

(2007) 03 CAL CK 0039
In the Calcutta High Court
Case No : F.A. No. 258 of 1995

Hemlata Bakshi (since deceased) represented by her sons and Legal Representatives, Rupnath Bakshi and Suvendu @ Shubhendra Nath Bakshi APPELLANT

Vs

Sekhar Nath Bakshi and Others RESPONDENT

Date of Decision : 16-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Evidence Act, 1872 — Section 114, 35, 44

Limitation Act, 1963 — Article 164, 17

Citation : (2007) 3 CHN 305

Hon'ble Judges : Sanjib Banerjee, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : P.B. Sahoo, Sudhakar Biswas, Nirmalendu Patra and Jayanta Kumar Das, for the Appellant; Haradhan Banerjee, Prabir Kumar Mishra and Amitabha Roy, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—I have gone through the draft judgment of my learned Brother. I agree with the conclusion arrived at by his Lordship. However, I wish to add words to the same. This appeal was originally preferred by one Hemlata Bakshi, the appellant abovenamed, against the judgment and decree dated 14th June, 1995 passed by the learned Assistant District Judge, 2nd Court, Contai. By the decree impugned the suit filed by the original appellant was dismissed. Original appellant filed this suit for declaration that she had title in respect of (ka) schedule properties acquired by the deed of family settlement and the defendant No. 1 has no title in respect of the same and that the ex parte judgment and decree passed on 10th April, 1972 and 20th April, 1972 respectively in Title Suit No. 124/71 in the 1st Court of Munsif at Contai filed by the plaintiffs husband late Kalipada Bakshi against the plaintiff are mala fide, fraudulent, purposive, illegal and vitiated by fraud and the same is not binding on the plaintiff and alternatively for decree for cancellation of the same.

2. The sum and substance of the case made out in the plaint is stated herein:

The plaintiff's husband one Kalipada Bakshi was a renowned local Lawyer and acquired considerable wealth which includes large property in the town of Contai during his lifetime. The said Kalipada Bakshi in order to distribute and settle his properties amongst his wife and sons by and under a registered deed of family settlement dated 21st September, 1956 gave away amongst other his dwelling house in mouza Hatabari within the town of Contai along with other properties to the plaintiff and the defendants. The description of the said properties given to them are mentioned in (ka) schedule of the plaint. According to the plaintiff since the date of registration of the said family settlement the plaintiff and the defendants of the instant suit have been enjoying and possessing the same. The said family settlement was acted upon in all respects by incorporating names of the persons in the settlement record under the appropriate provision of the law. Similarly in the municipal records the said family settlement was placed for taking follow-up action and accordingly the names of the persons who are beneficiaries were mutated in the municipal records. In fact the said properties were also mortgaged for obtaining loan from the Co-operative Bank, Contai Branch. After repayment of the loan when the original deed of settlement was sought to be taken back the plaintiff came to know that the said deed was taken back earlier by the first defendant and kept in his custody. The plaintiff has been realizing rents from the tenants of the dwelling house situated in the town of Contai acquired by the deed of family settlement. When the plaintiff wanted to execute a registered deed of family settlement in respect of the bastu land possessed by the defendant by a verbal settlement and called the defendant for sitting on 12th December, 1991 she for the first time came to know from the first defendant that she had no right to make settlement of the properties. It was represented by the first defendant that it was declared and held by the Court long ago that the said earlier deed of family settlement was acted upon and as such it was cancelled in a suit filed by the plaintiff's husband late Kalipada Bakshi and thereafter the said Kalipada gifted the properties to the first defendant. The said decree was passed on 12th December, 1991 ex parte in the Title Suit No. 124/1971 filed by the late husband of the plaintiff amongst other against the plaintiff and other persons who are beneficiaries of the family settlement which includes the defendant No. 5 herein. Thereafter, the plaintiff duly obtained the certified copy of the judgment and decree of the earlier suit as well as the copy of the plaint on or about 21st December, 1991. She came to know for the first time that her husband filed collusive suit making her party to the said suit. It is alleged that the plaintiff was not informed about the said suit and writ of summons of the said suit was not served on her. The said Kalipada since deceased being a Lawyer of the local Court in collusion with the first defendant who was and still is an Advocate of the same Court, could bring the peon under their control and caused him to write a false report to the effect that the writ of summons of the said suit was served. Thereafter ex parte decree was obtained by suppressing the fact that the said deed of family settlement was acted upon.

Thus the Court passed ex parte judgment and decree on 10th April, 1972 and 20th April, 1972. It is further alleged that upon misrepresentation being made and fraud being practised the plaintiffs husband could have managed to keep the entire proceedings of the said suit secret, so much so the plaintiff remains unaware of the same, and had an ex parte decree passed. The factum of the said family settlement being acted upon by the husband was suppressed and after 2 years the said family settlement was sought to be cancelled. It will appear from the plaint of the earlier suit that the suit was barred by limitation. The plaintiffs husband and the defendant No. 1 in collusion with each other influenced the process server and thereby procured a report of the refusal of service of writ of summons by the plaintiff. There was no occasion for the plaintiff to refuse to accept any summons as it was never attempted to be served. Moreover at the time of the filing of the suit and further passing of the decree defendant No. 5 S.N. Bakshi was minor and it was falsely represented before the Court as being a major making him party to the suit, and he was not represented by the independent person as guardian.

3. The instant suit was contested by filing written statement by the first defendant, Sekhar, no other defendant had come forward to file any written statement. The defence taken in the written statement is that the suit is not maintainable and, is hopelessly barred by limitation. The plaintiff has neither cause of action nor the same has been disclosed at all. It is alleged further in the written statement that the plaintiff was all along aware of filing of the suit and also the ex parte decree passed in Title Suit No. 124/1971 and such fact of knowledge will be apparent from the fact that the said late Kalipada filed a mutation case relying on the said decree and the plaintiff filed objection against the same through the learned Lawyer. Thereafter, she too filed mutation case with the help of the same Advocate wherein she stated that she had no title in other properties left by Kalipada. She consented to mutation being effected on the application of Kalipada. The plaintiff is informed of this mutation, now she is estopped from making any submission contrary to the same. That apart plaintiff had no title or ownership in the properties left by late Kalipada Bakshi by reason of the fact that after the said deed of settlement having been declared cancelled, the plaintiffs husband and defendants father late Kalipada Bakshi by a registered Will executed on 30th December, 1975 bequeathed the properties in question along with other properties to the plaintiff and their five sons the defendant Nos. 1 to 5 separately by separate schedule. In terms of the said registered Will the defendant Nos. 2 to 4 before receiving the property applied for mutation in their names in the records of Contai Municipality and thereby separate holdings were created. Afterwards the plaintiff also applied for mutation of her name in the Municipality of Contai and the same is pending for disposal as Mutation Case No. 49/1990-91. However, late Kalipada Bakshi revoked the said Will for part of earlier disposition, by registered deed of gift partly, and by a deed of gift executed on 2nd August, 1977 he transferred suit properties along with some other properties in favour of the first defendant and became fully divested of the

same and delivered possession in favour of the first defendant. Thus the first defendant is the absolute owner and has been possessing the same by mutating his name in the Municipality of Contai and paying rates and taxes. The suit is also barred by limitation.

4. The plaintiff cannot have any cause of action. The writ of summons was duly served and the learned Court being satisfied with the service of writ of summons passed the decree as there was no contest. The allegations of fraud is absolutely misplaced. Other allegations contained in the plaint cannot be agitated in the suit. No appeal has been preferred nor any application has been made for setting aside of the ex parte decree. With the passing of the decree allegations and contention made in the plaint in earlier suit are deemed to have been adjudicated and/or decided.

5. So he has prayed for dismissal of the suit. The other defendants namely defendant Nos. 2-5 filed their written statements. All these defendants have taken same stand. Allegations made in their respective submissions are almost identical. The defendant Nos. 2, 3 and 4 have filed joint written statement, while defendant No. 5 has done separately. The allegations and contentions are identical and the same support the plaintiffs case. In the written statement of the defendant No. 5 it is alleged that he was minor at the time of the passing of the decree in the earlier suit and he was not represented by any independent guardian and in fact no guardian was appointed to protect his interest. It is also alleged by him that no writ of summons nor any notice was served. His late father, the plaintiff in the earlier suit in collusion with and connivance of the first defendant has obtained the decree fraudulently. In both the written statements it is alleged that his late father being the plaintiff in the earlier suit and the first defendant is practising Lawyer of the local Court. Father used to depend upon, and act acted under influence and advice of the first defendant as he was looking after the family. Taking advantage of the trust and confidence reposed by their late father the first defendant has caused the said decree to be obtained without writ of summons being served upon the plaintiff or any of the defendants therein. Being eminent Lawyers of the local Court they have influenced the Court officials to effect make-belief service of writ of summons as such the plaintiff in the earlier suit as well as the first defendant has practised fraud.

6. Upon reading pleading the learned Trial Judge framed the following issues:

- (i) Is the suit maintainable as framed?
- (ii) Was the deed of settlement dated 21st September, 1956 acted upon and binding upon the parties as alleged?
- (iii) Was the decree in Title No. 124/71 of the first Court of the learned Munsif, Contai obtained by practising fraud and misrepresentation?
- (iv) Has the plaintiff any right, title and interest in the suit property?
- (v) Is the plaintiff entitled to the decree as prayed for?

(vi) To what other relief the plaintiff is entitled?

7. Upon reading the pleading of both the parties we think that the learned Trial Judge ought not to have framed issue No. 2, for in his suit the learned Trial Judge should not have endeavoured to go into this aspect as until and unless the decree passed in Title Suit No. 124/71 is reopened. With the passing " of the decree challenged, the plea of acting upon of the deed of settlement dated 21st September, 1956 has become futile. The plaintiff in order to prove his case has examined herself on commission, one Bimalendu Panda, an employee of the local municipal body; one Sanjay Kumar Das, an employee of the Contai Co-operative Bank Ltd.; one Amarnarayan Das, a learned Lawyer, one Bikash Ranjan Maity, a tenant and shop-keeper; one Kishori Mohan Jana, a deed writer and one Dilip Kumar Basu an employee of the office of the District Registrar were called as witness by the plaintiff to prove her case.

8. The first defendant deposed to demolish the case of the plaintiff. Subhendu Bakshi the 5th defendant examined himself as witness to support the case of the plaintiff. One Rambihari Ray was called as witness by the defendants supporting plaintiff.

9. Besides one Sanatan Mal a local cultivator, Shyam Sankar Maity were called as witnesses and examined on behalf of the defendants.

10. The learned Trial Judge after having read and analyzed evidence came to the findings that the writ of summons was duly served and as such the plaintiff has failed to prove her case. The learned Trial Judge also found that the 5th defendant or for that matter the plaintiff failed to prove that at the time of the passing of the decree or at the time of filing of the earlier suit the 5th defendant was minor. It has been further found by the learned Trial Judge that all along the plaintiff and the supporting defendants were aware of the existence of the earlier ex parte decree. Those persons remained silent and did not challenge the same before the appropriate Court within the period of limitation. It is further found by the learned Trial Judge that there is no satisfactory explanation in support of such long silence of the 5th defendant. He found further pursuant to the decree passed earlier all parties have acted upon. Even some of the properties have been transferred to the third parties. It is further findings of the learned Trial Judge that the plaintiff fruitlessly tried to establish that the deceased Kalipada Bakshi being the plaintiff in the earlier suit obtained ex parte decree from the 1st Court of the learned Munsif Contai by practising fraud.

11. Mr. Puspendu Bikash Sau, the learned Counsel for the appellant while assailing the judgment and decree of dismissal of the learned Trial Judge, submits that the learned Trial Judge upon total misreading of the evidence wrongly held that the suit was barred by limitation. This case is based on fraud as no writ of summons was served or rather the Court was misled to hold that the writ of summons was duly served upon the plaintiff in this suit who was the defendant in the earlier suit. As such the plaintiff was not aware of passing of the

ex parte decree in the earlier suit. In case of fraud date of discovery of the same is the reckoning factor for the purpose of computation of date of limitation. It is the burden of the plaintiff or the supporting defendant who got the decree ex parte in earlier suit to prove with the cogent evidence that the writ of summons was duly served upon the plaintiff in the present suit and also other defendant in the earlier suit. It is an admitted position that the first defendant and his father being the plaintiff in the earlier suit was and is practising Lawyer of the local Court and they were very renowned so much so that they have tremendous influence and clout in the Court where the suit was filed. Therefore the learned Court below should have examined scrupulously the issue of non-service of writ of summons for which the learned Court below ought to have called for the records of the earlier suit and examined by himself whether order recording the due service of writ of summons was correct or not.

12. He further submits that the learned Court below has erroneously held that the plaintiff and the 5th defendant in the present suit has failed to prove that the 5th defendant was minor at the time of the filing of the suit or at the time of passing of the decree. He would urge with a support of decision of the Supreme Court reported in *State of Punjab Vs. Mohinder Singh*, that the learned Trial Judge should have accepted the school-certificate as best evidence as proof of age. The decree was passed against the 5th defendant who was at that point of time minor. He after attaining majority has not accepted the said decree. Therefore, this decree has become void and the learned Court below should have held so. In support of his contention he has relied on the following decisions:

Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, , *Syed Shah Ghulam Ghouse Mohiuddin and Others Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died)* by Lrs. and Others, , AIR 1934 208 (Privy Council) Indian Cases 529.

13. Mr. Haradhan Bondapadhya appearing for the first respondent, Sekhar submits that the learned Court below has rightly dismissed the suit as it is hopelessly barred by limitation as from the evidence it is clear that the plaintiff and the supporting defendants had knowledge of filing of the earlier suit and passing decree thereon. As a matter of fact by act and conduct the parties to the earlier suit have accepted ex parte decree. The plaintiff in the present suit was a party to the earlier suit and she was served with the writ of summons. In the plaint there is no case of collusion or connivance regarding service of writ of summons having been made out. It will appear from the order sheet of the earlier suit that the learned Court held that service of summons was duly effected and there is no challenge against the aforesaid order regarding service. The plaintiff did not put any suggestion at the time of cross-examination of this defendant nor any attempt has been made to prove that order regarding due and effective service of summons was passed collusively or fraudulently.

14. It is further submitted that school certificate cannot be a conclusive proof of evidence as same is merely evidence of hearsay in nature. Mere exhibiting of the school certificate does not prove correctness of the contents of the certificate. No

one has come forward to prove the correctness of the said school certificate. In fact no suggestion was given by the 5th defendant or by the plaintiff to the defendant No. 1 when he was examined as to the fraud, collusion or the plea of minority. Therefore, the decree cannot be reopened by separate suit. Had plaintiff in the present suit or the supporting defendants being aggrieved could have approached the same Court for reopening of ex parte decree by making appropriate application or by preferring appeal. In support of his contention he has relied on the decisions of this Court and Supreme Court reported respectively as follows:

Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, and Kaushalya Devi and Others Vs. Baijnath Sayal and Others, .

15. We have heard the learned Counsels and we have gone through the pleadings and evidence and lastly impugned judgment in this appeal. In order to decide whether the judgment passed by the learned Court below is correct or not we think only two points are to be considered, (i) whether the plaintiff/ appellant and the supporting defendants are having knowledge of passing of the ex parte decree, if so whether the suit is barred by limitation (ii) secondly whether the writ of summons in the earlier suit was served or not.

16. The suit is based on fraud on the allegation that no writ of summons was really served upon the plaintiff in the present suit and defendant in the 1971 suit. We are of the view that this plea could have been brought before the same Court the moment the plaintiff came to know such fraudulent act by way of suppression of service of writ of summons and could have got the decree passed ex parte, set aside or the plaintiff/appellant herein would have approached the appropriate Appeal Court. Instead of taking this two courses of action the present suit has been filed on the grounds of fraud. Had this course been taken then it would have been more convenient for the Court concerned to decide the matter. We do not think of course on this ground the suit cannot be maintained though otherwise alleged by Mr. Haradhan Banerjee. By this time it is settled position of law that if fraud is practised in obtaining a judicial pronouncement, everything vitiates and this can be set right at any stage in any manner by initiating even a collateral proceeding.

17. Therefore we need not detain ourselves in this regard any more, since before the learned Court below this issue was not raised. We shall discuss the issue of fraud on account of suppression of service of writ of summons little later. We are inclined to discuss the question whether the plaintiff is having knowledge of passing of the ex parte decree or not for it relates to the question of limitation. The learned Trial Judge has taken a great pain upon analysis of evidence adduced by both the parties (both documentary or oral). In the process he found that the plaintiff and the supporting defendants were all along having full knowledge of the earlier ex parte decree. We do not think that the learned Judge has reached this conclusion absurdly or irrationally. We think that no conclusion can possibly be drawn other than what the learned Trial Judge had done. It is

evident from the evidence subsequent to passing of the ex parte decree husband of the plaintiff/appellant took steps in furtherance of decree and the same was acted upon by the plaintiff, and the supporting defendants too have accepted such course of action taken by the late husband of the plaintiff/ appellant. So we do not think the action brought by the plaintiff with this suit, is bona fide, one hence the action is stale. Accordingly the suit is barred by limitation.

18. As far as the question of service of writ of summons is concerned we have seen from the order sheets of the previous suit wherefrom it appears that the writ of summons was served by process server of the Court upon the plaintiff in the present suit. It appears to us the learned Judge before proceeding with the hearing of the suit ex parte, was satisfied with the fact of service of writ of summons, and by a separate order he has recorded so. There is no challenge in the present suit against the said recording of the learned Judge. In view of such recording of the learned Judge before passing ex parte decree we are of the view that there is hardly any scope to hold that writ of summons was not served upon the plaintiff or upon the contesting defendants. Mr. Sau contends that even if the case of non-service of writ of summons is not established it is permissible for the Courts to go into the merit of the original claim and if the Court finds original claim is unfounded and/or false then inference regarding the fraud can be derived. In this connection we have seen the judgment cited by him of the Patna High Court reported in Haricharan Rai Vs. Dwarika Prasad Singh and Others, .

19. Their Lordships in this judgment in paragraph 16 came to conclusion as follows:

...Where a new trial is sought upon the ground of fraud must be both alleged and proved and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined.

20. Then in paragraph 19 Their Lordships observed as follows:

Where, therefore, the mere non-service of summons is not by itself sufficient to prove fraud, it is permissible for the Court to go into the merit of the original claim and if the claim is found to be false, to draw such inference as to fraud as the circumstances may warrant.

21. In paragraph 20 Their Lordships went on saying as follows:

The question as to the falsity of claim does not by itself constitute fraud. This question can be gone into only to make the case of fraud probable and to show why the fraud was committed. Fraudulent motive or design is not capable of direct proof; in most cases, it can only be inferred. In the very nature of things fraud is secret in its origin on inception and in the means adopted for its success. Each circumstances by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan.

22. We think in this case upon reading of the plaint of the earlier suit there

cannot be any fraudulent design on the part of the husband of the plaintiff by reason of the fact that admittedly the properties belonged to late husband of the plaintiff/appellant and he settled the property by executing deed of settlement first. During his lifetime it is for him to deal with his property in lawful manner and in the way he likes no consideration flew in the deed of settlement and the plaintiff/appellant cannot claim any equity either. Subsequently when it was found that the deed of settlement was not working properly the same was sought to be cancelled and this could only be cancelled by a judicial pronouncement on lawful ground. Therefore the fraudulent motive cannot be inferred in the earlier suit to reopen the issues on the principle of law laid down by judicial pronouncement of above Patna High Court. Fraud means an act of deceit in order to achieve wrongful gain depriving someone's lawful right.

23. The decision of Supreme Court reported in AIR 1967 SC 1384 (Panna Lal v. Murari Lal) is of no assistance to the argument of Mr. Sau, rather it helps the case of the contesting defendant (defendant No. 1). In paragraph 4 of the said judgment in its concluding portion Their Lordships held that:

...It is question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of Article 164. The test of the sufficiency is not what the information would mean to a stranger, but what it meant to the defendant in the light of his previous dealings with the plaintiff and the facts and circumstances known to him. If from the information conveyed to him the defendant has knowledge of the decree sought to be set aside, time begins to run against him under Article 164. It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree, so that he has a clear perception of the injury suffered by him and can take effective steps to set aside the decree.

24. Here the learned Judge with cogent documentary and oral evidence found not only the plaintiff but also her other sons who are supporting him had perfect knowledge of passing decree and in fact consequent upon passing of the decree all persons indeed derived benefit. As such the fifth defendant did not challenge the decree despite having knowledge and attaining majority (assuming that he was minor) at the time of passing of the earlier decree.

25. The fact in this case regarding knowledge and acting upon the decree passed earlier by the parties is so loud and eloquent that the decisions cited by Mr. Shaw are of no help at all. As far as the question of minority of the defendant No. 5 is concerned we think Mr. Banerjee is right in his submission that it has not been proved by cogent evidence that he was minor at the time of passing of the decree. Mother being the best person who could have told the Court what is the date of birth of her son, failed to do so. On the other hand the first defendant who is the elder brother of the fifth defendant has said about his date of birth and further said that the date of birth recorded in the school certificate is incorrect. In the circumstance it is very unsafe to accept the version of minority

on the strength of the school certificate alone. The learned Trial Judge has come to findings that recording of the school certificate was not proved and mere exhibiting of the document does not prove the correctness of the contents of the documents. He has followed and applied the principle laid down by the Supreme Court quoted in the judgment itself. As far as the citation of Mr. Shaw on this question namely *State of Punjab Vs. Mohinder Singh*, is concerned we are of the view that Supreme Court on the fact in that case held that when there is no scope to get any evidence regarding age the school certificate is the only piece of evidence which can be relied on. It has not been laid down by the Supreme Court the school certificate is only document regarding conclusive proof of age unless such school certificate is proved by competent witness. Moreover in the case before the Supreme Court it can be noticed that there was no challenge regarding correctness of the contents of the school certificate. In view of the aforesaid discussion as above and also our findings we do not think that the learned Trial Judge has passed wrong judgment. Therefore, the judgment and decree passed by the learned Court below is affirmed hence appeal is dismissed, however, without any order as to cost.

Sanjib Banerjee, J.

26. The original appellant died in course of this appeal from a decree of dismissal and has been substituted. It is the substitution which leads to an anomaly as the suit was filed by the original appellant against her five sons. However, her principal grievance was against her eldest son, the first defendant in the suit and the contesting respondent before us. Of the other four defendants in the suit, at least one had all along supported the mother to the extent that we carry a distinct impression that the mother may have been persuaded to institute the suit in her name for the benefit of her youngest son.

27. The suit was one for setting aside an *ex parte* decree on the ground that no writ of summons had been served on the plaintiff, who was a defendant in the earlier suit, and that the plaintiff in the earlier suit had contrived with Court officials to prepare a report showing apparent service. The plaintiff in the earlier suit was Kalipada, the husband of Hemlata, the plaintiff in the later suit. The defendants in the earlier suit were Hemlata and the five sons of Kalipada and Hemlata. The earlier suit was for a declaration that a deed of gift of the year 1956 was invalid, inoperative and had not been acted upon and for the consequential cancellation thereof. The gift had been made by Kalipada in favour of Hemlata and the five sons and it covered several properties in Contai and near the Sunderbans.

28. The plaintiff in the subsequent suit claimed that the entire exercise of service was manipulated by her deceased husband in conjunction with her eldest son. This, she claimed, could be done as her deceased husband was an eminent lawyer of the Contai Court and at the relevant time her eldest son was also a practising Lawyer of that Court. She claimed that the deed of gift of 1956 had been acted upon, *inter alia*, by her having made over documents of title relating

to one of the properties covered by such deed to a bank by way of mortgage. She further claimed that she had no inkling of the earlier suit and it was only in December, 1991 that she came to know of the ex parte decree of 1972 passed in Title Suit No. 124 of 1971. According to her, the parties to the subsequent suit had always proceeded on the basis of the deed of 1956 being valid, as did her husband during his lifetime. The acts of fraud committed in course of the earlier suit, according to the original appellant, were in the report as regards service of writ of summons, in impleading youngest son Suvendu without indicating that he was a minor and in keeping the fact of the decree concealed from her and four of her sons. Her eldest son Sekhar had a role to play in the fraud as Sekhar subsequently claimed to be the donee under a deed of gift said to have been executed by Kalipada in 1977 of one of the properties that had originally been gifted to Hemlata by the 1956 document. It was only upon Sekhar's assertion of his right to such property in December of 1991, that the appellant came to know of the ex parte decree and that it was only thereupon, after obtaining certified copies of the papers relating to the earlier suit, that the suit was filed in January of 1992 to challenge the ex parte decree of April, 1972.

29. Though the plaint does not contain any particulars relating to fraud, it conveys a sense of fraud having been practised by Kalipada and Sekhar. The plaint indicates Sekhar's motive in the exercise but both the plaint and the evidence of the original appellant taken on commission are silent as to the possible motive of Kalipada in seeking to defraud his second wife.

30. Sekhar contested the later suit. He relied on documents that evidenced sales of a number of properties covered by the 1956 document, which were effected subsequent to the ex parte decree of 1972. Such transactions could not have been completed, according to Sekhar, without the direct or constructive knowledge of his mother or his brothers and, in fact, some of his brothers were witnesses to the documents of subsequent transfers. Sekhar also relied on an unprohibited joint Will of his parents which was executed in 1975 and from which it would be evident that the ex parte decree of 1972 had been accepted and acted upon by his mother and the story made out in the plaint of her being completely unaware of matters relating to the first suit and the decree therein, were patently false.

31. Learned Counsel on behalf of the substituted appellants submits that on the facts, it could not be said that the suit was barred by the laws of limitation merely on the strength of the 1975 and the 1977 documents produced by Sekhar. The knowledge necessary, according to learned Counsel, for the purpose of Section 17 of the Limitation Act, was direct knowledge of the matter. Hemlata was an almost illiterate and, loosely speaking, pardanashin lady. She had not been a party to any of the post 1972 documents that would debar her from maintaining the later suit. It had not been demonstrated by the contesting defendant in the later suit that in course of the various mutation proceedings subsequent to the 1972 decree, Hemlata had direct knowledge or any notice.

32. Learned Counsel for the appellants was of the view that it was open to the judgment-debtor of an ex parte decree to either apply under the provisions of Order 9 Rule 13 of the CPC or to file a fresh suit if the decree had been obtained by practising fraud on Court. However, it was only in course of his reply to submissions on behalf of the contesting respondent, he cited Haricharan Rai Vs. Dwarika Prasad Singh and Others, in support of his contention that if the non-service of writ of summons was part of a fraudulent scheme of the beneficiary of the ex parte decree, a fresh suit ought to be the more preferred remedy.

33. The Patna High Court was rendered in an appeal from a decree setting aside the ex parte decree in an earlier suit on the ground of fraud. The judgment-debtors under an ex parte decree filed a suit on the principal ground that the original plaintiff had fraudulently got a false service report of summons prepared in collusion with the Court peon and in order to obtain the ex parte decree. The later plaintiffs in that case went on further to suggest that the earlier plaintiffs' claim was false and fraudulent. It was not as if the subsequent suit was based only on the alleged false service report of summons, the underlying suggestion was that since the earlier plaintiffs claim was utterly bogus, there was motive in concocting a false service report as any semblance of contest would have resulted in the earlier suit failing. The learned Trial Judge held in the subsequent suit that the later plaintiffs had failed to prove non-service of summons and had failed to prove any fraud. On such findings he refused to go into the question of the alleged falsity of the claim in the previous suit. The later plaintiffs carried such decree of dismissal in appeal whereupon, on consideration of the evidence, it was held that the later plaintiffs had succeeded in proving that summons was not served on them. The Appellate Court also held that the earlier plaintiff had strong motive to commit fraud and thereby to obtain a false service of summons. Such motive was to ensure that the later plaintiffs did not have any knowledge of the suit and, this did not have any opportunity of setting up their up their defence. The Appellate Court held that the earlier plaintiffs' claim was totally unmeritorious and decreed the later plaintiffs' suit and set aside the ex parte decree.

34. In dismissing the second appeal, the learned Single Judge of the Patna High Court considered in what circumstances a subsequent suit would lie to set aside an ex parte. He also considered the effect of the later plaintiffs' suit being decreed on the question as to whether that would merely revive the earlier suit upon the ex parte decree being set aside or whether the subsequent decree would also cover the merits of the claim in the earlier suit. After noting several authorities, the learned Single Judge summarized the legal questions thus:

(15) It is a well-established principle that a decree once passed cannot be challenged by a separate suit except on the ground of fraud practised on the Court. It is not open to suitors 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. Such a suit 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 only on the ground of fraud practised on the Courts: AIR 1915 PC 99: 42 Ind App. 171.

(16) Where a new trial is sought upon the ground of fraud must be both alleged and proved and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined: AIR 1918 PC 184.

(17) By whatever procedure it is sought to overthrow a judgment on the ground of fraud, the fraud must be definitely alleged and its particulars unequivocally stated: AIR 1928 PC 261.

Full particulars of fraud ought to be given in the pleadings either as originally framed or as amended for the purpose: AIR 1914 PC 184.

(18) No doubt, decree passed by a competent Court cannot be set aside by a suit, simply on the ground that it is based on a false claim or on the mere ground that there was no service of summons or notice, but after the Court comes to a finding as in the non-service of summons or notice, it is open to it to go into the merits of the previous suit with the object of determining as to whether there was a motive for wilful or fraudulent suppression of the notice or summon in order to obtain a decree based on a false claim.

(19) Where, therefore, the mere non-service of summons is not by itself sufficient to prove fraud, it is permissible for the Court to go into the merits of the original claim and if the claim is found to be false, to draw such inference as to fraud as the circumstances may warrant: Jagdeo Prasad and Another Vs. Bhagwan Hajam, .

(20) The question as to the falsity of claim does not by itself constitute fraud. This question can be gone into only to make the case of fraud probable and to show why the fraud was committed. Fraudulent motive or design is not capable of direct proof; in most cases, it can only be inferred. In the very nature of things fraud is secret in its origin or inception and in the means adopted for its success. Each circumstance by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan: Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari, .

(21) The question as to whether, when an ex parte decree in a subsequent suit is set aside, the original suit in which that decree was obtained is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit. If upon an issue properly raised and tried in the subsequent suit it is held that the claim itself of the plaintiff in the original suit was false and fraudulent the effect of such a decision is to put an end to that suit and the suit cannot be revived and retried.

If, on the other hand, the ex parte decree is set aside on the ground that it was obtained by suppression of summons by means of fraud and the defendant in the original suit was prevented from appearing in the suit and defending it by reason of fraud committed by the plaintiffs, the previous suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of in accordance with law in spite of the fact that in the subsequent suit the Court went into the question as to the plaintiffs claim being false as a ground for holding that there was reason for him to obtain stealthily a decree behind the back of the defendant, by fraudulently keeping him out of the knowledge of the suit and preventing him from defending the action: 12 Pat LT 493 : AIR 1931 Pat 204(2)(FB).

35. On the other aspect as to what was the level of proof necessary for a plaintiff to establish non-service of the writ in an earlier suit, the learned Single Judge of the Patna High Court relied on the following passage from AIR 1949 278 (Privy Council) :

What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as "shifting". The burden of proof on the pleadings never shifts, it always remains constant. The initial burden of proving a prima facie case in his favour is cast on the plaintiff when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the Tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background.

36. Though the Patna case was cited only in course of the final stages of submission, the legal proposition contained therein have not been doubted on behalf of the contesting respondent. It has been urged, in answer to the Patna case, that not only did Hemlata fail to show lack of service of the earlier writ, there was no question of Kalipada having any motive in concealing the earlier suit and, in fact, it would be apparent that Hemlata was aware of the ex parte decree and her subsequent conduct demonstrated her acquiescence. The charge of fraud regarding the palpable falsity of the claim in the earlier suit, it was submitted on behalf of the contesting respondent, was not spelt out in the later plaint and there was, indeed, no fraud or falsity in the claim even if the lack of pleading regarding fraud was overlooked. It was contended that it was an admitted position that in 1956 Kalipada was the undisputed owner of the properties forming the subject-matter of the deed of gift and notwithstanding that deed, Kalipada remained the de facto owner of the properties.

37. A number of documents were exhibited before the learned Trial Judge. These

included certified copies of order-sheets relating to mutation proceedings, the unprohibited joint Will of Kalipada and Hemlata said to have been executed on December 30, 1975 and deeds relating to the sales of at least three of the properties originally forming part of the deed of gift of 1956 executed by Kalipada in 1977.

38. Learned Counsel for the appellants has taken us through the documents and has submitted that none of the documents would establish that Hemlata had direct knowledge of the matters relating thereto. This aspect was emphasised as the learned Court below disbelieved Hemlata's case that she came to know of the *exparte* decree only in December 1991. Hemlata had pegged her date of knowledge of the earlier decree at December 12 1991. The learned Court below disbelieving her on such count in effect, amounted to holding that the suit was barred by the laws of limitation. For a plaintiff in an action for fraud to be denied the benefit u/s 17 of the Limitation Act, 1963, the knowledge that was required to be ascribed was direct knowledge. In support of such proposition the appellants relied on the decisions reported at 20 Indian Appeals 1 (Rahimbhoy Hubibbhoy v. Turner), 36 CWN 758 (Swarnamoyee Dasi v. Probodh Chadra Sarkar and Ors.) and Syed Shah Ghulam Ghouse Mohiuddin and Others Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died) by Lrs. and Others, by his legal representatives and Ors.].

39. The appellants also buttressed the charge of fraud on the ground that Suvendu had not attained majority at the time of institution of the earlier suit but such fact was actively concealed from Court. It was contended that a decree passed against a minor was a nullity and could be taken as a ground to challenge the decree by any of the other judgment-debtors. Though, not included in the paper book as one of the exhibits to be relied upon in the appeal, a copy of Suvendu's Board Examination Certificate was handed over. It was submitted that such certificate could not be questioned. The following paragraph of the Supreme Court judgment reported at State of Punjab Vs. Mohinder Singh, was relied on for this proposition:

13. As observed by this Court in Umesh Chandra v. State of Rajasthan ordinarily oral evidence can hardly be useful to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence may have utility if no documentary evidence is forthcoming. Even the horoscope cannot be reliable because it can be prepared at any time to suit the needs of a particular situation. Entries in the school register and admission form regarding date of birth constitute good proof of age. There is no legal requirement that the public or other official book should be kept only by a public officer and all that is required u/s 35 of the Evidence Act is that it should be regularly kept in discharge of official duty. In the instant case, the entries in the school register were made ante litem motam.

40. On Suvendu being a minor, the further contention was that Sekhar had said in his oral testimony that his maternal uncle Byomkesh Dutta was aware of

Suvendu's exact age, but Byomkesh was not called to the box. The contesting respondent had, thus, withheld what was the best evidence according to him and as such presumption u/s 114(g) of the Evidence Act should be drawn against Sekhar and his contention that Suvendu was a minor at the time of institution of the earlier suit. The decision reported at Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, was cited in this context. In that case the Supreme Court had held that the Court ought to draw an adverse inference against a person who, despite being in possession of best evidence, withheld the same, notwithstanding that the onus of proof did not lie on such person.

41. Learned Counsel for the appellants also cited the decisions reported at AIR 1934 208 (Privy Council) and 37 CLJ 501 (Saratkumari Dasi v. Amullyadhan Kundu and Ors.) for the proposition that Court should take extra care to ascertain whether documents executed by a pardanashin lady had been read over to her so that she understood the same.

42. In furtherance of the case, though not clearly made out in the plaint, that Kalipada's claim in the earlier suit was fraudulent, the old authorities of 22 Indian Appeals 153 (Ganga Bakhsh and Anr. v. Jagat Bahadur Singh) and 1912(15) Indian Cases 529 (Rajaram Rajaram v. Khandu Balu) were placed. On the strength of such decisions, it was contended that a conscious deed of gift could not be annulled on the ground that it was inequitable and that cancellation of a deed of gift could not be justified by changed circumstances. There was also the Supreme Court judgment reported at AIR 1967 SC 1384 [Panna Lal v. Murari Lal (dead) by his legal representatives] referred to in support of the contention that when the summons in a suit had not been duly served, limitation would not start running against the defendant because he had received some vague information that some decree has been passed against him though the onus was on the defendant to show that an application under Order 9 Rule 13 of the CPC was within time and he had made the application within 30 days of his knowledge of the decree. Upon the defendant producing some evidence to show that the application was within time, it was for the plaintiff to rebut such evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application. Though Hemlata had not made an application under Order 9 Rule 13, it was contended that the principle would apply as regards Hemlata's knowledge of the decree. It was submitted that once Hemlata had shown, as she had done in this case, that she had instituted the suit within the period of limitation as she came to know of the decree on or after December 12, 1991, it was for Sekhar to demonstrate that Hemlata was aware of the decree prior to the period of limitation.

43. On behalf of Sekhar, the principle contained in Section 44 of the Evidence Act as to the finality of a decree was stressed upon. It was contended that a decree could be reopened only on the ground of fraud or collusion which required to be established and the charge of fraud levelled by Hemlata was devoid of particulars and, on facts, incredulous. Learned Counsel for the respondent placed Hemlata's

evidence, taken on commission, to argue that the case run by her could not be believed. It was suggested that Hemlata was not sure whether Suvendu was a minor at the time of institution of the earlier suit and, in any event, it was only for the minor, upon attaining majority to challenge the decree passed against him. Suvendu had filed a suit challenging the decree on such ground, but that was after Hemlata's suit. In any event, Suvendu had allowed the issue as to his age being adjudicated upon in the present suit and upon such issue having gone against him, his pending suit is meaningless.

44. Our attention was drawn to the various documents, particularly, those relating to mutation and the alleged joint Will of Kalipada and Hemlata, to suggest that it was inconceivable that such documents could be executed either without Hemlata being aware of them or the proceedings in connection therewith or of Hemlata or any of her sons being unaware of the decree of 1972.

45. It was contended on behalf of Sekhar that the documents had been exhibited without objection and as such the contents thereof stood admitted. In support of such legal principle, the Division Bench judgment reported at 70 CWN 452 (Lionel Edwards Ltd. v. State of West Bengal) was placed. In addition Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, was cited in support of the contention that the appellants had failed to establish that the judgment and decree under challenge was perverse and as such it was not for this Court to reassess the evidence before the learned Trial Court or to re-examine all matters. Kaushalya Devi and Others Vs. Baijnath Sayal and Others, was cited for the proposition that a decree may be voidable at the instance of the minor but it is not necessarily void. The decision reported at 44 CWN 849 (Durgagati Banerjee and Ors. v. Taharulla Mia) was placed in support of the principle laid down by Section 44 of the Evidence Act to the effect that unless fraud was alleged and established, an earlier decree could not be reopened by a person who was a party to the decree.

46. Kalipada was married earlier and had issues out of his first marriage. The 1956 document records that Kalipada's father, also a Lawyer in the Contai Court, had gifted immovable properties to Kalipada's son from his first marriage and that he had otherwise been well provided for. The properties covered by the 1956 document were undoubtedly Kalipada's. Even without going into the merits of Kalipada's suit seeking cancellation of the 1956 document, it is evident that the names of the owners were changed in the official records in respect of some of the properties following the 1956 document. What is not known, however, is whether notwithstanding such ostensible change in ownership, it was Kalipada who wielded the effective rights as owner of such properties. In 1956, all of Kalipada's sons other than Sekhar were minors. The youngest was said to be a "child". It was Kalidas's assertion in the earlier suit that he continued to exercise full ownership rights and the materials tendered in evidence in Hemlata's suit did not detract from the factual basis of Kalidas's claim. For reasons that need not be gone into, Kalipada had thought that the properties would be better secured if

they were in the names of his second wife and the sons born out of his second marriage. They were gifts made out of his love and affection and not transfers against consideration received from the transferees. However, upon that deed being executed and transferees getting title to the properties covered thereby, the doner had no right thereto unless the donee acquiesced thereto. This position notwithstanding, Hemlata's insistence that such deed had been acted upon was supported by her claim that she had mortgaged one of the properties that had come to her under that deed for obtaining a bank loan.

47. In her evidence Hemlata came through as a fulltime housewife unaware of business transactions and finances. True, there was a loan obtained in her name but it was unlikely that she had much to do with the money received to any more to do with the repayment of the loan. This is apparent from an overall reading of her oral evidence. Even the learned Court below did not have the advantage of Hemlata's demeanour in course of her oral evidence as that was received on commission.

48. But the merits of the first suit could be visited only upon the matter as to service of summons being decided. This primary issue could not be adequately adjudicated upon. Whether any further enquiry into the feeble case of fraud was called for, depended on the Court's conclusion as to service of writ of summons in the earlier suit has been effected. Hemlata denied service and notice. Sekhar claimed that he had been duly served, as had the other defendants in the earlier suit.

49. From the order sheet in the earlier suit, the following orders have been placed to suggest that even the Court harboured doubts as to service:

Order No. 4 dt. 10.6.71:

Plaintiff files hazira, summons upon the defendant duly served but they do not turn up. To 10.7.71 for ex parte hearing of the suit.

Sd/- Illegible Munsif

Order No. 6 dt. 22.7.71:

Plaintiff files hazira. The plaintiff files document as per list. The suit is taken up for ex parte hearing. P.W. 1 Kalipada Baxi is examined on S/A. Document marked Ext. 1.

For full satisfaction about service of summons upon defendants send the summons through the verification clerk for verification of its proper service upon each and all the defendants. To 21.8.71 for report of V.C.

Sd/- Illegible Munsif

Order No. 7 dt. 8.8.71:

It appears that even after written judicial order of the Court for verification of process the said order of the Court has been disobeyed on the ground that only

disposed of cases be allowed to be sent for verification. This Court given this special judicial order for special verification of this process by V.C. as a special case which is required by this Court for a fair judgment of this case. Nazir to arrange for special verification immediately without undue delay.

Dictated: Sd/- Illegible Sd/- Illegible Munsif Munsif

Order No. 14 dt.6.1.72:

Report submitted by the verification clerk. Report is satisfactory and summons against defendants are held to have been properly served. Put up on 13.1.72 for order.

Sd/- Illegible Munsif

50. The final order culminating in the decree in the earlier suit has also been placed:

Order No. 19 dt. 10.4.72:

Record is put up" today for orders.

The plaintiffs case is that the suit lands belong to him, that with a view to saving the same from same apprehended danger, be executed one inoperative and void nirupanpatra in favour of the defendants in respect of the same, that he had no intention to transfer the lands by that deed and the deed and the land have all along been in his possession; that the defendants have no right to title to the suit lands but in spite of that they have been claiming title to the lands. Hence this suit.

P. W. 1 who is the plaintiff himself, has proved the plaint case. The plaintiff is entitled to get the relief prayed for.

C.F. paid correct. Hence.

ORDERED

That the suit be decreed ex parte without cost. It is hereby declared that the deed of nirupan bearing No. 5340 registered by the Joint Sub-Registrar of Contai on 24.9.56, is void and inoperative and no title to the lands concerned passed to the defendant by that deed. The defendants are permanently restrained from claiming any title to the suit lands through the said deed.

51. The issue as to service of writ of summons in the earlier suit has to remain unresolved. As the learned Court below has noticed, the relevant file in which the records relating to service were required to be maintained, was no longer available. Under the rules of procedure laid down, such records were required to be preserved only for three years and thereafter the appropriate rule provides for destruction thereof. In the usual course, such records relating to service would have been destroyed long prior to the institution of the later suit.

52. It is thus that other materials have to be looked into to throw some light on such matter. Other documents could be looked into to gauge if Hemlata had contemporaneous knowledge of the decree or had accepted or acted upon the decree. In course of such exercise, the learned Court below examined the exhibits forming part of the documentary evidence before it and arrived at the conclusion that Hemlata's knowledge of the earlier decree could safely be concluded from such documents. Such exercise by the learned Court below has been challenged in this appeal, on the basis of Hemlata's oral testimony and the fairly admitted position that she was barely literate and mostly confined to the inner sanctum of the Bakshi household. Hemlata's evidence was discarded by the learned Court below on the score that the Advocate Commissioner recording the testimony was not examined at the trial. The learned Judge was probably slightly more technical than was necessary in the circumstances. In the absence of an objection that there were serious discrepancies in the recording, evidence taken on commission should ordinarily not be rejected. We have, therefore, had to look into Hemlata's oral evidence to examine whether it supported her claims.

53. However, that it is her admitted status in matters relating to money and properties that goes against her and what she would want us to believe. In the state of the evidence that prevailed in the learned Court below, there was no material to suggest that Hemlata would be actively involved in the loan transaction in which a property had been mortgaged but totally removed from the papers filed on her behalf in the mutation proceedings following the earlier decree. It would be difficult to accept that after Kalipada's death she executed papers at Sekhar's behest without knowing the contents thereof, if we were to place any reliance on her assertion that she was instrumental in setting the properties that came unto her by the 1956 deed equitably in favour of her five sons. There is a glaring incongruity in Hemlata's plaint assertion of her dominant role and her testimony as a docile dependent. She could not claim to be *pardanashin* for the transactions which could impute knowledge of the decree on her, and be the worldly-wise in matters which would evidence that the 1956 deed had been actively acted upon by her. Once she took shelter behind the *purdah*, she had to remain there.

54. Hemlata was 80 years old when the later suit was filed. She had a hunched back by then and could not, according to her, stand or walk straight, there were heart ailments that afflicted her and she had been advised not to travel. In her oral testimony it was not her case that she either had a strained relationship with her husband or that prior to Kalipada's death, there was anything amiss between her and her eldest son. In the friendly cross-examination of the defendant Nos. 2 to 5, Hemlata was helped to explain away the various documents that Sekhar had relied upon to demonstrate that Hemlata must have been and was, indeed, aware of the earlier decree and the consequences thereof. Her response was:

I did not file any application in the Municipality or B.L. & L.R.O. Office for mutation about the suit properties. Sekhar is a Muktear. My husband used to

consult with Sekhar about his properties. I did not know anything.

My husband used to trust his eldest son Sekhar too much. I have been possessing the properties which I got by way of settlement. My sons did not possess any room or land by force. I have given them permission to possess....

My husband had no right to possess that property which I was given by way of settlement....

During the lifetime of husband or after death I did not go to market and generally did not go anywhere.

...I did not know whether my husband executed any Will.

He did not use to take any advice from me regarding the property or any other matter. He used to take advice from his eldest son. The papers of my husband's estate used to remain with Sekhar. All papers used to remain with him because he used to supervise. My husband and I used to trust him.

I did not make any signature on the Will about which Sekhar has told.

55. Despite the valiant attempt by the four younger sons to resurrect their claim made by the mother after Sekhar had countered it with an avalanche of documents, the mother could not extricate herself. At the very least, if she had not consented to mutation in Kalipada's name consequent upon the 1972 decree, she had authorized such act and she had made no attempt either to deny any authority or question the conduct of what was ostensible her affairs by whoever she had authorized. If she did not venture out, as she maintained, her affairs must have been managed with her authority and consent. Hemlata's admission of her husband being in complete control of the family properties during his lifetime pricked the bubble of fraud that she had made around Kalipada's claim in the earlier suit.

56. The unquestionable principles laid down in the judgments cited on her behalf cannot prop up the later plaintiffs illusory claim. The learned Judge has examined the documents on record. No case has been made out requiring us to reassess such material. Even if we accept that the significance of Suvendu and one of the other sons being witness to the sale deeds of 1977 is undermined by the principle that attesting witnesses are merely privy to the act of execution and not accountable for the contents of the document, there is evidence of three of the sons other than Sekhar having direct knowledge of the earlier decree. The certified copy of extracts from the assessment list of Contai Municipality dated February 20, 1988 and exhibited lists, Chandra Nath, Rup Nath and Kalyan Nath as the applicants seeking mutation of a property. The reason given by the applicants was that they were entitled to such property under a Will. The only Will that has been referred to in the proceedings is one of December 30, 1975, although unprohibited but said to have been jointly executed by Kalipada and Hemlata. Implicit in the claim to the property arising out of the Will despite their mother being alive, was the admission that they were entitled to the property by

virtue of their father's bequest. There is also a notice issued by the office of the Commissioner of Contai Municipality on June 2, 1988 in connection with an application for mutation of a property said to have been made by Hemlata, Suvendu, Chandra Nath, Rup Nath and Kalyan Nath. Such notice was issued to the two persons named as executors in the will and copies of such notice were marked not only to the applicants for mutation but also to Sekhar.

57. It does not appear that either Hemlata or her sons, who have ultimately prosecuted the appeal on her death, were unaware of the earlier decree of 1972 or that there is any material to conclude that the earlier decree was actively concealed from them by Kalipada or Sekhar.

58. The only other limb of Hemlata's challenge was of Suvendu allegedly being a minor at the time of institution of the earlier suit and the passing of the decree therein. Hemlata's evidence on such score is doubtful as she said that her youngest son "was born in the month of Sraban in the year 1956". Ordinarily a Bengali month is not quoted with the English version of the relevant year. Yet again, the certification of Suvendu's age in his examination certificate cannot be easily discredited. There could have been no reason for Suvendu's school being supplied with the false date of birth in anticipation of the falsified date to be used in evidence some three decades later. Kalipada also referred to Suvendu as a "child" in the deed of gift of September 21, 1956 wherein three of the other sons were referred to as minors. But it may not be necessary to labour on such details as Suvendu chose not to avoid the decree. It can not be said that Suvendu was unaware of the decree in view of what has been held above. If upon a person attaining majority, he does not question a decree passed against him when he was a minor, he is deemed to have accepted the same. It is irrelevant as to whether Suvendu was a minor in 1972, but from his conduct it is apparent that he made no grievance in respect thereof.

59. Though it has been urged on behalf of the respondent that Hemlata's only remedy was by way of making an application under Order 9 Rule 13 of the Code, it is possible that a party to an earlier decree may challenge it by way of a subsequent suit. There is no bar to a subsequent suit being instituted on the ground that an unserved defendant's rights against the decree were protected by Order 9 Rule 13 of the Code. However, an allegation of mere non-service of the summons would probably be inadequate to found the subsequent suit.

60. Similarly, Hemlata's challenge to the earlier decree on the ground that it was erroneous and contrary to established legal principles could not have been considered. If a decision has attained finality, a party cannot negate the effect of such decision against him on the ground that it was erroneous. The principles of *res judicata* apply irrespective of the correctness of the decision, unless there was inherent lack of jurisdiction. Hemlata's challenge to the earlier decree on the ground that changed circumstances would not alter the effect of a valid transfer of an Immoveable property, was not a challenge touching upon the Court's authority to receive or try such question. If correctness of a decision were to be

made a relevant factor to determine its finality, it would lead to legal anarchy of cataclysmic proportions and rob the conclusiveness that finality connotes.

61. The appeal fails. The decree of dismissal of the suit is affirmed. There will be no order as to costs.

62. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertakings.