
(1940) 01 PAT CK 0024
In the Patna High Court

Gopal Das and Others

APPELLANT

Vs

Jageshwari Prasad Narain Deo and Others

RESPONDENT

Date of Decision : 11-01-1940

Acts Referred:

Citation : AIR 1940 Patna 259

Hon'ble Judges : Harries, C.J.; Fazl Ali, J

Bench : Full Bench

Judgement

Fazl Ali, J.—This is an appeal from an order of the Subordinate Judge of Patna rejecting an application made by the appellants under Order 22, Rule 10, Civil P.C., It appears that in the year 1917 one Harihar Prasad Narain Deo had instituted a suit in the Court of the Subordinate Judge of Gaya against his elder brother Isri Prasad Narain Deo for the partition of the Dhanwar estate. Subsequently, the sons of Harihar Prasad Narain Deo were added as plaintiffs and the suit was transferred to the Court of the Subordinate Judge at Patna. On 22nd August 1925 the suit was dismissed by the Subordinate Judge, but on appeal it was partially decreed by the High Court. The High Court held that the plaintiffs were not entitled to claim partition of the Dhanwar estate which was impartible, but they were entitled to a preliminary decree in respect of moveables and a number of villages which had been acquired by one Ran Bahadur Singh, the last holder of the impartible estate, and had not been incorporated with it.

2. The plaintiffs not being satisfied with the decree of the High Court appealed to the Privy Council and their Lordships of the Privy Council by their judgment dated 29th July 1936 allowed the appeal in part and modified the decree of the High Court by including therein two villages named Telonari and Palanki among the properties to be partitioned. They further referred to the Court of the Subordinate Judge under Order 41, Rule 25, Civil P.C., the question whether

any villages to be specified by the appellants from list A or B filed with the plaint were the self-acquired properties of Maharaja Ran Bahadur Narain, deceased and

if so, whether any such self-acquired villages were incorporated by him with the estate.

3. Now, it appears that the appellants had a money decree against Harihar Prasad Narain Deo and in execution of that decree they attached the preliminary decree of the partition suit passed by the High Court on 26th February 1931. On 15th April 1937 they purchased the aforesaid preliminary decree and on 14th September 1937 they filed a petition in the partition proceedings then pending in the Court of the Subordinate Judge at Patna to the following effect:

That the petitioners purchased the rights, title and interest of plaintiff 1 in auction sale in Execution Case No. 97 of 1936 in this Court on 15th April 1937 as will appear from the sale certificate filed herewith and the sale was confirmed and now plaintiff 1 has no interest left in the suit.

It is therefore prayed that your honour may be graciously pleased to strike off the name of plaintiff 1 and substitute the petitioners' names in place thereof and pass such and further order or orders as your honour may deem fit and proper in the case.

4. The application was opposed by the heirs of Harihar Prasad Narain Deo who had died in the meantime and it was ultimately rejected by the Subordinate Judge by his order dated 16th May 1938 the material part of which runs as follows:

First point for consideration, therefore is whether these persons (the appellants) have acquired any interest in the properties by virtue of their purchase of the High Court decree when that decree had already been superseded by the decree of the Privy Council. As the sale certificate stands they have not purchased the right, title and interest of Harihar Prasad Narain Deo in the properties sought to be partitioned, but in the decree itself. Now, as observed above, the decree purchased by them had already been superseded by the decree of the Privy Council. The effect of this would be that the decree purchased by them was non-existent at the time of their purchase and so they have acquired nothing by this purchase and cannot be substituted as representative of Harihar Prasad Narain Deo. Their prayer for substitution is accordingly rejected.

Against this order the appellants have preferred the present appeal. In my judgment the view expressed by the Subordinate Judge that the appellants by purchasing the High Court decree acquired no rights whatsoever is not correct. It is true that they purchased the High Court decree after the decision of the Privy Council, but it is to be remembered that the only effect of that decision was to confirm all the rights which had been acquired by Harihar Prasad Narain Deo and his sons under the preliminary decree of the High Court and to confer upon them a further right to claim partition of two villages which were held to be part of the impartible estate by the High Court.

5. It is evident that when a person purchases a decree, what in fact he purchases

is the right acquired by the decree-holder under the decree and so it is only when the decree purchased by him is reversed or set aside, that it can be legitimately said that the decree purchased by him confers no rights upon him. Therefore as the rights acquired by Harihar Prasad Narain Deo under the High Court decree were not taken away from him, but confirmed by the decision of the Privy Council, it seems difficult on general principles to hold that the appellants got nothing as purchasers of the High Court decree. But then arises the question as to whether this view can be reconciled with the proposition which has been propounded in a number of cases decided by this Court as well as the other Indian High Courts that where the decree of a Court is affirmed or varied by the Appellate Court, it merges in the decree of that Court.

6. Now, if we analyze the cases in which this proposition has been enunciated, we find that broadly speaking they fall under two heads: those relating to execution and those relating to amendment or review of a decree. The result of these decisions may be summed up as follows: firstly, where the decree has been affirmed or varied by a Court of appeal the decree of that Court is the only decree capable of execution; and, secondly, that in such cases the Court which affirms or varies the decree is the Court which can entertain an application for amendment or review. In my opinion, the rules so laid down are merely rules of procedure and cannot affect the substantive rights of the parties acquired under a decree which has not been reversed but substantially confirmed. In *Kristo Kinker v. Rajah Burrodakant Roy* (1870-72) 14 MIA 465 the Privy Council dealing with the view expressed from time to time by Indian High Courts that the decree of a Court when affirmed in appeal merges in the decree of an Appellate Court observed as follows:

The function of an Appellate Court is to determine that decree the Court below ought to have made. It may affirm, reverse, or vary the decree under appeal. In the first case, it leaves the original decree standing, super-adding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.

In all these cases the decree of the Appellate Court may be regarded either as a direction to the lower Court to make and execute a decree of its own accordingly, or as an independent decree, whether it is to be executed by the Appellate Court or by the lower Court. In the latter case a further question arises, viz. whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the Appellate Court as the sole decree capable of execution or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other.

* * * * * If the question were *res Integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz., that the execution ought to proceed on a decree, of which the mandatory part expressly

declares the right sought to be enforced. Considering, however, that for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying, that there may be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal.

7. These observations and particularly those which I have italicized suggest that a decree of the first Court does not become a nonentity in law after it is affirmed on appeal. It has been held in several cases that where a person who was originally a party to a suit is not made a party to the appeal preferred against the decree passed in the suit either as an appellant or as a respondent and the Appellate Court has not adjudicated upon his case, the decree of the Court of first instance does not merge in that of the Court of appeal: see *Gajraj Mati v. Swami Nath* (1917) 4 AIR All 281 and *Prasanno Kumar Mukerjee v. Sree Kanta Raut* (1913) 40 Cal 173. These cases also show that the rule of merger has its own limitations and a decree passed by a Court of competent jurisdiction does not become a non-entity merely because it has been affirmed on appeal. Indeed, the proper view to take would be that such a decree receives further sanctity as a result of the affirmance. I am, therefore, unable to agree with the view expressed by the Subordinate Judge that the appellants acquired no rights whatsoever by purchasing the decree of the High Court, because they made the purchase after the decision of the Privy Council.

8. It is true that the decree of the High Court was varied to some extent by the Privy Council, but that variation was in favour of Harihar Prasad Narain Deo and it is conceded by the appellants that in the circumstances of the case they are not entitled to the benefit of that variation.

I would, therefore, allow this appeal, set aside the order of the Court below and direct that the application of the appellants for substitution be disposed of according to law after dealing with the other objection, if any, raised by the respondents. Costs will abide the result of the application.

Harries, C.J.

9. I agree.