

Surendra Singh Vs. Birendra Prasad Singh

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Court : Patna

Decided On : Aug-30-2005

Judge : S.N. Hussain, J.

Acts : Hindu Succession Act; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 54 and 151 - Order 7, Rule 3 - Order 8, Rule 6A and 6(3) - Order 20, Rule 18 - Order 23, Rules 1(1), 1(3) and 3; Code of Civil Procedure (CPC) (Amendment) , 1976; Hindu Law

Appeal No. : Civil Revision No. 857 of 2004

Appellant : Surendra Singh

Respondent : Birendra Prasad Singh

Advocate for Def. : Shiva Nandan Roy and Ravindra Kumar Singh, Adv.

Advocate for Pet/Ap. : Gauri Shankar Jha, Adv.

Disposition : Petition dismissed

Prior history : S.N. Hussain, J. 1. Heard learned counsel for the parties. Petitioner is defendant of Partition Suit No. 563 of 1993, which was filed by the opposite party for his moiety share in the ancestral properties as both the parties were brothers. 2. Petitioner is aggrieved by impugned order dated 12.4.2004 passed in the aforesaid suit by which learned Subordinate Judge- XII, Patna, rejected the petition filed by the defendant (petitioner) under Section 151 of the Code of Civil

Procedure (hereinafter

Judgement :

S.N. Hussain, J.

1. Heard learned counsel for the parties. Petitioner is defendant of Partition Suit No. 563 of 1993, which was filed by the opposite party for his moiety share in the ancestral properties as both the parties were brothers.

2. Petitioner is aggrieved by impugned order dated 12.4.2004 passed in the aforesaid suit by which learned Subordinate Judge- XII, Patna, rejected the petition filed by the defendant (petitioner) under Section 151 of the Code of Civil Procedure (hereinafter referred to as 'the Code' for the sake of brevity) for correction of order dated 23.9.2003 by which learned Court below had held that it had no objection and the defendant is at liberty to withdraw his counter-claim if he thinks that the counterclaim is defective, but the Court is unable to accord any permission to file fresh claim for partition or to bring a fresh suit with respect to counter-claim, which in its opinion, will amount to multiplicity of suits and will cast an impediment in the progress of the present suit in such a situation when the evidence on behalf of the plaintiff is going on and, accordingly, petition of the defendant was disposed of.

3. From the argument of the learned counsel for the parties and after perusing the materials on record, it is quite apparent that in the said suit petitioner (defendant No. 2) appeared alongwith his mother (defendant No. 1) and both of them filed their written statement setting up a counter-claim of 1/3rd share for each of them and also giving details of the various joint ancestral properties. To this counter-claim, plaintiff (opposite party) filed written statement objecting to the share claimed by defendant No. 1 and also objecting to the inclusion of other properties. It further transpires that subsequently on 2.9.2003 the defendant-petitioner filed a petition under Order XXIII, Rule 3 of the Code to permit the defendant 'to withdraw such formally defective counter-claim under Rules 6(A) and 6(3) of Order VIII, with permission to file such subject matter of partition of shares in he immovable properties in accordance to Section 54 read with Rule 3 of Order VII, CPC so as to

afford ground to this Court to pass a proper decree in accordance to Rule 18 of Order XX, CPC in such subject matter of partition of shares in the immovable property so sought.'

4. It further transpires that this petition of the defendant was disposed of by the learned Court below by its order dated 23.9.2003 (Annexure-7) holding that 'this Court has no objection and the defendant is at liberty to withdraw his counter-claim, if he thinks that the counter-claim is defective, but this Court is unable to accord any permission to file fresh claims for partition or to bring a fresh suit with respect to counter-claim, which is my opinion will be multiplicity of this suit and it will really cast an impediment in the progress of the present suit in such a situation when the evidences on behalf of the plaintiff is going on. 'Later, on 3.11.2003 the defendant filed a petition under Section 151 of the Code 'to correct such apparent mistake committed by this Court in it's order dated 23.9.2003, in order to appear not to be self-contradictory in the first stance and to be not in contravention of the. Hindu Succession Act as well as the Hindu Law governing the parties to this partition suit.' This petition of the defendant has been rejected by the learned Court below by the impugned order.

5. Learned counsel for the defendant-petitioner submitted that since serious defects were there in paragraphs 11, 12 and 13 of the counter-claim, it was bound to fail and hence there was an occasion to file a fresh counter-claim or a fresh/suit, but without considering the same the learned Court below refused to grant any such permission to the defendant-petitioner while allowing him to withdraw the counter-claim. In this connection, he relied upon a decision of this Court in case of Rameshwar Singh v. Subu Lal Jha, reported in AIR 1921 Patna, 360. He further submitted that the petition under Order XXIII of the Code had to be accepted or rejected as a whole and there should not have been any part acceptance and part rejection as per the decision in case of Balbir Singh v. Sulochana Devi, reported in : AIR1970 All382 . He further submitted that the Court had inherent jurisdiction to correct its own mistake as has been held in case of M/s. Gammon. India Ltd. and Ors. v. The Bihar State Electricity Board, reported in : AIR1976 Pat305 and that even an order which can be challenged in appeal can be corrected under the provision of Section 151 of the Code as has been held in case of Bajrang Rai and

Ors. v. Ismail Mian and Ors., reported in : AIR1978 Pat339 . Hence, he submitted that the learned Court below has committed a clear illegality by failing to exercise the jurisdiction vested in it and that the impugned order is fit to be set aside.

6. On the other hand, learned counsel for the plaintiff- opposite party submitted that a counter-claim is maintainable in all types of suit after the amendment of the Code in 1976. In this connection, he relied upon several decisions of the Hon'ble Apex Court as well as of this Court, namely, in case of Gurbachan Singh v. Bhag Singh and Ors., reported in : AIR 1996 SC1087 and in case of Jag Mohan Chawla and Anr. v. Dera Radhaswami Satsang and Ors., reported in : AIR 1996 SC2222 , as well as well as in case of Ramakant Thakur and Ors. v. Satya Narain Choudhary and Ors., reported in 1998 (1) PLJR, 642. Learned counsel for the opposite party further submitted that under the provision of Order XXIII, Rule 1(1) of the Code the plaintiff or defendant can abandon his suit or claim without any condition whereas Order XXIII, Rule 1(3) of the Code provides that in case the suit/claim was to fail by reason of some formal defect or there were sufficient grounds for allowing institution/of a fresh suit/claim, in such circumstances the suit/claim can be allowed to be withdrawn with liberty to institute a fresh suit/claim. Learned counsel for the opposite party also averred that in the instant case neither any defect in the counter-claim could be shown nor the Court found any sufficient ground, hence in such situations the petition of the defendant was for simple withdrawal and there was no question of granting permission to file a fresh suit or claim. He also submitted that in the aforesaid circumstances the order of learned Court below dated 23.9.2003 was legal and proper and it was sought to be modified/corrected under Section 151 of the Code only after the review was barred by law of limitation. Hence, he claimed that the impugned order requires no interference.

7. After hearing learned counsel for the parties and after perusing the materials on record, it is quite apparent that petition dated 2.9.2003 filed by the defendant-petitioner under Order XXIII, Rule 3 of the Code was not maintainable as no compromise of suit/claim was sought therein. No. specific defect was pointed out nor any sufficient ground for allowing him to institute a fresh suit was pointed out as provided even under Order XXIII, Rule 1(3) of the Code. Furthermore, in the

prayer portion of the said petition no liberty was sought for instituting a fresh suit or fresh claim and the only provision which was mentioned therein was Section 54 and Order VII, Rule 3 of the Code which provided partition of Estate or separation of share and description of specific boundaries and numbers in survey record with regard to the subject matter of the suit regarding immovable properties. These reliefs can very well be sought by a defendant in his written statement without raising any counter-claim as the suit was for partition in which the respective shares of the parties have to be decided and hence there was no occasion for raising a counter-claim in the suit, specially when the mother (defendant No. 1) had admittedly died and only the two brothers, namely, the plaintiff and the defendant are surviving as co-sharers of the suit properties.

8. Furthermore, from perusal of order dated 23.9.2003 it is quite apparent that whatever has been stated in the concluding portions of the said order is not a clerical or typographical error or a mistake in dictation, rather the said order was passed by the learned Court below consciously on the basis of its specific finding after appreciating the claims of the parties, provisions of law well as the materials on record. Hence, against the said order the defendant-petitioner could have filed a petition in lower Court for review of the said order or he could have challenged the said order in the higher Court. But no such step having been taken, the defendant-petitioner can not legally be allowed to take recourse to Section 151 of the Code as in these circumstances there was no occasion for the learned Court below to exercise its inherent powers as neither there was any such necessity in the ends of justice nor there was any question of abuse of the process of the Court.

9. In the aforesaid facts and circumstances. I do not find any illegality or jurisdictional error in the impugned order and accordingly this Civil Revision is dismissed.