
(2014) 04 PAT CK 0078
In the Patna High Court
Case No : First Appeal No. 685 of 1976

Arjun Tiwary and Others

APPELLANT

Vs

Harinandan Tiwary and Others

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148, 151

Citation : (2015) 2 PLJR 399

Hon'ble Judges : Birendra Prasad Verma, J.

Bench : Single Bench

Advocate : Binod Kumar Singh, for the Appellant; Umesh Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Birendra Prasad Verma, J.—This appeal has been filed against the judgment and decree dated 14th August, 1976 passed in Title Suit Nos. 121/41 of 1973/76 by learned 2nd Additional Subordinate Judge, Buxar, whereby the aforesaid suit brought by the plaintiffs-respondents herein for partition of suit properties, detailed in Schedule "Ka" of the plaint, to the extent of half share was decreed on contest with costs. The plaintiffs-respondents herein were found entitled to have half share in the suit properties, detailed in Schedule "Ka" of the plaint. By office notes dated 1.4.2014, it has been pointed out that this appeal stood dismissed as against the substituted respondent Nos. 2(i) to 2(v) on account of non-compliance of the peremptory order dated 4.3.2013 passed by a Bench of this Court. Hence, competency matter of this appeal has been placed for consideration by this Bench.

2. Learned counsel appearing on behalf of the respondents submits that in view of dismissal of the appeal as against the substituted respondent Nos. 2(i) to 2(v), the whole appeal has become incompetent and cannot proceed further. In support of his above contention, he has placed reliance on a judgment by a Division Bench of this Court in the case of Dhanukha Singh vs. Saudagar Singh

[AIR 1955 Patna 240].

3. Though, learned counsel appearing on behalf of the appellants has argued the matter for some time, but he has not been able to rebut the submissions made by the learned counsel appearing on behalf of the respondents.

4. From perusal of the record, this Court finds that this appeal was admitted on 16.3.1981 and notices were issued to the respondents. Admittedly, during the pendency of the appeal, respondent No. 2 Kapildeo Tiwary, one of the decree holders, died on 8.11.2005 leaving behind his heirs and legal representatives.

5. In view of death of respondent No. 2, I.A. No. 659 of 2006 was filed on behalf of the appellants seeking substitution of the heirs and legal representatives of the deceased respondent No. 2, fully detailed in Paragraph No. 2 of the aforesaid Interlocutory Application. The aforesaid Interlocutory Application No. 695 (sic-- 659?) of 2006, which was in the nature of substitution petition, was allowed by an order dated 20.4.2009 and his heirs and legal representatives were substituted. The appellants were granted four weeks" time for filing requisites for issuance of appeal notice upon the substituted heirs of deceased respondent No. 2. Unfortunately, the aforesaid order dated 20.4.2009 was not complied with by the appellants for about four long years, whereafter, by office notes dated 1.3.2013 the matter was placed for consideration before a Bench of this Court.

6. By an order dated 4.3.2013 passed by a Bench of this Court, the appellants were further granted two weeks" time for filing talbana etc. for issuance of appeal notice to the substituted heirs of deceased respondent No. 2. The order dated 4.3.2013 was peremptory in nature. However, even this order dated 4.3.2013 has not been complied with by the appellants, despite passage of more than one year.

7. It is also an admitted fact that despite dismissal of appeal as against the substituted respondent Nos. 2(i) to 2(v) on account of non-compliance of the Court's peremptory order dated 4.3.2013 and despite passage of more than one year, no petition has been filed on behalf of the appellants seeking restoration of the appeal as against the aforesaid substituted respondent Nos. 2(i) to 2(v). Hence, the order dated 4.3.2013 has attained its finality. In the aforesaid background, by office notes dated 1.4.2014 the competency matter was placed for consideration.

8. When this appeal was taken up for consideration on 2.4.2014, the Court had passed the order as under:--

"From perusal of the office notes dated 1.4.2014, it appears that the present appeal stood dismissed against the substituted respondent Nos. 2(i) to 2(v) on account of noncompliance of the Court's peremptory order dated 4.3.2013 passed by a Bench of this Court.

This appeal arises out of the judgment and decree passed in a Partition Suit, and in view of its dismissal against the aforesaid substituted respondent Nos. 2(i) to

2(v), it has become incompetent.

However, as prayed for by learned counsel appearing on behalf of the appellants, the matter is adjourned for a week, enabling him to take appropriate steps in the meanwhile. List this matter after one week under the same heading."

9. Despite aforesaid indulgence granted by this Court, no steps, at all, have been taken by the appellants either by filing restoration petition or a petition under Section 148 read with Section 151 of the Code of Civil Procedure for enlargement of time for complying the order dated 4.3.2013.

10. Admittedly, the present appeal arises out of a judgment and decree passed in a Partition suit. Admittedly, respondent No. 2 was one of the decree holders. Admittedly, respondent No. 2 died on 8.11.2005 leaving behind his heirs and legal representatives. Admittedly, his heirs were substituted by an order dated 20.4.2009, when the appellants were granted four weeks' time for filing talbana etc. for issuance of appeal notice. Since then, almost five years have elapsed, but the appellants have not carried out the aforesaid order dated 20.4.2009 as also the order dated 4.3.2013 passed by this Court, as a result thereof the appeal stood dismissed as against the substituted respondent Nos. 2 (i) to 2(v). Consequently, the appeal has become incompetent and cannot proceed further.

11. Law is well settled that appeal is a continuation of suit. In a joint Hindu family governed by Mitakshra School of Hindu Law, each and every co-parcener has an independent and distinct right of his/her own, which is not interdependent upon one or the other. It is also well settled that a co-owner of a property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place. The impugned judgment and decree has attained finality against the substituted respondent Nos. 2(i) to 2(v), and if this appeal is allowed, then there will be a conflicting decree between the parties in the same subject matter in the same suit/appeal, which is not permissible in law.

12. In view of the aforesaid well settled proposition of law, and in view of dismissal of the appeal as against the substituted respondent Nos. 2(i) to 2(v), the present appeal as a whole has to fail in the factual matrix noticed above and in view of law laid down by the Hon'ble Apex Court in the cases of *The State of Punjab Vs. Nathu Ram*, *Ram Sarup Vs. Munshi and Others*, *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, and *Budh Ram and Others Vs. Bansi and Others*, besides a Division Bench judgment of this Court in the case of *Dhanukha Singh vs. Saudagar Singh* (supra).

13. For the reasons recorded above, this Court is of the considered opinion that no useful purpose shall be served by keeping the present appeal pending any longer, as it has become incompetent and cannot proceed further. In the result, the appeal as a whole has to fail and is, accordingly, dismissed, but there shall be no order as to costs.