

Smt. Anandi Devi Vs. Mahendra Singh and ors.

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Court : Patna

Decided On : Jul-05-1995

Judge : B.L. Yadav, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 54 - Order 20, Rule 18 - Order 22, Rules 10A and 18; Patna High Court Rules - Rule 6

Appeal No. : Second Appeal No. 523 of 1979

Appellant : Smt. Anandi Devi

Respondent : Mahendra Singh and ors.

Advocate for Def. : Vijendra Nath and Upendra Prasad II, Adv.

Advocate for Pet/Ap. : Farooque Ahmad Khan, Adv.

Disposition : Appeal dismissed

Prior history : B.L. Yadav, J. 1. This is a defendant's second appeal under Section 100 of the Code of Civil Procedure (for short the Code) in a suit for declaration that ex parte decree dated 17-2-1961 passed in Partition Suit No. 38 of 1960 in the Court of Subordinate Judge, Gaya is illegal and without jurisdiction and also for restraining defendant No. 1 from taking further steps in pursuance of the ex parte decree. 2. The plaintiffs have filed the suit with the averments that there was an earlier suit

Judgement :

B.L. Yadav, J.

1. This is a defendant's second appeal under Section 100 of the Code of Civil Procedure (for short the Code) in a suit for declaration that ex parte decree dated 17-2-1961 passed in Partition Suit No. 38 of

1960 in the Court of Subordinate Judge, Gaya is illegal and without jurisdiction and also for restraining defendant No. 1 from taking further steps in pursuance of the ex parte decree.

2. The plaintiffs have filed the suit with the averments that there was an earlier suit No. 38 of 1960 filed by the present defendant Smt. Anandi Singh in the Court of Subordinate Judge III, Gaya. Lakshman Singh was also made party to the suit, whereas other sons namely, Mahendra Singh and Upendra Singh (the respondents 1 and 2), who (Illegible) minors, were not parties and a preliminary decree obtained on 17th February,

1961 was illegal and fraudulent.

3. The suit was contested by the defendant appellant refuting the averments made in the plaint and alleging that Sakaldip Singh, was the natural guardian of minors Mahendra

Singh and Upendra Singh, who were not made parties to the suit. But as the natural guardian Sakaldip Singh was a party, hence even though minors were not made parties but that was no prejudice. Lakshman Singh, the major brother of minors Mahendra Singh and Upendra Singh was already party. A preliminary decree was obtained and that was legal and of no prejudice to minors or any body else. The claim of minors or others could be gone into while preparing final decree. The suit was correctly decreed. No relief can be granted in the present suit.

4. The trial Court dismissed the suit. Against that decree Mahendra Singh and Upendra Singh, the minor sons of Sakaldip Singh filed an appeal before lower appellate Court and the said appeal was allowed. Against that decree the present

Second appeal has been filed by the defendant-appellant Smt. Anandi Devi.

5. Learned counsel for the appellant urged that one Rajendra Singh respondent in the First Appeal was dead and his heirs were not brought on the record. Even though substitution application was filed by the appellants there, but no order was passed. Name of deceased Rajendra Singh continued in the decree of lower appellate Court. The decree of the lower appellate Court was in favour of dead person; hence it was a nullity. It was next urged that the interest of Mahendra Singh and Upendra Singh, minors was represented by their father and natural guardian Sakaldip Singh who was a party in the earlier suit for partition. Consequently non-impalement of minors was of no consequence. The lower appellate Court erred in allowing the appeal.

6. Learned counsel for the respondents, on the other hand, refuted the submissions of the learned counsel for the appellant and urged that minor sons namely, Mahendra Singh and Upendra Singh, who were plaintiffs in the present suit, were co-sharers and they were entitled to their legitimate share. In their absence earlier suit could not have been effectively disposed of and by oblique motive these minors were not made parties even though their father Sakaldip Singh was made a party. After the death of Rajendra

Singh, a substitution application was filed by the plaintiffs-respondents, that remained pending without any order, hence there is no question of abatement.

7. For the mistake of the Court no party would suffer. In any case, while preparing a final decree separate share would be allotted to all. The interest of every co-sharer would be represented. He leaned heavily on *Rajeshwar Singh v. Rajendra Singh*, 1992 (1) PLJR 480 : (AIR 1992 Pat 125). It was further contended that the appellant ought to have followed the procedure under Chapter VI, Rule 4 of the Patna High Court Rule. But appellant did not follow the procedure.

8. Having scrutinised the submissions of the learned counsel for the parties, the questions for determination are whether the present appeal abates on account of death of Rajendra Singh, one of the parties to the appeal before the Lower Appellate Court and substitution application was filed by the respondents who

were appellants before lower appellate Court, could the decree of lower appellate Court be said to be passed against a dead person, hence nullity. Whether appellant could follow the procedure under Chapter VI, Rule 4 of the Rules of Patna High Court, if not its legal effect?

9. As regards first question suffice is to say that after the death of Rajendra Singh a substitution application was filed in the Court below on behalf of plaintiff-respondent there. But remained pending. The order ought to have been passed by the lower appellate Court on that application. It was by mistake of the Court that substitution application could not be decided on merits. But who must suffer for mistake on the Court?

10. There is a Latin Maxim 'ACTUS CURIAE NEMINEM GRAVABIT' which

connotes that by act of the Court no body must suffer. In such matters there is another Maxim 'BONI JUDICIS EST AMPLIARE JURISDICTIONEM' which means a Judge must extend the limits of his remedial jurisdiction to the advancement of substantial justice. In the present context it means such remedy may be given which could satisfy

substantial justice. The substantial justice would be that while preparing final decree the Court be directed to consider the share of all the co-sharers, including the legal representatives of deceased Rajendra Singh. In my opinion, there was no mistake nor it would ensure to the advantage of present appellant even if no order was passed on substitution application of present respondents before Court below.

11. The matter can be angulated from another perspective. After 1976 Amendment in the Code of Civil Procedure New Rule 10 A to Order 22 of the Code has been inserted in the Code making it obligatory to the other side (the respondent in the lower appellate Court and the present appellant) to inform the Court about date of death or the pendency of substitution application but he did not do so. He was accordingly equally liable and cannot take advantage of his own mistake or inaction.

12. Chapter VI, Rule 4 of the Rules of the Patna High Court provides the procedure that after the death of the party in the Court, in case no substitution application was filed and the second appeal is filed here, in that event the application should be filed here by the appellant in second appeal bringing the heirs on record indicating the fact that the death was not within the knowledge of the appellant. In that event necessary orders would be passed on that application and there would be no defect either in the second appeal or in the judgment and decree of the lower appellate Court. It was for the defendant appellant to avail remedy provided under Chapter VI, Rule 4 of the Rules of this Court but he failed to do so.

13. In view of the procedure contemplated under Order XX, Rule 18 of the Code and other relevant provisions including Section 54 of the Code, in appropriate cases there can be second or third preliminary decree also, if there is any necessity on account of death of a party to the suit or on account of absence of any co-sharers or on account of any transferee from a co-sharer who was a party to the suit. In such matters the Collector or Deputy Collector while preparing final

decree in a partition suit can decide the dispute by passing or modifying the decree or effect a suitable or equitable partition (See *Khemchand v. Vishnu*, AIR 1983 SC 124). In other words if so necessary the matter can be brought to the notice of the Court preparing the decree and dispute between the parties (particularly in respect of share of Rajendra Singh) could be adjudicated upon and the correct preliminary decree/final decree in respect of the shares can be prepared. Similar view has been taken in *Rajeshwar Singh v. Rajendra Singh*, 1992 (1) PLJR 480 : (AIR 1992 Pat 175) (supra). In *Phoolchand v. Gopal Lal*, AIR 1967 SC 1470, Lordships of the Apex Court observed.

'We are of the opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties the and shares of other parties are thereby augmented.'

14. In my opinion, in view of the above observations and keeping in view the provisions of Order XX, Rule 18 and Section 54 of the Code it is open to the plaintiff-appellant and other co-sharers to bring the facts of the share of deceased Rajendra Singh to the notice of the appropriate Court which would pass a proper order and if necessary prepare a modified preliminary decree.

15. In this view of the matter it is open to the present-appellant or to even the plaintiff or any co-sharer to bring to the notice of the Court preparing decree about the latest position in respect of the shares of the parties including shares of the minors i.e. Mahendra Singh and Upendra Singh or deceased Rajendra Singh. Even if minors were not made parties to the earlier suit that would be immaterial as they would get share while preparing preliminary a modified or amended preliminary or final decree.

16. In view of premises aforesaid, I do not find any merit in this second appeal and the same is dismissed, without any order as to costs.

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