
(1940) 05 CAL CK 0032
In the Calcutta High Court

Durgagati Banerjee and Others

APPELLANT

Vs

Taharulla Mia and Others

RESPONDENT

Date of Decision : 22-05-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : AIR 1941 Cal 215

Hon'ble Judges : Edgley, J

Bench : Division Bench

Judgement

Edgley, J.—In the suit out of which this appeal arises the plaintiff Taharulla Mia, sought to set aside an ex parte rent decree which was obtained against him by the defendants on 22nd December 1935. This decree was put into execution and some property belonging to Taharulla and some of the other defendants was sold at an execution sale which was held on 20th May 1936. The other defendants in the rent suit applied to set aside the sale and the plaintiff, who was defendant 9 in the rent suit was made a party to these proceedings. The application appears to have been made on the usual ground of material irregularity and fraud in publishing and conducting the sale and also on the allegation that the execution case was not maintainable. The sale was set aside by the first Court on 21st December 1936, but this decision was reversed on appeal on 15th May 1937, and the sale was confirmed on 29th June 1937. There-after, on 18th March 1938, a writ for delivery of possession was issued in favour of the decree-holders and, on 23rd March 1938, Taharulla Mia, defendant 9 in the rent suit, instituted the suit out of which this appeal arises. The plaintiff's case was to the effect that the claim against him in rent suit No. 2426 of 1935 was false as it suppressed the material fact that there was no privity of contract between himself and the defendants. He further maintained that the summonses were suppressed in the rent suit and the resultant ex parte decree was fraudulent by reason of the said false claim and the alleged fraudulent suppression of the processes. He also alleged that the processes were suppressed when the decree was put into execution and the Court was asked to set aside the decree obtained in rent suit

No. 2426 of 1935 and the subsequent proceedings in Execution Case No. 247 of 1936. Beyond the vague statements mentioned above with regard to the alleged falsity of the claim, and the allegations with regard to the supposed fraudulent suppression of the processes the plaintiff did not set out any detail with regard to the nature of the alleged fraud.

2. The case for the defence was to the effect that the claim was true, that the requisite processes were served both in the rent suit and in the execution proceedings and that the plaintiff in fact appeared through a pleader in the suit and took time to file his defence. In the first Court only one witness was examined on behalf of the plaintiff and that witness, beyond making a general statement to the effect that the plaintiff had not been served with summons in connexion with the rent suit and that no process relating to the sale had been served, made no attempt to prove that these processes had been fraudulently suppressed. Evidence in rebuttal was given on behalf of the defendants and the first Court held that it had been established as a fact that the plaintiff had been duly served with the summons in the rent suit and that he actually appeared in that suit and took an adjournment. On this finding, the learned Munsif further held that the question of the bona fides of the claim did not arise and that the plaintiff was not entitled to have the decree against him set aside on the ground that it was fraudulent.

3. The learned advocate for the respondents criticises the judgment of the learned Munsif on the ground that it does not contain a further finding with regard to the alleged fraudulent suppression of the processes in the execution proceedings. Having regard, however, to the vague nature of the evidence which was given on this point in the first Court it would not appear that this was a matter upon which the plaintiff placed much, if any, reliance. The onus lay on him to show that there had been fraudulent suppression of the processes not only in the suit but in the execution proceedings. As regards the suit, it was clear that the processes could not have been fraudulently suppressed in view of the fact that the plaintiff actually appeared by pleader at the hearing of the suit and, as regards the execution processes, apart altogether from the fact that it had been decided in a previous proceeding in which the plaintiff was a party that the sale could not be set aside on account of any material irregularity or fraud in connexion with the publishing of the sale, the plaintiff led no evidence in the suit, from which fraud could possibly be inferred. It is, therefore, clear that the plaintiff failed to establish any fraudulent suppression of the processes either in the suit or in connexion with the subsequent execution proceedings.

4. At the appellate stage neither in the grounds of appeal nor in the argument before the lower appellate Court was any point taken with regard to the correctness of the finding to the effect that the summonses in the suit had been duly served or with reference to the absence of any finding in the judgment of the trial Court as regards the suppression of the processes in the execution proceedings. At that stage the only point urged was that the learned Munsif

should have considered whether or not there was any cause of action in respect of the claim in the rent suit. In other words, the contention seems to have been that the learned Munsif should have considered the question whether the Court was misled into granting an ex parte decree by reason of the falsity of the claim put forward by the plaintiff in the rent suit and that, if such claim was found to be false, the plaintiff in the subsequent suit would be entitled to have the resultant decree set aside even on the assumption that he had been duly served with a summons in the suit. The above contention was accepted by the learned District Judge on the authority of a decision of this Court in *Lakhmi Charan v. Nur Ali* ("11) 15 CWN 1010, and he consequently remanded the case to the Court of the learned Munsif for reconsideration.

5. In second appeal, it is contended that the remand order was wrong and that the correct view of the law had been adopted in the trial Court. On behalf of the respondents, on the other hand, it is contended that the fact that the claim in the rent suit against Taharulla Mia, defendant 9 in that suit, was groundless, was one of the main elements which should have been taken into consideration in deciding whether the ex parte rent decree obtained against him should be set aside as fraudulent and this point would require consideration irrespective of any finding to the effect that the requisite processes on Taharulla Mia had been duly served. During the course of the arguments, I have been referred to numerous authorities which require some detailed examination as this case raises for consideration the general question of the grounds upon which a person is entitled to have a decree against him set aside on the ground that it had been fraudulently obtained. The main decision upon which the appellants rely is the case in *Mahomed Golab v. Mahomed Sulliman* ("94) 21 Cal 612, in which Sir Comer Petheram C. J., laid down two broad principles which should be held to govern cases in which a plaintiff seeks to set aside a decree on the ground that it was obtained by fraud. In the first place, the learned Chief Justice pointed out that:

It is an elementary principle that a person who charges another with fraud must himself prove the fraud, and it is very certain that the plaintiff is not relieved from this obligation because the defendant has told an untrue story.

6. The second principle was to the effect that:

Where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed

7. It appears to have been the view of the learned Chief Justice that, if the plaintiff failed to establish either of these points, he would not be entitled to have the decree against him set aside on the ground that it had been obtained by

fraud. The views which the learned Chief Justice expressed in *Mahomed Golab v. Mahomed Sulliman* ('94) 21 Cal 612 were based on a consideration of the general principles governing the law with regard to this matter which had been laid in *Patch v. Ward* (1868) 3 Ch A 203 and *Flower v. Lloyd* (1879) 10 Ch D 327. In the first of the abovementioned cases Lord Cairns L. J., after referring to the principles laid down in *Duchess of Kingston's Case* (1776) 2 Sm LC 593, stated that:

The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him.

8. His Lordship went on to say:

I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled.

9. In a concurring judgment Sir John Rolt L. J. said:

I think, for the reasons which have been given by my learned brother, that the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance.

10. As regards the case in *Flower v. Lloyd* (1879) 10 Ch D 327 the learned Chief Justice relied upon certain observations made by James L. J., in which Thesiger L. J., concurred. This case related to a suit which had been instituted by the plaintiff for a declaration to the effect that the judgment in a former suit between the same parties had been obtained by fraud and for relief consequent on that declaration. The Court of appeal held that no fraud had been proved and they therefore dismissed the suit, but in this connexion, James L. J. observed that

Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable 1 That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had

sustained on this appeal the judgment in their favour, the present defendants in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum...Perjuries, falsehoods, frauds when detected must be punished and punished severely : but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds.

11. The learned advocate for the respondents points out that, having regard to the nature of the decision in *Flower v. Lloyd* (1879) 10 Ch D 327 the observations of James L. J., must be regarded as obiter and that, if these observations be taken to imply that in no circumstances can a question be reopened in a subsequent suit brought to set aside a decree on account of fraud, which the parties had an opportunity to contest in the original suit, a different view was adopted in two subsequent English cases, namely the cases in *Abouloff v. Oppenheimer* (1883) 10 QBD 295 and *Vadala v. Lawes* (1890) 25 QBD 310. It may perhaps seem strange that no reference was made to these two cases in the judgment of the learned Chief Justice in *Mahomed Golab v. Mahomed Sulliman* ('94) 21 Cal 612, but it must be remembered that both of them relate to suits brought for the purpose of enforcing foreign judgments and that special considerations apply as regards such judgments, the most important of which are recognized in the law of India in Section 13, Civil P. C. Further reference will be made in due course to the cases in *Abouloff v. Oppenheimer* (1883) 10 QBD 295 and *Vadala v. Lawes* (1890) 25 QB 310, but at this stage it may be mentioned that, although the observations of Sir Comer Petharam C. J. in *Mahomed Golab v. Mahomed Sulliman* ('94) 21 Cal 612 were obiter dicta, they were accepted in a later decision of this Court in *Abdul Huq Chowdhury v. Abdul Hafez* ('10) 14 CWN 695, as enunciating correct legal principles on this point.

12. The learned advocate for the respondents relies on the decision of the Judicial Committee of the Privy Council in *Khagendra Nath v. Pran Nath* ('02) 29 Cal 395, in support of his contention that, in spite of the service of the requisite processes, it was open to the plaintiff to show that the decree was fraudulent by reason of the fact that there was no cause of action in the suit in which the decree had been obtained. In the case cited, apart from certain allegations of fraud connected with the service of the summonses, the plaint contained a number of other allegations of fraud which, if proved, might have shown that the plaintiff had been prevented from placing his case before the Court. For example, it seems to have been alleged that, in order to keep him out of the way, fraudulent proceedings had been taken to have the plaintiff declared a lunatic and to make him stay away from his home. It appears that proceedings had been taken to have the ex parte decree set aside on the ground of irregularity in the service of the processes, but the plaintiff's allegations to this effect had been rejected. The Judicial Committee pointed out however that the allegations in the

plaint 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.

13. This decision is certainly no authority for the proposition that, if in fact it had been possible for the plaintiff to place his case before the Court in the original suit he would have been at liberty in a subsequent suit to impugn the decree on allegations to the effect that the decree was of a fraudulent character. In *Lakhmi Charan v. Nur Ali* ("11) 15 CWN 1010, D. Chatterjee J. dissented from the views expressed by the learned Judges in *Mahomed Golab v. Mahomed Sulliman* ("94) 21 Cal 612 and *Abdul Huq Chowdhury v. Abdul Hafez* ("10) 14 CWN 695 and, after reviewing these cases and certain English authorities on the subject he held that:

It is quite clear from the eases quoted above that the jurisdiction of the Court trying a suit of this kind is not limited to an investigation merely as to whether the plaintiff was prevented from placing his case at the prior trial by the fraud of the defendant. The Court can and must rip up the whole matter for determining whether there has been fraud in the procurement of the decree.

14. This decision was followed in a later case by Fletcher and N. R. Chatterjea JJ., in *Kedar Nath v. Hemanta Kumari* ("15) 2 AIR 1915 Cal 69, and was cited with approval by N. R. Chatterjea J., in *Manindra Nath v. Hari Mondal* ("20) 7 AIR 1920 Cal 126. In view of the fact that the plaintiff in *Lakhmi Charan v. Nur Ali* ("11) 15 CWN 1010 was unable to attend the Court owing to illness at the time when the suit in the Akyab Court came on for hearing, it is difficult to understand why he did not apply to have the ex parte decree set aside u/s 108, Civil P. C., which corresponded to Order 9, Rule 13 of the present Code, or obtain its reversal by way of appeal. On the facts which appear in the report all the points on which the plaintiff relied in the subsequent suit to set aside the ex parte decree were matters which he ought to have made grounds of defence in the original suit and, in my view, the ordinary doctrine of res judicata would appear to have been applicable according to the law of India. The leading English case upon which Chatterjee J., relied, namely the case in *Abouloff v. Oppenheimer* (1883) 10 QBD 295, related to a case in which the plaintiff sued to recover the value of goods on the basis of a judgment obtained in a Russian Court. The defence raised was to the effect that the foreign Court had been misled by fraudulent concealment of certain facts by the plaintiff. It was assumed that the defence of fraud was actually taken in the Russian Court and that evidence was given in support of the charge, but even on this assumption it was held that

whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the Courts of this country; and further, that nothing ought to persuade an English Court to enforce a judgment against one party which has been obtained by the fraud of the other party to the suit in the foreign Court.

15. It is true that the judgments of the learned Judges who decided *Abouloff v.*

Oppenheimer (1883) 10 QBD 295 in the Court of appeal contained observations which indicated that they would be prepared to accept without any limitation the doctrine which they propounded, even in the case of a judgment which had been fraudulently obtained in an English Court and, with regard to the observations of James L. J. in *Flower v. Lloyd* (1879) 10 Ch D 327 Brett L. J. remarked:

If it is to be taken that the doubts of James and Thesiger L. JJ, related to a fraud of a party to the action, committed before the Court itself for the purpose of deceiving the Court, I cannot after having heard the present argument, agree with the doubts expressed by them.

16. The fact remains, however, that the actual decision in *Abouloff v. Oppenheimer* (1883) 10 QBD 295 would merely have the effect of establishing the proposition in the case of foreign judgments only that such a judgment obtained by the fraud of a party to the suit in a foreign Court cannot afterwards be enforced by him in an action brought in an English Court, even although the question whether the fraud which had been perpetrated was investigated in the foreign Court and it was there decided that the fraud had not been committed. The same principle was followed by the Court of appeal in *Vadala v. Lawes* (1890) 25 QBD 310, in which the defence was raised that a judgment of the Italian Courts had been obtained by fraud. In deciding the latter case their Lordships held that the decision in *Abouloff v. Oppenheimer* (1883) 10 QBD 295 had the effect of establishing the principle that, if it is alleged that a foreign judgment had been obtained fraudulently, and,

if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can reopen the whole case, even although you will have in this Court to go into the very facts which were investigated and which were in issue in the foreign Court.

17. Lindley L. J. concludes his judgment with the following observations:

Therefore it is competent in point of law for the defendant in this action to raise this defence, and to satisfy the jury, if he can, that the Italian Court was misled by the fraud of the plaintiff, that fraud consisting in this, that the plaintiff knowingly placed before the Italian Court bills of exchange which he alleged to be commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions. And if the jury were to find in fact, not only that the bills were for gambling transactions, but, further, that the Italian Court has been imposed on by the fraud, that is a good defence according to the case in *Abouloff v. Oppenheimer* (1883) 10 QBD 295.

18. The principles laid down by the Court of appeal in *Abouloff v. Oppenheimer* (1883) 10 QBD 295 and *Vadala v. Lawes* (1890) 25 QBD 310, if carried to their logical conclusion and applied to domestic as well as foreign judgments, would involve the acceptance of the proposition that a decree obtained on perjured evidence could be set aside in a subsequent suit. This aspect of the matter is clearly brought out in the passage in the judgment of Lindley L. J. in *Vadala v.*

Lawes (1890) 25 QBD 310 in which he discussed the effect of the decision in *Abouloff v. Oppenheimer* (1883) 10 QBD 295 where he says:

The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false. That was the whole fraud.

19. This view was actually adopted by the Madras High Court on the basis of the abovementioned two cases in *Venkatappa Naick v. Subba Naick* ("06) 29 Mad 179. This proposition has however been negated in the case of domestic judgments not only by the English Courts but also by a series of decisions of this Court. Such a case was that of *Baker v. Wadsworth* (1898) 67 LJQB 301, which was decided some years after *Vadala v. Lawes* (1890) 25 QBD 310. In that case the plaintiff sought to set aside a judgment on the ground that the verdict had been obtained by falsely and fraudulently committing perjury. The learned Judges decided against the plaintiff on the basis of the opinions expressed by James and Thesiger, L. JJ. in *Flower v. Lloyd* (1879) 10 Ch D 327. Darling J. however pointed out that James and Thesiger, L. JJ. did not say that there might not possibly be cases in which the Court would allow an action to be brought to set aside a judgment obtained by fraud in a former action. As pointed out by Sir Comer Petheram C. J. in *Mahomed Golab v. Mahomed Sulliman* ("94) 21 Cal 612 perjury is the worst kind of fraud as fraud of this nature is committed deliberately, but, in this connexion, the learned Chief Justice observed that:

I am not aware that it has ever been suggested in any decided case and in my opinion it is not the law, that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other party, which is of course fraud of the worst kind, that he can obtain a rehearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given.

Most of the recent decisions of this Court on this point have adopted the views expressed by the learned Chief Justice in *Mahomed Golab v. Mahomed Sulliman* ("94) 21 Cal 612 and the view that a suit cannot be brought to have a decree set aside merely on the ground that it was obtained by perjured evidence appears now to be well settled : *Abdul Huq Chowdhury v. Abdul Hafez* ("10) 14 CWN 695, *Mosuful Huq v. Surendra Nath Roy* ("12) 16 CWN 1002, *Manindra Nath v. Hari Mondal* ("20) 7 AIR 1920 Cal 126 *Hamida Rahaman and Another Vs. Jamila Khatun and Another*, and *Muktamala Dasi Vs. Ram Chandra De and Others*, . As regards the more recent English cases in which it was sought to rescind a final and valid judgment on the ground of fraud, although it is of course recognized that in suitable cases an action for this purpose would lie, the Courts appear to have adopted the principle that they would not set aside a judgment on this ground unless there had been a discovery of fresh materials which the plaintiff had been unable to place before the original Court. On this point the

observations of Lord Selborne in *Boswell v. Coaks* (1894) 6 R 167 are instructive. In that case an action had been taken to have it declared that a judgment given by the House of Lords was obtained by the fraud of the respondent. His Lordship observed that:

It seems to me that in every case of this kind, if a motion to stay an action is so made; the Court ought to receive such evidence pros and cons as is material to the question whether there has really been, since the former judgment, a new discovery of something material in this sense, that prima facie it would be a reason for setting the judgment aside if it were established by proof.

20. The same principle was adopted by the Court of appeal in the case in *Birch v. Birch* (1902) 1902 PD 130, in which it was held that, in order to maintain an action to set aside, on the ground of fraud, a judgment establishing a will, the plaintiff must adduce evidence of facts discovered since the judgment which raise a reasonable probability of the success of the action. Vaughan Williams L. J. observed that:

I think that the Court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the former judgment which raise a reasonable probability of the action succeeding.

21. Cozens-Hardy L.J. was of the same opinion. His Lordship held that an action might be maintained when a judgment had been procured by the fraud of a party to the action, but he cited with approval the observations of Lord Selborne in *Boswell v. Coaks* (1894) 6 R 167 and observed that a mere general allegations of fraud without particulars cannot avail. He went on to say that:

It would be highly dangerous to allow a solemn judgment to be set aside on the ground of alleged perjury by witnesses dealing with a collateral point, more especially when the alleged perjury is absolutely and with considerable appearance of probability denied.

22. In *Mosuful Huq v. Surendra Nath Roy* ("12) 16 CWN 1002 Carnduff and Chapman JJ., discussed the authorities upon which D. Chatterjee J. relied on *Lakhmi Charan v. Nur Ali* ("11)15 CWN 1010, They pointed out that the two leading English cases on which reliance had been placed by D. Chatterjee J. related to foreign judgments which stood on a footing of their own, and, on other points, they were not prepared to adopt the reasoning on which the decision in *Lakhmi Charan v. Nur Ali* ("11)15 CWN 1010 was based. I agree with the reasons given by the learned Judges in *Mosuful Huq v. Surendra Nath Roy* ("12) 16 CWN 1002 for not following Chatterjee J.'s decision. As stated by them

the maxim interest reipublice ut sit finis litium should prevail....If evidence not originally available comes to the knowledge of a litigant and he can show thereby that the evidence on which a decree against him was obtained was perjured his remedy lies in seeking a review of judgment; but the rule of *res judicata*

prevents him from re-agitating the matter on the same materials or on materials which might have been laid before the Court in the first instance.

23. On the same principle it is difficult to support a general proposition such as was adopted by Chatterjea J. in *Manindra Nath v. Hari Mondal* ('20) 7 AIR 1920 Cal 126 to the effect that, where a Court has been intentionally misled by the fraud of a party and fraud has been committed upon the Court to procure its judgment, such judgment can be set aside in a subsequent suit based upon the fraud. Such right on the part of a litigant, I think, must depend on whether or not he was prevented by the person responsible for the fraud from establishing the alleged fraud in the suit in which the decree was passed. It is argued in this case that the decree in the rent suit, which was sought to be set aside as fraudulent, was obtained by suppressing the fact that there was no privity of contract between the plaintiff in that suit and Taharulla Mia. This question however was one of the matters substantially in issue in the rent suit and in effect the contention merely amounts to an assertion that the decree was based on a false claim. In such a case the falsity of the claim and the truthfulness of the witnesses must be decided by the Court which tries the case and the matter cannot be reagitated in a subsequent suit unless one of the parties has fraudulently taken undue advantage of the other and thereby prevented that party from placing the requisite facts before the Court by the observance of the proper procedure as regards discovery or cross-examination.

24. By this I must not be taken to imply that there are no cases in which suppression of material facts might not amount to fraud which would entitle a party by suit to set aside a decree. For example, the fraudulent omission of a material document from an affidavit, sworn in pursuance of a discovery order under O.11, Rule 12, Civil P. C., might have the effect of preventing the opposite party from placing his case adequately before the Court. In such a case, even if the party concerned had testified in Court during the hearing of the case to the effect that he had no material document in his possession beyond those which had been included in his affidavit and thereby obtained a decree, it might reasonably be argued that such a decree had been obtained not merely by perjury, but by perjury coupled with fraudulent suppression which had prevented the defendant from safeguarding his interests at the trial. The present case is not one of that nature. The facts relating to the plaintiff's claim were either before the Court or might have been discovered by observing the proper procedure prescribed by the law. There is also no evidence that any fact was suppressed that the plaintiff in the original suit was legally bound to disclose nor has there been any new discovery of material facts or documents which had been improperly withheld by the plaintiff at the time of the trial. Even if it be assumed that the plaint suppressed certain material facts or contained misrepresentations of facts or that the suit was based upon an entirely false claim, it is nevertheless clear that Taharulla Mia was served with the requisite processes and the alleged fraud will not satisfy the test laid down by Lord Cairns and Sir John Rolt, L. JJ. in *Patch v. Ward* (1868) 3 Ch A 203 and which was adopted by Sir Comer Petheram

C. J. in Mahomed Golab v. Mahomed Sulliman ("94) 21 Cal 612. As pointed out by Sir Lawrence Jenkins C.J. in Nanda kumar howladar Vs. Ram jiban howladar, , the jurisdiction to impugn a previous decree for fraud is beyond question; it is recognized by Section 44, Evidence Act, and is confirmed by a long line of authority. But it is a jurisdiction to be exercised with care and reserve, for, it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation.

25. The learned Chief Justice also held that a prior judgment cannot be upset on a mere general allegation of fraud or collusion. It must be shown how, when, where and in what way fraud was committed and that such fraud must amount to a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case in order to obtain the decree which it is sought to impugn. This also appears to have been the view adopted by this Court in Nalini Kanta Mukherji and Others Vs. Hari Nikari and Another, . In that case the second ground put forward was that the claim in the suit was itself fraudulent as it was based on a hatchita which was made out in the absence of the defendant in the original suit and which was an untrue document. On this point, Greaves J., observed that

so far as the second ground of the decision is concerned, there has been some conflict of authorities in this Court; but we think the balance of the authority is that it is not open to raise pleas of this nature, if the suit has been decreed after contest or if the suit has been decreed ex parte and it is established that summonses were served on the defendants.

26. This view of the law was also adopted by this Court in Baikuntha Chandra v. Prahlad Chandra ("26) 18 AIR 1926 Cal 426 and Muktamala Dasi Vs. Ram Chandra De and Others, In the latter case B. B. Ghose J. held that

where a case has been decided, even if it was decided ex parte the decree cannot be set aside merely upon the ground that the claim of the plaintiff in that case was false or that it was obtained by the aid of perjured evidence and that something more should be proved in support of the allegation of fraud in order to have the decree set aside on that ground.

27. An examination of the above cited cases leads me to the conclusion that a plaintiff is not entitled to have a decree against him set aside on the ground that it had been fraudulently obtained merely by reason of the fact that the claim in the original suit was false or without any cause of action or merely because the decree was obtained by false representation or suppression of facts provided the person so applying for a reversal of the decree in the original suit was not prevented by the fraud of the decree-holder from placing his case before the Court. I think the law on this point has been correctly stated in the observations of Sir Comer Petheram C. J. in Mahomed Golab v. Mahomed Sulliman ("94) 21 Cal 612 and in the decisions based thereon and I am not prepared to follow those decisions in which a different view has been adopted. In the case with

which we are now dealing it is clear that Taharulla Mia was served with the requisite summons in the suit and he therefore had an opportunity in that suit to place before the Court any defence which might have been open to him with regard to the falsity or the fraudulent nature of the claim against him. The view adopted by the trial Court is therefore correct. The decision of the lower appellate Court is set aside and that of the learned Munsif is restored. The appeal is, accordingly, allowed with costs throughout. The hearing-fee in this Court is assessed at three gold mohurs.