

(1925) 03 CAL CK 0100
In the Calcutta High Court

Hon"ble Maharaja Sir Manindra Chandra Nandi Bahadur	APPELLANT
Vs	
Bhagabati Devi Chowdhurani and Others	RESPONDENT

Date of Decision : 11-03-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 20, Order 41 Rule 33, Order 41 Rule 4

Citation : 90 Ind. Cas. 986

Hon'ble Judges : Suhrawardy, J; Duval, J

Bench : Division Bench

Judgement

Suhrawardy, J.—The present suit was brought by several persons for declaration of title to and recovery of possession of, the disputed land which is said to be on the boundary between the plaintiff's and the defendant's mouzas. The real issue in the case that was tried was whether the disputed land forms part of the plaintiff's Mouza Kadamtola or of the defendant's Mouza Sitaijhar. The Trial Court decreed the suit in part holding that a partition of the land in suit belonged to the plaintiff's mouza. On appeal by the plaintiff, the learned District Judge found that the entire land in suit belonged to the plaintiff's mouza and decreed the suit. Against this decree the present appeal has been preferred by defendant No. 1 making all the plaintiffs and some of the defendants-respondents to the appeal. During the pendency of the appeal in this Court the plaintiff, respondent No. 3 Gopal Das Roy Chowdhury died and an application was made by the appellant after the period of limitation fixed for that purpose to have the abatement of the appeal as against that respondent set aside and for substitution of his heirs in his place. A Rule was issued by this Court; but it was finally discharged on the 48th February last. The result of the decision in the Rule is that the appeal as against the plaintiff-respondent No. 3 has abated.

2. At the hearing of this appeal a preliminary objection is taken on behalf of the respondent that the appeal is incompetent and cannot proceed in the absence of one of the plaintiffs-respondents against whom it must be taken to have been dismissed. I am of opinion that this objection must prevail. The suit was brought

jointly by a number of persons for recovery of possession of a certain property. The suit was decreed and the plaintiffs without specification of their interest in the property were declared to be entitled to possession on a certain right claimed by them. Any person who is dissatisfied with the decree must have a declaration in the presence of the entire body of the plaintiffs that they are not entitled to the right claimed by them which is based upon a common ground of title alleged by them. In a case like the present the real test to be applied is what is suggested in the case of *Dharmjit Narayan Singh v. Chandreshwar Prosad Narayan Singh* 11 C.W.N. 504 : 5 C.L.J. 393, namely, whether the suit as framed could proceed in the absence of one of the plaintiffs. There is yet another test--whether, if the plaintiffs were appellants, the appeal could proceed in the absence of one of the plaintiffs either as appellant or respondent. If the defendant succeeds in this appeal and it is declared that the property in suit belongs to his mouza then there will be two decrees one against all the respondents on the record in whose presence it is decreed that the property belongs to the defendant's mouza and another decree of the lower Court in favour of plaintiff No. 3 who is no party to this appeal to the effect that the property in suit belongs to the plaintiffs' mouza of which he was a part, proprietor. In view of this anomalous result it has been held that an appeal arising out of a suit for possession of land to which one of the plaintiffs-respondents is not a party cannot proceed in his absence. The point was fully considered in the case of *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* 54 Ind. Cas. 822 : 24 C.W. N 44 : 30 C.L.J. 217, where all the cases on the point have been referred to and commented upon. Most of these cases were placed before us by the appellant and the question re-argued. I have given my best considerations to this point and decided to follow the decision in the case of *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* 54 Ind. Cas. 822 : 24 C.W.N 44 : 30 C.L.J. 217. Reliance is placed on behalf of the appellant on the decisions in the case of *Chandarsang v. Khimabhai* 22 B. 718 : 11 Ind. Dec. 1061 and *Upendra Kumar Chakravarti v. Sham Lal Mandal* 34 C. 1020 : 11 C.W.N. 1100 : 6 C.L.J. 715 which follows the Bombay case. These cases have been considered in the case of *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* 54 Ind. Cas. 822 : 24 C.W. N.: 44 : 30 C.L.J. 217 and have been justly distinguished and are not of much authority because no reasons were assigned in support of the view there taken. In the Bombay case, the real point was as to the competency of the appeal in the absence of one of the appellants. In considering the case of one of the respondents who had also died and whose heirs were not brought on the record the learned Judges observed that the Court could proceed u/s 544 of the Code of 1882 (corresponding to Order XLI, Rule 20 of the present Code) against the rest of the respondents. In the case of *Upendra Kumar Chakravarti v. Sham Lal Mandal* 34 C. 1020 : 11 C.W.N. 1100 : 6 C.L.J. 715, the Bombay case was referred to and accepted without any argument. I do not find myself prepared to follow these cases It is argued further on behalf of the appellant that we should proceed in this case under Order XLI, Rule 4. C.P.C. though one of the plaintiffs-respondents is not a party to this appeal. I do not think that we should follow the

course suggested. That rule is limited to the case of appellants. An analogous provision is to be found in the proviso to Order IX, Rule 13, C.P.C. where a number of persons are adversely affected by a common decree any one of them may move the Court to have the decree varied and the Court may vary it not in respect of such person but also in favour of other parties against whom it was passed. But it does not entitle a person against whom the decree is passed to have it varied in the absence of a person in whose favour it was made.

3. It is next prayed that we may proceed under the provisions of Order XLI, Rule 20, C.P.C. and bring in the heirs of the deceased plaintiff-respondent No. 3 on the record and hear the appeal in their presence. An application for that purpose has been formally made: I do not think that we should accede to this request. Order XLI, Rule 20 is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suit without the presence of a party who was not made a party to the appeal. It is not intended to override the provisions of Order XXII, C.P.C. The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated. Reference in this contention has been made to the case of Pulin Behari Roy v. Mahendra Chandra Ghosal 67 Ind. Cas. 10 : 34 C.L.J. 405, where the procedure suggested by the appellant was adopted. Without examining the ratio of that case we are not prepared to follow the procedure adopted therein.

4. We are again asked to exercise our powers under Order XLI, Rule 33. That provision of the law is also not applicable to this case. It is intended to cover cases where the Court may vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court was passed liable under the order passed by the Appellate Court. Whatever view may be taken with regard to the inherent power of this Court as contained in Order XLI, C.P.C. or outside the Code, the present case is not one in which such power should be exercised.

5. In the result, this appeal must be held to be incompetent and dismissed with costs.

6. The application filed by the appellant, is rejected.

Duval, J.

7. I agree.