

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Khagendra Nath Mahata and others v. Pran Nath Roy, from the High Court of Judicature at Fort William in Bengal; delivered the 1st day of March 1902.*

Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ANDREW SCOBLE.

[*Delivered by Lord Robertson.*]

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

The Respondent avers in his plaint that he inherited certain properties from his mother and is now the true proprietor of these; but that those of the Appellants whose name is Shaha had long coveted those possessions and formed a design to acquire them; that they procured a person now represented by the minor Appellants

to institute a groundless suit for monies which were not due; that, in order to get the Respondent out of the way, they, by a collusive suit, got him declared a lunatic and by threats forced him to leave his home and stay elsewhere in secrecy; that they concealed the money suit, got a false return of service and carried through the decree and sale of the properties behind the back of the Respondent. These allegations are plainly an attack not on the regularity or sufficiency of the service or the proceedings, but on the whole suit as a fraud from beginning to end.

It seems to their Lordships, now that the matter is fully before them, as it did on less complete information to the Board which had previous cognisance of the question, as raised in an appeal of *Radha Raman Shaha v. Pran Nath Roy*, I.L.R. Bengal XXVIII. 475, on identically the same ground, that this is a case generically different from any which was or indeed could be determined under Sections 108 and 311 of the Civil Procedure Code. Those sections limit the attention of the tribunal to specific matters, and, instead of subjecting to enquiry the radical question now involved, they assume the existence of a real suit. But here the suit itself is attacked as a fraud; and the fraudulent and violent incidents of its progress, as for instance at the stage of service and in the abduction of the Respondent, while they may individually have founded an application under Sections 108 and 311 are here treated as parts and *indicia* of a whole.

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

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