
(1913) 01 CAL CK 0005
In the Calcutta High Court

Srish Chandra Pal Chowdhury

APPELLANT

Vs

Triguna Prosad Pal Chowdhury and Others

RESPONDENT

Date of Decision : 30-01-1913

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : 18 Ind. Cas. 444

Hon'ble Judges : Holmwood, J;Chapman, J

Bench : Division Bench

Judgement

1. The plaintiff appeals. He had been one of the defendants in a suit for partition. The suit had terminated in a compromise and the decree for partition had been in accordance with it, The present suit was for a declaration that in one respect, the compromise deed had not expressed the intention of the parties. The appellant's case was that it had been the intention to preserve a certain tank and the appurtenances thereto as joint property, but that by mistake, these items had been allotted to certain parsons who were made defendants in the present suit. The prayer was that the deed of compromise should be rectified accordingly.

2. The appellant's suit was dismissed upon two grounds. The first ground is that the suit was barred by res judicata. The appellant had made an application for review of the judgment in the previous suit upon the same ground as that put forward in the present suit. That application for review had been unsuccessful, The District Judge appears to have held that the matter in issue between the parties having been heard and decided in the course of the proceedings in review, the present suit, could not be entertained. It is contended that the learned District; Judge here fell into error. The contention must, in our opinion, prevail. It is true that the parties to the present suit were also parties to the application for review. But an application for review is not a suit within the meaning of Section 13 of the Code of Civil Procedure, and neither that section nor any doctrine of constructive res judicata can rightly be applied to cases of

the present kind. The matter has been very fully discussed in the case of *Musammat Gulab Koer v. Badshah Bahadur* 10 C.L.J. 420 : 2 Ind. Cas. 129 : 13 C.W.N. 1197 We are in entire accordance with the views there expressed and are of opinion that the previous case of *Ram Gopal Mazumdar v. Prosanna Kumar Samal* 2 C.L.J. 608 : 10 C.W.N. 529 can rightly be distinguished upon the grounds there stated. The present suit was not, in our opinion, barred by reason of the decision in the previous application for review.

3. The second ground, upon which the appellant's suit was held to be incompetent, was that the compromise having merged in a decree it was not open to the appellant to sue merely for the rectification of the compromise. He should have prayed for the rectification of the decree. This is, in our opinion, a mere technicality. The decree merely recited that the suit was decreed in terms of the compromise. The rectification of the decree must necessarily follow any rectification of the compromise, and if the plaintiff could make out a case for the rectification of the compromise he should, in our opinion, be given the relief to which the facts proved would entitle him, that is, a decree for the rectification of the decree based on the compromise. The technical omission in the plaint to ask for relief in this particular form should not be allowed to stand in the way.

4. The two preliminary grounds upon which the appellant's suit was dismissed were erroneous. We, therefore, set aside the judgment and decree of the learned District Judge and remand the case for disposal by him on the merits in accordance with the above remarks. Costs will abide the result.