

(1932) 05 CAL CK 0004

Calcutta High Court

Case No: None

Haridas Sadhu Khan

APPELLANT

Vs

Iswar Ratneswar and Others

RESPONDENT

Date of Decision: May 24, 1932

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3

Citation: AIR 1933 Cal 94

Hon'ble Judges: M.C. Ghose, J; Guha, J

Bench: Full Bench

Judgement

Guha, J.

This appeal has arisen out of an application under Order 23, Rule 3, Civil P.C., made by the plaintiff in a suit for recording a compromise. The suit was instituted by the plaintiff in the Court of the Additional Subordinate Judge, Howrah, for a declaration that the properties mentioned in the plaint were debuttar properties of the idols Sri Sri Iswar Ratneswar Kedar Nath Shiva and Sri Sri Iswar Sridhar Jiu, and for a further declaration that the plaintiff was a shebait of the idols. In view of the allegations made in the plaint that the defendants, three in number, had acted in contravention of the terms of the shebaitnama, dated 20th June 1874, the plaintiff prayed that the defendants might be declared unfit to continue as shebaites. A permanent injunction was prayed for preventing the defendants from offering any resistance in case the plaintiff acted as a shebait of the said idols, and made repairs to the temples belonging to the idols. A prayer was made by the plaintiff as shebait for obtaining possession of the debuttar properties, and there was a further prayer for accounts to be rendered by the defendants in the suit. As it appears from the order sheet, the case was pending from 1924; on 18th August 1930, when it was about to come to a hearing, a representation was made to the Court by the plaintiff and defendants 1 and 2 that the parties wanted to come to an amicable settlement, and an application was filed in Court praying for a day's time to put in a solenama.

2. On that date pleaders were heard, and time was allowed as prayed for. On the next date the plaintiff and defendants 1 and 2 filed a joint application, stating that the solenama had not yet been signed by defendant 3, and prayer was made for a day's further time, to file the petition of compromise. The Court granted time as prayed for. On 20th August 1930, the pleaders of the parties, presumably the pleaders appearing for the plaintiff and defendants 1 and 2, stated to the Court that defendant 3 was unwilling to join in the solenama. The case was on that date directed to be put up on 23rd August 1930, for enabling the plaintiff and defendants 1 and 2 to file the solenama, and for proceeding ex parte against defendant 3 who was absent on that date, viz., 20th August 1930. The next order recorded in the order sheet shows that on 23rd August 1930, plaintiff and defendant 1 filed a joint application praying for time to file solenama, and this prayer was granted, as the last chance; and the case was adjourned to 25th August 1930, for filing the solenama, for ex parte trial against defendant 3. At this stage of the proceedings, on 25th August 1930, the plaintiff filed the application under Order 23, Rule 3, Civil P.C., for recording a compromise which, according to the plaintiff, had been entered into between all the parties to the suit. The defendants opposed the application so made by the plaintiff. The objections raised by the defendants have been negatived by the lower Court. There is no appeal to this Court by defendants 1 and 2. It is only defendant 3 who has preferred an appeal to this Court. (After discussing evidence his Lordship proceeded.) In the above view of the case, regard being had to the materials placed on the record, we have no hesitation in coming to the conclusion, that so far as defendant 3 was concerned, he was not a party to the compromise which was entered into as between the plaintiff and defendants 1 and 2 and which was sought to be enforced by an application made to the Court under the provisions contained in Order 23, Rule 3, Civil P.C.

3. It is necessary to mention that a preliminary objection was raised on behalf of the plaintiff-respondent, as to the maintainability of the appeal to this Court, on the ground that no appeal had been preferred against the decree that was passed in the case, and which had been signed before the appeal to this Court was filed on 13th January 1931. It would appear that the order of the learned Subordinate Judge recording the compromise under Order 23, Rule 3 of the Code and directing the drawing up of the decree, the order against which this appeal is directed, was passed on 20th September 1930. The decree was actually signed on 4th November 1930. The appeal to this Court was filed on 13th January 1931. There is no doubt that on the date on which this appeal was filed, there was the decree passed by the Court below, in existence; and the preliminary objection relates to this that no appeal having been preferred against the decree, the appeal against the order dated 20th September 1930, made under Order 23, Rule 3 was not maintainable. The objection so raised is based upon a decision of this Court in the case of Bengal Coal Co. Ltd. v. Apar Collieries Ltd. AIR 1926 Cal 419. It appears to us that the decision in that case must now be taken to be superseded by the decision of a Full

Bench of this Court in the case of [Taleb Ali and Another Vs. Abdul Aziz and Others,](#). The case in Bengal Coal Co. v. Apcar Collieries Ltd. AIR 1926 Cal 419 was referred to in the course of the argument before the Full Bench and having regard to the principle upon which the decision of the Full Bench is based, it is impossible for us to hold that the rule laid down in the case in Bengal Coal Co. v. Apcar Collieries Ltd. AIR 1926 Cal 419 is still good law. It may also be mentioned that the decision in the case reported in Bengal Coal Co. v. Apcar Collieries Ltd. AIR 1926 Cal 419 does not take into account the effect of Section 96, Clause (3)r Civil P.C., and of the statutory right of appeal given by Order 43, Rule 1(m), so far as Order 23, Rule 3 is concerned. In our opinion after the decision of the Full Bench to which reference has been made, an appeal from an order under Order 23, Rule 3 is not incompetent if a decree is made before the appeal is presented.

4. It is not necessary for the party aggrieved by an order under Order 23, Rule 3 of the Code to appeal both from the order and the decree in order to maintain his appeal against the order under Order 23, Rule 3. We overruled the preliminary objection, and heard the appeal from order, as preferred to this Court, on the merits.

5. In the result the appeal is allowed; the order of the Court below, so far as it relates to defendant 3 in the suit, is set aside. It will be open to the plaintiff-respondent now to proceed with the suit as against defendant 3 in accordance with law. We make no order as to costs in this appeal.

M.C. Ghose, J.

6. I agree.