**(1909) 11 CAL CK 0026**

**Calcutta High Court**

**Case No:** None

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| Narsing Das and Another | | APPELLANT |
| | Vs | |
| Musammat Bibi Rafikan and Others | | RESPONDENT |

**Date of Decision:** Nov. 25, 1909

**Judgement**

1. 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 hi other 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.

2. It appears that in 1879 her brother, Najim-ud-din, got his own name registered as proprietor under an alleged verbal gift from her and thenceforward continued dealing with the property as Lis 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 Najim-ud-din as 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.

3. Amongst other things the defendants Nos. 3 and 4 pleaded in this suit that by reason of allowing Najim-ud-din to act as the owner of the property and also by reason of her having taken no objection as to the title of Najim-ud-dir 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 bat on second appeal this Court remanded the case for a clear finding on the question as to the character in which Najim-ud-din held possession of the property, i.e. whether lie 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.

4. 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.

5. 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 shew 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 fact 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 prima facie binding on the plaintiff until it, is legally set aside and although she says she came to know of the defendants'' possession in 1893 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 invaded. She ought to have applied if possible to have the decree set aside u/s 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 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 Addul Mazumdir v.

Mahomed Gazi 21 C. 605; Mahomed Golab v. Mahomed Sulliman 21 C. 612; Prannath Roy v. Mohesh Chandra Moitra 24 C. 546; Nistarini Dassi v. Nandolal Bose 26 C. : 3 C.W.N. 670; Radia Raman Shaha v. Prannath Roy 29 C. 395 : 29 I.A. 99; Khajendra Nath Mahata v. Prannath Roy 29 C. 395 : 29 I.A. 99.

6. 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 u/s 108 of the Civil Procedure Code. The question, however, was raised in several cases and the decisions seem to shew 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 21 C. 695, 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 u/s 108 of CPC 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 Mohnmed Golab v. Mohamed Sulliman 21 C. 612, and Nistarini Dassi v. Nandolal Bose 26 C. 191 : 3 C.W.N. 670, but no reference to the relevancy of Section 108, CPC in that connection. In the case of Prannath Roy v. Mohesh Chandra Moitra 24 C. 546 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 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. Prannath Roy 28 C. 475.

7. In a similar case Khajandra Nath Mahata v. Prannath Roy 29 C. 395 : 29 I.A. 99, before the Privy Council, it was arguad that the applications of the plaintiff under Sections 103 and 311 of the Civil Procedure Co le 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 attacked 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 29 A. 212 : A.W.N. (1907) 31 : 4 A.L.J. 51. In this case an application u/s 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.

8. 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 u/s 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 plaintiffs dismissed, but under the circumstances of the case we do not allow costs in this Court: they will have their costs in the Courts below.