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Court : Patna

Decided On : Jul-04-2005

Judge : S.N. Hussain, J.

Acts : Code of Civil Procedure (CPC) - Order 23, Rule 3 - Order 41, Rule 11

Appeal No. : Civil Revision No. 1075 of 2004

Appellant : Arbind Krishna @ Uday Krishna

Respondent : Ramdulari Devi and ors.

Advocate for Def. : S.K. Mazumdar, Sr. Adv. and Sanjeev Ranjan Gupta, Adv.

Advocate for Pet/Ap. : Panditji Pandey, Adv. D.K. Sinha, Sr. Adv.S.S. Dwivedi, Sr. Adv. and Ravi Shankar Dwivedi, Adv.

Judgement :

S.N. Hussain, J.

1. Heard learned counsel for the parties.

2. The petitioner was defendant-Judgement debtor in partition suit No. 7 of 1945 which was originally filed by the predecessor of opposite party Nos. 1 to 11 for partition of their eight annas five daam share in the suit property. The said suit was decreed and Preliminary decree was prepared to the extent of the share claimed

by the plaintiff, but the said Preliminary decree was never challenged by any one and it attained finality. Thereafter, Final decree was prepared by the trial Court in the year 1949 against which First Appeal No. 186 of 1949 was filed by the defendant-Judgment debtor which was allowed with certain modification and directions. Against the said Judgment and decree of this Court Civil Appeal No. 1014 of 1964 was filed and the same was allowed by the Hon'ble Apex Court on 6.2.1967 by which the matter was remanded to the trial Court with a direction to take fresh steps for preparation of the Final Decree.

3. Accordingly, the trial Court appointed an Advocate Commissioner for Takhtabandi etc., but before he could submit his report he died. In the meantime, on 15.4.1982 a petition for compromise was filed by the parties under the provision of Order XXIII Rule 3 of the Code of Civil Procedure (hereinafter referred to as 'the Code' for the sake of brevity. It further transpires that without looking into the said compromise petition a new Advocate Commissioner was appointed by the Court on 25.1.1985. In the said circumstances, parties again filed the compromise petition on 10.7.1985 but without appreciating the said compromise petition a report was submitted by the Advocate Commissioner on 11.6.1986, which according to the petitioner, was collusive. Hence, the petitioner filed a petition in the trial Court for passing an order as per the compromise. The petitioner's said petition was dismissed by the trial Court on 9/30.11.1987 on the ground that the said Advocate Commissioner had already submitted his report. In the said matter, two Civil Revisions were filed out of which Civil Revision No. 20 of 1988 was disposed of by this Court with a direction to the trial Court to consider the petitioner's objection whereas Civil Revision No. 21 of 1988 was disposed of by this Court with a liberty to the petitioner to challenge the said order in Appeal.

4. Learned counsel for the petitioner has submitted that the said order of this Court was passed on 10.10.1988 but in October and November, 1988, there was a strike of Non-Gazetted employees and hence he appeared in the Court below and filed haziri on 5.12.1988. But immediately thereafter on 8.12.1988 Final Decree was prepared against which the brother of the petitioner filed Title Appeal No. 144 of 1991 which was dismissed by the lower Appellate Court on 23.3.1998 whereafter Second Appeal No. 113 of 1988 was dismissed by this Court on 14.6.2000 and

Civil Appeal No. 14937 of 2000 filed in the Hon'ble Supreme Court by the same person was dismissed on 5.2.2001.

5. The petitioner further claims that he has also filed Second Appeal No. 237 of 1998 against the Judgment and Decree of the lower Appellate Court dismissing Title Appeal No. 144 of 1991 in which he was respondent. But the said Second Appeal was also dismissed by this Court under Order XLI Rule 11 of the Code in the year 2002 against which Civil Review No. 189 of 2002 has been filed by the petitioner which is pending before this Court for hearing after being admitted. It transpires that after rejection of the petitioner's Appeal, Execution Case No. 1 of 2002 was filed by the Decree-Holder which is still pending.

6. Learned counsel for the petitioner submitted that in Execution Case Kamla Devi was impleaded as party, although, she was already dead whereas Asha Kumari who was earlier party to the suit/Appeal was left out and the substituted heirs of the dead persons were not impleaded therein. He further contended that the decree of the Second Appeal containing the names of the heirs was not filed in the Execution case nor the decree under execution was amended. Learned counsel for the petitioner further claimed that the quality of service of notice can be ascertained by the fact that notice on Kamla Devi who had admittedly died earlier in September, 2001, was shown to have been served. Learned counsel for the petitioner further submitted that the defendant-Judgement debtor also objected before the Executing Court that in Partition Suit every co-sharer was necessary party, but the learned Sub-Judge-VI, Patna, rejected the said objection in Execution Case No. 1 of 2002 by the impugned order dated 31.7.2004 without considering the aforesaid matters in issue and ordered for striking out the name of Kamla Devi allowing the petition of the opposite party dated 14.5.2004.

7. On the other hand, the learned counsel for the opposite parties submitted that this civil revision is directed against the impugned order by which the name of Kamla Devi was directed to be deleted on the petition of the Decree-holder (Annexure-A) in which it was specifically stated that neither she appeared nor contested the suit in the Court nor she ever filed her written statement. Learned counsel for the opposite parties further submitted that although Respondent No.

11 Asha Kumari died in the year 1995 and the petitioner was fully aware of the said fact, but he did not raise any objection at any stage and hence the civil revision is absolutely frivolous.

8. After hearing the learned counsel for the parties and after perusing the materials on record, it is quite apparent that when Kamla Devi had never appeared in the suit or appeal nor she contested the same at any stage, the learned executing Court was quite justified in deleting her name. Furthermore, Asha Kumari was a party in the trial Court, but in the Title Appeal filed by the brother of the petitioner, who was a co-defendant, her name was expunged. It may be noted here that the petitioner had not filed any Title Appeal against the decree by which the plaintiff's suit was allowed. Hence, it is quite apparent that the name of Asha Kumari was already expunged on 2.6.1995 and the prayer by the Decree-holder was only for exempting him from substituting her heirs.

9. It is an admitted fact that Asha Kumari was alive till the suit was decreed, hence there is no defect in the decree of the trial Court passed in favour of plaintiff-opposite party. However, any such mistake, if committed, is at the stage of the appeals, which were filed either by the petitioner or his brother, both of whom were defendants, hence they can not be legally allowed to take advantage of their own wrong.

10. It is also not in dispute that the defendant-appellant got the name of Asha Kumari expunged at the appellate stage, and hence in the appellate judgments and decree she was not a party. Hence, when the decree of the trial Court merged with the decree of the appellate Court, it is the appellate decree which is to be executed, but since in the appellate decree Asha Kumari was not a party, there is no occasion for substituting her heirs when the said decree is being executed.

11. It further transpires that the Partition Suit was decreed and the Final Decree was prepared by which one takhta was separately prepared for the plaintiff whereas the other takhta was prepared for all the defendants. Hence, by the execution case only the takhta prepared for the plaintiff is going to be handed over to him. But so far the other takhta is concerned, it is joint among the other claimants who may or may not be parties in the Execution case and the

defendants, if they so like, can get their separate share partitioned subsequently.

12. Moreover, this matter is pending since 1945 and the Preliminary Decree by which the share of the plaintiff was declared, remained unchallenged and the Final Decree has been affirmed till the highest Court. Hence, in the aforesaid circumstances, there is no occasion to keep the matter pending for any further period. Furthermore, the heirs of Asha Kumari have not raised any such objection at any stage of the suit/appeal/case and hence it appears that this is merely a dilatory ploy of the Judgement-debtor.

13. In the aforesaid circumstances, I do not find any illegality or jurisdictional error in the impugned order and accordingly this civil revision is dismissed with a liberty to the petitioner to move a petition for stay of the execution case in the Civil Review pending before this Court and if no such order of stay is produced within two months from to-day, the Executing Court should proceed with the execution case leading to its logical conclusion expeditiously.

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