

(1974) 01 PAT CK 0013

In the Patna High Court

Case No : Civil Revision No. 247 of 1972

Janakraj Kuer and Others

APPELLANT

Vs

Pandit Muneshwar Misra and Another

RESPONDENT

Date of Decision : 02-01-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 35

Citation : AIR 1974 Patna 282

Hon'ble Judges : H.L. Agarwal, J

Bench : Single Bench

Advocate : Parmeshwar Prasad Sinha and Hare Krishna Kumar, for the Appellant; Sankat Haran Singh and Vijay Pratap Singh, for the Respondent

Final Decision : Allowed

Judgement

H.L. Agarwal, J.—In this Civil revision application, an important question of law has been raised for decision of this Court, namely, as to whether an application under Order IX, Rule 13 of the CPC can be entertained by the trial Court when the decree itself has been merged in the decree of an appellate Court.

2. In order to appreciate the point raised as above, it is necessary to state a few facts of this case. The petitioner instituted a Partition Suit No. 75 of 1959 against his two brothers in the court of the Munsif at Palamau with respect to certain ancestral properties. Both the defendants filed separate written statements but defendant No. 1 did not participate in the hearing of the case and only the second defendant contested the same. The suit, however, was decreed in favour of the plaintiff. Against the preliminary decree, the contesting defendant filed Title Appeal No. 39 of 1961 in the Court of the District Judge at Palamau. In the lower appellate court also defendant No. 1 did not appear. The title appeal ultimately was dismissed on 3rd October, 1964 on merits. Defendant No. 2 also made an attempt in this Court by filing a second appeal (Second Appeal No. 77 of 1965) but the same was dismissed in limine. The final decree was also drawn on 9-9-1967.

3. In the year 1971, after all the proceedings were over, defendant No. 1 filed an application under the provisions of Order IX Rule 13 of the CPC in the trial Court for setting aside the preliminary decree dated 15-9-1961 passed in the said partition suit on the various grounds which are not necessary to be stated as the matter was disposed of by the Court below on a preliminary objection taken on behalf of the petitioner regarding the maintainability of the application under Rule 13, namely, that the decree of the trial Court having been merged in the appellate decree, the application in question for setting aside the preliminary decree of the trial Court was not maintainable. The learned Munsif decided the question of maintainability of the miscellaneous case as a preliminary issue and upheld the objection of the plaintiff and came to the conclusion that the application filed by defendant No. 1 under Order IX, Rule 13 of the Code at this stage was not maintainable. He put reliance upon a Bench decision of the Calcutta High Court in *Mono Mohan Kundu Vs. Nripendra Nath Nandi and Others*, . Against the said order, a miscellaneous appeal was taken by defendant No. 1 to the court of appeal below and the learned District Judge by the impugned order on referring to a decision of the Judicial Commissioner's court of Peshawar in the case of *Mt. Ghulam Fatma v. Mt. Bilkis Jan*, AIR 1946 Pesh 7 where a view contrary to that expressed by the Calcutta High. Court was taken, set aside the order of the learned Munsif as according to him, in view of the conflicting decisions of the High Courts, it was advisable to determine the case on merit and therefore, the case was remanded. It is against this order of the learned District Judge that the plaintiff has moved this Court in revision as said above.

4. In this Court, Mr. Parmeshwar Prasad Sinha has urged before me the same ground which was urged before the learned Munsif. The learned Counsel contends that the preliminary decree dated 15-9-1961 passed by the learned Munsif lost its own independent character and stood merged in the judgment of the court of appeal below and, therefore, the application filed by defendant No. 1 for setting aside the decree, which did not exist, was misconceived and, as such, not maintainable.

5. Mr. Sankat Haran Singh, learned Counsel for the opposite party, conceded that if the theory of merger applies to the facts of the present case then the application under Rule 43 of Order IX of the Code was misconceived. Learned Counsel, however, contended that the decree of the trial Court having been affirmed by the court of appeal below, it was very much in existence independently and the learned Munsif had still the jurisdiction to set aside the same on a proper case being made out and, therefore, the question of maintainability was wrongly decided by the trial Court and as such has been set aside.

6. It is difficult to accept this contention of Mr. Sankat Haran Singh. In my opinion, the contention of the counsel for the petitioners has got great force and must succeed. It is now well settled by high authorities that after the disposal of

a suit by the Court of the first instance, if an appeal is taken to any higher court then it is the ultimate decision of the Appellate Court that prevails and is binding upon the parties, be it is a judgment of affirmance or reversal and the judgment of the Subordinate Court stands superseded or merges from stage to stage in the judgment of the Superior Court. In support of this proposition, it may be sufficient to cite only one decision of the Supreme Court in the case of Sheodan Singh Vs. Smt. Daryao Kunwar, . Learned Counsel for the petitioners then referred to the case of Mono Mohan Kundu Vs. Nripendra Nath Nandi and Others, of the Calcutta High Court. The facts of that case are some what similar to the facts of the present case. In a suit against several defendants, a decree was passed on contest against some and ex parte against the other. The contesting defendants had appealed against the decree making all the persons to the suit as parties in appeal. The Appellate Court had affirmed the decree of the trial Court against all the defendants, except one, namely, defendant No. 6 against whom an ex parte decree was passed under Order IX, Rule 13 of the Code. But before the said application could be considered by the trial Court, the appeal itself stood disposed of on 7th of June, 1933, by which the decree of the trial Court was affirmed. The application for setting aside the ex parte decree came up for hearing before the Court below on 25th of September, 1934, when it took a similar view and rejected the application on the sole ground that the decree passed by it having been affirmed in appeal by the appellate court, there was no decree of the trial court in existence which could be set aside by it under the provision of Order IX Rule 13 of the Code. This view was ultimately accepted by their Lordships of the Calcutta High Court in Mono Mohan Kundu Vs. Nripendra Nath Nandi and Others, . I feel myself in respectful agreement with the view expressed in the case of Mono Mohan Kundu aforesaid. I may also usefully refer to a case of this Court in Ekram Hussain Vs. Mt. Umatul Rasul and Others, . In this case an execution case was filed by the decree-holder to execute the decree of the first court which had been affirmed by this Court on appeal, without expressly asking the executing court to execute the decree of the Appellate Court. An objection was taken by the judgment-debtor to the executability of the decree in question on various grounds and one of the questions raised was as to whether after the affirmance of the decree of the trial Court by the High Court, the execution of the decree of the Appellate Court could proceed. In this Court when the matter came, the learned Judges expressly took the view that where the decree of the first Court was affirmed, reversed or modified on appeal by the High Court, the appellate decree was the only decree capable of execution. I am also supported in my views by a decision of the Bombay High Court in the case of Kantilal Khodabhai Patel Vs. Chiba Bava Bhandari, where a similar question was raised and answered as stated above.

7. Examining the question independently also, it appears to me that to take a different view would lead to an anomalous position. An appeal is always the rehearing of the suit and if the decree passed by a Subordinate Court is reversed or affirmed by a higher Court determining the rights of the parties to a

proceeding, and the court of the first instance is authorised to set aside the decree passed by it it will amount to nullifying the entire proceeding subsequent to the passing of its decree and to interfere with the decree of the Superior Court. This cannot be allowed. In this view of the matter, in my considered opinion, the view taken by the learned Munsif was quite correct and the learned District Judge has committed an apparent error in setting aside the order of the trial Court particularly on putting reliance upon the decision of the Judicial Commissioner's Court of Peshawar. In view of a clear decision of a Bench of the Calcutta High Court, there was no difficulty in the way of the learned District Judge to come to his own decision on this question than to remand the matter for decision of the entire case on merit.

8. I would accordingly allow this application, set aside the order of the court of appeal below and affirm that of the trial court, but in the circumstances of the case, I shall make no order as to costs.