
(1939) 08 PAT CK 0008
In the Patna High Court

Harballav Prasad Chowdhury and Others APPELLANT
Vs
Jagballav Prasad Chowdhury and Another RESPONDENT

Date of Decision : 24-08-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1940 Patna 7

Hon'ble Judges : Rowland, J;Chatterji, J

Bench : Full Bench

Judgement

Chatterji, J.—This appeal arises out of proceedings in a partition suit instituted so far back as in the year 1917. Without going into the long history of the case, it will be enough to state that in pursuance of the preliminary decree which was passed in 1919, a commissioner was appointed who eventually submitted his report on 26th April 1935, According to his findings, the plaintiffs were entitled to get various sums from the defendant who was the karta of the joint family. The defendant filed objections to the report and those were disposed of by the Subordinate Judge by his order dated 17th January 1936. Accepting the commissioner's report in part, he passed a final decree. Before the final decree was actually prepared, the defendant made an application on 17th February 1936 for review of the judgment dated 17th January 1936.

2. In the application certain items in the commissioner's report were specifically referred to and it was prayed that "those items should be reconsidered with a view to rectify the mistakes and inequities that have crept in owing to a misapprehension." This application was presented to and heard by the same Judge who passed the final decree on 17th January 1936. He granted the application by his order dated 5th March 1937 and by the same order he passed a fresh final decree. The present miscellaneous appeal is directed against that order in so far as it granted the application for review.

3. The substantial point urged in this appeal is that there were no sufficient grounds upon which the learned Subordinate Judge could review the final decree

which was passed on 17th January 1936. In support of his contention Mr. Mitter has relied upon the decision of the Privy Council in *Chhajju Ram v. Neki* AIR (1922) PC 112 where their Lordships laid down that "any other sufficient reason" in Order 47, Rule 1, Civil P.C., means a reason sufficient on grounds at least analogous to those specified immediately previously. In the present case however the learned Subordinate Judge has held that there was an error apparent on the face of the record or something analogous to it. If that is so, certainly the review was permissible under the express provisions of Order 47, Rule 1. But let us assume that the Subordinate Judge was wrong in his view of the facts with which he was dealing. The question is whether in this appeal we can examine the propriety of his decision. Indeed under Order 43, Rule 1(w) an order granting an application for review is appealable; but Order 47, Rule 7 specifies certain limits within which such an appeal can be entertained. The relevant portion of Order 47 Rule 7 runs as follows:

An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was: (a) in contravention of the provisions of Rule 2, (b) in contravention of the provisions of Rule 4, or (c) after the expiration of the period of limitation prescribed therefore and without sufficient cause, Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final, decree or order passed or made in the suit.

4. Thus it is clear that an order granting an application for review can be objected to Only upon the three grounds specified in the above rule and no other. Now in the present case the first and the third grounds-unquestionably do not exist. An attempt was made by Mr. Mitter to support the appeal on the second ground, namely that-the application was in contravention of the provisions of Rule 4. That rule runs as follows:

(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same : Provided that (a) no such application shall be granted without previous notice to the opposite party, to enable him to; appear and be heard in support of the decree or order, a review of which is applied for: and (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be, adduced by him when the decree or order was passed or made, without strict proof of such allegation.

Sub-rule (1) does not obviously apply as it refers to a case where the Court rejects the application. It cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be

granted the case falls under Sub-rule 2. Mr. Mitter wanted to rely on proviso (b) of that Sub-rule, but the application was not based on the ground of discovery of any new matter or evidence nor was it granted on any such ground. The position therefore is that none of the grounds on which the order granting the application for review could be attacked by way of appeal exists in the present case. Mr. Mitter has referred us to a decision of the Bombay High Court in *Daso Keshav Panchbhavi v. Karbasappa Kariyappa* AIR (1926) Bom 121 and to the decision of the Nagpur Court in AIR 1929 73 (Nagpur) .

5. In both these cases it was no doubt held that the right of appeal granted by Order 43, Rule 1(w) is not restricted by the grounds set out in Order 47, Rule 7. But there are decisions of this Court on this point in *Jadunandan Singh and Others Vs. Shankar Sahu and Another*, and *Sundar Lal v. Upendra Nath* AIR (1916) Pat 370. In the latter case, though it was a decision of a single Judge, it was held that an appeal under Order 43, Rule 1(w) is subject to the provisions of Order 47, Rule 7. It was further held that an order granting a review merely for sufficient ground is not appealable. In *Jadunandan Singh v. Shankar Sahu* AIR (1936) Pat 310 a Division Bench of this Court held that when a review is granted an appeal is permissible only on the grounds specified in Order 47, Rule 7. The High Courts of Calcutta, Rangoon and Lahore have also taken the same view as this Court.

6. This being the state of the authorities on the point, I am afraid we are unable to follow the decisions of the Bombay High Court and the Nagpur Court referred to. It is to be observed that the Bombay High Court subsequent to its aforesaid decision deleted Order 43, Rule 1(w) by virtue of its rule-making power.

Mr. Mitter further contends that the order now under appeal being the final judgment in the suit, it may be attacked on grounds other than those specified in Order 47, Rule 7. The answer to this is that this is not a regular appeal against the final decree but. a miscellaneous appeal from the order granting the application for review and it cannot. be treated as a regular appeal in view of the fact that the question of court-fee would arise.

7. Mr. Mitter has asked us to treat the appeal as a regular appeal on payment of the deficit court-fee; but it is now too late to accede to that prayer. The appeal was presented on 19th July 1937 and was not properly constituted as a regular appeal, being insufficiently stamped. There is no justification for converting it into a regular appeal so long after the expiration of the prescribed period of limitation. Mr. Mitter lastly asked us to treat the memorandum of appeal as an application in revision as was done in *Sikandar Khan v. Baland Khan* AIR (1927) Lah 435. u/s 115, Civil P.C., revision is permissible only where the order complained of is not appealable. In the present case the order sought to be revised amounts to a final decree and as such is appealable. Consequently, Section 115 cannot come in. In the Lahore case, where the facts were quite peculiar, there was no such appealable decree or order. I would dismiss the appeal but in the circumstances the parties should bear their own costs.

Rowland, J.

8. I agree.