

(2004) 02 PAT CK 0003

In the Patna High Court

Case No : C.R. No's. 1190 of 2002 and 720 of 2003

Arjun Mistry

APPELLANT

Vs

Rajendra Prasad Vishwakarma
 Rajendra Prasad
Vishwakarma Vs Om Prakash Vishwakarma

RESPONDENT

Date of Decision : 04-02-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 21 Rule 97

Citation : (2004) 2 PLJR 239

Hon'ble Judges : Nagendra Rai, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Nagendra Rai, J.—Both the matters are connected one and as such they have been heard together and are being disposed of by this common order.

2. Civil Revision No. 1190 of 2002 has been filed by the Defendant/Petitioner in the suit for partition against the order dated 6.8.2002 passed by the Subordinate Judge, 1st, Bihar Sharif in Execution Case No. 8 of 2000 rejecting his petition challenging the maintainability of the execution case.

3. Civil Revision No. 720 of 2003 has been filed by the Plaintiffs/deed holders against the order dated 6.5.2003 passed by the Subordinate Judge, 1st, Bihar Sharif in Misc. Case No. 5 of 2003 whereby the Court below has directed for stay of the further proceeding in execution case pending in the Court of Subordinate Judge, 1st, Bihar Sharif till disposal of the objection raised by the objector/opposite party under Order XXI, Rule 97 of the Code of Civil Procedure.

4. The factual matrix for disposal of the present application are that the Plaintiff/opposite party filed a suit for partition against the Defendant including Arjun Mistry who is the Petitioner of Civil Revision No. 1190 of 2002. That suit was decreed on 27.5.1978 by passing a preliminary decree against which the Defendant Petitioner filed Title Appeal No. 73 of 1978 which was allowed and the

matter was remanded to the trial Court after addition certain properties. The Plaintiff/opposite party challenged the said judgment and decree in Second Appeal No. 86 of 1981 and this Court set aside the order of the appellate Court but remanded the matter to the trial Court to dispose of the matter afresh on merit after excluding the property which was ordered to be included by the first appellate Court. Thereafter again the trial Court passed a preliminary decree on 3.6.1992 against which the Defendant Arjun Mistry filed Title Appeal which was dismissed on 3.2.1996 and the Second Appeal filed by him being Second Appeal No. 78 of 1996 was also dismissed on 10.7.2000. Thus, the preliminary decree dated 3.6.1992 has been affirmed up to this Court.

5. In pursuance of the earlier preliminary decree dated 27.5.1978 a final decree was prepared on 12.6.1980 and appeal against that was dismissed for default. Thereafter, the Plaintiff-opposite party filed an Execution Case on 17.11.2000 for execution of the preliminary decree dated 27.5.1978. The Defendant/Petitioner raised objection as to the maintainability of the execution case as that was filed beyond the period of 12 years. The Court below has rejected the said prayer by the impugned order on the ground that fresh preliminary decree was passed on 3.6.1992 and as such the execution case is not barred by limitation.

6. The persons not parties to the suit, namely, Om Prakash Vishwakarma and others filed an application that they have shares in the suit land and without making them party in the suit, the same has been decreed and accordingly their petition under Order XXI, Rule 97 of the Code has been entertained by the Court below and their pray to stay the aforesaid execution case till the disposal of the objection has been allowed by the order dated 6.3.2003 against which Civil Revision No. 720 of 2003 has been filed.

7. learned Counsel appearing for the Petitioner in Civil Revision No. 1190 of 2002 submitted that preliminary decree only determines the right of the parties and thereafter in pursuance of that final decree is prepared under Order XX, Rule 18 and as the earlier preliminary decree was set aside the final decree prepared in pursuance of it has no legal value and unless a fresh final decree is prepared in pursuance of fresh preliminary decree after remand of the matter dated 3.6.1992, the execution case is not maintainable.

8. learned Counsel appearing for the decree holder/Plaintiff/opposite party on the other hand submitted that the preliminary decree dated 27.5.1978 is still good even after passing of the fresh preliminary decree as nothing has changed and only the rights have been determined in the same term as was determined earlier.

9. Two questions arise for consideration. Firstly, whether the execution case is maintainable to execute the final decree dated 12.6.1980 and secondly as to whether the execution is to be made on the basis of previous final decree prepared in pursuance of the preliminary decree or fresh final decree has to be prepared.

10. The preliminary decree determines the rights of the parties and thereafter a

final decree is prepared to carve out the shares of the parties in terms of the preliminary decree. There cannot be final decree unless there is a preliminary decree determining the rights of the parties. The preliminary decree dated 27.5.1978 on the basis of which final decree was prepared on 12.6.1980, has admittedly been set aside and no longer exists in the eye of law. In that view of the matter, there is no question of preparation of final decree and giving effect thereto by virtue of it being non-existent.

11. If the submission advanced on behalf of the learned Counsel for the Plaintiff/opposite party is accepted that the said decree is valid then there will be more, difficulty in the Plaintiff's way as admittedly that decree cannot be executed after 20 years. Admitted position is that a fresh preliminary decree has been prepared after setting aside the preliminary decree. In my view, the final decree has to be prepared on the basis of the preliminary decree dated 3.6.1992 and after preparation of the final decree, the same can be put into execution. Accordingly, the objection raised by the Defendant/Petitioner about the maintainability of the execution case is valid one. The final decree dated 12.6.1980 cannot be put into execution. The Court below will take steps to prepare final decree in pursuance of preliminary decree dated 3.6.1992 and thereafter proceed in accordance with law.

12. So far other case is concerned in that case execution case has been stayed but as I have already held that the execution case is not maintainable on the aforesaid ground there is no question to pass an order staying the execution case.

13. Accordingly, the impugned order dated 6.8.2002 is set aside. The execution case is held to be not maintainable. However, the Plaintiffs will take steps for preparation of final decree and after preparation of final decree, they will take steps for execution of final decree.

14. The impugned order dated 6.5.2003 is also set aside as the prayer of the objector/opposite party has become infructuous in view of the order holding that the execution case is not maintainable.

15. Accordingly, both the civil revision applications are allowed.