
(2006) 07 PAT CK 0062

In the Patna High Court

Case No : Appeal from Appellate Decree No. 131 of 1990

Abdul Salam (dead) Taiyaba Khatoon and Another

APPELLANT

Vs

Bibi Zubaida Khatoon and Others

RESPONDENT

Date of Decision : 24-07-2006

Acts Referred:

Citation : (2006) 07 PAT CK 0062

Final Decision : Dismissed

Judgement

Syed Md. Mahfooz Alam, J.—This Second Appeal has been preferred against the judgment dated 31.3.1990 and decree dated 20.4.90 passed by Sri Lallu Prasad Singh, 4th Additional District Judge, Patna, in Title Appeal No. 166 of 1988 confirming the judgment and decree dated 2.9.88 passed by Sri Rameshwar Prasad, Additional Sub-Judge VI, Patna, in Title Suit No. 355 of 1979.

2. The brief facts of the case are as follows:

Plaintiff-respondent Bibi Zubaida Khatoon along with her mother Bibi Hasina Khatoon filed Title Suit No. 355 of 1979 in the Court of Sub-Judge Ist, Patna, for preliminary decree of partition of the suit property fully described in Schedule of the plaint with respect to their share to the extent of 6 Annas 13 dams, 3 kauris and to carve out a separate Takhta by appointment of Pleader Commissioner. The original appellant Abdul Salam, who was defendant No. I in the said suit, firstly contested the suit by making certain averments in the suit but during the pendency of the suit both the parties filed a joint petition of compromise which was disposed of by order dated 2.9.88 and the learned Court of Sub-Judge has been pleased to record compromise decree on the basis of the compromise petition. The learned Sub-Judge further held that the compromise petition shall be the part of the final decree. It appears that original appellant Abdul Salam was not satisfied with the order of the learned Sub-Judge and, as such, he preferred appeal against the said order of the Sub-Judge dated 2.9.88 which was numbered as Title Appeal No. 166 of 1988 and was disposed of by Sri Lallu Prasad Singh, 4th Additional District Judge, Patna.

3. From the perusal of the judgment passed in appeal it appears that the learned Additional District Judge dismissed the appeal filed by Abdul Salam and Ors. holding that the order dated 2.9.88 whereby the learned Sub-Judge has recorded compromise was lawful. Against the said finding of the appellate court the said Abdul Salam preferred this Second Appeal.

4. At the time of admission of this Second Appeal on 29.6.90, only one substantial question of law was formulated which is as follows:

Whether the compromise recorded by the trial court was lawful.

5. During the hearing of this Second Appeal, learned Advocate of the appellants submitted that the compromise decree dated 2.9.88 is not lawful - firstly because of the fact that after the death of plaintiff No. I Bibi Hasina, all her heirs were not made parties in the suit even after filing of the petition on 23.7.88, as such, suit was not matured for disposal in absence of the heirs of Bibi Hasina; secondly, the trial court has not expressed any opinion on the right, title and interest of defendant Nos. 2 to 7 and recorded the compromise and thirdly the conduct of defendant No. I, as disclosed from the order dated 2.9.88, reveals that he never intended to enter into compromise and, so, the compromise was not wilful and no decree can be passed on such compromise which is not wilful.

6. From the perusal of the judgment of the appellate court it appears that the appellate court has dealt with all these points in its judgment and thereafter the appellate court has come to the conclusion that the order dated 2.9.88 passed by the learned Subordinate Judge recording compromise was legal and in accordance with law.

7. It should be kept in mind that this is Second Appeal and it is well settled principle of law that in Second Appeal this Court can only interfere with the findings of the courts below if the court finds that the findings are perverse but during the course of argument, the learned Advocate of the appellants could not be able to show me that the findings of the courts below are perverse. However. I would like to meet the points raised by the learned Advocate of the appellant in the following paragraphs.

8. The learned Advocate of the appellants firstly raised the point that during the pendency of the suit plaintiff No. 1 Bibi Hasina died. According to Mohammedan Law, she was entitled for 2 Annas share in the property as the suit property belongs to her husband. Learned Advocate further argued that as Bibi Hasina had no male issue, as such, according to Mohammedan Law, plaintiff No. 2 Bibi Zubaida was not the sole heir of Bibi Hasina and as legal heirs of Bibi Hasina were not brought on record in spite of the petition filed by defendant No. 1, the suit was not matured for disposal. I am of the view that this argument of the learned Advocate is misconceived because the only daughter of Bibi Haseena, namely, Bibi Zubaida Khatoon was already plaintiff No. 2 in the suit and after the death of Bibi Haseena she (Bibi Zubaida) was entitled to inherit her share alongwith original defendant No. 1 Abdul Salam. I am, therefore, of the view that

it is not correct to say that on 2.9.1988 when the compromise decree was passed the suit was not ready for hearing and therefore, I reject the submission of the learned Advocate of the appellant in this regard. Thus, Point No. 1 raised by the learned Advocate of the appellants is answered in negative.

9. The second point raised by the learned Advocate of the appellants was that although the minor sons and daughter of Abdul Salam were impleaded in the suit as defendant Nos. 2 to 7 but they had not participated in compromise. They were neither represented by their natural guardian nor through guardian ad litem, as such, compromise decree passed in absence of minor defendants without safeguarding interest of minor defendants Nos. 2 to 7 is bad in law. Learned Advocate further submitted that it was the bounden duty of the Court to satisfy itself about the terms of compromise and other details of compromise petition including the fact that parties and their lawyers have signed the compromise petition but the learned Subordinate Judge failed in duty in satisfying himself that the compromise petition was in order and the minor defendants were not represented either by their natural guardian or by their guardian ad litem and, so, the compromise petition was not in accordance with law and, therefore, by accepting the compromise the learned Subordinate Judge has committed gross error of law. In support of his argument, learned Advocate of the appellants has placed reliance on the judgment of the Patna High Court in the case of Pushpa Devi and Ors. v. Most. Anand Moyi Devi and Ors. reported in 2004 (2) B.L.J. 574. According to the said judgment, it is the bounden duty of the Court to have satisfied itself about the terms of compromise and other details of compromise petition including the fact that parties and their lawyers have signed the compromise petition.

10. It is admitted position that in this suit the minor sons and daughters of Abdul Salam, who were impleaded as defendant Nos. 2 to 7, have not participated in the compromise but the learned Sub-ordinate Judge without satisfying himself accepted the compromise and passed decree. It should be kept in mind that the parties are governed by Mohammedan Law and according to Mohammedan Law, during the life time of father, sons or daughters have no interest in the property as such the sons & daughters of Abdul Salam were not necessary parties. The plaint shows that they have been made parties because of the fact that the original defendant No. 1 Abdul Salam had executed some documents in their favour but the defendant No. 1 Abdul Salam, who was father of defendant Nos. 2 to 7, did not disclose in his written statement that he had executed any such document or deed in favour of defendant Nos. 2 to 7 transferring his right, title and interest in the suit property. In such situation, under Mohammedan Law when the defendant Nos. 2 to 7 were not necessary parties their participation in the compromise was not essential. I, therefore, hold that the Subordinate Judge has committed no illegality by recording compromise in absence of defendant Nos. 2 to 7, who were not necessary parties in the suit. Accordingly, this point is also answered in negative.

11. The third point raised by the learned Advocate of the appellants is that the conduct of defendant No. 1 revealed that he never intended that the suit be disposed of in terms of compromise and, therefore, the compromise was not wilful but the learned Subordinate Judge without applying his mind accepted the compromise which is against the settled principle of law and in this regard he has placed reliance upon the decision given in the case of Siddalingeshwar and Others Vs. Virupaxgouda and Others, . The relevant para which has been relied by the learned Advocate of the appellants runs as follows-

It need not be impressed that Rule 3 of Order 23 does not require just a seal of approval from the court to an alleged agreement of compromise.... The statute requires the Court to be first satisfied that the agreement of compromise which has been entered into between the parties is lawful, before accepting the same. Court is expected to apply its judicial mind while examining the terms of the settlement before the suit is disposed of in terms of the agreement arrived at between the parties.

12. It is true that the conduct of defendant No. 1, as it appears from the perusal of record of the Court of Subordinate Judge, was such which gives impression that he (defendant No. 1) had tried his best that the compromise could not be recorded. This is also apparent from the order sheet dated 2.9.88 of the Court of Subordinate Judge. However, the record of the trial court shows that although the defendant No. 1 had tried his best to avoid compromise by filing several frivolous petitions but he never filed any petition making statement that the compromise was obtained by playing fraud upon him or under coercion or threat or that the compromise petition does not bear his signature. The learned Subordinate Judge has mentioned all these facts in his order dated 2.9.88 and thereafter he has accepted the compromise. In such circumstance, it cannot be held that the learned Subordinate Judge while recording the order of compromise did not apply (sic). It is well settled law that the compromise can only be refused on the ground that it was fraudulent or it was brought to existence under coercion or threat or that the same was not (SIC) but when there is nothing on record to show that the compromise was not lawful or that the same was obtained under coercion or threat, then in that situation, can any person who is party to the compromise be permitted to back out from the compromise? - I am of the view that the law does not permit any litigant who has participated in the compromise which is also lawful to back out from the compromise and to continue the litigation at his sweet-will. Here, in this case I find that the compromise petition bears the signatures of necessary parties to the suit as well as respective lawyers. Besides that, the terms of the agreement arrived at between the parties are also very clear and according to the provisions of Mohammedan Law, so the learned trial court was right in recording the compromise which was lawful. I, therefore, hold that the compromise recorded by the trial court vide order dated 2.9.1988 is lawful and accordingly, this substantial question of law is answered.

13. In the result, I do not find any merit in this Second Appeal and, hence, the

same is hereby dismissed and the findings of both the courts below are upheld. However, there will be no order for cost.