"the procedure laid down in the Code of Civil Procedure for the trial of suits." Hence we do not think it can have the effect of *res judicata*.

The appellants' objection that the previous order is not between the same parties, as the present suit is founded on the fact that in the previous order the name of the landlord is recorded as Sultan Ali, while in the present suit the names of the landlords are Karbanali and Sultan Ali, that is to say, there is an additional landlord in the present suit. It may be, however, that Karban Ali was a party to the case under s. 105, though his name does not appear in the form in which the Revenue Officer has recorded his order. We could not decide this question without having the whole record of the s. 105 case before us. We, therefore, do not rest our decision on this ground.

For these reasons we consider that the Judge is wrong in holding that the present suit is barred by *res judicata*.

We accordingly set aside his decree, and remand the case to him to be disposed of on the merits. Costs to abide the result.

C. B. *Case remanded.*

PRIVY COUNCIL.

RADHA RAMAN SHAHA AND OTHERS (DEFENDANTS) *v.* PRAN NATH ROY AND OTHERS (PLAINTIFFS).

P. C.* 1901. May 2.

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

Suit, right of—Decree ex parte—Execution sale—Fraud—Civil Procedure Code (Act X of 1882), s. 108—Effect of order rejecting previous application to set aside the decree, where the plaintiff had not appealed from such order.

The defendants sued the plaintiff for arrears of rent, and obtained an *ex parte* decree, in execution of which they attached and sold land of the

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD ROBERTSON, SIR RICHARD COUCH and SIR FORD NORTH.

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plaintiff. The plaintiff applied under s. 108 of the Civil Procedure Code to set aside the decree. His application was rejected, but he did not appeal from this order.

The plaintiff then sued to set aside the decree and the sale in execution on the ground that he had no interest in the land, in respect of which the arrears of rent were alleged to be due, and the decree and sale had been obtained by false returns of summons and of processes in execution, and were fraudulent and void. The defendant objected that the plaintiff, having applied under s. 108 without success and not having appealed from the order rejecting his application, had no right of suit in the Civil Court.

Held, that the suit was maintainable.

APPEAL from a judgment and decree of the High Court of Calcutta (2nd April 1897), reversing a decree of the Subordinate Judge of Pubna (9th September 1895).

This appeal arose out of a suit brought by the present respondent, Pran Nath Roy, against seven defendants, Mohesh Chunder Moitra, Lalan Chunder Moitra, Radha Roman Shaha, Kishori Lal Shaha, Punchanan Shaha, an infant represented by his guardian Rajeshwari Dasi, Nobodwip Chunder Pal, and Ram Krishna Sircar, to set aside an *ex parte* decree and a sale in execution thereof, as being fraudulent and void.

The plaint alleged that the defendants Nos. 3, 4, and 5, Radha Raman Shaha, Kishori Lal Shaha, and Punchanan Shaha, three of the present appellants, fraudulently induced defendants Nos. 1 and 2, Mohesh Chunder Moitra and Lalan Chunder Moitra, who were stated to be landlords of defendant No. 7, Ram Krishna Sircar, to bring a suit, 1714 of 1893, against the plaintiff, and Ram Krishna Sircar for the rent of a village, of which Ram Krishna was their real tenant, and in which the plaintiff stated that he had no interest or concern whatever; that they carried on the suit without his knowledge and eventually obtained an *ex parte* decree against the plaintiff alone, in execution of which a village Dogachi belonging to the plaintiff was sold to defendant No. 6, Nobadwip Chunder Pal, the agent of the defendants 3, 4 and 5, for an inadequate price. The plaintiff stated that he had never been served with a summons, nor with any of the processes necessary for the execution of the decree, and that Ram Krishna was not a benamidar of his. The fraud alleged consisted in making

false returns of service of summons of the processes in execution of the decree, and in not giving a proper description and valuation of the property sold, in consequence of which a low price only was obtained for it. The plaintiff prayed that the *ex parte* decree, and the sale in execution thereof should be set aside as being fraudulent and void.

The defendants in their written statement denied all the allegations in the plaint as to there having been any fraud and collusion, and stated that all the proceedings in the suit, and in execution of the decree had been properly and duly taken, and that the plaintiff was cognizant of such proceedings. They also alleged that the plaintiff had the beneficial interest in and possession of the property, in execution of the decree for arrears of rent of which it was sold, and the decree was, therefore, properly passed against him.

The defendants also took the objection that the suit was not maintainable under ss. 13 and 244 of the Civil Procedure Code, because the plaintiff had already, on the grounds for setting aside the decree and sale stated in the plaint, applied to set aside the decree under s. 108 of the Code, and to set aside the sale in execution of the decree under s. 311, and these applications had been rejected and the plaintiff had not appealed, as he might have done, from the orders rejecting them. They therefore submitted that the plaintiff could not now get any such relief as he prayed for by a suit in the Civil Court.

The fact of the plaintiff having made such applications, and their having been rejected, were not disputed, but there was nothing on the present appeal to show what was brought before the Court on those occasions, nor what was the ground of rejection.

The Subordinate Judge on 9th September 1895 summarily dismissed the suit, as not being maintainable in consequence of the proceedings taken under s. 108 of the Code.

The plaintiff appealed and a Division Bench of the High Court (MACPHERSON and AMEER ALI, JJ.) on 2nd April 1897,

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reversed the order of the Subordinate Judge, and held that the suit would lie (1).

From that decision the defendants 3, 4, 5 and 6 appealed to His Majesty in Council.

1901, MAY 2. Mr. *J. D. Mayne* for the appellants.—The plaintiff, having adopted the procedure provided by s. 108 of the Civil Procedure Code, and having been unsuccessful, and not having appealed, as he might have done, from the order rejecting his application, had exhausted his remedies, and could not now bring a suit to set aside the decree, simply on the allegation that it was a fraudulent decree. The fraud necessary for such a suit must in any case be a fraud upon the Court itself and no such fraud is made out here. No doubt a Court has power to set aside a decree when fraud in the Court itself is shown, as in the case of *Abdul Mazumdar* v. *Mohomed Gazi Chowdhry* (2), which is distinguishable from the present case on that ground, and because in that case no previous attempt had been made to set aside the decree under s. 108.

The respondents did not appear.

1901, MAY 2. Their Lordship's judgment was delivered by

LORD HOBHOUSE.—Their Lordships are all agreed that the preliminary objection cannot be sustained, and that the High Court were right in overruling it. We have nothing before us, but the bare fact that the plaintiff endeavoured to get an *ex parte* decree set aside under s. 108 of the Code of Civil Procedure, under which the Court may try whether the summons was served or whether the plaintiff was prevented by any sufficient cause from appearing. We are not told what went on before the Court upon that occasion, and it is impossible to say that the matter now alleged as fraudulent matter came in any way before the Court under the application which was made by virtue of s. 108.

(1) (1897) I. L. R. 24 Calc. 546.
(2) (1894) I. L. R. 21 Calc. 605.

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It seems to their Lordships that the High Court have taken an entirely right view of the matter, and they will humbly advise His Majesty that the appeal ought to be dismissed. No respondent having put in an appearance, there will be no costs.

Appeal dismissed.

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

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

IN THE MATTER OF RUDRA NARAIN ROY.

1901 *June 7.*

Board of Examiners for pleadership and mukhtearship—Candidate—Examination.

When a candidate applies to the Board of Examiners for pleadership and mukhtearship to be allowed to present himself for examination, stating that he has complied with the rules and regulations entitling him to enter for such examination, the Board of Examiners for the time being should enquire into each individual case and form its own opinion as to the fitness of such applicant, even though such applicant may have been rejected as an improper person on a previous application to the Board in some past year when composed of different members.

THIS was a matter, in which a rule had been obtained on the 22nd of February 1901 under s. 45 of the Specific Relief Act (1 of 1877), calling on the Board of Examiners for Pleadership and Mukhtearship to shew cause, why Rudra Narain Roy should not be allowed to appear at the next examination for mukhtears and pleaders, he having fulfilled the conditions necessary under the law qualifying him to appear at such examination.

Mr. *O'Kinealy* (on behalf of the Board of Examiners) shewed cause—The form of the rule may be taken objection to, as it states that Rudra Narain Roy had fulfilled the conditions necessary under the law—this cannot be true of a man like Rudra Narain Roy, who has been guilty of personation at the Calcutta University. [Mr. *Sinha*—He was acquitted of that.] He was discharged for want of proof of identity, and that does not shew that he was faultless. The Court has no jurisdiction to revise or set aside the proceedings of the Board arrived