

(2007) 12 PAT CK 0013
In the Patna High Court
Case No : M.A. No. 77 of 2006

Jai Kishun Rai and Others

APPELLANT

Vs

Nandu Rai and Others

RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Citation : (2008) 1 PLJR 266

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.N. Hussain, J.—Heard learned counsel for the appellants and learned counsel for the respondents. This miscellaneous appeal has been filed on behalf of the plaintiff-appellants against order dated 30.11.2005, by which the learned Additional District Judge, 8th Court, Muzaffarpur disposed of Title Appeal No. 19 of 1993 by a common judgment and remanded the matter to the trial court for fresh consideration after framing further issues.

2. Title Suit No. 110 of 1986 was filed by the plaintiff-appellants for partition of their share in the suit properties and also for declaration that the sale-deed dated 12.7.1984 executed by Jainarayan Rai with respect to Schedule-III land was forged, fabricated brought into existence after his death. The said suit was decreed by the learned Subordinate Judge, 2nd Court, Muzaffarpur, by judgment and decree dated 15.4.1993. Respondent No. 1 of the instant miscellaneous appeal filed Title Appeal No. 19 of 1993 challenging the aforesaid judgment and decree of the trial court and the said title appeal was heard alongwith another Title Appeal No. 20 of 1993 and was disposed of by the impugned order dated 30.11.2005 remanding the case to the trial court with the following directions:--

"So I find from the pleading of the parties and also from the evidence of all the parties that Jhapsi Devi (P.W. 15) appeared as witness of plaintiff and she is daughter of Ganpat Rai who was admittedly son of Fatinga Rai, the common

ancestor of both the parties. It also appears that none of the parties have challenged her parentage, as such branch of Ganpat Rai is not extinct. She is neither be made plaintiff or defendant in the suit. In my view, since branch of Ganpat Rai is alive, it is to be examined whether she is necessary party in the suit or not. It is also to be examined whether the suit is hit by non-joinder of necessary party."

3. Learned counsel for the appellants challenges the aforesaid order of the learned lower appellate court stating that no doubt Fatinga Rai was the common ancestor of both the parties but his heir, namely, his son Ganpat Rai transferred all his shares and interest in the suit properties to the plaintiffs by registered deed of gift and hence his daughter Jhapsi Devi had no interest or share left in the suit property. He further submits that Jhapsi Devi herself appeared in the suit as P.W. 15 and stated that she was the daughter of Ganpat Rai and said Ganpat Rai had transferred his entire share and interest in the suit properties in favour of the plaintiffs. The said deed of gift executed by Ganpat Rai in favour of the plaintiffs was not challenged by anyone by a separate suit and the daughter of Ganpat Rai herself accepted the same as her father, the executant of the deed, had died and had not claimed any interest.

4. Learned counsel for the appellants further submits that in the aforesaid circumstances since said Jhapsi Devi, according to her own claim, has no share or interest left in the suit property, she was not a necessary party nor even a proper party in the aforesaid suit for partition as the estate of Ganpat Rai was fully represented by the plaintiffs, who were his transferees and hence there was no question of non-joinder of necessary parties and the order of remand by the lower appellate court to the trial court is absolutely frivolous and illegal.

5. On the other hand, learned counsel for the respondents vehemently opposes the contentions of learned counsel for the appellants and submits that from the averments of said Jhapsi Devi (P.W. 15) in her deposition, it is quite apparent that branch of Ganpat Rai is still existing and she is necessary party to the suit and due to her non-joinder, the suit was bad and hence the learned court of appeal below was quite justified in remanding the matter back to the trial court to frame the aforesaid issue and decide the same.

6. Considering the averments made by learned counsel for the parties and the materials on record including the impugned order of the learned court of appeal below, it is quite apparent that the lower appellate court has passed the said order without applying its mind to the facts and circumstances of the case and without even considering the specific averments made by Jhapsi Devi in her deposition as P.W. 15. Furthermore, a title appeal is continuation of the suit and the court of appeal below has full authority and jurisdiction to decide all questions of facts and law and also to frame an issue or to take any evidence, which it deems necessary for the proper adjudication of the case. It appears that the learned court of appeal below has failed to discharge its legal duties without applying its mind and without taking necessary steps in the appeal which it ought

to have taken.

7. In the said circumstances, the impugned order of the learned lower appellate court is hereby set aside and it is directed to decide the appeal in accordance with law and if it feels any necessity of framing an issue and taking evidence it can do so as per the requirements of law. With the aforesaid direction, this miscellaneous appeal is allowed.