

(1910) 05 CAL CK 0056
In the Calcutta High Court

Nityamoni Dasi and Others

APPELLANT

Vs

Gokul Chandra Sen and Others

RESPONDENT

Date of Decision : 19-05-1910

Acts Referred:

Citation : 9 Ind. Cas. 210

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of some of the defendants in a suits for partition of joint property. In the Court below, the parties put in a petition of compromise which as drawn up was obviously intended to be signed by all the plaintiffs and all the defendants. For some unexplained reason, however, it was signed only by some of the plaintiffs and some of the defendants. This defect was apparently overlooked, and arbitrators were appointed to give effect to the terms upon which the parties had agreed. One of the defendants who did not sign the petition of compromise took objection before the arbitrator; the result was that the arbitration fell through and the matter was brought back into Court, The Subordinate Judge then took up the matter for disposal, and on the 19th August, 1909, he held that as against the non-appearing defendant who had objected to the arbitration, the suit should be heard ex parte, and that as regards the other parties a preliminary decree should be passed in terms of the petition of compromise. The learned Judge then gave directions for the appointment of Commissioner to make the partition by metes and bounds in accordance with these terms. This preliminary decree is now challenged by several appellants who were all, except one, parties to the petition of compromise. The learned Vakil for the respondents has taken a preliminary objection to the hearing of the appeal on the ground that the appeal is incompetent because it is directed against a decree made by consent. This objection is sought to be supported by the decision of this Court in the case of Biraj Mohini Dasi v. Chintamoni Dasi 5 C.W.N. 877, where it was ruled that when a decree is passed by consent of parties, the question as to whether or not the compromise decree is valid cannot be gone

into on an appeal against that decree. This objection must prevail in so far as the appellants who were parties to the petition of compromise are concerned but it cannot take effect in so far as the sixth defendant is concerned, who did not join in the compromise and against whom the decree has admittedly been made ex parte. His contention is that the decree as against him should have been based on the merits of the case and ought not to have been passed on the terms of the petition of compromise of the other parties to the suit. This objection is obviously well-founded. It is suggested that the Subordinate Judge has gone into the merits of the case and has come to the conclusion that the arrangement acceptable to the other parties was so just that a decree ought to be made in accordance therewith even as against the sixth defendant. The Subordinate Judge, however, has done nothing of the kind suggested; he has obviously made a decree against the sixth defendant on the basis of the petition of compromise, the terms of which had been agreed to by the other parties only.

2. The result, therefore, is that while the appeal of all the appellants except the sixth defendant is dismissed, that of the sixth defendant is allowed. The decree of the Subordinate Judge must be set aside and the whole case retried, because, as this is a suit for partition of joint property, a decree by consent amongst some only of the parties cannot possibly be maintained. The appellants, however, whose appeals are dismissed, must pay the respondent their costs of this appeal. The sixth defendant must pay his own costs of this Court. We assess the hearing fee at Rs. 300.