

(1918) 03 CAL CK 0011
In the Calcutta High Court

Chandra Kumar Roy Chowdhury and Others

APPELLANT

Vs

Aswini Kumar Das and Others

RESPONDENT

Date of Decision : 14-03-1918

Acts Referred:

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

Citation : 45 Ind. Cas. 250

Hon'ble Judges : Smither, J; Charles Chitty, J

Bench : Division Bench

Judgement

Chitty, J.—This is an appeal by defendants Nos. 1 to 3, really on behalf of themselves and defendants Nos. 4 to 11 who are their co-sharers. Aswini Kumar Das, plaintiff No. 1, brought the suit to set aside an ex parte decree passed against him and Kashish Chandra Das, defendant No. 12, on the ground of fraud. That decree was passed in Rent Suit No. 1502 of 1910. Aswini Kumar Das alleged that there was fraud, not only because he was not served with summons, but also because the suit against him was bad ab initio on the ground that there was no relationship of landlord and tenant subsisting between him and defendants Nos. 1 to 11. Defendant No. 12, Kashish Chandra Das, was made a pro forma defendant to the present suit and in his written statement he alleged that the return of service against him also was fraudulent and collusive. At the same time, while raising no objection to relief being granted to Aswini Kumar Das, he did not ask for any relief for himself. On the other hand he objected to having been made a party to the suit with which he said he had nothing to do. On 12th September 1913 Kashish Chandra Das was transferred on his own petition from the category of defendants to that of the plaintiffs. Both the Courts have agreed in their findings of fact. They have set aside the ex parte decree in the rent suit as regards Aswini Kumar Das but have held that it must stand against Kashish Chandra Das, with this reservation that the rent lands only are to be liable for the decretal amount.

2. Two points have been raised before us by the appellants. First of all they say

that the decree against Kashish Chandra Das must be executed in the ordinary way and that the Courts deciding this suit had no right to impose a condition as to the mode of execution of that decree, In this contention the appellants are clearly right and the decree of the lower Appellate Court cannot be supported in this respect. It is not seriously argued for Kashish Chandra Das that it can be supported on that ground. The learned Pleader for Kashish Chandra Das has endeavoured to raise questions as to the findings of fact of the lower Court regarding his client and the service of summons upon him, but we do not think that in second appeal we can go into those questions.

3. The second point raised by the appellants was that the question of fraud raised by the plaintiff No. 1, Aswini Kumar Das, was *res judicata* inasmuch as he had brought an application under Order IX, Rule 13, Civil Procedure Code, to set aside the *ex parte* decree against him on the ground that service of the summons had been fraudulently suppressed, and that application had been dismissed. This might be a good ground if the allegations of the plaintiff with regard to fraud were confined to the service of summons against him. They were not, however, confined to that but were directed to the whole suit as being bad, Aswini Kumar Das alleging that there was no relationship of landlord and tenant as between him and defendants Nos. 1 to 11. The question was considered in the case of *Khirode Chandra Boy v. Ashtulla* See 35 Ind. Cas. 557 : 20 C.W.N. 845,, to the judgment in which case I was a party. There it was pointed out that if the fraud was confined to the non-appearance of the defendant in a suit it might be *res judicata* under section 108 of the Code of 1882, i.e., Order IX, Rule 13 of the present Code, but not so when the question was whether the whole suit was bad *ab initio*.

4. I would accordingly allow the appeal on the first ground and set aside so much of the decree of the lower Appellate Court as directs the execution of the rent decree to be confined to the jama. The decree must stand against Kashish Chandra Das as a personal decree. The appeal against Aswini Kumar Das fails. Defendants-appellants must have their costs of this appeal against plaintiff No. 2, Kashish Chandra Das, but they must pay the costs of plaintiff No. 1, Aswini Kumar Das.

5. Smither, J.--I agree.