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**SooperKanoon Citation :** [sooperkanoon.com/911377](http://sooperkanoon.com/911377)

**Court :** Patna

**Decided On :** Mar-01-2011

**Judge :** Mungeshwar Sahoo, J.

**Acts :** Code of Civil Procedure (CPC) - Section 115, 105(2)

**Appeal No. :** FIRST APPEAL No. 180 OF 2003

**Appellant :** Umesh Chandra Singh and ors .

**Respondent :** Ramesh Chandra Singh and ors.

**Advocate for Def. :** Mr. V. Nath, Adv.

**Advocate for Pet/Ap. :** Mr. Bishwanath Prasad Singh, Adv.

**Judgement :**

1. The defendant-appellant has challenged the final decree dated Sahoo, J. 30.05.2003 passed by Sri Ajit Kumar Sinha, the learned 6th Subordinate Judge, Siwan in Title Suit No.31 of 1989.

2. It appears that the plaintiff-respondent filed the aforesaid Title Suit No.31 of 1989 for partition of the suit property to the extent of half share. The said suit was decreed preliminarily. Subsequently, a final decree proceeding was started. A Pleader Commissioner was appointed who after visiting the spot divided the suit property according to the direction in the preliminary Judgment and Decree and submitted his report. The appellant filed an objection to the Pleader

Commissioner's report. The learned Court below heard both the parties and by terms of order dated 05.03.2003 rejected the said objection. Against the said order dated 05.03.2003, the defendants filed civil revision before this Court. The said civil revision was dismissed and thereafter by terms of order dated 07.05.2003, the learned Court below confirmed the Pleader Commissioner's report and final decree was prepared subsequently.

3. Mr. Bishwanath Prasad Singh, the learned counsel appearing on behalf of the appellant submitted that the learned Court below has wrongly confirmed the Pleader Commissioner's report without considering the principle of partition. According to him, the Pleader Commissioner had not issued notice to the appellant and the Pleader Commissioner never visited the spot and he conducted the entire proceeding behind the back of the defendants. The properties were not divided equally and valuation has also not been given properly. The learned counsel further submitted that the appellant challenged the order dated 05.03.2003 whereby the learned Court below rejected the objection application by filing a civil revision before this Court and while dismissing the said civil revision, this Court has given liberty to the appellant to raise all these objections in the appeal and, therefore, these questions ought to be decided in this Appeal. The learned counsel further submitted that some plots which are more valuable have been given in its entirety to the respondents and likewise smaller area has been allotted to the appellant. On these grounds, the learned counsel submitted that the final decree is liable to be set aside.

4. The learned counsel for the appellant also submitted that the takhta allotted to the appellant is not equal to that of the respondent. He further submitted that to test this in equality, the respondent may be allotted the takhta which stands in the name of the appellant.

5. On the other hand, Mr. V. Nath, the learned counsel appearing on behalf of the plaintiff-respondent submitted that on 07.05.2003, the Pleader Commissioner's report has been confirmed by the trial Court because on that date, there was no objection pending before the Court below. Since there was no objection filed by the appellant was pending, the learned Court below had no option but to confirm

the Pleader Commissioner's report and, therefore has rightly confirmed it. So, the First Appeal against the Judgment / Order dated 07.05.2003 is not maintainable. The learned counsel further submitted that so far the order rejecting the objection of the appellant, i.e., dated 05.03.2003 is concerned, the legality or otherwise of the same was tested by the appellant before this Court by filing revision application which was dismissed. Now, again the legality or otherwise of the order cannot be gone into in this First Appeal even though liberty has been granted to the appellant to raise all the points which he raised in revision. The learned counsel for the respondent relying upon A.I.R. 1938 (Patna) 104, Jugeshwar Singh and Ors. v. Ribhan Singh and others submitted that the First Appeal to the High Court from a final decree in a partition suit is really in the nature of a second appeal in which only question of law and principle can be considered. According to the learned counsel, since the revision has been dismissed against the Order rejecting the objection of the appellant, it will apply as res-judicata and the appellant cannot be allowed to agitate the same question of fact again in this First Appeal.

6. The learned counsel further submitted that all the allegation made by the appellant are not tenable because those are allegation of facts without there being any evidence in support of it. Moreover after confirmation of the final decree, the plaintiff have been given delivery of possession over the takhta allotted to them and the appellants sold some properties in the year 2006-07 and, therefore, he is estopped from saying that the takhta allotted to the appellant may be given. The learned counsel further submitted that the First Appeal has got no merit and, therefore, it may be dismissed with cost.

7. In view of the above facts, the only points arises for consideration in this Appeal is as to whether the learned Court below has not followed the principles of partition and wrongly confirmed the pleader commissioner's report and Whether the impugned Judgment and final decree are sustainable in the eye of law?

8. So far the submission of the learned counsel for the appellant that no notice was issued to the appellant by the Pleader Commissioner is concerned, from perusal of the Pleader Commissioner's report; it appears that in the report itself,

the Pleader Commissioner has clearly mentioned that both the parties were present who identify the suit land. So far the submission that the Pleader Commissioner did not visit the spot is concerned also as stated above, the Pleader Commissioner has mentioned that he visited the spot and the parties identified the suit land which was verified by him with the help of R.S. Map and found it correct. The learned counsel for the appellants submitted that the Pleader Commissioner had not classified the land according to the convenience of the parties and more valuable lands have been allotted to the respondent and that the respondent have been allotted more area. So far this submission is concerned except, the statements made in the grounds of the memo of appeal and the submissions of the learned counsel, there is no materials available on record to come into conclusion that in fact while partitioning the suit property, less area has been given to the appellant and more valuable lands is given to the respondent. The appellant never applied for adducing any evidence. Considering all these aspects of the matter, the learned Court below rejected the objections by terms of order dated 05.03.2003.

9. In A.I.R. 1938 Patna 104, Jugeshwar Singh & Anr. v. Rijhan Singh and Ors. a Division Bench of this Court has held as follows. The relevant portion is quoted below :

"This is a first appeal against the final decree in a partition suit, the appellants objecting to the takhtas which have been allotted to them by the order of the Subordinate Judge. Having regard to the frequency with which appeals from final decrees come to us, it is desirable that the principles upon which such appeals must be heard should be restated with emphasis. The Subordinate Judge when he makes the final decree considers, first, the report of the Commissioner; the Commissioner has been to the spot, has heard the contentions of the parties and the evidence which the parties produced before him and then to the best of his ability directed the partition by metes and bounds, taking into consideration the element of compactness, the element of equality, the nature of the land to be divided and many other circumstances which he must take into accounts and then submits his report to the Subordinate Judge. It is then open to any party, who is dissatisfied with the takhta allotted, to ask the Subordinate Judge to disregard the

report of the Commissioner; and the Subordinate Judge again reviews the facts and corrects the award of the Commissioner.

Therefore, a first appeal to this Court from the order of the Subordinate Judge is really in the nature of a second appeal in which only questions of law and principle can be considered. It is quite impossible for the Court to go down to the area in question, inspect the land, hear the various objectors and in fact review the decision of the Commissioner on fact. The power to review the decision of the Commissioner on the facts is a matter for the Subordinate Judge, and his view of the facts ought to be final as a first appellate decision on fact. The High Court should only interfere when it is shown that the Judge in his decision has gone wrong on some question of principle in making the final allotment and in drawing up the decree, and I think much money and trouble would be saved to parties to partition suits if they realized that principle and they would in the majority of cases refrain from coming before the High Court in an attempt to upset the allocation of the takhtas."

10. In the present case, from perusal of the Pleader Commissioner's report, it appears that both the parties were present before the Commissioner. They identified the suit land. The Pleader Commissioner verified the same from the R.S. Map and then considering their utility, fertility, location and value divided the same. It further appears that even the Commissioner valued the trees and thereafter takhta has been made. This Commissioner's report has been challenged by filing objection before the Subordinate Judge. The learned Subordinate Judge considering all aspects of the matter found no illegality or wrong in principles of partition and rejected the objection. In view of the Division Bench decision in the case of Jugeshwar Singh (Supra), the final decree cannot be interfered with lightly.

11. The other aspect of the matter is that the order of the learned Court below whereby the objection of the appellant was rejected on 05.03.2003 and the appellant filed revision application against that before this Court. It is admitted that the said revision application has been dismissed. However, only contention of the learned counsel for the appellant is that liberty has been given to the appellant to raise the points before the appellate Court. Therefore, the order passed by the

learned Court below dated 05.03.2003 has been confirmed by this Court in revisional jurisdiction. It is well settled that revisional jurisdiction of this Court is part of appellate jurisdiction. The order dated 05.03.2003, therefore, has become final on dismissal of the revisional application.

12. In A.I.R. 1974 Patna 153 Ramsarup Das and Ors v. Pyare Das and Anr., a Bench of this Court has held at paragraph 7 as follows: " 7. Learned counsel, however, submitted that the revisional jurisdiction of the High Court was an extraordinary jurisdiction and, therefore, any decision given by this Court in exercise of the revisional powers would not amount to res judicata for entertaining the same objection or ground in a regular appeal. It is difficult to accept this contention. Learned counsel referred to the decision of the Supreme Court in Satyadhyan Ghosal V. Smt. Deorajin Debi. A.I.R.1960 SC 941. In that case, however, the facts were entirely different. The Supreme Court was considering the scope of Section 105 (2) of the Code of Civil Procedure and it was held that a special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken, the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand, the correctness thereof could be challenged by an appeal from the final decision. In that case, an order of remand was made by the Calcutta High Court in exercise of its revisional power under Section 115 of the Code of Civil Procedure. It was observed by the Supreme Court after referring to the various decisions of the Privy Council that the order of remand was an interlocutory order and did not purport to dispose of the case, and a party was not bound to appeal against every interlocutory order which was a step in the procedure that leads up to a final decision, and as such the correctness of the same could be challenged in an appeal from the final order. It was specifically held in that case that the order of the Calcutta High Court was not appealable to the Supreme Court and, therefore, the bar under sub-section (2) of Section 105 of the Code of Civil Procedure was not attracted. The Supreme Court, accordingly, set aside the order of the Calcutta High Court. In my opinion, the decision of the Supreme Court in the above case is of no assistance to the appellants. In this very decision, the Supreme Court has laid the foundation for applying the principles of res judicata. In paragraph 8 of the report, their Lordships

have clearly observed that the principles of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court, having at an earlier stage decided a matter in one way, will not allow the parties to re- agitate the matter again at a subsequent stage of the same proceedings."

13. In the case of Shankar Ramchandra Abhayankar V. Krishnaji Dattatraya Bapat, A.I.R. 1970 (S.C 1), it has been clearly laid down by the Supreme Court that "when the aid of the High Court is invoked on the revisional side, it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense."

14. In the present case, further it is admitted fact that after final decree, possession has been delivered to the plaintiff. It is also admitted fact that the appellant has sold some of the properties allotted to him in his takhta and, therefore, now at this stage the appellant cannot be allowed to say that takhta may be exchanged. Moreover, that is not a ground for interference with the final decree, particularly when it has attained its finality. I, therefore, find that the impugned Order / Judgment and final decree cannot be interfered with in this First Appeal.

15. In the result, I find no merit in this First Appeal and accordingly it is dismissed. There shall be no order as to costs.

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