

(2010) 08 AHC CK 0483

Allahabad High Court

Case No: C.M.W.P. No. 44792 of 2010

Ram Kumar and Another

APPELLANT

Vs

Additional District Judge and
Others

RESPONDENT

Date of Decision: Aug. 6, 2010

Acts Referred:

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

Citation: (2011) 2 ADJ 770 : (2011) 112 RD 173

Hon'ble Judges: Krishna Murari, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Krishna Murari, J.

Shri T.P. Bharadwaj holding brief of Shri Vishesh Kumar Gupta has made a request to adjourn the case. The matter was heard at great length on 5th August, 2010. On the request made by Shri Vishesh Kumar Gupta, the matter was adjourned for after lunch session in order to enable him to look into the decision referred to in the impugned judgment in Rani Choudhury v. Lt. Col Suraj Jit Choudhury.¹ However, after lunch he did not appear. The matter was posted for today and again, adjournment has been sought. Prayer made is refused.

2. The sole controversy in this case is as to whether after dismissal of appeal filed against the decree, whether an application is maintainable under Order IX, Rule 13, CPC. The issue is clearly covered by the decision of the Hon'ble Apex Court in the case of Rani Choudhury (supra), wherein it has been held as under:

A plain reading of the Explanation clearly indicates that if any appeal against an ex parte decree has been disposed of on any ground other than the ground that the Appellant has withdrawn the appeal, no application for setting aside the ex parte decree under Order IX, Rule 13 will be entertained. The words used in the

Explanation are clear and unambiguous. The language used in the Explanation clearly suggests that where there has been an appeal against a decree passed ex parte and the appeal has been disposed of on any ground other than the ground that the Appellant has withdrawn the appeal, no application shall lie under Order IX, Rule 13 for setting aside the ex parte decree.

3. In the case in hand, suit filed by the Plaintiff -Respondent was decreed by the Trial Court by means of ex parte judgment and decree dated 10.10.1980, against which First Appeal was preferred by some of the Defendants, which was partly allowed on 15.7.1982. The matter came up to this Court in Second Appeal No. 2257 of 1982, which was also dismissed on 10.11.2005. The judgment and decree has been affirmed by the Hon"ble Apex Court by dismissal of the SLP on 17.4.2006. Thereafter the Petitioner moved an application under Order IX, Rule 13 CPC for recall of the ex parte judgment and decree on the allegation that they were also legal heirs of the deceased Defendants and were not impleaded after his death.

4. It is undisputed that the estate of the deceased Defendant was duly represented by some of the heirs, who went up in appeal. Hon"ble Apex Court in the case of N.K. Mohd, Sulaiman Sahib v. N.C. Mohd. Ismail Saheb and Ors.,¹ in identical situations, held that the principle of representation of the estate by the heirs who were joined as parties applied to the case and the decree was binding on persons who claimed to be the sons of the deceased mortgagor and sued for a declaration that the mortgage decree was not binding on them.

5. Same view has been taken by the Hon"ble Apex Court in the case of Harihar Prasad Singh and Ors. v. Balmiki Prasad Singh and Ors.,² wherein it has been held that the estate of the deceased was fully represented by the heirs, who had been brought on record and these heirs represented the absent heirs also, who could be equally bound by the result.

6. In view of the law laid down by the Hon"ble Apex Court, the application filed by the Petitioners under Order IX, Rule 13, CPC for recall of the ex parte decree on the ground that they were also the heirs of the deceased Defendant, who were not impleaded, would not be maintainable and has rightly been rejected by the two Courts below.

The writ petition being devoid of merit, stands dismissed.