
(1917) 08 CAL CK 0032
In the Calcutta High Court

Nilmoni Dey

APPELLANT

Vs

Hira Lal Das

RESPONDENT

Date of Decision : 21-08-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 31 Rule 2, 73

Citation : 43 Ind. Cas. 452

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. The events which led to the issue of this Rule may be briefly stated. One Bhusan Chandra Bnar appointed three persons A, B, and C as executors to his Will. After his death, one of his creditors X instituted a suit against two of these executors A and B for recovery of his dues from the estate. The suit was not defended and an ex parte decree was made on the 17th April 1917. A, one of the executors, who was himself a creditor of the estate, instituted a suit against B and G for recovery of his dues. The claim was decreed. The question now arises, whether these two decree-holders are entitled to rateable distribution of the assets u/s 73 of the Civil Procedure Code. The Subordinate Judge has held that X is not entitled to claim rateable distribution along with A. In our opinion this view cannot be supported.

2. It may be conceded that Order XXXI, Rule 2, Code of Civil Procedure, provides that where there are several executors, they shall all be made parties to a suit against one or more of them, provided that the executors who have not proved their testator's Will need not be made parties. From this point of view, it is conceivable that the petitioner should have instituted this suit against A, B and C. No objection, however, was taken to the frame of the suit, and it is now impossible to hold in these proceedings that the decree made therein is not operative against the estate of the testator, merely because one of the executors was not joined as a party. The view, we take, receives some support from the decision in *Hafizabai v. Kazi Abdul Karim* 19 B. 83pc : 10 Ind. Dec. (N.S.) 55.

What has happened in substance is that, there are now two decrees against the estate, each obtained against two out of three executors. One of these two executors is common to the two suits. Each decree is *prima facie* capable of execution against the estate of the deceased testator. In these circumstances, we are of opinion that the two decrees may, without unduly straining the language of Section 73, be regarded as passed against the same judgment-debtor, namely, they are both decrees against the estate of Bhusan Chandra Bhar, in one case represented by A and B, in the other case by B and G. We may add that we are not disposed to put a narrow construction upon the terms of Section 73, so as to defeat the ends of justice. We hold accordingly that the two decree-holders must rateably divide the assets u/s 73. The Rule is made absolute and the order of the Court below set aside. The record will be returned to the Subordinate Judge in order that this order may be carried out. We make no order as to the costs of this Rule.