
(2011) 01 PAT CK 0149
In the Patna High Court
Case No : F.A. No. 117 of 2010

Gauri Shankar Pathak and Others

APPELLANT

Vs

Dr. Shankaranand Upadhyay and Others

RESPONDENT

Date of Decision : 27-01-2011

Acts Referred:

Citation : (2011) 8 RCR(Civil) 2250

Final Decision : Dismissed

Judgement

Mungeshwar Sahoo, J.—Heard all the parties on Interlocutory application No. 6685 of 2010, interlocutory application No. 10326 of 2010, I.A. No. 9920 of 2010, I.A. No. 9921 of 2010 and I.A. No. 10252 of 2010. All these five interlocutory applications were pressed by their respective counsels and are being disposed of by this common order as all of them are interlinked. Heard Mr. Shashi Shekhar Dwivedi, the learned senior counsel on behalf of the Appellant. Mr. Chitranjan Sinha, the learned senior counsel on behalf of the Respondent No. 1. Mr. Raghiv Ahsan, learned senior counsel on behalf of Respondent No. 2. Mr. Jitendra Kishore Verma on behalf of the interveners and likewise, Mr. V. Nath, the learned Counsel on behalf of another interveners.

2. For the purpose of disposal of these interlocutory applications, the brief facts are stated as hereunder.

3. The three Appellants, Gourishankar Pathak, Shivshanker Pathak and Prem Shanker Pathak have filed this First Appeal against the compromise final decree signed on 3-4-2010 by Sub-Judge-I, Patna in Title Suit No. 269 of 1996.

4. The said title (Partition) suit No. 269 of 1996 was filed by one of the partner, namely, Dr. Shankaranand Upadhaya with a prayer to dissolve the partnership and separate his share by affecting partition. In that case, the father of these Appellants, namely, Chunchun Pathak was Defendant No. 1. The Defendants appeared and thereafter on 26-8-1996, a joint compromise petition signed by all the parties to the suit was filed. Thereafter on 13-9-1996, the Court below

accepted and recorded the compromise and the said partition suit No. 269 of 1996 was finally disposed of in terms of compromise and it was directed that the compromise application shall form part of the final decree. The father of the Appellants, namely, Chunchun Pathak who was Defendant No. 1 died on 24-10-1997, i.e., more than one year after the compromise judgment and decree dated 13-9-1996 passed in said title partition suit No. 269 of 1996.

5. Thereafter, these Appellants filed Misc. Case No. 3 of 1998 as provided under Proviso to Order 23, Rule 3, Code of Civil Procedure. challenging the judgment and compromise decree dated 13-9-1996 and prayed for recall of the order dated 13-9-1996 and to set aside the compromise by declaring it to be unlawful, forged and fabricated and brought into existence by playing fraud both upon the Court and upon late Chunchun Pathak. The said misc. case was contested by the opposite parties of that misc. case. The parties adduced evidence oral as well as documentary and thereafter, the learned Court below after considering the evidence came to the conclusion that the joint compromise petition dated 24-8-1996 bears the signature of Plaintiff and all Defendants including Chunchun Pathak and their respective learned Counsels. The learned Court below also found that late Chunchun Pathak executed Vakalatnama in favour of his learned Counsel, Sri. Ramanand Sahay. The learned Court below also found that during lifetime, Chunchun Pathak never challenged the compromise recorded by the Court and the misc. case has been filed by his 3 sons after the death of their father, late Chunchun Pathak. On 16-7-2008, the learned Court below in view of the above fact dismissed the misc. case No. 3 of 1998.

6. Against the said order dated 16-7-2008, the Appellants of this First Appeal filed Civil Revision No. 1238 of 2008. This Court by terms of order dated 1-2-2010 considering all aspects of the matter found that late Chunchun Pathak, Defendant No. 1 had appeared in partition suit No. 269 of 1996 and had signed compromise petition dated 24-8-1996 and till his death on 24-10-1997, he did not raise any objection to the compromise decree and then dismissed the Civil Revision application. The Appellants then filed Civil Review No. 98 of 2010 which too was dismissed on 16-7-2010. It may be mentioned here that this First Appeal has been filed by aforesaid 3 Appellants on 15-7-2010.

7. After filing this First Appeal, I.A. No. 6685 of 2010 has been filed by the Appellants under Order 39 Rule 1 and 2, CPC praying therein to restrain the Respondents from encumbering, alienating, selling or changing or from taking forceful possession of the disputed property till final disposal of this First Appeal. When this application was placed under the heading for orders of petition on 18-11-2010, M/s. Balaji Steel Corporation Pvt. Ltd. appeared and it was submitted on behalf of this M/s. Balaji Steel Corporation that since Corporation has purchased the subject-matter of this appeal from the Plaintiff Respondent No. 1, the Corporation may be heard. Therefore, I.A. No. 9920 of 2010 was filed by said Balaji Steel Corporation Pvt. Ltd. under Order 1, Rule 10 read with Order 22, Rule 10, Section 107(2) and Section 151, CPC praying therein that

Corporation be added as party Respondent. The said deed dated 10-11-2010 purchased from Respondent No. 1 and Respondent No. 4 is annexed with the application.

8. A separate interlocutory application No. 9921 of 2010 was filed by the said Balaji Steel Corporation u/s 151, CPC praying therein to dismiss the appeal as not maintainable and also as barred by law of limitation and it was prayed that before passing any order on injunction application, this application may be disposed of regarding maintainability of the Appeal.

9. Another intervention application was filed being I.A. No. 10252 of 2010 by M/s. Classicon Builders (I) Pvt. Ltd. under Order 39, Rule 1 & 2, CPC praying therein to add the said builders as party and restrain both the parties to sell or distribute the land unnecessarily.

10. An application under Chapter 6 Rule 4 of the Patna High Court Rules being I.A. No. 9745 of 2010 has been filed by the Appellant seeking permission to prosecute this Appeal being legal representative of the deceased Defendant No. 1 and also seeking permission to add the legal representatives of the deceased No. 4 as Respondent in this Appeal.

11. As stated above, I heard all the respective counsels in all these interlocutory applications. The parties have filed counter affidavit and reply to the counter affidavit to the interlocutory applications.

12. Mr. Jitendra Kishore Verma appearing on behalf of the Balaji Steel Corporation Pvt. Ltd. firstly pressed his interlocutory application No. 9920 and submitted that the Steel Corporation had purchased the suit property by registered sale deed dated 10-11-2010 which is Annexure "A" to the application and, therefore, the Steel Corporation be added as party Respondents in this Appeal. On the other hand, the learned senior counsel Mr. S. S. Dwivedi appearing on behalf of the Appellant submitted that the said Steel Corporation has not purchased the entire subject-matter of the suit/appeal and moreover purchase is made during pendency of appeal, therefore, he cannot be made party to the appeal.

13. So far this interlocutory application is concerned, it appears that the intervener has purchased the suit/appeal property. Only the contention of the learned Counsel, Mr. Dwivedi is that he has not purchased the entire share. Even if the contention of the learned Counsel for the Appellant is relied upon then also admittedly the intervener has purchased the interest of Respondent Nos. 1 and 4. While deciding the application under Order 1, Rule 10, Code of Civil Procedure, the Court is not required to see whether the sale deed is genuine or not. Prima facie, it appears that the intervener has purchased the interest in the subject-matter which is admitted by the Respondent Nos. 1 and 4.

14. In a decision, reported in Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, the Hon''ble Supreme Court has held at paragraph 16 as follows:

16. The doctrine of lis pendens applies only where the lis is pending before a Court. Further, pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the Defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the Defendant, the latter having no more interest in the property may not properly defend the suit. He may collude with the Plaintiff. Hence, though the Plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII, Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

15. Therefore, although the Appellant is under no obligation to make a lis pendens transferee a party, the Court has discretion in the matter which must be judicially exercised and alienee would ordinarily be joined as party to enable him to protect the interest.

16. In view of the above settled principal of law, this intervention application being I.A. No. 9920 of 2010 is allowed and Sri Balaji Steel Corporation Pvt. Ltd., Patna as mentioned in detail in the said intervention application is added as party Respondent in this Appeal.

17. Mr. Jitendra Kishore Verma next pressed his application, i.e., I.A. No. 9921 of 2010 and submitted that this first appeal is not maintainable on two accounts. Firstly, that it is barred u/s 96 Sub-section (3) CPC because this Appeal has been filed against compromise decree. Secondly, that even if it is held that the Appeal is maintainable then also it is hopelessly barred by law of limitation because by this Appeal, the Appellants are indirectly challenging the order dated 13-9-1996 whereby the learned Court below recorded the compromise and disposed of the partition suit directing that the compromise application shall form part of the final decree. The learned Counsel submitted that the period of limitation will start from the date of judgment/Order dated 13-9-1996 and the Appellants have filed this First Appeal in the year 2010, although they had the knowledge in the year 1998 as they filed Misc. Case No. 3 of 1998 challenging the said order dated 13-9-1996.

18. The learned Counsel relied upon Dr. Chiranji Lal (D) by LRs. Vs. Hari Das (D) by LRs., and West Bengal Essential Commodities Supply Corporation Vs. Swadesh Agro Farming and Storage Pvt. Ltd. and Another, From perusal of these decisions, it appears that the Hon"ble Supreme Court has held that the period of limitation

commences from the date of judgment.

19. In the case of Udayan Chinu Bhai AIR 1977 (supra), it has been held that the date of judgment will necessarily be the date of the decree. In such a case, the party cannot take advantage of any ministerial delay in preparing the decree, prior to his application for a copy. A person cannot get exclusion of the period that elapsed between pronouncement of judgment and signing of the decree, if he made the application for a copy only after preparation of the decree. However, on the other hand, the learned senior counsel, Mr. S. S. Dwivedi submitted that the decree was only prepared and signed on 3-4-2010, and therefore, he could not have filed the appeal earlier. So far this second question, i.e., limitation matter is concerned, it is only required to be considered only if it is held that this First Appeal is maintainable. Therefore, let us first consider as to whether this First Appeal is barred u/s 96 Sub-section (3) Code of Civil Procedure.

20. Mr. Dwivedi, the learned senior counsel appearing for the Appellant submitted that judgment, decree or order obtained by fraud has to be treated as nonest and nullity whether by Court of first instance or by the final Court. It can be challenged in any Court at any time in appeal revision, writ or even in co-lateral proceeding. The learned Counsel further submitted that in this case, the Respondents playing fraud upon the Court and father of the Appellants obtained compromise decree. The compromise application was never signed by their father, Chunchun Pathak and, therefore, in fact, there was no compromise between the parties. In such circumstances, the Appeal is maintainable under Order 43, Rule 1A(2). In support of his contention, the learned Counsel relied upon A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, From perusal of the said judgment, it appears that the C. B. I. held inquiry and submitted a detailed report in the High Court which revealed that there was fraud and collusion on the part of the land owners in collusion with the Port Trusts Officers and also officers acting under the Ceiling Act. In view of the above report of the C. B. I., the High Court came to the conclusion that fraud was committed by the land owners in collusion with Officers of the Respondent and in that context, the Hon"ble Supreme Court held that a judgment, decree or order obtained by playing fraud on the Court, tribunal or authority is a nullity and non est in the eye of law. Therefore, there must be a clear finding regarding fraud either upon the Court or on the party. In the present case, admittedly, taking these pleas, the Appellant filed Misc. Case No. 3 of 1998. After full-fledged trial, the trial Court dismissed the said misc. case as stated above. The revision application was also dismissed and the review application was also dismissed and now special leave application has been filed by the Appellants before the Hon"ble Supreme Court challenging the order passed by this Court in revision and review both.

21. Order 23, Rule 3, CPC read as follows:

3. Compromise of suit - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise

(in writing and signed by the parties), or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit):

(Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.)

Explanation....

22. In view of the proviso to Order 23, Rule 3, Code of Civil Procedure, the Appellants filed Misc. case No. 3 of 1998. In Pushpa Devi Bhagat (D) th. LR. Smt. Sadhna Rai Vs. Rajinder Singh and Others, , the Hon"ble Supreme Court at paragraph 17 has held as follows:

17. The position that emerges from the amended provisions of Order 23 can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) Code of Civil Procedure.

(ii) No appeal is maintainable against the order of the Court recording the compromise (or refusing to record a compromise) in view of the deletion of Clause (m) of Rule 1, Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the Court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the Court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the Court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the Court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second Defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise

in accordance with law. Significantly, none of the other Defendants challenged the consent decree. For reasons best known to herself, the second Defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the Court which passed the consent decree. Such an appeal by the second Defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.

23. In view of the above decision of the Hon'ble Supreme Court, the only remedy available to the Appellant was to approach to Court which recorded the compromise and rightly the Appellants approached the trial Court in this case and are pursuing the said remedy now also by filing SLP before the Hon'ble Supreme Court. In that decision, the Hon'ble Supreme Court has held that the Appeal challenging consent decree is barred u/s 96(3) Code of Civil Procedure.

24. The learned Counsel for the Appellant submitted that it is maintainable under Order 43, Rule 1A(2) Code of Civil Procedure. Order 43, Rule 1A read as follows:

1A. Right to challenge non-appealable orders in appeal against decrees- (1) where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the Appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

25. In view of the above provision, if the compromise is disputed then only the order regarding the compromise can be challenged in appeal against decree. Where the compromise is not disputed, it will be barred u/s 96(3) Code of Civil Procedure. In the present case, the father of these Appellants was Defendant No. 1 who appeared and executed Vakalatnama appointing his Advocate in the Court below. He also signed the joint compromise application and his Advocate also signed the compromise application as would be evident from the order passed by the learned Court below in Misc. Case No. 3 of 1998. Chunchun Pathak died one year after the recording of the compromise but then he never disputed the compromise. Only after his death, the Appellants filed Misc. Case No. 3 of 1998 and prayed for stay of preparation of final decree and, therefore, the Court did not prepare final decree. However, ultimately, the misc. case was dismissed and the Appellants filed Civil Revision and in Civil Revision, this Court stayed further proceeding and, therefore, the decree could not be prepared. The decree has been prepared and signed on 3-4-2010 only after dismissal of the civil revision application. Since the Appellants have already challenged the order dated 13-9-1996 by filing Misc. Case No. 3 of 1998 before this Court and even now, the matter is pending before the Hon'ble Supreme Court, now, they cannot be allowed to challenge the said order dated 13-9-1996 again in this Appeal. The

decision of the Hon"ble Supreme Court in Pushpa Devi Bhagat case (supra) clearly applies in the present facts and circumstances of this case.

26. Now, let us consider the position if the Appellants are allowed to challenge the said order dated 13-9-1996 in this First Appeal. The Appellants shall again contend the same thing and advanced the same argument which was enquired into in the trial by the trial Court in Misc. Case No. 3 of 1998 and the legality or otherwise of the order of the trial Court was tested before this Court by filing civil revision. It is well settled principal of law that revisional jurisdiction is a part of appellate jurisdiction. While sitting in appeal against final decree, this Court cannot again consider the legality or otherwise of the order passed by the trial Court in Misc. Case No. 3 of 1998 and differ and take contrary view then taken by this Court in revisional jurisdiction in civil revision filed by the Appellants. Moreover, the order passed by the trial Court in Misc. Case No. 3 of 1998 cannot be challenged in this First Appeal which is being challenged before the Hon"ble Supreme Court and moreover it is not impugned in this appeal.

27. In view of the above, the Appellants have already tested the legality or otherwise of the order dated 13-9-1996 in properly constituted proceeding which is still pending before the Apex Court. The said order is not appealable. According to Order 43, Rule 1A Code of Civil Procedure, the Appellant could have challenged the order in appeal provided the compromise was in dispute but here it was found in miscellaneous case that the Appellant's father had appeared and signed the compromise application. This finding is not subject-matter of this appeal and, therefore, the correctness or otherwise of the finding in miscellaneous case cannot be decided in this appeal. Moreover, it was tested by this Court in Civil revision and found correct. Therefore, under Order 43, Rule 1A(2) Code of Civil Procedure. also the appeal is not maintainable.

28. In view of my above discussion and in view of the settled principal of law laid down by the Hon"ble Supreme Court, I find that this First Appeal against the compromise decree dated 13-9-1996 decree signed on 3-4-2010 is barred u/s 96(3) of Code of Civil Procedure. Accordingly, it is held that this First Appeal is not maintainable against the compromise final decree dated 13-9-1996 being barred u/s 96(3) Code of Civil Procedure.

29. Since the appeal itself is barred u/s 96 Sub-section (3) Code of Civil Procedure, no question of limitation or condoning the delay arises.

30. In view of my above finding, no order is required to be passed separately in the injunction application, i.e., I.A. No. 6685 of 2010 as the appeal itself is not maintainable and likewise no separate order is passed in I.A. No. 9745 of 2010 and I.A. No. 10252 of 2010. These applications are disposed of in view of above finding that the appeal itself is barred u/s 96(3) Code of Civil Procedure.

31. In the result, this First Appeal is dismissed as not maintainable being barred u/s 96 Sub-section 3, Code of Civil Procedure. The interim order, if any, is vacated.