

(1948) 07 CAL CK 0022
In the Calcutta High Court
Case No : L.P.A. No. 13 of 1945

Hemraj Agarwalla

APPELLANT

Vs

Sova Chand Oswal

RESPONDENT

Date of Decision : 26-07-1948

Acts Referred:

Citation : (1948) 07 CAL CK 0022

Judgement

G.N. Das, J.—This is an appeal by the plaintiff against the judgment of our learned brother Chakravartti J.

2. The plaintiff's case is that Bhagabandas Hemraj was not a firm, that the plaintiff used to carry on his business in that assumed name, that defendant 2 Meher Chand Agarwalla had no interest in this business, that defendant 1 Sovachand Oswal on a false allegation that a sum of Rs. 291-8-0 was due from the plaintiff and defendant 2 who were partners of the said firm, Bhagabandas Hemraj, brought a suit and recovered an ex parte decree on 17th November 1939 by fraudulent suppression of summons, that defendant 1 executed the said decree and an attachment was sought to be effected on 12th April 1940; that the plaintiff then came to know for the first time, of the fraudulent suit and decree and filed this suit on 19th April 1940, for setting aside the ex parte decree and for an injunction restraining defendant 1 from executing the said decree against the plaintiff.

3. The suit was contested by defendant 1 who denied the allegations of fraud and falsity of claim.

4. The learned Munsif decreed the suit. On defendant 1's appeal, the learned District Judge reversed the decision of the Munsif and dismissed the suit.

5. The plaintiff preferred a second appeal to this Court which was dismissed by our learned brother Chakravartti J.

6. The present appeal is directed against that decision.

7. Dr. Sen Gupta appearing for the plaintiff has contended that the basis of the decision of our learned brother Chakravartti J. and that of the District Judge was wrong and that this case should be remanded to the Court of the District Judge for a rehearing of the appeal.

8. In order to deal with this point a few facts have to be stated.

9. The service of summons in the original suit is alleged to have been made on 19th September 1939. The peon's report Ex. C(1) states that the summons of the suit was tendered to the plaintiff and defendant 2 who refused to give receipts and that thereupon, the same was hung up in the outer door of the shop room. The witnesses to the service were stated to be Banwarilal Agarwalla and Khera Chand Agarwalla who were not known to the peon, Harendranath De.

10. The peon was examined as D.W. 2. The peon deposed to say that he did not know the plaintiff and served the summons on the identification of the mokabila witnesses who were also not known to him. In cross-examination he stated that he had no independent recollection of service and could not say who identified the plaintiff. Of the two makabila witnesses, Khem Chand Agarwalla deposed as P.W. 2 and denied his presence at the service. The plaintiff led evidence to show that the other witness Banwarilal Agrawalla was a fictitious person. The defendant did not lead any evidence to show that Banwarilal was a real person. The peon's report does not bear the signatures or thumb impressions of the said two witnesses. The plaintiff denied service of the summons.

11. Our learned brother Chakravartti J. has held that service of summons was proved by an admission of P.W. 4 in his deposition; and that in this view, the question of falsity of the claim did not require consideration. Our learned brother has held that the evidence of P.W. 4 contains "in the plainest terms an admission that he had heard of the service of summons on the day it was served after returning from, the station," and that in any case, if the deposition is susceptible of the above meaning, this Court has no jurisdiction to interfere with the finding of the District Judge based on the above reading of the deposition.

12. In our opinion, our learned brother Chakravartti J. has taken a limited view of the powers of the Court under S. 100, Civil P.C. It is not a case merely of misreading of the evidence. The deposition of P.W. 4, in our opinion, cannot be read as containing an admission of service of summons of the suit on the plaintiff. It is a confused statement of the witness. The statement was made in examination-in-chief. The witness is a Marwari and his deposition as recorded was a translation of the depositions by the learned Munsif. In the Munsif's Court the defendant did not rely on the evidence of P.W. 4 as an admission of service. In the memorandum of appeal filed by defendant 1 before the District Judge, no such ground was taken that the deposition of P.W. 4 contains an admission. We have carefully considered the effect of the evidence of P.W. 4. We are unable to agree with our learned brother that the deposition is capable of the interpretation put upon it. The other evidence bearing on the question of service was not

adverted to by our learned brother.

13. The learned District Judge also did not come to a clear finding on the evidence of service but based his judgment on the alleged admission of P.W. 4 in his evidence; we have held that this is not the proper effect of that evidence.

14. In the above circumstances, we think that the judgment and decree of our learned brother, Chakravartti J. and those of the learned District Judge should be set aside and the case remitted to the Court of the District Judge for a re-hearing of the appeal.

15. We express no opinion on the question of law dealt with by our learned brother or on the merits of the case.

16. Costs of this appeal and of the hearing: before our learned brother Chakravartti J. and before the learned District Judge would abide the final result.

Mookerjee, J.

17. I agree.