APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

NARSINGH DAS

v.

RAFIKAN.*

1909

Nov. 25.

Right of Suit—Non-service of Summons—Fraud—Civil Procedure Code (Act XIV of 1882), s. 108—Ex-parte decree.

A fresh suit would not lie to set aside a decree on the mere ground of non-service of summons, though it would be maintainable on the ground of fraud.

Radha Raman Shaha v. *Pran Nath Roy* (1) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (2) referred to.

Puran Chand v. *Sheodat Rai* (3) followed.

SECOND APPEAL by Narsingh Das and another, the defendants second party.

The plaintiff, Musammat Rafikan, being the owner of the properties in dispute by virtue of a deed of gift, dated 13th December 1859, from her father, Waizuddin Hossain, executed a lease of the properties on the 14th December 1859 in favour of her father and her mother, Ulfat, for a term of 30 years, expiring on the 7th December 1889. The plaintiff's father died in 1892, and her mother and brother Najimuddin continued in possession as *ticcadars* even after the termination of the lease, paying the rent reserved by the lease to the plaintiff, until the death of her brother in 1898.

The plaintiff's brother, Najimuddin, alleging himself to be the owner of the properties by a verbal deed of gift from Rafikan, had his name registered as proprietor in 1879, and mortgaged the properties in 1886 to Narsingh Das and Ram Pertab

* Appeal from Appellate Decree, No. 1091 of 1907, against the decree of H. E. Ransom, District Judge of Darbhanga, dated Feb. 25, 1907, confirming the decree of Kali Krishna Chowdhury, Subordinate Judge of Mozufferpore, dated Jan. 13, 1904.

(1) (1901) I. L. R. 28 Calc. 475. (2) (1902) I. L. R. 29 Calc. 395.
(3) (1906) I. L. R. 29 All. 212.

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Das, defendants Nos. 3 and 4, and subsequently sold the same to Ajodhya Pershad Singh Thakur and Ambika Pershad Singh, the defendants Nos. 1 and 2.

In 1895, the mortgagees, *i.e.*, the defendants Nos. 3 and 4, brought a suit on their mortgage and made Rafikan, the plaintiff No. 1, and defendants Nos. 1 and 2 as parties defendants, and obtained a decree, and in the execution-sale the properties were purchased by defendants Nos. 3 and 4 for Rs. 6,500. The plaintiff brought this suit for the recovery of khas possession of the properties, but was resisted by the defendants, who claimed under alienation from her brother, and also pleaded that by law of estoppel the plaintiff having allowed Najimuddin, her brother, to hold the properties in dispute as owner, and by the fact of the plaintiff's raising no objection to the title of Najimuddin in the mortgage suit brought against him to which the plaintiff was a party defendant, she was estopped from challenging the decree. The Subordinate Judge held that as the service of summons on Rafikan in the mortgage suit was not proved, and as she denied all knowledge of the suit, she was not bound by it, and decreed the suit for khas possession.

The District Judge, on appeal, reversed the decree and dismissed the suit. On appeal, the High Court remanded the case for a finding on the question of the character in which Najimuddin held possession of the property, and whether such possession was that of a manager or adverse to the interest of the plaintiff, and also whether the question of estoppel was made out. The District Judge, having heard the case on remand, came to the conclusion that possession by Najimuddin was not adverse, that estoppel was not made out, and that the defendant's purchase was not shown to be *bonâ fide ;* and he accordingly dismissed the appeal.

The defendants second party now appealed to the High Court.

Babu Umakali Mookerjee (with him *Babu Lachmi Narayan Singh*), for the appellants, contended that the plaintiff, Bibi

Rafikan, being made a party defendant in the mortgage suit, and an *ex-parte* decree having been passed in the said suit, unless the said decree be set aside, the plaintiff is bound by the decree. Moreover, Rafikan having allowed the property to stand in the name of Najimuddin, she was estopped by her conduct from impeaching the sale. That the defendants appellants being *bonâ fide* purchasers for value, the suit of the plaintiff ought to be dismissed.

Dr. Rashbehary Ghose (with him *Babu Buldeo Narain Singh* and *Babu Chandra Sekhar Banerjee*), for the respondents. The plaintiff, Musammat Rafikan, being unaware of the suit instituted by the defendants, Narsingh Das and others, and the sale proceedings having taken place without the plaintiff's knowledge and not being served on her, she was entitled to have the decree set aside on the ground of fraud. Moreover, the service of summons on her in the mortgage suit by the defendant, Narsingh Das, was not proved, and she was not bound by the decree made therein.

Cur. adv. vult.

HOLMWOOD AND CHATTERJEE JJ. The plaintiff brought the suit giving rise to the present appeal on the allegation that her father had made a gift of the disputed property to her in 1859 : that she gave a lease of the property to her father and mother, that on her father's death her brother and mother held possession under the lease until the death of her brother in 1898, when, on going to assume khas possession, she found herself obstructed by the defendants who claimed under alienations from her brother.

It appears that in 1879 her brother, Najimuddin, got his own name registered as proprietor under an alleged verbal gift from her, and thenceforward continued dealing with the property as his own. In 1886 he mortgaged the disputed property to defendants Nos. 3 and 4. In 1888 he sold the same to defendants Nos. 1 and 2. In 1895 defendants Nos. 3 and 4 brought a suit on the mortgage and therein impleaded the plaintiff No. 1 as well as defendants Nos. 1 and 2 and Najimuddin as

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parties defendants. The suit was decreed, and at a sale held in execution thereof, the disputed property was purchased by defendants Nos. 3 and 4 for Rs. 6,500.

Amongst other things the defendants Nos. 3 and 4 pleaded in this suit that by reason of allowing Najimuddin to act as the owner of the property, and also by reason of her having taken no objection as to the title of Najimuddin in the mortgage suit, the plaintiff was barred by the plea of estoppel. The Court of first instance decreed the suit. On appeal, the District Judge dismissed the suit; but on second appeal this Court remanded the case for a clear finding on the question as to the character in which Najimuddin held possession of the property, *i.e.*, whether he had been in possession as manager or adversely, and also on the question of estoppel. The District Judge, on remand, has held that the possession was not adverse and that estoppel is not made out.

It is contended in second appeal before us that at least the question of estoppel has not been properly tried, and on the facts appearing on the face of the record, the suit should have been dismissed.

The Subordinate Judge held that, in regard to the mortgage suit, the plaintiff denied all knowledge of this suit and the defendants could not prove that the summonses were duly served upon her. He goes on to say—"paragraph 6 of the plaint of the mortgage suit would show that Bibi Rafikan (the plaintiff) was made a party, simply because she got her name registered in respect of Chak Garia, one of the mortgaged properties. Whatever that might be when the service of summons on her is not proved, and when Rafikan denied all knowledge of the suit, she was not bound by it." The District Judge, who first heard the appeal, held that the properties had been continuously in the hands of other persons to her knowledge, and the suit was barred by limitation. After remand by this Court the present District Judge has gone into the question of estoppel in a rather careless manner. He says:—"the evidence as to Rafikan having been made a party to the mortgage suit is meagre and unsatisfactory," and therefore estoppel is not made

out. If we read the language of the learned District Judge according to the ordinary sense of the words used, he is evidently wrong, for the plaintiff No. 1 was, on the face of the mortgage decree, a party defendant in the suit. It may, therefore, be that he meant to say, like the Subordinate Judge, that the service of summons upon her had not been proved, as otherwise there would be no meaning of the words "meagre and unsatisfactory." But even reading this meaning into the words used by the learned Judge, and taking it for granted that the onus of proving non-service was not misplaced, a further question remains to be decided, whether the plaintiff can get rid of the effect of the decree in the mortgage suit by simply proving that she was not served with the summons. The mortgage decree, which is *inter partes*, is *primâ facie* binding on the plaintiff until it is legally set aside, and although she says she came to know of the defendant's possession in 1898, and evidently the title which they asserted, she has not taken any steps for that purpose. The principle of *res judicata* is a principle of rest and convenience, and not of absolute justice. It may be that the plaintiff was really unaware of the suit, and the decree and the sale proceedings were all behind her back; but she was bound, as soon as she came to know the facts, to come to Court in the only manner in which the sanctity of a solemn act of Court can be impeached. She ought to have applied, if possible, to have the decree set aside under section 108, Civil Procedure Code, if she complained only of non-service of summons, or to have applied for a review on the ground of fraud, or brought a regular suit on the ground of fraud if she alleged any. She has done nothing of the kind, and pleads ignorance of the suit when challenged by a title sanctified by a Court sale in execution of a solemn decree of the Court. There is no doubt that fraud will re-open and nullify the most solemn acts of Courts of Justice, and it has been held in a series of cases that a suit will lie for setting aside a decree on the ground of fraud: see *Abdul Mazumdar* v. *Mahomed Gazi* (1), *Mahomed Golab* v. *Mahomed*

(1) (1894) I. L. R. 21 Calc. 605.

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Sulliman (1), *Pran Nath Roy* v. *Mohesh Chandra Moitra* (2), *Nistarini Dassi* v. *Nundo Lall Bose* (3), *Radha Raman Shaha* v. *Pran Nath Roy* (4), *Khagendra Nath Mahata* v. *Pran Nath Roy* (5). But fraud is neither pleaded nor proved in this case, and the only finding that assails the title of the defendants is non-service of summons. There is no direct authority in this Court that a decree can be impeached on this ground except under section 108 of the Civil Procedure Code. The question, however, was raised in several cases, and the decisions seem to show more than indirectly that non-service of summons alone is not a ground for setting aside a decree by suit. In the case of *Abdul Mazumdar* v. *Mahomed Gazi* (6), the learned Judges are reported to have said "it was argued that as the non-service of summons was the only indication of fraud alleged in the plaint, the proper course for the plaintiff 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, which must be the result of deliberate design:" the suit was held to be maintainable only if fraud was proved. There is an elaborate discussion of the principles upon which decrees are set aside for fraud in the cases of *Mahomed Golab* v. *Mahomed Sulliman* (1) and *Nistarini Dassi* v. *Nundo Lall Bose* (3), but no reference to the relevancy of section 108 of the Civil Procedure Code in that connection. In the case of *Pran Nath Roy* v. *Mohesh Chandra Moitra* (2), the learned Judges say—"it may be conceded that the plaintiff could not bring a suit to set aside the decree on the bare ground that the summons was not served, or that he was prevented for some good reason from defending the suit, and that would be so whether he had or had not availed himself of the remedy provided by section 108." This was, however, a mere opinion, as the case was really based on fraud. This case went on appeal to the Privy Council, and Lord Hobhouse, in delivering the judgment of the Judicial

(1) (1894) I. L. R. 21 Calc. 612.
(2) (1897) I. L. R. 24 Calc. 546.
(3) (1899) I. L. R. 26 Calc. 891.
(4) (1901) I. L. R. 28 Calc. 475.
(5) (1902) I. L. R. 29 Calc. 395.
(6) (1894) I. L. R. 21 Calc. 605.

Committee, said—"it is impossible to say that the matter now alleged as fraudulent matter came in any way before the Court under the application which was made by virtue of section 108": *Radha Raman Shaha* v. *Pran Nath Roy* (1).

In a similar case, *Khagendra Nath Mahata v. Pran Nath Roy* (2), before the Privy Council, it was argued that the applications of the plaintiff under sections 108 and 311 of the Civil Procedure Code having failed, he was not entitled to bring a suit for setting aside the decree and consequent sale on the ground of fraud. Lord Robertson, in delivering the judgment of the Judicial Committee, said—"those sections limit the attention of the tribunal to specific matters, and instead of subjecting to enquiry the radical question now involved, they assume the existence of a real suit. But here the suit itself is attached as a fraud." These cases indirectly support the view that if non-service of summons were the only ground on which a decree is impeached no fresh suit would lie. There is direct authority, however, in the Allahabad High Court, in the case of *Puran Chand* v. *Sheodat Rai* (3). In this case an application under section 108, Civil Procedure Code, having been rejected, it was held that the plaintiff could not maintain a fresh suit on the ground of non-service of summons.

If the question of non-service of summons cannot be raised by suit, it cannot be raised as a defence to a suit, and the only remedy would appear to be an application under section 108. The plaintiff is, therefore, not entitled to impeach the decree obtained against her on the mere ground of non-service of summons, and so far as this case is concerned must be held to be bound by the mortgage decree and sale in execution thereof. In this view of the case the appeal must be allowed and the suit of the plaintiff dismissed, but under the circumstances of the case we do not allow costs in this Court: the appellants will have their costs in the Courts below.

Appeal allowed.

S. A. A. A.

(1) (1901) I. L. R. 28 Calc. 475. (2) (1902) I. L. R. 29 Calc. 395.
(3) (1906) I. L. R. 29 All. 212.