

Chandeshwar Prasad and ors. Vs. Smt. Sumitra Devi and ors.

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Court : Patna

Decided On : Dec-22-2004

Judge : S.N. Hussain, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 41, Rule 5(3)

Appeal No. : Civil Revision No. 787 of 2002

Appellant : Chandeshwar Prasad and ors.

Respondent : Smt. Sumitra Devi and ors.

Advocate for Def. : Sidheshwari Prasad Singh, Sr. Adv. and Kaushal Kishore and Sanjay Kumar, Advs.

Advocate for Pet/Ap. : Pushkar Narain Shahi, Ganga Sharan Sharma and Ram Vinay Sharma, Advs.

Prior history : S.N. Hussain, J. 1. Heard learned counsel for the parties. 2. This civil revision has been filed by the plaintiffs-decree holders against order dated 27-4-2002 passed in Title Appeal No. 77/2001, by which the learned Additional District Judge III, Patna has stayed further proceedings of Execution Case No. 4/2001, pending in the Court of Subordinate Judge II, Danapur for execution of the final decree dated 4-7-2001 passed in Title Partition Suit No. 176/1979, till disposal of the said appeal. 3

Judgement :

S.N. Hussain, J.

1. Heard learned counsel for the parties.
2. This civil revision has been filed by the plaintiffs-decree holders against order dated 27-4-2002 passed in Title Appeal No. 77/2001, by which the learned Additional District Judge III, Patna has stayed further proceedings of Execution Case No. 4/2001, pending in the Court of Subordinate Judge II, Danapur for execution of the final decree dated 4-7-2001 passed in Title Partition Suit No. 176/1979, till disposal of the said appeal.
3. Partition Suit No. 176 of 1979 was filed by the petitioners for partition of their share in the suit properties. The said suit was decreed and preliminary decree was passed on 30-9-1985, against which several first appeals were filed by the defendants, which were dismissed in the year 1996, whereafter the L.P.A. filed against the said judgment was also dismissed on 30-6-1998. Hence the preliminary decree attained finality.
4. Thereafter, the proceeding for preparation of final decree started and ultimately final decree was prepared on 4-7-2001, against which the defendants-judgment debtors filed Title Appeal No. 77 of 2001, which is pending before the Additional District Judge III, Patna. However, after preparation of the final decree execution case No. 4 of 2001 was filed by the plaintiffs-petitioner Nos. 2 and 3 in the Court of Subordinate Judge II, Danapur, for execution of the aforesaid final decree, which is also pending.
5. It appears that the defendants-judgment debtors filed petition in Title Appeal No. 77/2001 for stay of further proceeding of execution case No. 4/2001, which has been allowed by the impugned order and further proceeding of execution case pending before the Subordinate Judge II, Danapur was stayed till the disposal of the title appeal
6. Learned counsel for the plaintiffs-petitioners challenges the aforesaid impugned order of the learned Court below on the ground that the learned Court below has not fulfilled the criteria fixed under Order XLI Rule 5 (3) of the Code of Civil

Procedure (hereinafter referred to as 'the Code' for the sake of brevity) while passing the order of stay. He further submits that the preliminary decree was prepared about two decades back but till now the petitioners are deprived of the fruit of the decree. He further avers that there is neither any substantial loss to the opposite parties nor there are any serious civil consequences which could have led to stay of the proceeding of the execution case. Hence, according to him, the impugned order of the learned Court below is illegal and perverse.

7. On the other hand, learned counsel for opposite party 1st set seriously controverts the contentions of the learned counsel for the petitioners and submits that the learned Court below has considered all the three criteria fixed under the provision of Order XLI Rule 5 (3) of the Code. He further contends that the execution case should not proceed as there were serious illegalities in the final decree as the lands exceeding their share were transferred by the plaintiffs and also that land of others, land submerged under the bed of Ganges and the land acquired in land acquisition proceeding had been included in the shares allotted to them in the final decree. Learned counsel for the said opposite party also relied upon a decision of the Hon'ble Supreme Court in the case of Mool Chand Yadav v. Raza Buland Sugar Company Limited, Rampur reported in (1982) 3 SCC 484 in which it was held that previous history of litigation cannot be overlooked and that judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended. In the aforesaid circumstances, he submits that the impugned order is legal, proper and justified and needs no interference.

8. It may be noted that the learned counsel for opposite party 1st set has raised preliminary objection that there is no finality in the order granting stay and hence this civil revision is not maintainable. In this connection he relies upon a decision of the Apex Court in the case of Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers reported in (2003) 6 SCC 659 : (AIR 2003 SC 2434).

9. After hearing the learned counsel for the parties and after perusing the materials on record including the impugned order and the case laws relied upon by the learned counsel for the opposite party 1st set, it is quite apparent that the Supreme

Court has held in the aforesaid decision of Shiv Shakti Coop. Housing Society, (AIR 2003 SC 2434) (supra) that the right under Section 115 C.P.C. is confined only to jurisdiction and jurisdiction alone and here in the instant case it is apparent from the impugned order that the learned Court below has failed to exercise the jurisdiction specifically vested in it by the provision under Order XLI Rule 5 of the Code. Although the learned Court below has enumerated the three criteria fixed under the provision of Order XLI Rule 5 (3) of the Code but it has failed to deal with the matter considering the facts of the case and the lands involved in the suit.

10. So far the question of substantial loss is concerned, the learned Court below has held that the appellants are presently residing in Holding No. 222, which has been allotted to the respondents and if the execution proceeding would not be stayed, the appellants would be ousted from it. Hence he assumed that the appellants would suffer substantial loss with respect to the entire properties involved in the appeal which included agricultural land also. Furthermore, without considering the relevant materials the learned Court below has opined that no security is required to be given by the appellants for due performance for ultimate decree being binding upon them. Hence, in my opinion, the learned Court below has committed a serious jurisdictional error by ignoring the aforesaid provision of law.

11. So far the claim of the appellants-opposite parties regarding sale/transfer of the lands, the land of others and the land submerged in the bed of Ganges and the land acquired in the land acquisition proceeding are concerned, these objections to the final decree can be and must have been raised by the appellants-opposite parties in the title appeal and the learned lower Appellate Court shall consider the same while deciding the title appeal and these matters cannot be allowed to be raised at this stage. However, if the appellants-opposite parties feel that the lands involved in the appeal are going to be sold/transferred by the plaintiffs, they can very well approach the Appellate Court for appropriate remedies, but all these things cannot be considered under the provision of Section 115 of the Code. The plaintiffs-respondents are also given the same liberty, if they have same kind of grievance.

12. In the aforesaid facts and circumstances, I hereby modify the impugned order of the learned Court below to the extent that further proceeding of Execution Case No. 4/2001 pending before the learned Subordinate Judge II, Danapur shall remain stayed only with regard to the house and homestead lands involved in the appeal till the final disposal of Title Appeal No. 77 of 2001 for which security should be fixed by Court below. So far the agricultural lands are concerned, neither the learned Court below has seen any substantial loss if execution case proceeds, nor I am satisfied by the arguments of the learned counsel for the opposite parties that execution with regard to agricultural land will in any manner cause serious civil consequences or any substantial loss to them. Since the matter is about 25 years old, the learned Court below is directed to expedite the disposal of Title Appeal No. 77 of 2001.

13. With the aforesaid modification/direction this civil revision is allowed in part.

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