
(2012) 11 PAT CK 0067
In the Patna High Court
Case No : First Appeal No. 114 of 1974

Gautam Rai and Others

APPELLANT

Vs

Madan Bihari Thakur and Others

RESPONDENT

Date of Decision : 30-11-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 13

Citation : AIR 2013 Patna 102

Hon'ble Judges : V. Nath, J

Bench : Single Bench

Advocate : Devendra Kr. Sinha, Rajendra Sinha, Nawal Kishore, P.D. Singh and Anil Kumar Singh, for the Appellant; Raghubansh Singh, Abhay Kr. Singh, Parimal Chandra Das, Ashok Kumar Singh, Dudhnath Singh, Harendra Pratap Sinha, Satyapal Singh, Mukesh Kumar Singh, Umesh Kr. Mishra, Bipin Bihari Singh and Shankar Kumar, for the Respondent

Final Decision : Allowed

Judgement

V. Nath, J.—This appeal has been filed against the final decree dated 18.09.1973 passed by 3rd Additional Sub-Judge, Chapra in T.S. No. 37/14 of 1964/1967. The facts, as uncurtained in this appeal, are that T.S. No. 37/14 of 1964/67 was filed by the plaintiff-respondent No. 1 for partition of her 1/5th share in the properties mentioned in the schedules-1 and 2 of the plaint after the declaration of the registered sale deed dated 12.06.1963 executed by the defendant No. 1, namely, Daroga Rai and defendant No. 2, namely, Mukhtar Rai as void. By judgment and decree dated 20.09.67, the suit was decreed and it was ordered as follows:--

Let a preliminary decree for partition by metes and bounds of 1/5th share of the plaintiff (P.W.-7) and for partition of the remaining 4/5 share in the 3 equal lots, one to the defendant Nos. 5 and 6, the other to the defendant Nos. 3 and 4 and third to the defendant Nos. 1 and 2 in the lands under partition described at the part of the plaint be drawn up.

2. The final decree proceeding thereafter was initiated and the pleader

commissioner was appointed in terms of the provision of Order 26, Rule 13 C.P.C. for making the partition. In the meantime, the plaintiff filed a petition for amendment of the decree and prayed to include seven plots therein which were not mentioned earlier in the plaint as suit properties. The learned court below vide order dated 23.08.1971 allowed the said amendment as prayed. Subsequently, the defendant Nos. 5 and 6 (appellants in the present appeal) filed a petition for recall of the order dated 23.08.1971 by which the seven plots had been directed to be added as suit properties in the plaint but the said petition for recall was rejected. The appellants then filed the civil revision No. 728 of 1972 before this Court which was also dismissed but with observation that the appellants would be at liberty to agitate the question regarding legality of the order adding the seven plots, in appeal against the final decree.

3. The final decree was sealed and signed on 30th November, 1973 and thereafter the present appeal has been filed.

4. Earlier, when this appeal was taken up for hearing, this Court after hearing the parties and also in view of the submission made by the appellants in pursuance to the liberty granted to them in C.R. No. 728 of 1972, by its order dated 07.09.1999, remitted the matter to the learned court below for reconsideration of the prayer, made by the plaintiff for amendment of the plaint through application dated 19.08.1971, which had been allowed by order dated 23.08.1971. It would be pertinent to take into notice paragraph-15 of the said order dated 07.09.1999 of this Court passed in this appeal which reads as follows:--

In the facts and circumstances of the case, there is no alternative for me but to remit the matter to the Subordinate Judge to reconsider the application filed by the plaintiffs dated 19.08.1971 for amendment of the decree which was allowed by order dated 23.08.1971. This appeal shall remain pending and will be disposed of after the objection of the appellants with regard to the amendment is decided on merit. It is open to the parties to lead additional evidence on the question whether the plots which were included in the decree by amendment were exclusive plots of the appellants or the joint family property liable to be partitioned. The Subordinate Judge-1, Siwan is directed to dispose of the amendment application within four months of the receipt of this order and remit his finding.

5. The learned sub-ordinate Judge, thereafter, reconsidered the prayer for amendment by the plaintiff and by order dated 07.03.2000 rejected the amendment petition dated 19.08.1971 filed by the plaintiff and remitted the findings to this Court. From the records of this appeal, it does not appear that any memorandum of objection has been filed by the contesting respondents against the order or the findings as recorded in the order dated 07.03.2000. As by order dated 07.09.1999 this appeal has remained pending, it has been now placed for hearing and final disposal.

6. It would be worth noting here that by the order dated 07.09.1999, while remitting the matter to the court below for reconsideration of the prayer of the plaintiff with regard to the seven plots, it was also held that the appellants were not entitled to raise other objections to the final decree relating to the remaining plots as all the objections had been considered and rejected by the learned Subordinate Judge. As such against the order dated 07.09.1999, the appellants preferred Intra Court appeal being L.P.A. No. 1526 of 1999. By order dated 16.03.2000, a bench of this Court dismissed the said appeal with the following observations:-

The learned Judge while keeping the appeal pending before this Court, remitted the matter to the Subordinate Judge to reconsider the application filed by the plaintiff on 19.08.1971 for amendment of the decree which was allowed by the order dated 23.08.1971.

Since appeal has been kept pending, obviously after an order is passed by the Subordinate Judge, the entire matter will be open before this Court, and the parties will have liberty to make their submissions before this Court.

We, therefore, find no good reason to interfere in this appeal, which is accordingly, dismissed.

7. Mr. D.K. Sinha, the learned senior counsel has submitted that undisputedly the final decree under challenge in this appeal has been prepared taking into consideration the seven plots also as suit properties, and the shares of the parties have accordingly been allocated. Drawing the attention of the court to the schedules prepared by the pleader commissioner, containing the properties allotted to the parties, the learned senior counsel has pointed out that the parts of the seven plots have, in fact, been included in the different schedules and the pleader commissioner has also proceeded to make the said allotment after considering the nature and valuation of the suit properties. It has been canvassed by the learned senior counsel that after the order dated 07.03.2000 by which the seven plots stand excluded from the suit properties and against which no objection has been raised by the respondents, the essential consequence would be that the allotments made to the parties of the suit properties, as mentioned in different schedules of the final decree, would get disturbed. It has thus been urged that in any view of the matter, the preparation of the final decree afresh has now become a necessity and for that purpose the impugned final decree in this appeal be set aside and the matter be remitted back to the learned court below for the purpose of preparation of a fresh final decree excluding the seven plots.

8. The learned counsel appearing on behalf of the respondent No. 2 has, however, submitted that a civil writ petition bearing C.W.J.C. No. 4986 of 2007 had been filed by one of the appellants, namely Gautam Rai, against the order dated 19.10.2006 passed in case No. 274 of 2006 by permanent Lok Adalat, Siwan. It has been pointed out by the learned counsel that by the said order the

compromise entered into between respondent Nos. 1 and 2 had been recorded wherein the 7 plots had been accepted by them as their self acquired property. The learned counsel has further submitted that earlier when this appeal was heard and the order dated 07.09.1999 had been passed, it had been specifically submitted on behalf of the respondents that an appeal against final decree was not maintainable as for all purposes such appeal was a second appeal and was not maintainable unless substantial questions of law was shown to exist. The order dated 07.09.1990 has also been placed to bolster the submission that the said submission had been made on the basis of the law laid down by different decision of this Court as well as other High Courts and had been accepted in the said order. It has thus been submitted by the learned counsel that in view of the order dated 07.09.1999 the appellant's objection with regard to only seven plots can be considered and with regard to the remaining suit plots, this appeal must be held to be not maintainable. The learned counsel, however, has not challenged the legality and validity of the order dated 07.03.2000 passed by the learned court below in pursuance to the order dated 07.09.1999 of this appeal.

9. The learned counsel appearing on behalf of respondent No. 1 has submitted that although no petition had been filed by this respondent against the report of the pleader commissioner in the court below and even a cross appeal had not been filed by him but still his grievance is that he had not been allotted share in two plots which should be considered. No other submission has been made by the learned counsel.

10. Mr. Sinha, the learned senior counsel appearing on behalf of the appellants, in reply, has relied upon the order dated 16.03.2000 passed by a bench of this Court in L.P.A. No. 1526 of 1999 and on that basis has submitted that the observations made by their Lordships in that order is a complete answer to the submissions made on behalf of the respondent No. 2 because it has been held that the entire matter will be open before this Court after the order is passed by the learned Subordinate Judge in pursuance to the order dated 07.09.1999.

11. In view of the rival contentions of the parties, the only point which emerges for determination in this appeal is the sustainability of the impugned final decree after the order dated 07.03.2000 passed by the learned court below rejecting the prayer of the plaintiff for adding the seven plots also as suit properties. It has not been disputed by the parties to this appeal that the impugned final decree has been prepared after including the seven plots i.e. plot Nos. 1375, 1170, 1010, 972, 973, 123 and 55 as suit properties. In fact, from the report of the pleader commissioner also, it transpires that the pleader commissioner had also proceeded to prepare the final decree taking the seven plots also as suit properties. The report of the pleader commissioner further shows that the total area of the suit lands, as earlier mentioned in the certified copy of the preliminary decree was 16 bighas, 14 katha and 13 dhurs but after the addition of the seven plots by amendment, the total area of landed property has become 17 bighas, 14 katha and 14 dhurs. The allotments of the suit land has been

made to the parties by preparing three schedules viz. schedule-D to the plaintiff, schedule-E to the defendant Nos. 1 to 4 and schedule-F to the defendant Nos. 5 to 6. From the perusal of the schedule-D containing the lands allotted to the share of the plaintiff, it becomes manifest that lands of plot Nos. 1375 and 1170 are there. Similarly, in schedule-E containing the allotment to the defendant Nos. 1 to 4, the lands of plot Nos. 1170 and 55 are there. The schedule-D of the pleader commissioner's report, showing the allotted share to the defendant Nos. 5 to 6, contains lands of plot Nos. 1375, 1010, 1170, 972 and 973. These schedules have been prepared after taking into consideration the classification and the valuation of the lands of the plots mentioned as suit properties.

12. There is no objection to the order dated 07.03.2000 passed by the learned court below by the respondents and as such this order is accepted and having attained finality between the parties. Now after the exclusion of the seven plots aforesaid from the suit properties, the allotments to the parties will definitely be disturbed. There is force in the submission of the learned senior counsel on behalf of the appellants that the entire exercise will have to be taken up afresh as the final decree as it stands now will not be sustainable after the removal of the areas of the seven plots allotted to the parties in schedules-D, E and F. From the perusal of the schedule-F, containing the allotment of lands to the defendant Nos. 5 and 6, it appears that major portions of the lands of seven plots have been shown therein. In the changed circumstances now the defendant Nos. 5 and 6 will have to be allotted equal area of the land of seven other plots of equal nature and value which have been shown in the schedules-D and A in the share of the plaintiff and defendant No. 1 to 4. Similarly, schedule-D and schedule-E will have also to be prepared afresh after removing the lands of the seven plots aforementioned. In this view of the matter, the preparation of a fresh final decree has become inevitable.

13. The learned counsel for the contesting respondents has submitted that the objection of the appellants with regard to the allotments of other plots cannot be considered in view of the order dated 07.09.1999 passed in this appeal. This submission needs no consideration now as the final decree in question will no more survive. As a final decree will have to be prepared afresh, the parties shall be at liberty to raise appropriate objections, against the said final decree, in accordance with law. Ex consequent, this appeal is allowed and the impugned judgment and decree passed by the learned court below is set aside. The matter is remitted back to the learned court below for preparation of fresh final decree, in accordance with law, excluding the seven plots with regard to which the prayer of the plaintiff for their addition as the suit plots has been rejected by its order dated 07.03.2000. In the facts and circumstances of the case there will be no order as to costs.