

(2007) 10 PAT CK 0003
In the Patna High Court
Case No : Misc. Appeal No. 404 of 2004

Bibi Badrun Nisha and Others

APPELLANT

Vs

Md. Masud Akhter and Others

RESPONDENT

Date of Decision : 09-10-2007

Acts Referred:

Citation : (2008) 1 PLJR 661

Hon'ble Judges : Rekha Kumari, J

Bench : Single Bench

Advocate : Shiv Nandan Roy and Dilip Kumar Jha, for the Appellant; Manoj Kumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Rekha Kumari, J.—This Misc. Appeal arises out of judgment dated 25.2.2004 passed by the 7th Additional District Judge, Bhagalpur in Title Appeal No. 21 of 2001 whereby he has set aside the final decree passed in Title Suit No. 71 of 1973 and directed the trial court to prepare a final decree afresh after giving notice to all the parties. It appears that appellants Bibi Badrun Nisa and others had filed the above title suit against Bibi Sakina and others for partition of the property of one Mahtab Ali. The suit was decreed. The plaintiffs were allotted 11 annas, 13 13/27 Gandas of share and the defendants were adjudged four annas, 2 1/2 paise share. A preliminary decree was drawn up on 28.11.1978. Title Appeal No. 16 of 1979 filed against that decree was dismissed on 12.8.1987. Second Appeal No. 340 of 1987 against the appellate order was also dismissed on 2.4.1990. The proceeding of the final decree was initiated by petition dated 29.1.1991. Defendants Sakina, Quamruddin and Jalaluddin after passing of the preliminary decree died on 27.9.1980, 26.11.1996 and 22.1.1997. The trial court appointed a Pleader Commissioner for carving out the shares of the parties. The Pleader Commissioner submitted his report and on the basis of that report the final decree was drawn up on 1.7.2.1999.

2. Md. Masood Akhtar and Md. Mahmood Akhtar sons of Late Salahuddin

(defendant) filed the above Title Appeal No. 21 of 2001 against the final decree on the ground, inter alia, that no notice of the final decree was served on them. The final decree was passed against the deceased defendant without bringing his heirs on record.

3. The respondents filed rejoinder opposing the prayer of the appellants.

4. The learned Additional District Judge after hearing the parties and going through the record found that the proceeding of the final decree is a fresh proceeding and as such fresh notices were required to be sent to the judgment debtors but the record shows that no notice was sent to them. He further held that though Bibi Sakina and others died after passing of the preliminary decree, their legal representatives were not brought on record and the final decree was passed against the dead person and, therefore, the final decree is a nullity.

5. Learned counsel for the appellants submitted that even though no notice was given by the Advocate Commissioner, the defect has been cured. He further submitted that the heirs of the deceased defendant were substituted in appeal filed against the preliminary decree and that would be deemed to be substituted in the final decree stage.

6. Learned counsel for the respondents defended the impugned judgment.

7. As regards notice to the respondents first party of this appeal (appellants in the above title appeal) the impugned judgment shows that no notice was sent to the judgment debtor in the proceeding of final decree by the Court. Learned counsel for the appellants does not controvert it as already mentioned. His submission is that the Advocate Commissioner had sent notice to them and as such the defect had been cured.

8. The report of the Pleader Commissioner is that he had sent a post card to the defendants for local inspection and measurement of land and the defendants turned down but this report is not at all specific whether the notice was sent to the respondents first party. The report of the Pleader Commissioner is that he was not given the names of the parties or their addresses alongwith the writ. The plaintiffs after long delay supplied him the certified copy of the preliminary decree and copy of the plaint. The father of the respondents first party had died after passing of the preliminary decree. There is also nothing to suggest that the copy of the plaint supplied bore the names of these respondents who are the sons of Jalaluddin, the original defendant. Therefore, on the basis of the report of the Pleader Commissioner, it cannot be said that notice was sent to them. Besides this even if it be assumed that the Pleader Commissioner had sent post card to them, the post card contained the date of local inspection and not the date of hearing in court. Therefore, this cannot be a substitute for notice sent by the court of hearing of the proceeding. Hence, the final decree passed is ex parte against these respondents and liable to be set aside.

9. Though copy of the final decree passed in the suit shows the names of Bibi

Sakina, Jalaluddin and Quamruddin who were dead, whereas the names of the respondents first set and others, the legal representatives of the deceased are not mentioned therein. It is thus, obvious that they were not made parties in the final decree. The final decree was thus passed against the dead persons and without bringing their legal representatives on record. The learned lower appellate court was, hence, correct in holding that the final decree is a nullity. I, thus, do not find any merit in this appeal. It is dismissed. As the suit is very old, the learned trial court must take steps to get the final decree prepared expeditiously.