

(1937) 05 CAL CK 0020
In the Calcutta High Court

Mono Mohan Kundu

APPELLANT

Vs

Nripendra Nath Nandi and Others

RESPONDENT

Date of Decision : 11-05-1937

Acts Referred:

Citation : AIR 1937 Cal 548

Judgement

1. One Moti Lal Kundu died leaving seven sons, Khetra Mohan, Lalit Mohan, Mono Mohan, Mohini Mohan, Kristo Mohan, Jatindra Mohan and Radhika Mohan, Khetra being the eldest and Radhika being the youngest. Shortly after the death of Motilal, leaving some infant sons, the other sons of Motilal borrowed a sum of Rs. 50,000 from some Nandis for the purpose of carrying on their ancestral business on a security of 6/7 the share in some of their ancestral properties. The Nandis thereafter instituted a suit to recover the mortgage money. In this suit Mono Mohan, Mohini Mohan, Kristo Mohan and Radhika Mohan were impleaded as defendants 1 to 4. Lalit Mohan having died after the mortgage his infant sons, defendants 6 and 7, were also impleaded as defendants. Jatindra Mohan having died childless, his mother, that is the widow of Motilal, was also made a party defendant to the suit. The suit was contested by defendants 2, 3 and 4. The natural guardian of defendants 6 and 7 having failed to appear in the suit, a pleader of the Court was appointed their guardian. Summons was served upon him but he did not contest.

2. A preliminary decree was passed in the suit on 22nd February 1929 on contest against defendants 2, 3, 4 and ex parte against defendants 1, 4, 5, 6 and 7. The decree was made final on 26th March 1929. Thereafter defendants 2, 3 and 4 filed an appeal to this Court on 23rd May 1929. On June 1929 defendant 6 filed an application for setting aside the ex parte decree passed against him under Order 9, Rule 13, Civil P.C. On 27th July 1929 defendant 1 filed another application for setting aside the ex parte decree. The appeal to this Court, preferred by defendants 2, 3 and 4, was disposed of on 7th June 1933. The appeal of defendant 4 was allowed and the suit was dismissed against him and the decree of the trial Court was affirmed by this Court. The applications of

defendants 1 and 6 came up for hearing before the learned Subordinate Judge on 25th September 1934, and by his order dated 29th September 1934 the learned Judge rejected the two applications on the ground that the decree of the Subordinate Judge against all the defendants except defendant 4 having been affirmed on appeal by this Court, there was no ex parte decree of the trial Court in existence which could be set aside by him under the provisions of Order 9, Rule 13 of the Code. Hence these two appeals, M.A. No. 107, is by defendant 6 and M.A. No. 104 is by defendant 1. By Rule 13 of Order 9, Civil P.C., the Court which passes an ex parte decree has authority to set aside the ex parte decree. The exercise of this power pre-supposes the existence of an ex parte decree. If an appeal is preferred against the ex parte decree, the ex parte decree continues till the appellate Court has determined the rights of the parties in controversy. After such determination by the Court of appeal, the decree of the trial Court ceases to exist. If the decree of the trial Court is affirmed in appeal, it merges in the decree of the Court of appeal and consequently ceases to have any existence: See the case in *Brij Narain v. Tejbal Bikram* (1910) 32 All 295.

3. The contention of the learned Advocate appearing on behalf of the appellants in these two appeals however is that in spite of the decree of the Court of appeal there is still a subsisting decree of the trial Court over which the trial Court has control. It is argued that the decree of the trial Court against defendants 2 and 3 only, was affirmed by the Court of appeal and not the decree against the other defendants, including the appellants in these two appeals, and consequently the ex parte decree of the trial Court against the appellants still subsists. Whether the entire decree or a portion of it merged in the decree of the Court of appeal would depend upon the scope of the appeal which was preferred by defendants 2 and 3 against the decree of the trial Judge. The scope of an appeal would depend not only on its value but also on a

variety of things as well, namely the subject matter involved, the parties concerned therein and the manner of its disposal: see *Kalimuddin Ahamed Vs. Esabakuddin and Others*, .

4. It is not disputed that the value of the appeal which was preferred by defendants 2 and 3 was the same as the value of the suit. The parties to the suit were all parties to the appeal. The decree of the trial Court was one indivisible decree against all the defendants and it proceeded on a ground common to all of them, namely that they executed the bond and received the consideration and did not pay off the debt. The appeal to this Court proceeded on grounds common to all the defendants, though there was a special ground so far as the appeal of defendant 4 was concerned, namely that he was a minor at the time when the bond was executed. The grounds of appeal taken in the appeal were such, if instead of affirming the decree of the trial Judge, the Court of appeal had reversed it, it could have done so in favour of the other defendants as well, who were parties to the appeal but who did not appeal. There cannot be any doubt therefore that the entire subject matter of the suit and of the decree was

involved in the appeal. The manner in which the appeal was disposed of by the Court of appeal is indicated by the following passage in the judgment of the learned Judges who disposed of the appeal:

The defendants to the suit, including the present appellants, raised several defences which it is not now necessary to mention beyond saying this: that they raise defences which have been disallowed to the effect that the defendants were made to sign the mortgage whereas they had unbounded confidence in their elder brother and agreed to sign the document as they were given to understand that this was a lease. The Subordinate Judge has rightly rejected this part of the defendants' case.

5. From this it is clear that the learned Judges were not simply considering the defence of the appealing defendants. They were considering the defence to the entire suit. The decree that was passed by the learned Judges is in these terms:

It is ordered and decreed that the decree of the Court below be varied in the manner following, namely, that the decree of the Court below in so far as it has allowed the plaintiff's suit as against defendant 4, and in so far as it has directed that costs be paid by him to the plaintiff, be set aside, and in lieu thereof it is ordered and decreed that the suit do stand dismissed as against the" said defendant i alone. And it is further ordered and decreed that the rest of the decree of the Court below do stand affirmed.

6. There cannot be any doubt therefore that the entire subject matter of the suit, as well as of the decree of the trial Judge, came under the judicial consideration of the Court of appeal and the Court of appeal dealt with the entire subject matter of the decree. The learned Judge was therefore right in holding that the decree of the trial Judge became merged in the decree of the Court of appeal and ceased to subsist any longer and that there was no ex parte decree of the trial Court subsisting which he could set aside under the provisions of Order 9, Rule 13 of the Code. It may be pointed out that defendant 6 was admittedly a minor at the time when the ex parte decree was passed. In his application under Order 9, Rule 13, there is no allegation that the summons upon his guardian was not served. The result therefore is that the appeals are dismissed with costs hearing fee being assessed at one gold mohur in each appeal payable to the decree-holders only.