the suit itself was fraudulent? Is the previous suit revived and can it be reheard on merits?”

COURTNEY TERRELL, C. J.—I agree.

- (1) (1897) I. L. R. 24 Cal. 546.
- (2) (1901) I. L. R. 28 Cal. 475, P. C.
- (3) (1902) I. L. R. 29 Cal. 395, P. C.
- (4) (1917) 1 Pat. L. W. 499.
- (5) (1922) 4 Pat. L. T. 102.
- (6) (1924) 6 Pat. L. T. 150.
- (7) (1927) 9 Pat. L. T. 7.
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S. N. Basu (with him *M. K. Mukherji*), for the petitioner: Where an ex parte decree is set aside on the ground of fraud, the finding of the court below being that there was no foundation for the original suit, the effect of the order setting aside the ex parte decree would be that the suit will not be reheard. I concede that if the suit is based merely on the ground of fraudulent suppression of summons, the parties will be remitted to their original rights: [*Lalji Thathra v. Ganga Thatra*⁽¹⁾ and *Dharnidhar Aditya v. Hemanga Chandra Jana*⁽²⁾]. But where the basis of the subsequent suit is that there was no foundation for the original suit, and the decree is set aside on the ground that there was a fraudulent suppression of summons and the suit itself was conceived in fraud, the result of such finding would be that the original suit will not be restored. In *Pundit Chandī Prasad Misra v. Gobind Sahay*⁽³⁾ it was held that no further proceedings would lie as the plaint was dead. It was there pointed out that a finding that there was a fraudulent suppression of summons amounted to a finding that the entire proceeding was fraudulent. Similarly in *Bhairō Prasad Sahu v. Ram Chandra Prasad*⁽⁴⁾ it was held that when a final decree is set aside on the ground of fraud by means of a separate and independent suit, the original suit is not thereby revived.

[SAHAY, J.—A different point was involved in that case.]

I rely on the last paragraph of the judgment and adopt it as a part of my argument. Another decision of a Division Bench of this court—*Damodar Prasad v. Ram Sarup Kumar*⁽⁵⁾—also supports my contention. In that case the lower court allowed the original suit to proceed but the High Court said it could not.

(1) (1927) 9 Pat. L. T. 7.

(3) (1917) 1 Pat. L. W. 499.

(2) (1917) 21 Cal. W. N. 1087.

(4) (1918) 4 Pat. L. W. 273.

(5) (1922) 4 Pat. L. T. 102.

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[SAHAY, J.—In *Damodar Prasad v. Ram Sarup Kumar*(¹) no distinction is made between the two classes of cases. All that is said is that the original suit cannot proceed if the decree is set aside on the ground of fraud.]

The distinction seems to have been drawn at least in *Pandit Chandi Prasad Misra v. Gobind Sahay*(²).

[SAHAY, J.—What do you say to the case of *Asharfi Lal Mahtha v. Surajmaya Misrain*(³)?]

* That was a case of a consent decree; so is the case of *Khajooroonissa v. Rowshan Jehan*(⁴). The decision in *Dharnidhar Aditya v. Hemanga Chandra Jana*(⁵) is apparently against me; but there the learned Judges made no distinction between a consent decree and an ex parte decree. Moreover, it does not appear on what precise grounds the ex parte decree had been set aside. At any rate it was not a case where the whole claim was attacked as fraudulent.

For the purposes of determining whether the suppression of summons was fraudulent and deliberate the court had to go into the merits of the case and decide that the plaintiff's claim was false. The matter is *res judicata*, although no issue may have been formally drawn up: *Lilabati Misrain v. Bishun Chowbey*(⁶).

[In the course of argument *Ramchandra Prasad v. Firm Parbhulal Ram Ratan*(⁷), *Ram Narain Lal Shaw v. Tooki Sao*(⁸), *Khagendra Nath Mahata v. Pran Nath Roy*(⁹), *Jangal Chaudhury v. Laljit Pasban*(¹⁰) and *Khetra Mohan Barik v. Mangobinda Pal*(¹¹) were referred to.]

(1) (1922) 4 Pat. L. T. 102.

(2) (1917) 1 Pat. L. W. 499.

(3) (1924) 6 Pat. L. T. 150.

(4) (1876) I. L. R. 2 Cal. 184, P. C.

(5) (1917) 21 Cal. W. N. 1087.

(6) (1907) 6 Cal. L. J. 621.

(7) (1927) I L. R. 6 Pat. 458.

(8) (1920) 5 Pat. L. J. 259.

(9) (1902) I. L. R. 29 Cal. 395, P. C.

(10) (1920) I. Pat. L. T. 795.

(11) (1910) 14 Cal. W. N. 556.

S. N. Ray and *G. P. Sahi*, for the opposite party, were not called upon.

JWALA PRASAD, J.—This reference has been made under the following circumstances.

The opposite party, *Kishuni Singh*, brought a money suit no. 208 of 1922 on the basis of a pro-note for Rs. 500 against the petitioner *Nirsan Singh* and obtained an ex parte decree on the 28th June, 1922. The defendant then applied under Order IX, rule 13, of the Code of Civil Procedure to set aside the decree. The application was dismissed for default. He then instituted Title Suit no. 174 of 1923 in the court of the Munsif of Begusarai for setting aside the ex parte decree on the ground that it was obtained by fraud. That suit succeeded.

The opposite party, *Kishuni Singh*, the plaintiff in the original suit, then applied to the Munsif of Begusarai to restore the case to its original file and to decide it on merits. The Munsif granted the prayer by his order, dated the 27th May, 1929. Against this order of the Munsif the petitioner came to this Court in Civil Revision no. 383 of 1929 which was heard by a Division Bench of this Court.

On account of divergence of judicial opinion as to the effect of setting aside an ex parte decree in a subsequent suit on the ground that that decree was obtained by fraud, the Division Bench, which originally heard the case, has formulated the following question and referred it to this Bench for decision :—

“What is the effect of setting aside an ex parte decree in a subsequent suit, based on a finding that the ex parte decree had been obtained by fraud, and that the suit itself was fraudulent? Is the previous suit revived and can it be reheard on merits?”

Now as to whether, when an ex parte decree in a subsequent suit is set aside, the original suit in which that decree was obtained is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit. If upon an issue

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properly raised and tried in the subsequent suit it is held that the claim itself of the plaintiff in the original suit was false and fraudulent, the effect of such a decision is to put an end to that suit, and the suit cannot be revived and retried. If, on the other hand, the ex parte decree is set aside on the ground that it was obtained by suppression of summons by means of fraud and the defendant in the original suit was prevented from appearing in the suit and defending it by reason of fraud committed by the plaintiff, the original suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of in accordance with law in spite of the fact that in the subsequent suit the Court went into the question as to the plaintiff's claim being false as a ground for holding that there was reason for him to obtain stealthily a decree behind the back of the defendant by fraudulently keeping him out of the knowledge of the suit and preventing him from defending the action.

The remedy of the defendant to have an ex parte decree set aside is by an application under Order IX, rule 13 or by a suit. In the former case he is entitled to have the ex parte decree set aside upon his satisfying the Court that the "summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing." Order V of the Code of Civil Procedure lays down the rules and the methods for service of summons upon a defendant. It may be personal or in any other way provided for in the rules. Under rule 6 of Order IX when the plaintiff appears and the defendant does not appear when the suit is called on for hearing the Court may proceed ex parte only upon proof that the "summons was duly served," and may pass an ex parte decree. Order IX, rule 13, therefore entitles the defendant to have the ex parte decree set aside if he satisfies the Court that the summons "was not duly served" upon him. He will also be entitled to have the decree set aside if

he succeeds in showing that he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing although on the face of it the summons appears to have been served in accordance with the rule laid down in Order V. 'Fraud' is not specifically mentioned in rule 13, but the "sufficient cause" referred to in rule 13 may be, amongst others, the suppression of the summons by means of fraud so as to prevent the defendant from having any knowledge of the suit against him and thus to enable the plaintiff to obtain an ex parte decree. It is open to the Court to go into the question as to the merits of the previous suit with the object of determining as to whether there was motive for wilful and fraudulent suppression of the summons in order to obtain a decree based on a false claim by preventing the defendant from placing his case before the Court. In this sense the falsity of the plaintiff's claim in the original suit may pertinently be gone into in a proceeding under Order IX, rule 13; that is only for the purpose of enabling the Court to decide whether the failure to serve notice was fraudulent or deliberate.

If the decree is set aside under Order IX, rule 13, the original suit is revived and the Court in the concluding words of the rule "shall appoint a day for proceeding with the suit" irrespective of the fact that the Court might have held that there was no foundation for the plaintiff's suit and that the claim was false, for the enquiry into that question was merely incidental to the real question of the defendant having been prevented from sufficient cause from appearing and defending the suit. That point has to be determined in the suit itself which, by reason of the ex parte decree having been set aside, is revived.

If the defendant does not succeed in having the ex parte decree set aside under Order IX, rule 13, still he has a right to have it set aside by instituting a regular suit on the ground that it was obtained by fraud: [*vide Pran Nath Roy v. Mohesh Chandra*

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Moitra⁽¹⁾]. The matter was taken twice to the Privy Council and the view taken by the Calcutta High Court was upheld: [*Radha Raman Shaha v. Pran Nath Roy*⁽²⁾ and *Khagendra Nath Mahata v. Pran Nath Roy*⁽³⁾]. In such a suit the defendant as plaintiff can succeed only upon proof that he was prevented from appearing and placing his case before the Court in the original suit by means of fraud practised upon him, such as, the suppression of summons by fraudulent means, etc., and as a motive for the fraudulent conduct of the plaintiff he may attack the original suit in which the ex parte decree was obtained as being fraud from beginning to end and that the plaintiff's claim itself was false and there was absolutely no foundation for the suit.

Thus, whereas the principal issue in the subsequent suit is the obtaining of the ex parte decree by fraudulent means, such as, suppression of summons, etc., the question as to whether the claim of the plaintiff in the original suit was false and fraudulent may be gone into as affording a motive for the plaintiff in the original suit having stealthily obtained the ex parte decree against the defendant by preventing him from appearing in Court and exposing the falsity of the plaintiff's claim. The Court might have gone into that question only incidentally, or it might have formed the subject-matter of a clear decision upon an issue raised and tried between the parties. In the former case simply the ex parte decree is set aside and the parties are relegated to their former position and the suit is restored and the plaintiff's claim enquired into and disposed of in accordance with law. If, on the other hand, the decree is set aside not only upon the ground of suppression of summons by fraud but upon the ground that the original suit itself was

(1) (1897) I. L. R. 24 Cal. 546.

(2) (1901) I. L. R. 28 Cal. 475, P. C.

(3) (1902) I. L. R. 29 Cal. 395, P. C.

fraudulent and the plaintiff's claim was false, the suit cannot be restored and retried for the issue, whether the plaintiff in the original suit had a right to obtain a decree against the defendant on the facts alleged in the plaint, has already been determined in the second suit and the same question cannot be agitated in any suit, whether that suit in point of time was instituted before or was subsequently instituted. The principle of *res judicata* would bar the determination of the same question.

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At the Bar the following authorities were cited : *Chandi Prasad Misra v. Gobind Sahay*⁽¹⁾, *Bhairo Prasad Sahu v. Ram Chandra Prasad*⁽²⁾, *Damodar Prasad v. Ram Sarup Kumar*⁽³⁾, *Ram Narain Lal Shaw v. Tooki Sao*⁽⁴⁾, *Asharfi Lal Mahtha v. Surajmaya Misrain*⁽⁵⁾, *Ramchandra Prasad v. Firm Parbhulal Ram Ratan*⁽⁶⁾, *Lalji Thathra v. Ganga Thathra*⁽⁷⁾, *Lilabati Misrain v. Bishun Chowbey*⁽⁸⁾, *Khajooroonissa v. Rowshan Jehan*⁽⁹⁾, *Khetra Mohan Barik v. Mangobinda Paul*⁽¹⁰⁾ and *Dharnidhar Aditya v. Hemanga Chandra Jana*⁽¹¹⁾. After having carefully considered them the above seems to be the correct view although in some of the cases there is some apparent expression of contrary views.

Therefore, the answer to the question under reference as to what is the effect of setting aside an *ex parte* decree in a subsequent suit based on fraud

(1) (1917) 1 Pat. L. W. 499.

(2) (1918) 4 Pat. L. W. 373.

(3) (1922) 4 Pat. L. T. 102.

(4) (1920) 5 Pat. L. J. 259.

(5) (1924) 6 Pat. L. T. 150.

(6) (1927) I. L. R. 6 Pat. 458.

(7) (1927) 9 Pat. L. T. 7.

(8) (1907) 6 Cal. L. J. 621.

(9) (1876) I. L. R. 2 Cal. 184, P. C.

(10) (1910) 14 Cal. W. N. 558.

(11) (1917) 21 Cal. W. N. 1067.

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and whether the previous suit is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit as indicated above.

Now under the rules of this Court we have to decide the application in revision filed by the petitioner.

The plaintiff no doubt alleged in the plaint in the subsequent suit no. 174 of 1923 that he had not taken any money from the defendant or executed any hand-note, but no relief was claimed by him upon this allegation. He claimed only the following reliefs:—

(1) "That on determination of the above points it may be held by the Court that the defendant on 'suppressing' the service of the summons to the defendant, i.e., without its service and without the knowledge and information of the plaintiff obtained an ex parte fraudulent decree in Small Cause Court suit no. 208 of 1922 against the plaintiff on the 28th June, 1922.

(2) "That on determination of the above facts the said ex parte decree may be held to be inoperative, ineffectual and illegal and be set aside."

The only issues raised were as follows:—

(1) "Is the suit barred by section 11 of the Code of Civil Procedure?"

(2) "Was the summons in suit no. 208 of 1922 fraudulently and surreptitiously served as alleged by the plaintiff?"

The Munsif decided both the issues against the petitioner. On appeal by him the Subordinate Judge by his decision, dated the 13th July, 1925, reversed the decision of the Munsif on both the points and decreed the plaintiff's suit.

There was no issue framed as to the plaintiff's claim based on the hand-note being false or fraudulent. The appellate Court incidentally went into that question and made the following observation:—

"There can, therefore, be no doubt that in such a case the Court is not precluded from examining the circumstances in which the disputed decree was passed. That is to say, the Court has got the

power in such a case to ascertain whether there was any foundation for the previous suit in which the decree in question was passed. I have, therefore, to look to the circumstances in which the said hand-note in question was executed."

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Therefore, the genuineness or otherwise of the hand-note was looked into by the appellate Court for the express purpose of finding out whether there was reason for the plaintiff to have the summons suppressed. The Court did not decide expressly and clearly that the hand-note was forged or that the plaintiff's suit was fraudulent. It simply says:

"These facts and circumstances are indeed very suspicious. If there was really suppression of service of summons on the plaintiff in the said money suit this Court on the face of the aforesaid fact and circumstances must hold that the said suppression was deliberate and at the instance of the defendant with the object of enabling him to snatch a decree from the Court in the absence of the plaintiff."

Keeping this in view therefore the Court decided only in that case that:

"In such circumstances this is a fit case in which this Court must hold that plaintiff succeeded in establishing suppression of service on him. The said suppression of service, in view of the facts and circumstances, must be held to have been deliberate on the part of the defendant who did it with the object of getting a decree from the Court behind the back of the plaintiff."

The question, therefore, whether the hand-note on the basis of which the former suit was instituted was not decided in that case and has yet to be decided in the case in which the ex parte decree has been set aside by virtue of the subsequent suit no. 174 of 1923. The original suit is, therefore, revived and has been rightly restored by the Munsif to be disposed of in accordance with law.

The result is that the petitioner's application to this Court in Civil Revision no. 363 of 1929 must be dismissed with costs: hearing fee three gold mohurs.

WORT, J.—I agree.

KULWANT SAHAY, J.—I agree.

Rule discharged.