

that if the judgment-debtor would pay the decretal amount to the decree-holders by the 31st January, 1935, the sale would be set aside, but on his failure to do so, the sale would be confirmed. It is contended on behalf of the respondents that in arriving at this compromise, the father of the appellants acted as the karta of the family and represented the appellants and, therefore, the compromise would be binding upon the latter also. This is, however, a question of fact which it will be for the Subordinate Judge to investigate along with the other facts of the case.

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 FAZI,
 Ali, J.

In my opinion these appeals must be allowed. Costs of these appeals will abide the result of the application under Order XXI, rule 90. Hearing fee ten gold mohurs.

It is not necessary to pass any order on the stay application which becomes infructuous in view of the order passed.

The Court below is directed to expedite the hearing of the application under Order XXI, rule 90.

ROWLAND, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

Before Macpherson and James, JJ.

JANKI GOPE

v.

JANGBAHADUR CHAUDHURY.*

1935.
 January,
 31.

Res judicata—application under Order IX, rule 13, Code of Civil Procedure, 1908 (Act V of 1908)—finding as to service of summons whether operates as res judicata in a subsequent suit for setting aside the decree on the ground of fraudulent suppression of summons.

* Appeal from Original Order no. 124 of 1934, from an order of Babu K. N. Singh, Subordinate Judge of Muzaffarpur, dated the 3rd May, 1934, reversing the decision of Babu U. N. Singh, Munsif, 1st Court, Muzaffarpur, dated the 17th November, 1932.

1935.

JANKI
GOPE
v.
JANG-
BALADUR
CHAUDHURY.

The decision in a proceeding under Order IX, rule 13, Code of Civil Procedure, 1908, that the summons was duly served is *res judicata* and no further suit for setting aside the *ex parte* decree will lie on the ground that the summons had been fraudulently suppressed.

Jangal Chaudhury v. Lalgit Pasban (1), followed.

Mahanth Ramrup Ghoshain v. Mahabir Shah(2), distinguished.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Macpherson, J.

S. N. Dutt (for *S. K. Mitra*), for the appellants.

S. N. Roy and *B. N. Rai*, for the respondents.

MACPHERSON, J.—This appeal must be decreed with costs.

The appellants brought a suit against the respondent and obtained an *ex parte* decree. Thereupon the respondent applied under Order IX, rule 13, on the ground of fraudulent suppression of summons. The matter was gone into and it was found not only that the summons had not been suppressed fraudulently but had not been suppressed at all and it was duly served. This finding was upheld in appeal. The respondent then brought the suit out of which this second appeal has arisen. It was sought to set aside the *ex parte* decree on three grounds, (1) fraudulent suppression of the summons in the said suit, (2) the falsity of the claim in that suit, and (3) that the defendants got the plaintiff's appeal in the rehearing case dismissed by fraudulent misrepresentation. The learned Munsif who tried the suit held on the strength of the decisions of this Court in *Jangal Chaudhury v. Lalgit Pasban*(1) and *Mahanth Ramrup Ghoshain v. Mahabir Shah*(2) that the suit

(1) (1920) 1 Pat. L. T. 735.

(2) (1923) 5 Pat. L. T. 66.

was barred by *res judicata*. The second and third points he held were frivolous.

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PHERSON, J.

In appeal from his decision the Subordinate Judge of Muzaffarpur came to the conclusion that the suit was maintainable and set aside the decision of the Munsif and remanded the suit for a fresh trial on the merits. The defendants have, therefore, preferred this second appeal.

Mr. Dutt supports the appeal on the basis of the decision of *Jangal Chaudhury v. Lalgit Pasban*(¹). The only decision cited by the learned Advocate for the respondent is *Maharani Janki Kuer v. Babu Thakur Rai*(²). Now in *Jangal Chaudhury v. Lalgit Pasban*,(¹) a Letters Patent Appeal against the judgment of Das, J., it was decided that the decision in an application of Order IX, rule 13, that the summons was duly served is *res judicata* and no further suit will lie on the ground that the summons had been fraudulently suppressed. In the decision cited on behalf of the respondent, Das, J. expressed some measure of doubt in respect of the decision in *Jangal Chaudhury v. Lalgit Pasban*(¹) but he did not dissent from it. Sitting as his colleague it fell to me to point out that in the case before us it was not even necessary to rely on that decision since there was no evidence whatsoever on the record of the litigation as to the contents of the application of the plaintiff-respondent under Order IX, rule 13, and as an application under Order IX, rule 13, may be made on a ground other than non-service of summons, the contention of the appellant was completely covered by the decision of the Judicial Committee in *Radha Raman v. Pran Nath*(³). I also observed that, as then advised, I was not prepared to doubt the correctness of the decision in *Jangal Chaudhury v. Lalgit Pasban*(¹). I adhere to the view which I then

(1) (1920) 1 Pat. L. T. 795.

(2) (1923) 5 Pat. L. T. 66.

(3) (1901) I. L. R. 28 Cal. 475, P. C.

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expressed. In my opinion that decision is sound. Further it completely covers the point at issue in the present case. The question of service or non-service of summons was agitated between the parties in the proceedings under Order IX, rule 13, and it was held that the summons had been duly served. It is not open now to the respondent in the present case by regular suit to agitate the same point found against him. It must be taken in this suit that the summons was duly served upon the plaintiff-respondent and if it was duly served it was impossible that there could have been the fraudulent suppression of it which is the basis upon which he desires the ex parte decree against him to be set aside as fraudulent.

I would allow the appeal with costs in this court and in first appeal and restore the judgment of the first Court.

JAMES, J.—I agree.

Appeal allowed.

SPECIAL BENCH.

1935.

February,
4.

Before Wort, Khaja Mohamad Noor and Agarwala, JJ.

SURJA NARAIN, MUKHTEAR, *In re**

Legal Practitioners' Act, 1879 (Act XVIII of 1879), section 13—accused persons ordered to be released on bail—R's offer to stand surety rejected—Mukhtear standing surety—agreement of indemnity between R and mukhtear—amount deposited with the surety—mukhtear, whether guilty of professional misconduct—agreement, whether constitutes a public mischief—surety, obligations of.

Where certain persons were ordered to be released on bail and one R offered himself as surety for them but the Magistrate refused to accept him whereupon S, a mukhtear, stood surety but before standing surety the mukhtear had entered into an

* Civil Reference no. 3 of 1934, made by R. B. Beevor, Esq., I.C.S., Sessions Judge of Bhagalpore, by letter no. 1994/VII-9, dated the 28th of June, 1934.