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the proper course for the plaintiffs was to proceed under section 108 of the Code of Civil Procedure for setting aside the *ex-parte* decree. But what is alleged in the plaint is not mere non-service but fraudulent suppression of the summons and the causing of a false return of service to be filed. And without in any way dealing with the facts of the case, which we cannot do in second appeal, or saying anything which would hamper the Court of Appeal below in the decision of the case on its merits, we may here observe that there is a material difference between mere non-service or absence of due service of summons, which is the result of mistake or inadvertence and the suppression of service, and the causing of a false return of service which must be the result of deliberate design.

Whether the decree sought to be set aside was obtained by fraud or not is a question of fact which it will be for the lower Appellate Court to decide. If it finds that the decree was fraudulently obtained, the suit would lie. But if it does not find that the decree is tainted by fraud, then the suit will not be maintainable.

The result then is that the decree of the lower Appellate Court will be set aside, and the case remanded to that Court to be tried on its merits.

Costs will abide the result.

H. T. H. *Appeal allowed and Case remanded.*

CRIMINAL REVISION.

1894
March 1.

Before Mr. Justice Beverley and Mr. Justice Hill.

BHOJAL SONAR AND OTHERS (PETITIONERS) *v.* NIRBAN SINGH AND OTHERS (OPPOSITE PARTY.)*

Costs—Criminal Procedure Code, section 148—Order for costs—Assessment of such costs by successor in office.

When a Magistrate passed an order for costs under section 148, Criminal Procedure Code, but did not state what the amount was to be, *held* that his successor in office had no jurisdiction to pass an order assessing such costs.

THE petitioners instituted criminal proceedings under section 145, Criminal Procedure Code, against Nirban Singh and others, and

* Criminal Revision No. 23 of 1894, against the order passed by C. F. O'Donnell, Esq., District Magistrate of Patna, dated the 13th of December 1893.

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the Sub-Divisional Officer (Mr. Leeds) of Barh, by an order dated the 24th of September 1888, gave the petitioners possession, and directed that the members of the second party should each pay his share of the total costs which was to be equally divided amongst the petitioners' ryots. The order did not mention what was to be the amount of the costs. Mr. Leeds was then transferred, and Mr. Hudda succeeded him at Barh. The petitioners then applied to Mr. Hudda to enforce the order for costs passed by Mr. Leeds, and Mr. Hudda, after hearing both parties, assessed the costs at Rs. 542. After some delay the properties of the second party were attached, and on the 26th of April 1893 Mr. Babonau, the then Sub-Divisional Magistrate of Barh, issued notices on the second party to show cause why their properties should not be sold on the 29th of July 1893 in execution of the order for costs. Mr. Babonau allowed the objections of the second party and refused to enforce the order passed by Mr. Hudda, thus virtually setting aside the said order. The petitioners then moved the District Magistrate of Patna and the application was dismissed. From this decision the petitioners moved the High Court in revision and a rule was issued, and on the rule coming on for hearing

Moulvie *Syed Mahomed Tahir* and Moulvie *Serajul Islam* appeared for the petitioners.

Baboo *Atulya Charan Bose* appeared for the opposite party.

Baboo *Atulya Charan Bose* showed cause.—The order of Mr. Babonau refusing to enforce the order of Mr. Hudda awarding costs against Nirban Singh and others is a perfectly good order. Section 148, Criminal Procedure Code, deals with the power as to awarding costs. The order is in the nature of a fine and a fine must be specific, see *Anonymous case* (1) and *Queen-Empress* v. *Husein Gaibu* (2). The Magistrate who made the order under section 145, Criminal Procedure Code, did not award any specific sum, therefore Mr. Hudda who succeeded him in office had no power to order a specific sum to be paid. The language of the section is clear. The power to award costs is not given to the Court passing an order under section 145, but to the individual Magistrate who has given a decision under that section.

(1) 5 Mad., 5. (2) I. L. R. 8 Bom., 307.

There are two unreported cases in my favor, see *Queen-Empress* v. *Sheikh Kaman* decided by Beverley and Ameer Ali, JJ., on the 10th November 1891, and *Queen-Empress* v. *Kunj Behari Lal* decided on the 31st January 1893.

Moulvie *Syed Mohamed Salim* in support of the rule.—The arguments of the other side are of a highly technical character. The Magistrate who passed the order under section 145 really awarded costs. He merely omitted, through an oversight, to name a specific sum, and what Mr. Hudda has done is to carry out his order after due inquiry by specifying a sum to be paid by the other side. The language of section 148, Criminal Procedure Code, clearly means the Court which passes the decision under section 145, not the individual Magistrate. If the construction sought to be put upon that section were correct, it would result in great hardship to litigants. It may be that the Magistrate passing the decision is transferred, as in the present case, and the officer succeeding him would be powerless to help a party in whose favor the original order has been passed and who would then be deprived of the costs incurred by him in the proceedings under section 145, Criminal Procedure Code.

The judgment of the Court (BEVERLEY and HILL, JJ.) was as follows :—

We are of opinion that we ought not to interfere with the order of Mr. Babonau, dated the 29th July 1893. We think that the action of Mr. Hudda in assessing, by his order of [illegible] May 1891, the costs which had been allowed by Mr. Leeds' [illegible] of the 15th September 1888, was without [illegible]diction. In this view we are supported by a decision of this Court in the case of *Queen-Empress* v. *Sheikh Kaman* and others, first party, and *Jhonti Sing*, second party, decided on the 10th November 1891, in which the Court held that under section 148 of the Code of Criminal Procedure it was only the Magistrate who passed the decision, who was authorized to make an order regarding the payment of costs, and we think that the assessment of costs must be taken to be a necessary part of that order. We think, therefore, that, under the circumstances, Mr. Hudda had no jurisdiction to assess the costs in this case more than two

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years after the order for payment of costs had been made by Mr. Leeds, and that Mr. Babonau was justified in refusing to make an order to realize those costs. The rule is discharged.

C. S. *Rule discharged.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1894 *March* 30.

MAHOMED GOLAB (DEFENDANT) *v.* MAHOMED SULLIMAN (PLAINTIFF).*

Fraud—Suit in Recorder's Court to set aside for fraud decree obtained in Small Cause Court—Perjury.

A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story.

Where a decree has been obtained by a fraud practised on another, by which that other has been 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 may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed. But it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other side (which is fraud of the worst description) that he can obtain a rehearing of the questions in dispute in a fresh suit, by merely changing the form in which he places it before the Court, and alleging in his plaint that the first case was obtained by the perjury of the person in whose favor it was against.

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In this case a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Court of Small Causes at Rangoon on the ground that it had been obtained by fraud was held under the circumstances of the case to be not maintainable.

THIS was a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Judge of the Rangoon Court of Small Causes, on the ground that it was obtained by fraud. The plaintiff alleged that he, having been informed by one Molla Sulliman that he was about to go to his country and that

* Regular Appeal No. 307 of 1892 against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated 13th September 1892.