

(1969) 12 OHC CK 0003
In the Orissa High Court
Case No : Second Appeal No. 630 of 1964

Laxmi Narayan Thakur

APPELLANT

Vs

Puniya Behera and Another and Gopalamani Patnaik

RESPONDENT

Date of Decision : 05-12-1969

Acts Referred:

Citation : (1970) 36 CLT 352

Hon'ble Judges : S. Acharya, J;B.K. Patra, J

Bench : Division Bench

Advocate : N. Mukherji, for the Appellant; A. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

S. Acharya, J.—This is an appeal by Defendant No. 1 against the judgment and decree of the Additional Subordinate Judge, Puri, confirming the decision of the Munsif, Puri, in O.S. No. 244 of 1960.

2. The Plaintiffs filed the suit for setting aside the judgment and decree passed by the Munsif, Puri, in Original Suit No. 60 of 1959(1) on the ground of fraud and prayed therein for joining the Defendants from executing the decree in the said suit. Plaintiff No. 1 is the husband of Plaintiff No. 2. The Plaintiffs' case in short is that Defendant No. 1 on the allegation of having purchased the suit house from Defendant No. 2, the widow of Padmacharan Patnaik, filed O.S. No. 60 of 59 in the Court of the Munsif at Puri for evicting the Plaintiffs from the said house. Defendant No. 1 as Plaintiff in the said suit acting through Marfatdar Nityananda Das suppressed the service of summons, the notices, and the copy of the plaint etc. on these Plaintiffs, the Defendants in the said suit, and fraudulently obtained an ex parte decree on 31-8-1959 against these Plaintiffs. Previous to the aforesaid suit, Padma Charan Patnaik, husband of Defendant No. 2, had brought a suit being O.S. No. 35/357 of 1951/50(1) in the Court of the Munsif, Puri, against Plaintiff No. 1, and in the said suit Padmacharan's prayer for evicting the Plaintiff No. 1 from the suit house had been dismissed in O.S. No.

68/59 this aforesaid fact was also intentionally suppressed.

3. Defendant No. 1 only contested the suit mostly on the following averments. The suit is not maintainable as it is hit by *res judicata* and barred by limitation. The Plaintiffs were monthly tenants-at-will in respect of the suit house under Padmacharan Patnaik, the husband of Defendant No. 2's vendor, and the Plaintiffs having defaulted in the payment of rent the above named Padmacharan filed O.S. No. 35/357 of 1951/50(1) in the Court of the Munsif, Puri, in which a decree in favour of the said Padmacharan was passed for realisation of arrears of rent although his prayer for evicting the Plaintiffs herein from the suit house was disallowed. After Padmacharan's death, his wife, Defendant No. 2, was the landlord of the suit house, having succeeded to her husband's property, and she sold away the suit house to Defendant No. 1 by a registered sale deed dated 25-6-1956 and after the said sale the Plaintiffs attorned to this Defendant. The Plaintiffs having been adjudged in O.S. No. 35/357 of 1950/51 as tenants in occupation of the house on payment of rent and having attorned to Defendant No. 1 cannot question his ownership, and are estopped from challenging the title of this Defendant.

It was also asserted that as the Plaintiffs fell into arrears of rent, Defendant No. 1 sent Pleader's notice by registered post to the Plaintiffs, but the Plaintiffs having refused to accept the same this Defendant instituted O.S. No. 68/61 against the Plaintiffs; and that the summons in the said suit were duly served on the Plaintiffs who were Defendants in the said suit, and they having failed to appear and contest the said suit, the said suit was decreed *ex-parte* against them. It is alleged that the Plaintiffs not having any other way to avoid the execution of the decree obtained by Defendant No. 1 in O.S. No. 6a/59 have filed this false and frivolous suit.

Defendant No. 2 did not appear or contest the suit and was set *ex parte*.

4. The trial Court decreed the Plaintiffs' suit on the finding that the *ex parte* decree in O.S. No. 6a/59 was obtained by Defendant No. 1 by fraudulent means and as such was void and inoperative; that the Plaintiffs are bound by the decree in O.S. No. 35/357 of 1951/50(1) but they are not bound by the decree in O.S. No. 63/50 that the question of estoppel as raised by Defendant No. 1 is immaterial and does not arise on the facts and circumstances of this case; that the suit was filed within time and that the decree in O.S. No. 68/59 being fraudulent cannot operate as *res judicata*. Defendant No. 1 was also enjoined from executing the decree in O.S. No. 6a/09 against the Plaintiffs.

5. In appeal preferred by Defendant No. 1, the main question for determination was whether there was fraudulent suppression of summons in O.S. No. 68/59 on the Defendants therein, who are Plaintiffs in this suit, due to which the *ex-parte* decree in the said suit being vitiated should be set aside. The Additional Subordinate Judge, Puri, on a discussion of the evidence on record and the facts and circumstances of the case and by referring to a decision of this Court

reported in Raghunath Pani Vs. Radhakanto Deb, , confirmed the finding of the trial Court and dismissed the Defendants appeal. Defendant No. 1 has preferred this appeal against the above mentioned confirming decision of the Additional Subordinate Judge.

6. Justice G.K. Misra (as he then was) not finding himself in agreement with the Single Judge decision of this Court reported in Raghunath Pani Vs. Radhakanto Deb, , has referred this appeal for an authoritative pronouncement by a Division Bench.

7. On the question raised by Misra J, and the contention put forward on behalf of both the parties, it is at first to be determined in this appeal as to what are the essential elements to be established in this suit in order that the Plaintiff can get such an ex parte decree against him set aside, and on whom is the onus to prove these essential elements. In this connection the following decisions are worth mentioning. In Ram Chandra Prasad and Another Vs. Firm Parbhu Lal-Ramratan and Others, Justice Kulwant Sahay delivering the judgment of the Court held that in such a suit for setting aside an ex-parte decree the Plaintiffs have in the first place to show that there was no service of summons or notice of the previous suit or, appeal or of the proceedings in review in which the impugned ex parte decree was passed. "They have then to show that the non-service of the summons or the notices was due to a fraud practised by the Plaintiff in the previous suit with the object of keeping the Defendant in that suit in ignorance of the suit and of preventing him from placing his case before the. Court. A decree passed by a competent Court cannot be set aside simply on the ground that the decree passed was based on a false claim, nor can a decree be set aside simply on the ground that there was no service of summons or notices. "We are in full agreement, with the above enunciation of the law on the subject.

8. That being so, we have now to consider the second question, namely as to on whom is the onus to prove the above two essential elements for setting aside such an ex parte decree. It goes without saying that the first of the two above mentioned elements, namely, that there was no service of summons on the Defendants in the previous suit, has to be proved undoubtedly by the Plaintiffs in the later suit, by cogent and reliable evidence.

It is now to be examined as to who has the onus to prove the other essential element regarding fraudulent suppression of summons, enunciated properly in the Patna decision, and mentioned within quotation in para 7 above. In AIR 1941 93 (Privy Council) , Lord Atkin delivering the judgment of the Court observed as follows:

Fraud of this nature like any other charge of a criminal offence whether made in civil or criminal proceedings must be established beyond reasonable doubt.

In AIR 1940 98 (Privy Council) , their Lordships of the Privy Council accepted with approval the test laid down by Niamatullah J, in the impugned judgment of the High Court, in which after stating that the party alleging fraud is bound to

establish it by cogent evidence and that suspicion cannot be accepted as proof, the learned Judge observed.

Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted with good faith they cannot be accepted as affording sufficient proof of the fraud.

Accepting the test laid down above; their Lordships of the privy Council reviewed the relevant evidence on record and ultimately came to a finding that the Respondent's case of fraud failed, and accordingly dismissed the suit. In the Patna case cited above *Ram Chandra Prasad and Another Vs. Firm Parbhu Lal-Ramratan and Others*, , Sahay, J., while laying down the law as stated above observed as follows:

But, once it is established that there was no service of summons or notices, it is, in my opinion, open to the Plaintiff in the subsequent suit to show that the claim in the previous suit was a false claim and the Court can go into the question with the object of determining as to whether there was a wilful and fraudulent suppression of the notices and summons in order to obtain a decree based on a false claim by preventing the Defendant from placing his case before the Court. In other words, after non-service" of the summons is proved it is open to the Court to go into the question as regards the merits of the previous suit with the object of finding as to whether there was any motive for the fraud and as to whether fraud was actually perpetrated, and as to whether, if opportunity had been given to the Defendant he could have produced evidence which might have led the Court to come to a different decision.

His Lordship found that his above view was supported by the decision in *Kedar Nath Das v. Hamanta Kueari Debi* (1914) 18 Cal. Weekly 447, On a review of a large number of authorities Sahay, J. further observed:

To my mind it is necessary for a proper decision of the case to come to a finding on the question of fraud as alleged by the Plaintiffs on a consideration of the entire evidence in the case. There were specific allegations of fraud in the plaint and they must be investigated into on a consideration of the entire evidence. If the learned District Judge finds that there was no service of summons or notices, it would be open to him to see on the evidence whether the claim in the suit in the Agra Court was a true or a false claim in order to arrive at a finding as to whether there was fraud perpetrated by the Plaintiffs in the Agra suit in obtaining the decree.

Thus, though it is the duty of the Plaintiff to show that the non-service of the summons or notices was due to fraud practised on him by the Plaintiff in the previous suit, it is open to a Court to consider the entire evidence on record adduced by the parties and to come to a finding on the second essential element based on fraud, as quoted above. When both the parties join issue and adduce evidence, it is the duty of the Court to review the entire evidence on record in order to arrive at a proper and just decision of the case. It cannot therefore be

said as contended by Mr. Mukherji, the learned Counsel for the Appellant" that the onus of showing the fraudulent aspect of the matter being on the Plaintiff, that fact can only be determined from the evidence led by the Plaintiff to that effect, and other evidence on record cannot be looked into for that purpose. In *Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others*, , it has been held:

The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic.

In *Hadri Narayan Nandar v. Parsoti Pasban* AIR 1937 Pat. (sic) it is observed:

It may be from the circumstances of the case established that the non-service in itself was fraudulent and if that is not found, then it is absolutely necessary to go into the question whether the original claim was a fraudulent one or not.

In *Ramchander Singh v. Bibi Asghari Begam and Anr.* AIR 1957 Pat. 224, it is held that the onus of proving such a negative issue is ordinarily discharged by a denial and by negative evidence. Very little evidence, and, in certain circumstances, a mere denial regarding want of knowledge by the party would discharge his onus and shift the onus on the other party.

That being so, Mr. Mukherji's above contention is without substance and absolutely untenable.

9. Both the Courts below, in the respective decisions in this case, have referred and followed the decision of Barman, J., in *Raghunath Pani Vs. Radhakanto Deb*, . Paragraph 6 of the said decision is as follows:

Mr. S. Misra learned Counsel for the landlord Defendant-Respondent herein, contended that mere non-service is not sufficient to prove fraud for the purpose of setting aside the ex parte decree. Undoubtedly that is so but in the present case, having regard to the surrounding circumstances and the background of the litigation between the parties over their respective rival claim to the Marfatdari right in respect of the said deity as discussed above, I am satisfied that there appears to be sufficient proof of the alleged motive for obtaining fin ex parte decree by fraudulent suppression of summons.

That shows that Barman, J. in the said decision was aware of the law on the subject that mere non-service of summons is not sufficient ground for setting aside an ex parte decree, and that fraudulent suppression of summons is also to be established in a matter of this nature. Thus Barman, J. being cognizant of the law on the subject" on the peculiar facts of that case ultimately found as follows:

In any event the fact of non-service of summons and the absence of any proof of the alleged service of summons considered in the background of the case is

sufficient ground, in my opinion, for setting aside the ex-parte decree passed in the circumstances as aforesaid.

His decision, therefore, it is in conformity with the settled law on the subject.

10. In the instant case before us, the finding of fact of both the Courts below on legal and relevant evidence is that the summons and notices of the previous suit, in fact, were not served on the Defendants in that suit, who are Plaintiffs herein. Plaintiffs in this suit asserted the said fact and led cogent and reliable evidence to that effect. So, the above finding of fact cannot be challenged in this second appeal.

11. It is now to be seen if non-service of summons or notices was due to fraud practised by the Plaintiff in the previous suit with the object of keeping the Defendants in that suit in ignorance of the suit and of preventing them from placing their case before the Court. Both the Courts below have found that the parties are not in talking terms with each other, and it is obvious that the relationship between the parties in this suit is not at all cordial. The Plaintiff in O.S. No. 35/357 of 1951-50, being unsuccessful in evicting Plaintiff No. 1 of the present suit from the suit property, transferred the said property in favour of Defendant No. 1 in this suit, who thereafter instituted O.S. No. 68/59 and obtained against these Plaintiffs the ex parte decree for eviction, now under challenge. In that rmit (O.S. No. 68/59) it was not brought to the notice of the Court that in O.S. No. 35/ 357 of 1951-50 instituted by Defendant No. 1" predecessor-interest, the prayer for ejecting Plaintiff No. 1 in the present suit, who was Defendant therein, had been rejected. From materials on record it is evident that the Plaintiffs herein seriously and successfully contested the above suit of 1951-50 instituted against them for eviction; and it is obvious that they are ill possession of the suit property. Defendant No. 1 admittedly never received any rent from the Plaintiffs, and his case that the Plaintiffs attorned to him was negatived. There is a clear finding by the trial Court that Active fraud was practised by the landlord Defendant No. 1 in the present suit in suppressing the summons and notices in the previous suit in order to get the ex parte decree for the eviction of the Plaintiffs in this suit. Considering an these in the context of the facts of the case, we are satisfied beyond all reasonable doubt that suppression of the notices and summons on the Defendants in the previous suit was deliberately a fraudulent Act on the part of the Plaintiff in the said suit, who is Defendant No. 1 Appellant herein.

12. Thus the Plaintiffs-Respondents 1 and 2 have been able to establish that there was absence of service of summons and notices on them in the previous suit (O.S. No. 68/59) instituted by Defendant No. 1-Appellant herein. It is also established beyond reasonable doubt that the said non-service of summons and notices was due to fraud practised by the Plaintiff in the previous suit (Defendant no 1 herein) with the object of keeping the Defendants in that suit (Plaintiffs herein) in ignorance of the suit, thereby preventing them from placing their case before the Court. As both the elements, required to be proved in a case of this

nature, have been established, Plaintiffs suit has rightly been decreed, and the same has to be maintained as such.

13. In the result, therefore, the decree passed by the trial Court and confirmed by the first appellate Court is hereby upheld, and this appeal is dismissed accordingly; but there will be no order as to costs of this appeal.

B.K. Patra, J.

14. I agree.