
(1989) 12 PAT CK 0004
In the Patna High Court
Case No : Civil Revision No. 1528 of 1986

Bhikhari Rai and Another

APPELLANT

Vs

Smt. Girdhari Kuer and Others

RESPONDENT

Date of Decision : 04-12-1989

Acts Referred:

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

Citation : (1992) 1 BLJR 20 : (1991) 2 PLJR 487

Hon'ble Judges : Binod Kumar Roy, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Binod Kumar Roy, J.—Title Suit No. 18 of 1964 was filed by original opposite party Nos. 1 to 7 (Plaintiffs), whose names were deleted at the risk of the petitioners vide order dated 3-11-1987. The said order appears to have been passed after submission of a report by the office that opposite party Nos. 1, 4 and 6 are dead and that steps for substitution of their heirs be taken. The said suit was decreed by judgment and preliminary decree dated 25-8-1973 and the plaintiffs-Opp. Party--"first party were allowed 1/2 share in the entire properties and the petitioners and the opposite party-second party were allowed the remaining 1/2. The Opp. party-first party took steps for preparation of the final decree by filing an application on 9-7-1985 in the court below that First Appeal No. 58 of 1973 preferred in this Court against the judgment and preliminary decree dated 25-8-1973 has already been dismissed on 4-12-1978. It appears that a petition dated 10-9-1985 was also filed on behalf of the defendants Dhyan Dhari Kuer, Ram Jatan Rat (opposite party No. 9), Chandrama Rai (Opposite party No. 11), Shyam Sunder Devi (Opposite party No. 13) and Kaushalya Devi praying to carve out their 1/8 share. Another petition was also filed by other set of defendants on 30th September, 1985 for carving out their share. It appears that an-objection petition dated 4-10-1985 was also filed against the petition dated 10-9-1985 of the aforementioned defendants stating therein that in the

judgment and decree only the share of the plaintiffs has been directed to be carved out and thus the shares inter se cannot be carved out unless decided by a competent court and thus the petition dated 10-9-1985 is fit to be rejected. The court below by the impugned order held that even though it is a fact that the share of the defendants inter se has not been directed to be carved out but since the share has been declared in favour of the plaintiff, the remaining land shall certainly go to the shares of the defendants and thus there cannot be any difficulty in carving out the shares of the defendants inter se by appointing a Pleader Commissioner as well as the 1/2 share of the plaintiffs and proceeded to reject the objection petition dated 4-10-1985 of the petitioners and directed the parties to deposit necessary fee for appointing a Pleader Commissioner.

2. The petitioners are aggrieved by the rejection of their objection petition dated 4-10-1985.

3. Learned Counsel for the petitioners submits a very short point, namely, that no direction having been made in the judgment and preliminary decree for partition inter se between the defendants, the court below was not correct in directing inter se partition through a Pleader Commissioner by the impugned order. He however, failed to cite any judgment or any provision of law to support his submission.

4. In my view the submission is devoid of any substance.

5. In paragraph 56 of the judgment dated 25th August, 1973, it was categorically held that the land of Khata No. 188 is the joint family land of the plaintiffs and the defendants and in which the plaintiffs have one-half share in the said land. In the preliminary decree dated 25-8-1973 it was directed to make partition or separation according to the rights of the parties.

6. The suit in question cannot be said to be not pending merely because of a preliminary decree and its affirmance by this Court in the First Appeal which was dismissed for default. It is also a settled law that in a suit for partition simpliciter every defendant in law is a plaintiff and irrelevant is the array of parties and the most relevant fact is that all the members entitled to shares are on the record and found entitled to reliefs.

7. The provisions of Order XX, Rule 18 of the CPC are also relevant in this regard which runs as follows:

Decree in suit for partition of property or separate possession of a share therein--

(1) Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then (i) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

8. The aforesaid provision clearly provides that where a decree for partition of property is passed or for separate possession of a party's share therein, the court may if the partition or separation cannot be easily made without further enquiry pass a preliminary decree, declaring the rights of several interested parties and give further directions as may be required on payment of court-fee etc., as may be necessary.

9. It was held in the case of AIR 1935 12 (Privy Council) that after passing of a preliminary decree it is always open to the parties to bring in further property for partition, but before passing of the final decree. In the case of AIR 1940 11 (Privy Council) it was held to the effect that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties, who were added after the preliminary decree, have to be adjusted at the time of final decree. In AIR 1924 198 (Privy Council) it was held as follows:

After decree it is open to any party to a suit, to whose interest it is that further proceedings be taken to initiate the supplementary proceeding;....

10. From the aforementioned propositions of law there can be no doubt that the court upto final decree stage, but before passing of the final decree, can entertain a request of a co-defendant to have a partition against a co-defendant also of their joint shares declared in the preliminary decree provided that he pays necessary court fees, stamps etc. In passing the impugned order, thus, in my view, the court below has not committed any illegality.

11. For the reasons aforementioned, I do not find any merit in this civil revision application and it is accordingly dismissed, but in the peculiar facts and circumstances of the case, there shall be no order as to costs.