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therefore be set aside. We observe that in his explanation the District Magistrate attempts to justify his order on the ground that the record of the case shows that there was an unlawful assembly and a danger of a breach of the peace. There may be evidence on this point, but that evidence has not been accepted by either of the Courts, and therefore there is no justification for an order under s. 106.

D. S.

PRIVY COUNCIL.

KHAGENDRA NATH MAHATA v. PRAN NATH ROY.

P. C.* 1902 *Feb.* 13. *March* 1.

[On appeal from the High Court at Fort William in Bengal.]

Decree, ex-parte—Sale in execution of ex-parte decree—Rejection of applications to set aside decree and sale in execution—Civil Procedure Code (Act XIV of 1882) ss. 108, 311—Subsequent suit to set aside decree and sale on ground of fraud—Omission to appeal from orders of rejection.

In a suit to set aside an *ex-parte* decree and a sale in execution of such decree as illegal, fraudulent, and collusive, the allegations made in the plaint were clearly an attack not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex-parte* decree was obtained as being a fraud from beginning to end:—

Held, the suit was maintainable notwithstanding that the plaintiff had been unsuccessful in applications under s. 108 and s. 311 respectively of the Civil Procedure Code to set aside the *ex-parte* decree and the sale in execution, and had not appealed from the orders rejecting such applications; the questions in the suit as a whole being such as could not have been determined on applications under those sections.

APPEAL from a decree (11th August 1897) of the High Court at Calcutta reversing a decree (4th September 1895) of the Subordinate Judge of Pabna by which the respondents' suit was dismissed.

The defendants Khagendra Nath Mahata and others appealed to His Majesty in Council.

This is one of two similar cases which have come on appeal before the Judicial Committee. The appeal in the former case has been reported as *Radha Raman Shaha* v. *Pran Nath Roy* (1).

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR ANDREW SCOBLE.

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The suit out of which the present appeal arose was brought, like the former suit, to set aside an *ex-parte* decree and a sale in execution of such decree as being fraudulent and void. It was brought against defendants, some of whom were the same defendants as in the former case, but in respect of different properties. There were five defendants—Shoshi Bhusan Mahata (represented on this appeal by two minors, Khagendra Nath and Monmotho Nath), Radha Raman Shaha, Kishen Lal Shaha, Panchanan Shaha, and Doorga Churn Chuckerbutty, and the allegations in the plaint were that the plaintiff was entitled to and in possession of certain immoveable property which the defendants Nos. 2, 3 and 4 (the Shaha defendants) had been for a long time trying by wrongful means to acquire for themselves; that they had induced defendant No. 1 to cause a suit (1730 of 1893) to be instituted against the plaintiff in the Court of the Second Munsif of Pabna for arrears of rent beyond what was actually due, and, having made a false return of service of summons, had fraudulently obtained an *ex-parte* decree against him; that in order to keep the plaintiff out of the way and prevent him from knowing what was going on, the Shaha defendants had induced his wife and his brother-in-law's widow to institute proceedings to have the plaintiff declared a lunatic, and by means of various threats caused him to leave his home and stay elsewhere in secrecy; that they and the other defendants executed the *ex-parte* decree concealing all the proceedings in connexion with the execution from the knowledge of the plaintiff, and not obeying the provisions of the law as to such proceedings; that they had caused false returns to be made of the processes necessary to obtain execution, and by such means illegally, collusively, and fraudulently caused the plaintiff's property to be sold for a low price and purchased by the Shaha defendants in the name of defendant No. 5, Doorga Churn Chuckrabutty. The plaintiff stated that he only became aware of these fraudulent acts after the sale had taken place. He claimed to have the decree and sale set aside, and possession of the property restored to him on the ground of fraud, dating his cause of action from 23rd June 1894 when the sale was confirmed.

The defendants denied any fraud or collusion, and stated that the summons in the suit (1730 of 1893) against the plaintiff had been duly served on him, and that he was fully cognizant of the suit and of the proceedings in execution of the decree which had been all taken and conducted in accordance with the provisions of the law. Their main ground of defence in law was that, "on the grounds stated in the plaint for setting aside the decree and the execution sale, the plaintiff previously filed petitions to set aside the *ex-parte* decree under s. 108, and to set aside the sale in execution of that decree under s. 311 of the Code of Civil Procedure; those petitions were rejected, and the plaintiff cannot again get any such relief on those grounds."

This last defence raised the only question on this appeal. The same question was raised in the former case of *Radha Raman Shaha* v. *Pran Nath Roy*, but in the record of that appeal there was nothing to show what took place before or was decided by the Court of the Munsif of Pabna on the rejection of the applications under ss. 108 and 311 of the Civil Procedure Code. In the present appeal, however, those judgments were on the record.

On the application under s. 108 the judgment of the Munsif stated that—

"The applicant seeks to have the decree set aside under s. 108, Civil Procedure Code, on the allegation that no summons was served in his house or within his knowledge in the suit in which the decree was passed. The application is opposed by the opposite parties. The application is not supported by affidavits, nor has the petitioner pledged his oath in support of the allegations made by him in his application."

Then, after reviewing the evidence as to the service of summons, the Munsif says—

"The peons who served the summons depose that they knew the applicant and his house, and that they served the summons by affixing copy of the same and the plaint in the house of the applicant, as he could not be found in person, and as no other person upon whom his summons could be lawfully served was present. The peon, Kanai Sheik, deposes that he served summons in the petitioner's house in presence of Brojo Nundi. Considering the circumstances of this case, I see no reason to disbelieve the depositions of the serving peons examined by the opposite party."

There was no allegation of fraud made on the application, and the Munsif held that the summons had been duly served, and dismissed the application.

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On the application under s. 311 to set aside the sale in execution, the petition alleged fraud in not issuing attachments and publishing sale proclamations whereby the petitioner (the plaintiff) was not aware of the sales, and also material irregularities by means of which he suffered substantial injury. The Munsif found that the attachments and proclamations had been duly issued, and that the petitioner was perfectly aware of the intended sale. He also found that the property had been sold for an adequate price, and that there was no evidence to show that any substantial injury had been caused to the petitioner by any irregularities in the execution proceedings. For these reasons he rejected the petition.

On 4th September 1895 the Subordinate Judge held that the dismissal of the petition under s. 108 was fatal to the maintenance of the plaintiff's suit, and made a decree dismissing it.

The plaintiff appealed to the High Court, and on 11th August 1897, a Division Bench (MACPHERSON and WILKINS JJ.) of that Court gave judgment as follows:—

"This is an appeal from a decree on a judgment which was the subject of consideration in appeal from original decree No. 354 of 1895, *Prannath Roy* v. *Mohesh Chandra Moitra* (1). We see no reason to come to any conclusion different from the conclusion arrived at in that case, and the judgment in that case will be taken as our judgment in this case. The result is that the decree of the Subordinate Judge will be set aside and the case remanded under s. 562, Civil Procedure Code, for trial."

Mayne for the appellant. The plaintiff having been unsuccessful in getting the decree set aside under s. 108 had his remedy by an appeal from the order rejecting his application. Not having resorted to that remedy, he is precluded from bringing a suit now to set aside the decree. *Raj Kishen Mookerjee* v. *Madhoo Soodun Mundul* (2), *Punye Chunder Sircar* v. *Hur Chunder Chowdhry* (3). The case of *Abdul Mazumdar* v. *Mahomed Gazi Chowdhry* (4) is distinguishable, as in that case no application was made under s. 108 to set the decree aside. The plaintiff made no allegation of fraud in his application under s. 108. The

(1) (1897) I. L. R. 24 Calc. 546.
(2) (1872) 17 W. R. 413.
(3) (1884) I. L. R. 10 Calc. 496.
(4) (1894) I. L. R. 21 Calc. 605.

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additional evidence on the record supplied by the decisions of the Munsif in dismissing the plaintiff's applications shows that there is no foundation for the allegation of fraud on which his suit is based. All the applications now set up as establishing fraud were asserted and negatived in the proceedings in the suit No. 1730 of 1893.

The respondents did not appear.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. The suit out of which this appeal arises was brought by the respondent "for setting aside a decree and auction sale, on finding them to be illegal, fraudulent, and collusive." The defence, in support of which the appeal is brought, is that the action cannot be maintained because the respondent applied under ss. 108 and 311 respectively of the Civil Procedure Code to have the decree and sale set aside; his application was refused, and he did not appeal against the refusal. It is therefore necessary to ascertain what are the true grounds and scope of the present suit, in order to see whether the refusal of the applications under the sections specified has already determined the questions now raised.

The respondent avers in his plaint that he inherited certain properties from his mother and is now the true proprietor of these; but that those of the appellants whose name is Shaha had long coveted those possessions and formed a design to acquire them; that they procured a person now represented by the minor appellants to institute a groundless suit for monies which were not due; that, in order to get the respondent out of the way, they, by a collusive suit, got him declared a lunatic and by threats forced him to leave his home and stay elsewhere in secrecy; that they concealed the money suit, got a false return of service, and carried through the decree and sale of the properties behind the back of the respondent. These allegations are plainly an attack, not on the regularity or sufficiency of the service or the proceedings, but on the whole suit as a fraud from beginning to end.

It seems to their Lordships, now that the matter is fully before them, as it did on less complete information to the Board which

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had previous cognisance of the question, as raised in an appeal of *Radha Raman Shaha* v. *Pran Nath Roy* (1) on identically the same ground, that this is a case generically different from any which was or indeed could be determined under ss. 108 and 311 of the Civil Procedure Code. Those sections limit the attention of the tribunal to specific matters, and, instead of subjecting to enquiry the radical question now involved, they assume the existence of a real suit. 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 ss. 108 and 311, are here treated as parts and *indicia* of a whole.

As the matter must go for trial and the investigation of the facts, their Lordships do not think it well further to discuss the bearing of those facts as now alleged. They will humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitor for the appellants: *W. W. Box.*

J. V. W.

(1) (1901) I. L. R. 28 Calc. 475.

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Geidt.

1902
May 1.

RATAN MAHANTI
v.
KHATOO SAHOO.*

Jurisdiction—Foreign Court—Decree, execution of—Civil Procedure Code (Act XIV of 1882) ss. 223, 224, 229 (A) and 229 (B)—British Courts in India, power of, to send their decrees for execution to Foreign Courts.

The Tributary Mahals of Orissa do not form part of British India; therefore, in the absence of a prior notification in the *India Gazette* as specified in ss. 229 (A) and 229 (B) of the Civil Procedure Code, no decree by a Court in British India can

* Civil Rule No. 500 of 1902.