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**(1873) 03 CAL CK 0008**

**Calcutta High Court**

**Case No:** Regular Appeal No. 246 of 1871

A.B. Mackintosh

APPELLANT

Vs

Kally Doss Mullick and  
Others

RESPONDENT

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**Date of Decision:** March 4, 1873

**Final Decision:** Dismissed

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### **Judgement**

Sir Richard Couch, Kt., C.J.

The case put forward in the plaint in this suit was that Nobin Chunder Bose had made a purchase as the benamidar for the second, third and fourth defendants; that the sixth defendant had subsequently made a collusive purchase from Nobin Chunder Bose; that the sale at which the property in suit was purchased was in execution of a decree passed in a previous suit; that as the suit was irregular and collusive, the decree passed therein, and the sale in pursuance of it, were invalid, and the plaintiff prayed that the illegal and collusive sale, as he called it, should be set aside. There was no pretence for alleging that there was any collusion on the part of the Collector, nor has it been shown that Charoo Chunder brought about the sale by any intentional default in paying the rent due to the Government. In fact, the case as presented to us now is that Nobin Chunder Bose purchased on behalf of Charoo Chunder and Surruth Chunder, and it was simply a case of benami transaction.

2. An objection has been taken to the validity of the sale that, the defendants in the suit brought by the Government were not summoned. It was put as high as that by the learned Advocate-General. This objection, although not distinctly raised in the plaint, may be considered as coming under the allegation that the suit was irregular.

3. It appears that the suit being commenced by the Government through Prosonno Coomar Mookerjee, the head mohurir, Ashootosh Deb and Promothonath Deb were made defendants in the plaint. Then it was discovered that they were dead, and the second, third and fourth defendants accepted the summons and granted receipts as the heirs. A summons was issued, entitled "in the suit of Prosonno Coomar Mookerjee, head

mohurir, on part of Government" as plaintiff, and these persons as defendants, requiring them to appear on the 9th of April 1868. This summons appears, from the receipt of the peon, which is annexed to it, to have been served by being affixed to the outer door of the house of the defendants, it being stated that on search they were not to be found. Now s. 45 of Act X of 1859 provides that "the summons shall be served by delivering a copy of the summons to the defendant personally when practicable, or if the summons cannot be served on the defendant personally, by affixing a copy of it to some conspicuous part of his usual place of abode, and also affixing a copy of the same in the Collector's office." S. 47 provides that, if the "place of abode of the defendant be in another district, the summons, together with the costs of the service thereof, shall be sent, by the public post, to the Collector of such district, who shall issue the summons and return the same after service, with the prescribed endorsement to the officer by whom it was transmitted to him." These defendants, it is said, were living in another district, in the district of Calcutta, the proceedings being in the Court of the Collector of the 24-Pergunnahs, and it is upon the ground that the summons was not sent, in the manner indicated, to the Collector of Calcutta, that the Advocate-General has rested his objection to the validity of the decree. It is true as argued by him that s. 56 says:--"If on the day fixed by the summons or proclamation for the appearance of the defendant the plaintiff only appears, the Collector upon proof that the summons or proclamation has been duly served, according to the provisions of this Act, shall proceed to examine the plaintiff or his agent, and after considering the allegations of the plaintiff and any documentary or oral evidence adduced by him, may pass judgment ex parte against the defendant;" but it appears to me that the words as to summons or proclamation being duly served according to the provisions of the Act refer to the mode of service directed by s. 45, and it would not be a ground for not proceeding with the case that the summons was not served through the Collector of the district, but by an officer of the Court itself, if the summons had been served in the manner the Act requires, namely, personally when it is practicable, or by affixing a copy to the defendant's place of abode when personal service is not possible. S. 58 provides that an appeal shall not lie "from a judgment passed ex parte against a defendant who has not appeared, but that in all such cases if the defendant shall, within 15 days after any process for enforcing the judgment has been executed, or at any earlier period, show good and sufficient cause for his previous non-appearance, and satisfy the Court that there has been a failure of justice, the Collector may, upon such terms and conditions as to costs or otherwise as he may think proper, revive the suit and alter or rescind the decree as the justice of the case requires." In this case I think there was an ex parte judgment against the defendants which, if they had been prejudiced by the summons having been served on them in this manner, instead of through the Collector of Calcutta, they should have applied to have set aside. There would be really no reason for setting aside the judgment if they had notice of the proceedings. The summons having been served on them by a peon from the Court of the 24-Pergunnahs would give them notice just as well as if it had been served by a peon of the Collector of Calcutta. It seems to me there is no reason for holding that an irregularity of this kind by which the party is not injured vitiates the whole proceedings and renders the decree void, and as was

contended for by the learned Advocate-General that the sale should also be treated as void and as giving no title to the purchaser. No authority going to such a length has been quoted to us. I think the decree was not rendered void by the summons not being served through the Collector of Calcutta. The appeal must be dismissed with costs.

Jackson, J.

4. I am entirely of the same opinion. On the first part of the case the plaintiff asks us, sitting here in appeal, to declare that the decree obtained against Charoo Chunder and his co-defendants was a nullity, and then to go on and set aside the sale by which the land in dispute was conveyed to Nobin Chunder Bose. I entirely concur in the view taken by the Chief Justice as to the meaning of the words in s. 56, Act X of 1859, with reference to a summons being duly served according to the provisions of that Act. It seems to me that those words clearly refer to the mode in which a summons is to be served, and not to the agency by which it is to be served. If we suppose that the plaintiff, or that the defendants in the rent suit, had proceeded by way of application to the Revenue Court, to set aside the ex parte decree on the ground that the summons was not duly served under the provisions of the Act, can we suppose that the Revenue Court would, advertent to the terms of s. 58, have set aside its own decree? It must be borne in mind that the land in respect of which the arrear of rent was claimed is in Dehi Panchannogram, which is a suburb of Calcutta, and that the occupants of the land lived just within the town of Calcutta, at a distance which does not precisely appear, but which certainly does not exceed two or three miles. Can we suppose that under such circumstances the Collector would have held that the summons had not been duly served according to the provisions of the Act, because the serving officer was a peon on his own establishment, and not on the establishment of a neighbouring Collector, and that in consequence failure of justice occurred, for unless he were of that opinion, he could not have granted a new trial? Then, is the plaintiff in the present case to be in a better position than the defendants in the rent suit would have been if they applied under s. 58, Act X of 1859? It appears to me that he ought not, and that there would be considerable danger in allowing him so to stand; for otherwise, instead of submitting the question as to the regularity of the rent decree obtained to the Courts which granted it, it would be leaving the matter to be tried by a different Court, and considerable facility would thus be afforded for collusion between the plaintiff and the defendant for the purpose of defeating a third party, the purchaser of the land sold. But in addition to that, it seems to me to be extremely doubtful whether the Civil Court, which includes not only the Court of the District Judge and of the Subordinate Judge, but also that of the Munsiff, is competent to enquire into the regularity of decrees obtained in the Revenue Court, and either set them aside, or treat them as nullities, on the ground of greater or less irregularities in the proceedings. But even if we admit that the decree ought in this case to have been set aside, and that the Civil Court might deal with it as the plaintiff asked, will the sale for that reason be annulled? As far as I am aware, all the decided cases in this Court take the clear position that under such circumstances the sale, which has been held in execution of a decree either of the Civil or

the Revenue Court, does not fall simply because the decree has been afterwards set aside. I think, therefore, that this Court could not on the ground contended for by the plaintiff, even if it were made out, declare the sale to be invalid.

5. I agree, therefore, in thinking that this appeal must be dismissed with costs.

Mitter, J.

I am of the same opinion. I do not think that the mere fact of non-service of summons, according to the provisions of the Act, is sufficient to render a decree passed by a Court of competent jurisdiction an absolute nullity; for it is clear from the provisions of s. 119 of Act VIII of 1859, as well as from those of s. 58, Act X of the same year, that, unless such a decree is impeached within the time prescribed by those sections, its validity cannot be questioned afterwards. If a decree passed by a Court of competent jurisdiction were, as contended by the appellant, an absolute nullity merely because the summons had not been duly served, the Legislature would not have made those provisions for having such a decree set aside within a prescribed period of time. I have further to remark that the objection as to the validity of the decree does not affect the sale to the purchaser Nobin Chunder Bose, and in that respect the case falls within the principle laid down in the case of Jan Ali v. Jan Ali Chowdhry 1 B.L.R., A.C., 56. In that case a suit for arrears of rent had been brought against the plaintiff, and an ex parte decree passed against him. While that decree was in force, the plaintiff's property was sold in execution, and purchased bond fide by one of the defendants. The decree was afterwards set aside on the application of the plaintiff under the provisions of s. 58, Act X of 1859, upon the ground that he had been kept in ignorance of the proceedings instituted against him by the fraud of the principal defendant. But, notwithstanding the reversal of the decree, the Court refused to interfere with the sale on the ground that, at the time when it was made, the decree was in full force.<sup>(2)</sup>

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<sup>(2)</sup>Their Lordships all agreed with the Subordinate Judge in holding that here was not sufficient evidence to establish that Nobin Chunder Bose bought benami for the mortgagors.