

(1914) 05 CAL CK 0003

Calcutta High Court

Case No: Rule No. 444 of 1914

Damodar Misra and Another

APPELLANT

Vs

Hrishi Naik and Others

RESPONDENT

Date of Decision: May 5, 1914

Judgement

1. In this case the Petitioners before us instituted a suit for declaration of their title to, and for possession of, certain lands. The suit was instituted on the 7th of January 1913 against five Defendants. On the 9th of April in the same year, Defendants Nos. 4 and 5 filed a petition of compromise and asked for a decree so far as they were concerned on that compromise, and an ex-parte decree against the other Defendants. Fresh service, however, was ordered on the other Defendants and, on the 7th of May, Defendants Nos. 4 and 5 appeared in Court with a petition of compromise purporting to be executed by Defendants Nos. 1 to 3 as well as by themselves. On this petition a decree was made in terms of the compromise. Afterwards, Defendants Nos. 1 to 3 put in a petition to the Court stating that Defendants Nos. 4 and 5 had no authority to present the petition of compromise on their behalf, that no summons had ever been served on them, as had been ordered, and that the petition, was fraudulently represented as being made by them. On this, the Court, acting under Order IX, rule 13, C.P.C., set aside the decree that had been passed and ordered the case to be set down for trial in the usual way. A Rule has now been granted to the Plaintiffs calling upon the Opposite Parties to show cause why the order setting aside the decree should not be set aside. The rule must be made absolute for, the reason that the decree in this case cannot be treated as an ex-parte one and that consequently Order IX, rule 13, C.P.C., does not apply. It is argued before us that, on the evidence that has been given, it appears that the petition of compromise was not the petition of Defendants Nos. 1 to 3, and that consequently they cannot be considered to have appeared before the Court and that the decree was ex-parte. We cannot dispose of the case from this point of view. The Judge, when he made his order, was under the impression that all the parties in the case were/before him and that the petition was the petition of all the parties.

Consequently, in granting the petition he did not intend to make it ex-parte and it does not appear that he did so on the face of the record. We cannot go behind the record to decide whether the Defendants Nos. 1 to 3 were properly represented or not. That would be begging the question which was sought to be raised before the Court.

2. The Rule is made absolute with costs - two gold mohurs.