

## APPELLATE CIVIL.

*Before Weston, C. J., and Harnam Singh, J.*

BASANTA MAL,—Appellant

versus

BEHARI LAL and ANOTHER,—Respondents.

Letters Patent Appeal No 80 of 1949.

1952

Code of Civil Procedure (Act V of 1908)—Section 11—October, 16th  
 Res judicata—Order 9 Rule 13—Application under for  
 setting aside ex parte decree dismissed—Subsequent suit  
 for setting aside ex parte decree on the same grounds.—  
 Whether barred by principles of res-judicata.—Order 21  
 Rule 92(3)—Whether bars suit to set aside auction-sale.

*Held*, that where the grounds on which the suit for the  
 setting aside of the *ex parte* decree is founded are the  
 grounds upon which the *ex parte* decree was sought to be  
 set aside in proceedings under rule 13 of Order 9 of the Code  
 of Civil Procedure, the suit is barred by the principles of  
*res-judicata*.

*Held further*, that the suit to set aside the auction-sale  
 is barred because of the provisions of rule 92(3) of Order 21  
 of the Code of Civil Procedure where the objections on  
 which sale is sought to be set aside fall within rule 90 of  
 Order 21 Civil Procedure Code.

*Khagendra Nath Mahata v. Pran Nath Roy* (1), held not  
 applicable.

*Letters Patent Appeal against the judgment of Hon'ble  
 Mr Justice Khosla in Regular Second Appeal No. 643 of  
 1948, affirming that of Shri Tek Chand Vij, Senior Sub-  
 Judge, with enhanced appellate powers, Jullundur, dated  
 the 7th July 1948, who affirmed that of Shri Radhey  
 Krishan Deveja, Sub-Judge, 1st Class, Jullundur, dated the  
 27th January 1948, dismissing the plaintiff's suit with  
 costs.*

TEK CHAND and Y. P. GANDHI, for Appellants.

I. D. DUA and H. L. MITTAL, for Respondents.

## JUDGMENT.

HARNAM SINGH, J. In order to appreciate the Harnam Singh  
 points arising in Letters Patent Appeal No. 80 of J.

(1) I.L.R. 29 Cal. 395 (P.C.)

Basanta Mal 1949, the facts of the case may be set out in some  
v. detail.

Behari Lal  
and another

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Harnam Singh  
J.

On the 23rd of March, 1926, Basanta Mal and Bhagwan Das mortgaged the shop in suit in favour of Nand Singh for rupees 9,000 on the foot of the mortgage deed, Exhibit D. 10. Out of the mortgage money Rs 8,875 were left in deposit with Nand Singh for payment to Ram Chand, previous mortgagee of the shop in suit on the foot of mortgage made on the 20th of April, 1920. On the 23rd of March, 1926, Basanta Mal and Bhagwan Das obtained the shop in suit on rent from Nand Singh mortgagee on the foot of rent deed, Exhibit D. 11.

On the 6th of July, 1926 Nand Singh brought a suit for ejection against Basanta Mal and Bhagwan Das. Basanta Mal, however, brought a suit for cancellation of the mortgage. On the 21st of November, 1928, the suits were compromised. Possession of the shop was delivered to the mortgagee and it was agreed that the mortgage money would be paid in instalments stated in the compromise, Exhibit D. 12.

On the 8th of November, 1933, Behari Lal defendant obtained an *ex parte* money decree against Basanta Mal and Bhagwan Dass. In execution of that decree the shop in dispute was put to sale and at the auction sale Behari Lal decreeholder purchased the equity of redemption on the 19th of April, 1935. No application was made under rules 89, 90 and 91 of Order 21 of the Code of Civil Procedure, with the result that the auction sale was confirmed on the 14th of May, 1935.

On the 2nd of October, 1944, Basanta Mal applied under rule 13 of Order 9 of the Code of Civil Procedure for the setting aside of the *ex parte* decree. In the application under rule 13 of Order 9 of the Code, Exhibit D. 4, Basanta Mal maintained that he and his son Bhagwan Das left Jullundur City for Indore in September, 1930, and returned to Jullundur City in April, 1942. On the 28th of September, 1944, it is said that Basanta

Mal came to know for the first time that Behari Lal had obtained an *ex parte* decree against Messrs. Basanta Mal-Bhagwan Dass, and in execution of that decree had purchased the equity of redemption. Basanta Mal claimed to be the proprietor of Messrs. Basanta Mal-Bhagwan Das.

Basanta Mal  
v.  
Behari Lal  
and another  
—  
Harnam Singh  
J.

In rejecting the application for the setting aside of the *ex parte* decree the Court came to the conclusion that the application was barred by time.

From the order passed by the Court rejecting the application under rule 13 of Order 9 of the Code of Civil Procedure on the 7th of August, 1945, Basanta Mal appealed in the Court of the Senior Subordinate Judge at Jullundur. That appeal failed and was dismissed with costs. In dismissing the appeal the Senior Subordinate Judge said—

“From all these facts, it would be evident that the petitioner was duly served by proclamation on 12th October 1933, after which a decree was passed against the petitioner on 8th November 1933, by holding that the petitioner was duly served. No doubt the respondent was ordered by the Court to put in the correct address of the petitioner and in its place the petition for substituted service was submitted to the Court by alleging that the petitioner was evading service, that his real residence was in Jullundur City and that he absconded by learning of the institution of the suit and could not be served in an ordinary manner. The petitioner has examined no less than 11 witnesses in Court and has himself appeared in the witness box to depose that he had gone to Indore State in the year 1930 and had returned in the month of April, 1942. The petitioner has also examined certain witnesses on commission who also stated that the petitioner was carrying on business in Indore State from the

Basanta Mal  
v.  
Behari Lal  
and another  
—  
Harnam Singh  
J.

year 1930 up to 1942. It is in the evidence of Mr. V. V. Kewardev, Advocate, that he has been working as counsel for the petitioner from the year 1932 to 1942 and the documents, marked Exhibits C.W.1/1 to C.W.1/8, have been produced in support of that fact. Mr. E. D. Keriwala, who was also examined at Indore, stated that Basanta Mal met him in the year 1934-35 and also met him on the last occasion in the year 1942. In cross-examination this witness stated that Basanta Mal petitioner had been purchasing commodities from his shop from the year 1937 to 1941 and on many occasions Basanta Mal himself came to his shop for the aforesaid purchases. The last two witnesses, examined at Indore, had to admit in cross-examination that they are not in a position to state as to whether Basanta Mal went outside from the year 1934 up to 1942. Even Durga Das, D.H.W.7, admitted in cross-examination that Basanta Mal and his son, Bhagwan Das, went away from Jullundur from the year 1930 up till 1942 but had been coming to Jullundur in between. Basanta Mal petitioner, while appearing as his own witness admitted in cross-examination that he came to Jullundur in the years 1938, 1940 and in the year 1942. Under these circumstances it cannot be said that any fraud or deception was practised upon the respondent or the Court in applying for substituted service, inasmuch as Basanta Mal and his son Bhagwan Das were admittedly coming to Jullundur on several occasions and it has not been established that Basanta Mal in fact was outside Jullundur in the year 1933."

Copy of the order passed by the Senior Subordinate Judge is Exhibit D.2.

From the order passed by the Senior Subordinate Judge on appeal Basanta Mal went up in revision to the High Court. In the revisional proceedings the order passed by the Senior Subordinate Judge was confirmed and the petition for revision was dismissed. In this connection copy of the order passed by the High Court, Exhibit D. 8, may be seen.

Basanta Mal  
v.  
Behari Lal  
and another  
—  
Harnam Singh  
J.

On the 27th of March, 1946, Basanta Mal instituted the suit out of which this appeal arises "for setting aside the *ex parte* decree and auction-sale on finding them to be fraudulent."

Behari Lal, defendant, pleaded, *inter alia*, that the suit for setting aside the *ex parte* decree was barred because the plaintiff applied under rule 13 of Order 9 of the Code of Civil Procedure to have the decree set aside, and that application was refused on merits. Behari Lal, defendant, then pleaded that Order 21, rule 92(3) of the Code of Civil Procedure barred the suit in so far as that suit related to the setting aside of the auction sale.

On the pleadings of the parties the Court of first instance fixed the following issues:—

1. Whether the suit is barred by *res-judicata*?
2. Whether the suit is not maintainable in the present form?
3. Whether the decree is no longer operative and whether the suit is not maintainable in view of that?

In deciding the suit the Court came to the conclusion that the suit was barred by the principles of *res-judicata* and by the provisions of Order 21, rule 92 (3) and section 47 of the Code of Civil Procedure. On issue No. 2 the Court found that the plaintiff ought to have sued for possession in respect of the ground floor but suit for mere

Basanta Mal v. Behari Lal and another ———  
Harnam Singh J.

declaration was maintainable in respect of the first floor. On issue No. 3 counsel for the defendant conceded that there was no force in the plea covered by that issue. In the result the Court of first instance dismissed the suit with costs. Basanta Mal appealed in the Court of the Senior Subordinate Judge. In that appeal the decision given by the Court of first instance on issue No. 1 was affirmed.

From the decree passed by the Senior Subordinate Judge on the 7th of July, 1948, Basanta Mal appealed under section 100 of the Code of Civil Procedure.

In deciding that appeal Khosla, J., has found that the suit to set aside the *ex parte* decree was barred by the principles of *res judicata* and that the suit to set aside the auction-sale was barred under Order 21, rule 92(3) and section 47 of the Code of Civil Procedure.

From the judgment given by Khosla, J., in Regular Second Appeal No. 643 of 1948 Basanta Mal appeals under para 10 of the Letters Patent.

In order to see whether the refusal of the application under rule 13 of Order 9, Civil Procedure Code, has already determined the question now raised, it is necessary to ascertain what are the true grounds and the scope of the suit out of which the appeal has arisen.

Paras Nos. 3 to 7 of the plaint deal with the matters on which the *ex parte* decree is sought to be set aside. In para. 3 of the plaint it is stated that Behari Lal defendant carried on business in Mandi Fenton Ganj, Jullundur, and knew that the plaintiff had left Jullundur for Indore in 1930. In paragraph No. 4 it is pleaded that Behari Lal gave notice to the plaintiff on the 8th of August, 1933, but that notice was returned to him with the endorsement that the whereabouts of Basanta Mal were not known. Notwithstanding that the plaintiff mentioned in the plaint that the defendant was

residing at Jullundur. In paragraph 5 of the plaintiff it is pleaded that notices were issued for the service of the defendant whereupon the process-server reported that the whereabouts of the defendant were not known. On the 10th of October, 1933, the plaintiff applied for substituted service on the defendant and in support of that application gave affidavit that the defendant was evading service. On these facts it is maintained that the substituted service effected on the defendant was not sufficient within rule 13 of Order 9 of the Code of Civil Procedure.

Basanta Mal  
v.  
Behari Lal  
and another  
—  
Harnam Singh  
J.

From what I have said above it appears that the only ground on which the *ex parte* decree is sought to be set aside is that there was fraud in the service of the process on the present plaintiff in the previous suit. On the 2nd of October, 1944, Basanta Mal applied under rule 13 of Order 9 for setting aside the *ex parte* decree passed in civil suit No. 933 of 1933 on the 8th November, 1933. That application proceeded upon matters pleaded in paragraphs 3 to 7 of the plaintiff. In this connection copy of the application under rule 13 of Order 9 of the Code, Exhibit D. 4, may be seen. In deciding that application the Court came to the conclusion that the applicant was not duly served but that the application was barred by time. In appeal Sardar Gurcharan Singh, Senior Subordinate Judge, was of the opinion that the appellant was duly served and the application was barred by time. From the order passed by the Senior Subordinate Judge a revision was filed in the High Court but the petition for revision was dismissed on the 7th of March, 1946. ,

Indisputably, the grounds on which the present suit for the setting aside of the *ex parte* decree is founded are the grounds upon which the *ex parte* decree was sought to be set aside in proceedings under rule 13 of Order 9 of the Code of Civil Procedure. If so, the present suit for the setting aside of the *ex parte* decree is barred by the principles of *res judicata*.

**Basanta Mal** v. **Behari Lal and another** : Basing himself upon *Khagendra Nath Mahata v. Pran Nath Roy* (1), counsel for the appellant urges that the decision of the Courts below is wrong.

**Harnam Singh**  
J.

In *Khagendra Nath Mahata v. Pran Nath Roy* (1), the suit was instituted to set aside an *ex parte* decree and a sale in execution of such a decree as illegal, fraudulent and collusive, the allegation made in the plaint being an attack not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex parte* decree was obtained as being fraud from beginning to end. On those facts Lord Robertson delivering the Judgment of their Lordships of the Privy Council found that suit was maintainable notwithstanding that the plaintiff had been unsuccessful in applications under section 108 and section 311 of the Code of 1882 to set aside the *ex parte* decree and the sale in execution; the questions in the suit as a whole being such as could not have been determined on applications under those sections. Section 108 of the Code of 1882 corresponded with rule 13 of Order 9 of the Code and section 311 of the Code of Civil Procedure of 1882 corresponded with Order 21 rule 90 of the Code of Civil Procedure. In my judgment, the decision in I.L.R. 29 Cal. 395 does not govern the present case where the *ex parte* decree is sought to be set aside on the ground that there was fraud in the service of the process on the present plaintiff and the *existence of a real suit* in which the decree was passed is not attacked.

From paragraph 9 of the plaint it appears that the right of redemption was sold on the 19th of April, 1935, and that the sale was confirmed within rule 92 of Order 21 of the Code of Civil Procedure on the 14th of May, 1935. In paragraphs Nos. 10, 11 and 12 of the plaint it is stated that there was fraud in the matter of publishing the sale. Clearly the objections on which the auction-

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(1) I.L.R. 29 Cal. 395 (P.C.)



sale is sought to be set aside, fall within rule 90 of Order 21 of the Code of Civil Procedure. If so, rule 92(3) of Order 21 bars the suit.

Basanta Mal  
v.  
Behari Lal  
and another

In arguments it was said on behalf of the plaintiff that suit to set aside the auction-sale should be treated to be a proceeding under section 47 of the Code. On his own showing the plaintiff came to know of the auction-sale on the 28th of September, 1944. Article 166 of the Limitation Act provides that the period of limitation for an application to set aside an auction-sale is 30 days from the date of the sale.

Harnam Singh,  
J.

Now, the sale which is sought to be set aside took place on the 19th of April, 1935, while the suit was brought on the 27th of March, 1946. Section 47(2) of the Code reads:—

“47(1) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.”

Clearly, there would be no justification for the adoption of the course suggested by the learned counsel for the appellant.

No other point arises in these proceedings.

In the result I dismiss with costs Letters Patent Appeal No. 80 of 1949.

WESTON, C. J.—I agree.

Weston,  
C. J.