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Susil Chandra Guha and Another Vs Gouri Sundari Devi and Others

None

Court: Calcutta High Court

Date of Decision: July 3, 1925

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 9 Rule 13

Citation: AIR 1926 Cal 1015

Hon'ble Judges: Cuming, J; Chakravarti, J

Bench: Full Bench

Judgement

Cuming, J.
This is an appeal against an order of the learned Subordinate Judge of Asansole rejecting an application under Order 9, Rule

13 to set aside two decrees which had been passed ex-parte. The ground for refusing the application is that it was not maintainable.

2. The facts appear to be these. A certain suit was instituted on the 13th February 1922 for recovery of certain royalty which had been made a

charge on the property. A preliminary decree was passed on the 31st October 1924 and the final decree was passed on the 17th November

1924. Both these decrees were passed ex parte. The present applicant is a puisne mortgagee under a mortgage deed executed in June 1921 and is

now in possession. Admittedly he was not a party to the suit.

It seems to me that the application was rightly rejected. Order 9, Rule 13 provides that:

In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to

set it aside; and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing

when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him.

3. Now, admittedly the applicant was not a defendant in the suit and he does not come within the purview of Order 9, Rule 13. The learned

advocate who appears for him contends that this case comes within Section 146 of the Code which provides as follows:

Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or

against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

4. I do not think that this case comes within the terms of the section.

5. Section 146 would not, I think, enable a pusine mortgagee who is not a party to the suit to maintain an application under Order 9, Rule 13. Let

us suppose for the sake of argument he was allowed to make the application and the ex-parte decree was set aside. He would surely not be a

party to that suit and the defendant could once more allow the suit to be decreed ex parte.

6. The order of the learned Subordinate Judge is right and [the appeal must be dismissed with costs. I assess the hearing fee at three gold mohurs.

Chakravarti, J.

7. I agree. The learned advocate for the appellant relied upon the case of Sitaramaswami v. Dulla Lakshmi Narasamma [1918] 41 Mad. 510 in

support of his contention that a person who was not a party to a suit was held entitled to come u/s 146, Civil P.C., and allowed to file an appeal

against a final decree. It appears to me that that case is clearly distinguishable for two reasons: first, because the interest of the appellant in that

case accrued after the institution of the suit; and the second ground on which I think the present case is distinguishable is that it was not an

application under Order 9, Rule 13 but an appeal against a final decree. This case, therefore, is no authority for the proposition which the learned

advocate wanted to establish in the present case. I think, therefore, this appeal is not maintainable. I agree therefore with my learned brother that

this appeal should be dismissed with costs.