

(1930) 02 CAL CK 0022
In the Calcutta High Court

Bala Baksh Bhararia and Another

APPELLANT

Vs

Amiruddin Mian and Others

RESPONDENT

Date of Decision : 07-02-1930

Acts Referred:

Citation : AIR 1930 Cal 700

Judgement

1. The facts of this case are that the petitioner brought a suit on a mortgage bond against the opposite party. The suit was decreed ex parte. Thereafter opposite parties 2 and 3 applied to the trial Court to have the ex parte decree set aside. That application succeeded and the decree passed against all the defendants was set aside. This rule was obtained on the ground that the trial Court was wrong in setting aside the entire decree including that portion of it which was passed against opposite party 1.

2. It appears that the mortgage bond on which the suit was based was executed by opposite party 1 for himself and on behalf of his minor brother Samiruddin who is now dead and through whom opposite parties 2 and 3 claim. The suit was brought on the basis of the bond against the defendant opposite party 1 as well as against the heirs of Samiruddin defendants 2 and 3. The decree prayed for was a joint decree against all the defendants and the decree passed in the suit was against all the defendants jointly. Neither in the mortgage bond nor in the plaint or the decree there is any specification of the shares and the liabilities of the several defendants in the suit. In my opinion the Court was right in the circumstances of this particular case in setting aside the entire decree. It is not possible to maintain the decree as against defendant 1 and to set it aside as against the other defendants. The decree is a joint decree and is of such a nature that it cannot be set aside against some of the defendants in the suit. One test, which may usefully be applied in such cases in order to determine if the decree is of such a nature that it can or cannot be partially set aside, is whether the decree against the non-contesting defendants may or may not be affected by the result of the trial against the other defendants. If in the present case the suit is dismissed against defendants 2 and 3 the decree against defendant 1 cannot be

maintained intact. The mortgage bond says that the property does not belong to defendant 1 alone but to him and his younger brother. So that the decree that can be¹ passed against defendant 1 will be a decree to the extent of his share in the¹ property in suit. There cannot be a mortgage decree affecting the entire property of which admittedly defendant 1 is not the sole owner. In this view of the matter I am of opinion that the order passed by the Court below is correct and this rule should be discharged with costs, two gold mohurs.