

Nirode Chandra Banerjee and ors. Vs. Profulla Chandra Banerjee and ors.

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Court : Kolkata

Decided On : Jan-29-1923

Reported in : 85Ind.Cas.168

Judge : Asutosh Mookerjee and ;Rankin, JJ.

Appellant : Nirode Chandra Banerjee and ors.

Respondent : Profulla Chandra Banerjee and ors.

Judgement :

1. This is an appeal by the pro forma defendants against what purports to be a consent decree in a suit to set aside a sale held under Regulation VIII of 1819. On the 21st May 1920 the plaintiffs instituted the suit against the zemindars, the auction-purchaser, and two other persons, their co-sharers whom they described as pro forma defendants. On the 30th June 1921 the pro forma defendants, who were infants represented by their mother as their certificated guardian, applied to be transferred from the category of defendants to that of plaintiffs. No order was passed on this application. On the 27th September 1921 the case was settled as between the plaintiffs and the auction-purchaser. At that stage the pro forma defendants renewed their application to be made co-plaintiffs. The Court refused the, application and made a decree on the basis of the compromise between the plaintiffs and the auction-purchaser. As a result of the decree so made, the suit was no doubt nominally dismissed as against the pro forma defendants; but there can be no question that their position was seriously affected thereby, because they

had the same interest in the cancellation of the putni sale as their co-sharers, the plaintiffs, who by reason of the arrangement with the auction-purchaser decided to abide by the sale. The present appeal is directed against the consent decree.

3. A preliminary objection has been taken that the appeal is barred under Section 96(3) of the C.P.C. 1908, which provides that no appeal shall lie from a decree passed by the Court with the consent-of parties. There is no force in this contrition, because, as explained in *Nityamoni Dasi v. Gokul Chandra Sen* 9 Ind. Cas. 210 : 13 C.L.J. 16, *Gobind Chandra Sardar v. Bhagabat Sardar* 27 Ind. Cas. 242, and *Loke Kath Singh v. Gaju Singh* 31 Ind. Cas. 426 : 22 C.L.J. 333 : 20 C.W.N. 178, a person who is not a party to the compromise, though a party to the suit, can appeal against the compromise decree which binds only those who are parties to the compromise. The bar applies only when the appellant has, by himself or through Counsel, consented in the Trial Court to the decree he seeks to impeach before the superior Tribunal: *Bradish v. Gee* (1754) 1 Kenyon 73 : 1 Ambler 229 : 93 E.R. 920, *Asad Reza v. Wahidunnessa Begum* 57 Ind. Cas. 70 : 30 C.L.J. 231, *Biraj Mohini Dasi v. Srimati Chimta Moni* 5 C.W.N. 877, *Radha Kissen Khetry v. Liuthmi Chand Jhawar* 56 Ind. Cas. 541 : 31 C.L.J. 283 : 24 C.W.N. 454. We hold accordingly that when a decree has been made as between some of the parties to a suit, the other parties who have not assented to the compromise are entitled to appeal against the decree, provided they have been prejudicially affected thereby. We may re-call in this connection that the case of *Krishna Chandra Goldar v. Mohesh Chandra Saha* 9 C.W.N. 584, shows that even a defendant may appeal against a decree which nominally dismisses the suit against him but really prejudices his position. The preliminary objection must consequently be overruled.

4. As regards the merits, we are clearly of opinion that the application of the pro forma defendants to be made co-plaintiffs should not have been refused. As pointed out in the cases of *Brojendra Kumar Das v. Gobinda Mohan Das* 34 Ind. Cas. 186 : 20 C.W.N. 752 and *Debendra Naryan Singh v. Narendra Narayan Singh* 54 Ind. Cas. 636 : 30 C.L.J. 417 : 24 C.W.N. 110, where the relevant authorities will be found reviewed, the Court has very wide powers, under the present Code, in respect of addition or transfer of parties. This discretionary power must be exercised in such a way as to achieve the ends of substantial justice. In

the case before us if the order of refusal is allowed to stand, the only result will be that the pro forma defendants will be driven to a separate suit.

5. The result is that this appeal is allowed and the decree of the Court below dismissing the suit as against the pro forma defendants set aside. We direct that the pro forma defendants, the present appellants, be transferred to the category of plaintiffs with liberty to prosecute the suit on their own behalf. The appellants are entitled to their costs of this appeal.

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