

(1927) 05 CAL CK 0043
In the Calcutta High Court

Sushil Kumar Chowdhury and Others	Vs	APPELLANT
Annada Prasanna Lahiri and Others		RESPONDENT

Date of Decision : 03-05-1927

Acts Referred:

Citation : AIR 1927 Cal 692 : 103 Ind. Cas. 860

Hon'ble Judges : Panton, J;Mitter, J

Bench : Full Bench

Judgement

Mitter, J.—This Rule was issued on the opposite parties to show cause why the order of the District Judge of Pabna and Bogra, dated the 4th of August 1926, dismissing an appeal against an order made under Order 9, Rule 13, Civil P.C., on the ground of non-joinder of necessary parties, should not be set aside. The facts which are necessary to be considered for the purposes of the Rule are these : The opposite parties 1, 2 and 3 brought a suit in the Court of the Subordinate Judge of Pabna against the petitioner 1, and the mother of petitioners 3 to 8 and of the late Sir Asutosh Chaudhuri (whose estate is now represented by the petitioner 2) and 47 other persons for partition of certain lands within certain touzis of Pabna and Rajshahi Colectorates and for specifications of their shares therein with respect to their zemindari and patni rights; 23 other persons, who were holders of a superior interest in the touzi concerned, were subsequently added as defendants to the suit.

2. On the 21st February 1923 a preliminary decree was passed in the said suit; some of the defendants filed a petition of compromise and the preliminary decree was based on a compromise as against the said defendants and was ex-parte against the other defendants including the petitioners; the petitioners alleged that they were not served with summons and they came to know of the preliminary decree on the 10th April 1923; on the 27th April 1923 petitioners applied to the Court under Order 9, Rule 13 of the Civil P.C. for setting aside the ex parte decree; the Subordinate Judge dismissed the application on the 19th March 1924; against the said order of dismissal the petitioners preferred an

appeal to the District Judge of Pabna making the plaintiffs and all other defendants parties to the partition suit. Respondent 30, Jatindra Nath Chakravarti, having died, his heirs were not brought on the record of the appeal within the time limited by law; respondent 50, viz., the Maharaja of Natore, having died, his heirs were not brought on the record of the said appeal. It may be mentioned here that the Maharaja is a holder of the superior interest and is not a necessary party to the suit of partition amongst the holders of the inferior interest the District Judge dismissed the appeal as the appeal had abated against respondents 30 and 50.

3. On these facts the present Rule was obtained and it is contended before us by the learned advocate for the petitioners that the lower appellate Court had declined jurisdiction in not hearing the appeal on the merits as the appeal before him was competently brought and notice was given to the plaintiffs who, it is contended, are "opposite parties" to the said application within the meaning of Order 9, Rule 14, Civil P.C.,) A preliminary objection has been taken to the hearing of this Rule on the ground that the Rule cannot be heard in the absence of the heirs of respondent 30. It may be stated here that an application by the heirs of the respondent 30 for being added as an opposite party to the Rule was made to us, and we refused this application. The question raised by the preliminary objection as to the competency of the Rule depends on the view which we take as to the competency of the appeal before the lower appellate Court. On the determination of the question involved in the Rule the question raised by the preliminary objection will depend. We, therefore, proceed to consider the soundness of the point raised by the learned advocate for the petitioners. The question depends on the construction which is to be put on Order 9, Rule 14 Civil P.C. The Rule runs as follows:

No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

4. It is contended on behalf of the petitioners that the word "opposite party" mean the plaintiffs in the present partition suit on whom notice of the application was admittedly served. On the other hand, it is contended on behalf of the opposite party that it is a suit for partition and as the position of the defendants inter se is the position of counter-claimants, the words "opposite party" would include the defendants besides the petitioners, and reliance has been placed on the following observations of their Lordships of the Judicial Committee in the case of *Nalini Kanta Lahiri v. Sarnomoyi Debya* AIR 1914 P.C. 31:

If any co-sharer applies for a partition of a property he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against the co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore it is a decree against them, and in favour of himself.

5. We have considered the two conflicting contentions and it seems to us that the

words "opposite party" would mean the plaintiffs who obtained the ex-parte decree against the defendant and as notice was given to the plaintiffs the learned District Judge was wrong in dismissing the appeal on the preliminary ground. The learned District Judge will therefore rehear the appeal on the merits and if he finds that no summons was served on the petitioners, he will set aside the ex-parte decree against them and proceed to rehear the partition suit but he will not set aside the decree against the other defendants as the proviso to Order 9, Rule 13, cannot be given effect to in the absence of some of the defendants. It will be open to the plaintiffs and the other defendants who have not applied to set aside the preliminary decree to take any objection that may be open to them arising out of the new state of things if the ex-parte decree is set aside and the suit against the petitioners " be proceeded with. The view we take receives indirect support from a decision of the learned Chief Justice and Mr. Justice Mookerjee in the case of Kailas Chandra Ray and Others Vs. Hridoy Chandra Das and Others, , relating to an order made under the analogous provisions of Order 9, Rule 9 Civil P.C. in a suit which was brought to set aside a preliminary and final decree for partition which was dismissed for default.

6. The view we take is not also inconsistent with the decision of the Judicial Committee to which reference has been made as there the question arose as to what is the effect of a decree between the defendants in a partition suit inter se and their Lordships laid down that such a decree will have the effect of res judicata and will bar a subsequent suit for partition instituted by one of the defendants against another as the position of defendants in a partition suit is that of counter-claimants. The Rule is made absolute but under the circumstances the petitioners¹ will pay the opposite party's costs which we assess at 2 gold mohurs.

Panton, J.

7. I agree.