

Privy Council Appeal No. 114 of 1913.

Allahabad Appeal No. 24 of 1911.

Rajwant Prasad Pande and others - - *Appellants.*

v.

Mahant Ram Ratan Gir and others - - *Respondents.*

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN
PROVINCES, ALLAHABAD.**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH JUNE 1915.

Present at the Hearing.

LORD SHAW.

SIR JOHN EDGE.

SIR GEORGE FARWELL.

MR. AMEER ALI.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree of the 23rd February 1911, of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree dated the 17th August 1909 of the Court of the Additional Subordinate Judge of Gorakhpur. The court of first instance allowed the plaintiffs' claim. On appeal the claim was dismissed.

The object of the present suit is, by its terms, declared to be three-fold. But upon examination the substantial and only object is for a declaration in favour of the plaintiffs against the defendants to the effect that the plaintiffs are no party to a certain order which was passed *ex facie* against them on the 22nd September 1902. Further declarations

are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a court of competent jurisdiction on the 22nd September 1902, and bearing to apply to the present appellants, does not in fact apply to them.

The circumstances of the case are these. In 1884 Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor in title of the respondents. He had two sons, Rajwant Prasad and Bhagwant Prasad. In 1897 a suit for sale under the mortgage, and directed against, *inter alios*, these three persons, was instituted. It was heard *ex parte*, and on 30th April 1897 a decree was made allowing the plaintiffs' claim. An order absolute was made on the 22nd September 1900.

In 1901, however (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant challenges made in the course of these litigations), Bhagwant and his two sons obtained an order under section 108 of the Code of Civil Procedure, 1882, to have the decree of the 30th April 1897 set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all of the joint family, but that one member thereof had been properly served with the suit and another had not. A certain embarrassment arose in consequence, and these proceedings, so protracted, ensued.

So far as Rajwant, the present appellant, was concerned, the original suit was found to have been properly initiated, and the summons properly served. The courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application, Rajwant had no right of compearing. Their Lordships are of opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

On the 22nd September 1902 the Subordinate Judge delivered judgment, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April 1897, he granted a complete decree to the respondents in this appeal, against all the members of the joint family. The situation that thus arose was that in September 1902 a decree was comprehensively directed against all the joint family of which Rajwant, the appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on the 23rd June 1903, namely, after the second and comprehensive decree had been obtained, an application was actually made for execution of the decree—not the second and comprehensive one of 1902—but the original decree of 1897.

Their Lordships think it right to record that in that application this statement was made :—

“In the beginning the name of Bhagwant Parshad also is entered as a defendant, but on his application this decree was set aside against him, and consequently his name was not entered in the column of judgment debtors. Another decree has been passed as against him. It will be executed separately.”

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to make the decree of September 1902 absolute as against all the members of the joint family, the appellants took steps to have the situation cleared up. Accordingly, on the 7th July 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate Judge on the 3rd November 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgments of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on the 3rd November 1906 the objectors, the present appellants, appealed to the High Court, and did so upon the same arguments as they now propound in support of the present appeal to this Board. The grounds of judgment of the High Court make it clear beyond all question that the very points which are now urged were points then taken. The objections were disallowed.

It is contended before their Lordships, however, that this matter cannot be dealt with as

res judicata; that it is open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated *seriatim*. The objections that are now taken are, first, that the decree of 1897 has never been set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was *res judicata*, and, therefore, they are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money, larger than the sum of money contained in the former. The answer is that the interest accounts for the difference, and, secondly, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgment of the court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgment now given no affirmance is given of the doctrine or application in the High Court of merger, either in a general sense or in the sense of a *cox signata*. The decree of

the 26th February 1908 sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the court; it had jurisdiction to entertain them.

It is said that the court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of this case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgment of Lord Hobhouse in *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa and another* (27 I.A., 216) is not a very remote example. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still, upon a new application to Courts of Justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordships' judgment, is equivalent to a suit for the rescission and destruction of a former decree of a competent court. That rescission and destruction could be obtained on the ground of fraud "practised

“ on the courts below ”; but fraud has been eliminated from this case. And accordingly these proceedings are, in their Lordships’ judgment, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

RAJWANT PRASAD PANDE AND
OTHERS

v.

MAHANT RAM RATAN GIR AND
OTHERS.

DELIVERED BY LORD SHAW.

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