

(1934) 07 CAL CK 0015
In the Calcutta High Court

Abbasali Bhuiya and Others

APPELLANT

Vs

Ram Kanai Majumdar and Others

RESPONDENT

Date of Decision : 27-07-1934

Acts Referred:

Citation : AIR 1935 Cal 95

Hon'ble Judges : M.G. Ghose, J

Bench : Division Bench

Judgement

M.G. Ghose, J.—This is an appeal by the defendants in a suit to set aside an ex parte decree on the ground of fraud. The trial Court dismissed the suit. The Court of appeal below has decreed the plaintiff's suit with costs and set aside the ex parte decree in the Rent Suit No. 3 of 1927 and directed the re-trial of that rent suit.

2. Upon hearing the learned advocates on both sides and upon perusal of the papers it appears that the learned Subordinate Judge has misdirected himself on the question of law. It appears that the Rent Suit No. 3 of 1927 was instituted in Chandpur Munsif's Court on 10th January 1927. The plaintiffs in that suit who are the defendants-appellants here claimed rent at Rs. 3-8-0 per annum against the principal defendant Abdul Karim and they also made the present plaintiff Ram Kanai a pro forma defendant on the ground that he was claiming the rent from the defendant tenant. The summons upon the plaintiff Ram Kanai Mazumdar was served twice. The first summons was served on 26th January 1927. Both the Courts have found that the service of that summons had not been proved. The second summons was served on 23rd May 1927. The trial Court found that service was effected and was a legal service. The Subordinate Judge has found that service was not a service according to law. Accepting the finding of the learned Subordinate Judge that there was no service upon the present plaintiff the question is whether for mere non-service of summons he can succeed in the present suit. The suit was instituted under Article 95, Limitation Act, to set aside a decree obtained by fraud or for relief on the ground of fraud. If it was a case

merely to set aside the decree under Order 9, Rule 13 the plaintiff would have to come within 30 days of the ex parte decree, but he came long after that date. When he claims the limitation of three years under Article 95 he must show that the decree was obtained by fraud. He must show that the summons was fraudulently suppressed and by fraud of the plaintiff he was kept ignorant of the decree.

3. There is no finding at all in the judgment of the Court of appeal below that there was any such fraud. On the other hand from the judgment of the trial Court facts appear which have not at all been touched upon by the Court of appeal below and those facts are proved not by oral evidence but by documentary evidence. The facts are as follows. The Rent Suit No. 3 of 1927 was instituted on 10th January 1927 and the first date of hearing was fixed for 8th February 1927. On 9th February 1927 the present plaintiff Ram Kanai instituted a Rent Suit No. 12 in the very same Court at Chandpur against the very same tenant, whom the appellants were suing, for the very same holding and in that Rent Suit No. 12 the tenant filed a written statement in which he mentioned the rent suit instituted on 10th January by the appellants and the Rent Suit No. 12 instituted by the present plaintiff against the tenant was decreed on compromise between the parties and the copy of that compromise decree was filed as a piece of evidence by the tenant in contesting the suit No. 3 of 1927. He hotly contested the suit denying the right of the appellant to get rent from him and stating that the present plaintiff was his landlord. If he had won that suit the plaintiff would have been completely benefited. He would then have no interest to institute the present suit. Upon contest the tenant lost the suit. He made an appeal and lost the appeal also. Thereafter the appellant instituted a suit for ejection against the tenant and the present plaintiff's son deposed as a witness for the tenant in that suit.

4. It was after that ejection suit that the present suit was instituted to set aside the ex parte decree. From these facts the Munsif drew the conclusion that there was no fraud practised upon the present plaintiff. It appears clear that the present plaintiff was aware of the suit No. 3 of 1927 very soon after its institution and whether the summons was served on him or not he became fully cognizant of the suit so early that he might have filed a written statement and contested the suit himself. He preferred to have the suit defended by the tenant Abdul Karim. If Abdul Karim had won the suit that would have been a sufficient relief and that was why probably he did not choose to file a written statement himself. But in this case he can have no valid ground to set aside the decree which was passed on contest against the tenant and ex parte against him for he was fully cognizant of the suit in all its stages and he has failed to prove fraud.

5. The result is that the appeal is allowed, the decree of the lower appellate Court is set aside and that of the Munsif restored. The appellants will get the costs of the Court of appeal below. The parties will bear their own costs in this Court.