

Most. Jokhani and Another Vs. Most. Bhekhawa and Others

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Court : Patna

Decided On : May-09-2014

Judge : Birendra Prasad Verma

Appeal No. : First Appeal No. 96 of 1978

Appellant : Most. Jokhani and Another

Respondent : Most. Bhekhawa and Others

Judgement :

1. This First Appeal has been filed against the judgment and decree dated 19th January, 1978 passed in Partition Suit No. 113/1 of 1974/1978 by the learned 5th Additional Sub-ordinate Judge, Motihari.

2. The plaintiffs-respondent Nos. 1 and 2 herein, brought the aforesaid Partition Suit for a decree of 1/2 share in the suit properties, fully detailed in Schedule 2 of the plaint. The suit was contested by the defendants 1st Set by filing their joint written statement. Both sides led their evidence and produced their materials in support of their respective cases. Finally, by the impugned judgment and decree the suit was decreed on contest with costs against the contesting defendants and ex parte without costs against the remaining defendants.

3. The defendants 1st party, being aggrieved by the impugned judgment and decree, preferred the present First Appeal, which was admitted on 26.6.1979 and notices were issued to the respondents. Now, the appeal has been listed under

the heading œFor hearing? for its final disposal.

4. Despite repeated calls, none appears on behalf of the appellants in support of the present appeal. None appears on behalf of the respondents either, though the names of the learned counsels appearing on behalf of the parties are printed in the daily cause list.

5. On examination of the record, this Court finds that this appeal was filed as far back as in the year 1978 and since then more than 35 years have already elapsed. Obviously, this appeal is very old one. On examination of the records, this Court further finds that this appeal stood dismissed as against the respondent No. 12 on account of non-compliance of the peremptory order dated 5.2.1981 passed by a Division Bench of this Court.

6. In view of dismissal of the appeal as against the aforesaid respondent No.12, by office notes dated 26.4.1982 incompetency matter was placed for consideration by a Bench of this Court. By an order dated 2.8.1982, in view of the submissions made by the learned counsel appearing on behalf of the appellants, it was directed that the matter shall be considered only after disposal of M.J.C. No. 330 of 1982, which was filed for restoration of the First Appeal with respect to aforesaid respondent No. 12.

7. Subsequently, by the office notes dated 27.11.1987, it was pointed out that the aforesaid M.J.C. No. 330 of 1982 stood rejected on account of non-compliance of the Courts order dated 19.7.1984 passed in the aforesaid M.J.C. No. 330 of 1982, whereafter, by an order dated 28.1.1988 passed by a Bench of this Court the incompetency matter was directed to be considered at the time of hearing of the First Appeal. Now, the matter has been listed under the heading œFor hearing?, therefore incompetency matter is required to be taken up for consideration.

8. Admittedly, this First Appeal arises out of a judgment and decree passed in a Partition Suit. Admittedly, the suit for partition brought by the plaintiffs-respondent Nos. 1 and 2 herein was decreed. Indisputably, the appeal stood dismissed as against the respondent No.12.

9. It is well settled that an appeal is a continuation of suit. It is also well settled that in a partition suit all the co-sharers/co-parceners are in the capacity of the plaintiffs or in the capacity of the defendants and in absence of any of them, a suit/appeal for partition cannot be effectively and properly decided.

10. In view of dismissal of the appeal as against the aforesaid respondent No. 12 , this Court is of the opinion that this appeal has become incompetent and cannot proceed further. Hence, no useful purpose shall be served by keeping the present First Appeal pending any longer.

11. Consequently, the appeal as a whole has to fail and is, accordingly, dismissed, but there shall be no order as to costs.

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