

(1925) 05 CAL CK 0013
In the Calcutta High Court

Baikuntha Chandra Dhupi and Others	APPELLANT
Vs	
Prahlad Chandra Dhupi and Others	RESPONDENT

Date of Decision : 03-05-1925

Acts Referred:

Citation : 88 Ind. Cas. 583

Hon'ble Judges : Ewart Greaves, J;Cuming, J

Bench : Division Bench

Judgement

Cuming, J.—The facts of this appeal are as follows: The appellant obtained an ex parte, decree against the respondents in a certain Title Suit No. 3 of 1917. The respondents then sued the appellant to set aside this ex parte decree on the ground that it was obtained by suppression of processes, by adducing false evidence and by wrongly including certain land within his tenancy which did not belong to the tenancy. The Court of first instance found that there had been no suppression of processes and that the respondent was fully aware of the progress of the suit. He further found that the appellant's suit was wholly false and that the decree was obtained by the production of false evidence and by the practice of fraud on the Court and decreed the respondent's suit. On appeal to this District Court this decision was upheld. The learned Judge there held agreeing with the Court of first instance that the respondent was fully aware of the suit and that processes have been served upon him. He, however, found that it was fraud on the part of the appellant to falsely allege his own Howla right and to obtain a judgment by adducing false evidence. The defendant has appealed to this Court. I think that the facts as found by the lower Appellate Court would justify the Court in holding that the appeal succeeds and the plaintiff's suit should be entirely dismissed.

2. The learned Advocate for the appellant has referred us to the case of Nalinikanta Mukherji v. Hari Nikari 86 Ind. Cas. 779 : 29 C.W.N. 325 : 41 C.L.J. 281 : AIR (1925) (C.) 663 to the decision of which one of the members of this Bench was a party. The allegations in that suit were more or less the same as

have been made in the present suit. In that suit it was urged that the summonses had not been served and that the claim was fraudulent. My learned brother in dealing with the second contention remarked that the balance of authority was that it was not open to a party to raise pleas of this nature if the suit had been decreed on contest or if the suit had been decreed ex parte and it was established that summonses had been served on the defendants. In the present case it has been found that the respondent who was the defendant in the original suit of which the decree is sought to be set aside had been served with summons and was at the time watching the suit, I see no reason to differ from the principle laid down in *Nalinikanta Mukherjee v. Hari Nikari* 86 Ind. Cas. 779 : 29 C.W.N. 325 : 41 C.L.J. 281 : AIR (1925) (C.) 663 with which I am in entire agreement. We have been referred to the case of *Kedar Nath Das v. Hemanta Kumari Dasi* 22 Ind. Cas. 709 : 18 C.W.N. 447. The facts of that case are, however, distinguishable because in that case it appears that no summonses had been served on the plaintiff and that the plaintiff was not aware of the suit and in those circumstances an ex parte decree had been obtained. We are also referred to the case of *Lakshmi Charan Saha v. Nur Ali* 11 Ind Cas. 626 : 15 C.W.N. 1010 : 38 C. 936. The facts of that case are also distinguishable because in that case the defendant although he was duly served with notice was unable to appear and defend the suit. In the present appeal the facts are entirely different. The respondents were all along aware of the case and were watching the case during the course of its prosecution.

3. In the circumstances we think that the appeal must succeed and the decree of the lower Appellate Court be set aside and the plaintiff's suit entirely dismissed with costs in all Courts.

Greaves, J.

4. I agree.