

(1924) 02 PAT CK 0022

In the Patna High Court

Raghubar Chaudhuri

APPELLANT

Vs

Ramasray Prasad Chaudhuri and Others

RESPONDENT

Date of Decision : 20-02-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : AIR 1924 Patna 771

Judgement

1. We are obliged to allow the appeal not because there is any merit in this appeal, but because the learned Subordinate Judge has set aside the mortgage decree as against Defendant No. 9.

2. The facts are these. The suit was on a mortgage and on the 30th of January, 1923, the Subordinate Judge passed an ex parte decree as against defendants Nos. 1, 2, 3 and 9, and a decree as against defendants Nos. 4 to 8 on contest. The petitioner, who was cited as defendant No. 1 in the action, and defendant No. 9 made separate applications for setting aside the decree under the provisions of Order 9, Rule 13 of the Code of Civil Procedure. The application of defendant No. 9 succeeded, but the application of Defendant No. 1 failed. Now the Code provides that where the decree is of such a nature that it cannot be set aside against any particular defendant, it may be set aside against all or any of the other defendants also. As I have already stated, the suit was brought on a mortgage and the liability of the defendants was a joint liability. That being so, the learned Subordinate Judge in setting aside the decree as against defendant No. 9 should have set aside the decree as against all the defendants. Strictly speaking this point really arises in the application which was made on behalf of defendant No. 9. But the position now is this, that although the liability of the defendants is a joint liability the decree has been set aside as against defendant No. 9 and maintained as against defendant No. 1. The position is an impossible one.

3. We must allow the appeal; but, as the appellant succeeds only by reason of the fact that the application of defendant No. 9 succeeded in the court below, he

must pay the costs of this appeal to the opposite party.