

The only other contention, on behalf of the appellants, is that the stipulation to pay compound interest must be deemed to be a penalty. We are unable to accede to this contention, which in our opinion is wholly untenable.

These are the points raised in this appeal, and we are of opinion that none of them has any force. We accordingly dismiss the appeal with costs. We extend the time for payment of the mortgage money for a period of six months from this date.

*Appeal dismissed.*

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HAR DAYAL  
v.  
PERRI  
SINGH.

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December 10.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

TIKA RAM (DEFENDANT) v. DAULAT RAM (PLAINTIFF).\*

*Suit to set aside a decree on the ground of fraud—Personal service not effected—Conduct of plaintiff.*

The mere fact that personal service of a summons has not been effected on a defendant will not render the proceedings against him absolutely abortive. But where the non-service is due to the fraudulent conduct of the plaintiff in the suit and others acting with him, and a decree is thereby obtained, such decree may be set aside as fraudulent. *Mahomed Gulab v. Mahomed Sulaiman* (1) followed.

THE facts of the case were as follows:—

Tika Ram, the defendant appellant, obtained an *ex parte* decree against the plaintiff, Daulat, from the Court of Small Causes at Agra. When execution of the decree was taken out the plaintiff instituted the present suit to set it aside on the ground of fraud. It was alleged in the plaint that the suit in which the *ex parte* decree was obtained had been instituted at the instigation of one Jhundu Mal, who was an enemy of the plaintiff, and that the claim of the defendant had been fraudulent and that no summons had been served upon the plaintiff. The Munsif, holding that the claim of the defendant was false and that no summons had been served upon the plaintiff in that suit, set aside the *ex parte* decree. On appeal the District Judge did not go into the fact whether the claim of the defendant against the plaintiff was fraudulent or not. He simply found that the service of the summons, which purported to have been made on the person of the plaintiff, was fictitious;

\* Second Appeal No. 855 of 1908 from a decree of B. J. Dalal, District Judge of Agra, dated the 10th of August, 1908, confirming a decree of Shambhu Nath Dube, Munsif of Agra, dated the 9th of August, 1907.

(1) (1894) I. L. R., 21 Cal., 619.

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and concluded that fictitious service of summons was sufficient to constitute fraud and hence dismissed the appeal.

The defendant appealed.

Babu *Parmeshwar Dayal*, for the appellant. The mere fact that there was no service of summons did not render the whole proceeding abortive. Non-service of summons was a mere irregularity in procedure; it could not warrant the conclusion that the claim of the defendant was fraudulent. The utmost that could be said of it was that it was a part of the scheme and the means or one of the means by which the fraud was committed; *Wahian v. Banke Behari Pershad Singh* (1), *Pran Nath Roy v. Mahesh Chandra Moitra* (2) and *Khagendra Nath Mahata v. Pran Nath Roy*, (3).

Attacking a decree *ex parte* on the ground of fraud in service of summons was different from attacking it as fraudulent from beginning to end. The one was a good ground for an application under section 108 of the Code of Civil Procedure, 1882, and the other for a regular suit. If a person brings a suit to set aside an *ex parte* decree on the ground of fraud, he must clearly and conclusively prove the facts constituting the fraud; it cannot be inferred from the mere fact of non-service of summons; *Kerr on Fraud and Mistake*, Ed. 111, p. 416; *Mahomed Golab v. Mahomed Sulaiman* (4).

Babu *Babram Chandra Mukerji* (for Maulvi *Shafi-uz-zaman*), for the respondent was not called upon.

STANLEY, C. J., and BANERJI, J.—This appeal is concluded by the finding of fact of the lower appellate court. The suit was brought by the plaintiff respondent to set aside a decree obtained by the defendant appellant in the Small Cause Court at Agra, the claim in that suit being to recover the price of a gold ornament and also Rs. 50, which is said to have been deposited with the plaintiff in this suit for payment to the daughter of the appellant. Daulat Ram brought the suit to have the decree set aside on the ground that a fraud was practised on him, namely, that he was not served with any summons, and was in fact prevented from placing his case before the Judge of the Small Cause Court by the machinations of the appellant

(1) (1903) I. L. R., 30 Calc., 1021.

(3) (1902) I. L. R., 29 Calc., 395.

(2) (1897) I. L. R., 24 Calc., 549.

(4) (1894) I. L. R., 21 Calc., 612.

and persons acting in collusion with him. It was represented in the Small Cause Court that there was personal service of the summons upon Danlat Ram, and evidence was given to prove the alleged personal service. As a matter of fact neither personal nor other service was effected, and the defendant Danlat Ram was wholly ignorant of the proceedings. Both the lower courts have found that these proceedings on the part of the appellant were fraudulent. It is contended before us that the mere fact that personal service was not effected would not render the whole proceedings fraudulent. This no doubt is the case. The mere fact that personal service of a summons has not been effected upon a defendant would not render the proceedings against him absolutely abortive, but where the non-service was, as has been found here, due to the fraudulent conduct of the plaintiff in the suit and others acting with him, and a decree was thereby obtained such decree may be set aside as fraudulent. That is what has been found in this case. The learned District Judge points out that not merely was there no personal service, but that the endorsement of service of the serving officer was false, and falsely procured by the appellant. He further finds that there was not, either in his court or in the lower court, any evidence whatever that the claim of the appellant in the Small Cause Court was a genuine one. The appeal has been ably argued by the learned vakil who represents the appellant, but we are unable to accede to his argument. The principle upon which cases of this kind rest is stated by PETHERAM, C. J., in the case of *Mahomed Gulab v. Mahomed Sulaiman* (1). The learned Chief Justice there observes:—"The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and the decree may be set aside by a Court of Justice in a separate suit." (See also *Abdul Majumdar v. Mahomed Gazi Chowdhry* (2). We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1894) I. L. R. 21 Calc., 612, at 619. (2) (1894) I. L. R., 21 Calc., 605

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 v.  
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