

(2004) 04 PAT CK 0067
In the Patna High Court
Case No : SA No. 107 of 2002

Bhola Yadav and Another

APPELLANT

Vs

Jadunandan Prasad Yadav and Others

RESPONDENT

Date of Decision : 26-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2004) 2 BLJR 1001

Hon'ble Judges : P.K. Sinha, J

Bench : Single Bench

Judgement

P.K. Sinha, J.—Heard learned counsels for both sides on I.A.No. 3833 of 2003, at flag-C, and I.A. No. 5708 of 2003, at flag-A.

2. The application at flag-C is u/s 151 of the CPC praying therein for modifying the order dated 1.7.2003 by which this second appeal was admitted by formulating a substantial question of law. It has. been submitted that substantial question of law was formulated on placement of wrong facts about the judgments of the lower Courts. The suit was filed for declaration that three gift deeds executed on different dates in favour of Deep Naryan Yadav and two others as well Will dated 24.1.1978 said to have been executed by Shri Lal Yadav in favour of defendant No. 1, Bhola Yadav, all were forged, illegal, not operable and not binding on the plaintiffs. There was prayer for other reliefs also.

3. From order dated 1.7.2003 it appears that it was observed that genuineness of Will could be decided only under special statute by a Court having statutory jurisdiction, i.e., by a District Court. The substantial question of law formulated was "whether the judgment passed by the Courts below are valid in the eye of law because of lack of jurisdiction". Learned counsel for the respondents, who has now appeared on issuance of appeal notice, submitted that on a perusal of the judgments of both the lower Courts it will be manifest that the lower Courts have concurrently declared the deed of gift to be illegal, void and inoperative, but they have left the decision about the Will to the Special Court where the matter

was pending for probate of the Will.

4. The learned counsel for the appellants pointed out that in the same order this Court had observed that any other substantial question could be raised at the time of hearing of the appeal.

5. In so far as this application (flag-C) is concerned, I don't think that this is a proper stage for modifying the order aforesaid which will amount to reopening of the hearing under Order XLI, Rule 11 of the CPC because this appeal is yet to be listed "for hearing" awaiting its turn in queue. In this regard Sub-section (5) of Section 100 of the CPC may be looked into which runs as follows :--

"(5) The appeal shall be heard on the questions so formulated and the responders shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question". Therefore, it will be open to the respondents to argue that the case did not involve substantial question of law as formulated by this Court. That, in my opinion, would be appropriate stage for hearing this application.

6. This application, therefore, will be considered at the time of hearing of the appeal.

7. Now coming to the application at flag-A filed under Order XLI, Rule 6, read with Section 151 of the Code of Civil Procedure, praying therein to stay proceedings in the execution case No. 2 of 1997, pending in the Court of Sub-Judge-I, Supaul, it may be noticed that before admission of this second appeal the matter had come up for hearing before Lawazima Board and learned Registrar General by order dated 19.12.2002 had rejected the prayer holding that no case of irreparable loss or injury was made out as the application or the decree did not show that the matter related to any dwelling house. Learned counsel for the appellants submitted and made it clear that the instant application related to stay of delivery of possession of the dwelling house standing on Schedule 2 (property) to the plaintiff, in which the appellants/applicants have been residing. Learned counsel also submitted that a probate case was still pending in the Court of District Judge, Saharsa and the substantial question of law had been formulated relating to lack of jurisdiction of the lower Courts.

8. Replying to these submissions, learned counsel for the respondents submitted that Schedule 2 of the plaintiff did not mention about any dwelling house upon that land. At that, learned counsel for the appellants produced a copy of the application in the execution case filed on behalf of the decree holders in which prayer was made also to hand over possession over the land in Schedule 2 (about 10 kathas, as admitted) by dispossessing the appellants from the dwelling structure. Going through that the learned counsel for the respondents agreed that such a prayer was made and human dwellings were shown upon that land.

9. This is a case in which there were concurrent findings in favour of the

defendants/respondents. However, it appears that upon the land in Schedule 2 there was also human dwelling, presently under occupancy of the appellants. But in case the prayer in this application is allowed, the interest of the respondents also has to be safeguarded who had won the suit in both the lower Courts. This land is said to be in the town of Supaul. This appeal was filed on 8.5.2002. It is also admitted by the learned counsel for the appellants that Schedule 2 of the plaint related to 10 kathas of land, on a part of which the residential house of the defendants situated.

10. The proceedings in the execution case bearing No. 2 of 1997, pending in the Court of Sub-Judge-I at Supaul is stayed with following conditions and stipulations :--

(i) The stay order will operate only to the residential portion and to 3 feet land around it plus the passage. In the rest of the land under Schedule 2 of the plaint there will be no stay order.

(ii) to secure the interest of the respondents, who have won in both the lower Courts, it is ordered that the stay is subject to deposit an amount of Rs. 300/- per month from the date of filing of this appeal which arrear upto date will be deposited within two months of this order, in the Execution Court. Thereafter, amount of Rs. 300/- per month will be continued to be deposited in the Court by 15th day of each succeeding month. Should the appellants fail to comply this order presently, or in future, any time then the stay would stand vacated. The amount so deposited in Execution Court will abide by the decision in this second appeal.

11. There will be no stay of the execution proceedings with regard to other properties in the suit.