(1925) 06 CAL CK 0071

Calcutta High Court

Case No: None

Madhusudan Chakravarti and Others		APPELLANT
	Vs	
Satish Chandra Nag and Others		RESPONDENT

Date of Decision: June 1, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 43 Rule 1(3), 96

Citation: AIR 1926 Cal 512 : 91 Ind. Cas. 620

Hon'ble Judges: Mukherji, J; Ewart Greaves, J

Bench: Division Bench

Judgement

Mukherji, J.

This is an appeal preferred by the defendants Nos. 27 to 31 from the decree of the learned Additional District Judge of Dacca, dated the 28th November 1922 by which he allowed the appeal of the defendant No. 1 in the suit and which appeal had been preferred agains the decree passed by the learned Subordinate Judge on the 23rd August 1921.

2. The facts out of which this appeal arises are these. The suit was originally instituted by plaintiffs Nos. 1 and 2 against two sets of defendants: one set being the tenants and the other the pro forma defendants who were the co-sharers of the plaintiffs. By an order passed on the 2nd June 1921 some co-sharer defendants, namely, the defendants Nos. 27 to 31 who are the appellants in this appeal were transferred to the category of the plaintiffs. On the 9th August 1921 a petition of compromise was put in, in the suit on behalf of the plaintiffs and some of the defendants namely, defendants Nos. 1, 33, 34 and 35. On the 23rd August 1921 another petition of compromise was put in as between the plaintiffs and the defendants Nos. 2 to 5, 7 to 9 and, 12 to 15. The learned Subordinate Judge on the 23rd August 1921 examined one witness on behalf of the plaintiffs and then passed an order which ran in these words: "Suit be decreed on compromise against the

defendants who are parties thereto and in the same terms ex parte against the remaining defendants. Dismissed against the minor heirs of the defendant No. 18 who are not represented properly in the suit." A decree was passed in accordance with this order of the learned Subordinate Judge and that decree purported to be a decree parsed on compromise as between the plaintiffs Nos. 1 and 2 and the proforma defendants Nos., 27 to 31 who as 1 have already stated had been transferred to the category of the plaintiffs and defendants Nos. 1, 2 to 5, 7 to 9 and 12 to 15, and 33 to 33.

3. The defendant No. 1 preferred an appeal against this compromise decree and on his appeal the learned Additional District Judge set aside the decree passed by the learned Subordinate Judge and made certain variation to the decree passed by the latter. As against this decree of the learned Additional District Judge the present appeal has been preferred by the defendants Nos. 27 to 31.

4. Before dealing with the point urged in support of this appeal I must refer to two objections of a preliminary nature which have been taken on behalf of the respondents. They are to the effect that two of the defendants, one Kokaian done Badaruddi had died some time in the year 1923 and that no application had been made within time to bring their heirs on the record and therefore, the appeal, was not maintainable inasmuch as according to the plaintiffs case they were joint tort feasors with the other defendants. The other objection is to the effect that some of the respondents were not made parties to this appeal when it was originally filed and that it was only after the period of limitation had expired that they were brought on the record as respondents in the appeal. Those objections may be disposed of with the observation that it has been proved to our satisfaction that neither the heirs of Kokai and Badaruddi nor the respondents who have been brought on the record after the period of limitation was over, are interested in the result of this appeal inasmuch as this appeal is only confined to the question of the compromise as between the plaintiffs Nos. 1 and 2 and the pro forma defendants Nos. 27 to 31 on the one hand and the defendant No. 1 on the other hand. The sole question in controversy now is whether in the first of the two solenamas mentioned above in which the defendant No. 1 was a party he had compromised the suit only with the plaintiffs Nos. 1 and 2 or with the added plaintiffs, namely, the persons who originally were defendants Nos. 27 to 31 as well. This, I think is sufficient to dispose of the preliminary objections urged on behalf of the respondents.

5. As regards the appeal itself the ground urged before us is to the effect that the learned Additional District Judge had no jurisdiction to deal with the appeal which had been preferred by the defendant No. 1 before him inasmuch as that appeal was really against a compromise decree. u/s 96 of the C.P.C. no appeal lies froth a decree passed by the Court with the consent of parties. It is clear that in so far as the decree purported to be one passed by the Court with the consent of the plaintiffs on the one hand and the defendants to whom I have already referred on the other, it

was a decree passed by consent and against this decree no appeal lay under the provisions of Section 96. The ground upon which the appeal was based was that the appellants before us, namely, the defendants Nos. 27 to 31 were not parties to this compromise. If, as a matter of fact, the appellants were not parties to the compromise the proper course for defendant No. 1 was either to make an application for review or to institute a suit for setting aside the compromise and so long as the decree purported to have been passed on the basis of the compromise he was not entitled to prefer an appeal there from. An appeal, of course, does he under the provisions of Order XLIII, Rule 1, Sub-rule (iii) from an order under Rule 3 of Order XXIII, recording or refusing to record an agreement, compromise or satisfaction. The present appeal however, does not appear to have been filed against such an order. None of the grounds taken in the memorandum of appeal before the learned Additional District Judge dealt with the question of the recording of the compromise. They were all directed against the decree itself and the Court-fees payable on the memorandum of appeal were also paid on the basis of the appeal being one against the decree, and not the order. We think, therefore, that no appeal lay to the learned Additional District Judge and the decree passed by him on the footing of such an appeal not having been validly preferred before him must be set aside.

6. We accordingly set aside the order of the learned Additional District Judge and hold that the decree of the learned Subordinate Judge dated the 23rd August 1921 should be restored with costs in this Court as also in the Court of Appeal below against the defendants-respondents who have appealed in this appeal.

7. Nothing that we have said in this judgment will be taken as precluding the respondents from challenging if they are so advised the validity of this compromise decree in such regular proceedings as may be under the law.

8. The Rule will be discharged. We make no order as to costs in the Rule.

Greaves, J.

9. I agree.