
(1953) 03 PAT CK 0015
In the Patna High Court
Case No : Misc. Appeal No. 155 of 1951

Kali Prasad Srivastava and Others

APPELLANT

Vs

Tulshi Prasad and Others

RESPONDENT

Date of Decision : 31-03-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4

Citation : (1953) 1 BLJR 361

Hon'ble Judges : Narayan, J;Ahmad, J

Bench : Division Bench

Advocate : K.P. Sinha, for the Appellant; T.K. Prasad, for the Respondent

Final Decision : Dismissed

Judgement

Narayan, J.—This is a miscellaneous appeal directed against an order of the Subordinate Judge of Hazaribagh rejecting an application u/s 47, Civil P. C. filed by the present appellants in Execution Case No. 32 of 1950 pending before the said Subordinate Judge. The decree which is sought to be executed in the said Execution Case is a decree for partition and for recovery of certain sums as costs, etc. The present appellants filed an application before the learned Subordinate Judge stating that the decree had become time-barred and that the application for execution was, therefore, not maintainable. This application was rejected by the learned Subordinate Judge, and hence the judgment-debtors-objectors have preferred this appeal.

2. On account of want of service on respondent 15 the appeal stood dismissed against him on 2-1-1953, and the question has, therefore, arisen as to whether the whole appeal has become incompetent. Because of Standing Order No. 1 of 1953 it has to be determined by the Bench immediately after the order of dismissal has been signed as to whether the appeal has become incompetent as a whole or not.

3. On behalf of the appellants it has been contended that they only being the

objectors before the Court below and the respondent 15 being not one of the decree-holders-respondents, the dismissal of the appeal against respondent 15 will not make the whole appeal incompetent. Counsel for the appellants placed reliance on certain decisions of this Court as well as on a decision of the Judicial Committee reported in -- AIR 1940 215 (Privy Council) . The Privy Council decision is, in my opinion, not at all a decision in point. The case before their Lordships was a case concerning the administration of an estate, and their Lordships observed that it not uncommonly happens in a suit for administration that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and inquiries so as to be bound by the result. It was concerning such a suit that their Lordships pointed out that it was open to the Judge in his discretion under Order 1, Rule 10, to add a party against whom the suit had abated for the purpose of giving effect to the rights of the parties. These facts can have no resemblance to the facts of the present case, and the principle laid down by their Lordships cannot be regarded as a principle of universal application. The decision of this Court on which reliance has been placed by the learned Counsel is the one reported in -- Radha Mohan Singh Vs. Shree Kishun Gir and Others, , and our attention has been particularly drawn to the following passage in the judgment:

"There is nothing whatever in the terms of B. 4 to suggest that the persons, who did not appeal, must be impleaded as respondents, and were it necessary, one would expect words to that effect in the rule. In Rule 33 there is, as I have already indicated, a direct indication to the contrary effect. Neither rule offends the principle that an order cannot be passed to the prejudice of a person in his absence, because the terms of each rule carefully and expressly limit its application to orders in favour of the absent person so that no question of any objection by him being shut out can arise."

On the basis of this observation it was argued that either under Rule 4 of Order 41 or under Rule 33 Of that Order the appeal should be allowed to proceed against the remaining respondents, inasmuch as the decision made in this appeal cannot be to the prejudice of respondent 15 against whom the appeal has been dismissed. In other words, the learned Counsel has urged that because respondent 15 was also a defendant and a judgment-debtor in the original suit, and because he did not prefer any objection in the execution proceeding it is not at all material if he is not made a party to this appeal. But it seems to have been overlooked that the decree which is sought to be executed is a decree in a partition suit and that respondent 15 was in the position of a plaintiff in the suit. He like any plaintiff of the partition suit can seek to enforce the decree passed in the suit.

It need hardly be pointed out that every defendant in a suit for partition is in the position of a plaintiff, and he can ask for a separate "patti" with regard to his

share and thus can seek the execution of the partition decree. Respondent 15 is, therefore, in a position to seek an execution of the decree passed in the partition suit, and in every action for partition, all persons interested in the joint properties must be made parties, so that allotments may be made in presence and according to the conveniences of all of them. Though this respondent was not one of the judgment-debtors he can seek an execution of the partition decree, and because this present appeal stands dismissed, against him, he would be able to seek an execution of the partition decree even if this appeal ultimately succeeds and it is found that the decree is not executable as it is time-barred. Therefore, it is manifest that if this appeal succeeds, two inconsistent situations will arise. Respondent 15 will be able to execute the decree, and the other respondents will not be allowed to execute the decree, because as against them the decision will be that the decree is time-barred. The question whether the interest of the respondent against whom the appeal stands dismissed still survives must depend on the nature of the litigation, the decree passed, the subject-matter of the appeal and the effect of the decision in appeal in their absence. It is indisputable that because this respondent is in the position of a plaintiff his interest will remain unaffected whatever be the decision in this appeal. In this view of the matter, I am of opinion that the whole appeal has become incompetent.

In the decision of this Court referred to above certain observations had been made against the Full Bench decision of this Court in -- Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, . The ratio decidendi of the Full Bench decision is that where all the plaintiffs or defendants appeal from a decree and the decree appealed from proceeds on a ground common to all the plaintiffs or defendants and one of them dies and no substitution is effected within time, and an application for setting aside the abatement, so far as the deceased appellant is concerned, has been refused, the appellate Court has no power under Order 41, Rule. 4, Civil P. C. to reverse or vary the decree in favour of all the defendants. It has further been held in this case that Rule 4 of Order 41 cannot override or create an exception to Order 22, Rr. 3 and 11, and in the case of one or more appellants dying even where a decree proceeds on a ground common to all the matter must be governed solely by the provisions of those latter rules, It was pointed out in this case that to hold otherwise will be to hold that Order 41, Rule 4 gives the Court the power to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. On analogy, the decree which has been passed by the learned Subordinate Judge in this case has become final so far as respondent 15 is concerned, and the learned Counsel for the appellant was, therefore, wrong in asking us to apply Order 41, Rule 4 in this case. Meredith J. who delivered the judgment in -- " AIR 1943 Pat 460" (B) while referring to this Full Bench decision observed as follows:

"Before I conclude I would like to express my personal opinion that Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, may upon a proper occasion need reconsideration by a larger Bench. Previous to this decision the current of

authority was fairly evenly divided. It is further noteworthy that when the answer of the Full Bench to the question propounded came back to the Division Bench hearing the First Appeal in question, that Bench was so struck by the manifest injustice which that answer involved that it resorted to the inherent power of the Court to override the provisions of the statute as interpreted by the Full Bench, and to give relief to the appellants. I do not myself believe in any such inherent power of the Court to override statutory provisions. But in my opinion, there is no question of overriding them."

On the facts of the particular case before their Lordships they might not have felt pressed with the Full Bench decision, but so long as this Full Bench decision stands and is not reconsidered by a larger Bench, we are bound to follow it. And it is not at all open to us to override the principles laid down in this case. It is true that Harries C. J. and Manohar Lall J. who were parties to this Full Bench decision resorted to the inherent powers of the Court while deciding the case in which reference had been made to the Full Bench for the decision of the points formulated. The judgment of the Division Bench shows that their Lordships exercised their inherent powers so that a proper decree might be passed in favour of the plaintiffs. But, if on the peculiar facts of that case the court thought fit to exercise its inherent powers that does not mean that in this case also we should exercise our inherent powers. Certainly, the facts of that case bear no resemblance to the facts of this present case.

In that case plaintiff 1 had sued for a decree for a sum of Rs. 33,070/4/21/2 against four defendants, and during the pendency of the appeal in this Court one of the four defendants died and no steps were taken to bring his heirs or personal representatives on the record. The defendants being the appellants before this Court the plaintiffs-respondents took a preliminary objection, that the appeal was incompetent and that by reason of the failure to bring the names of the heirs or personal representatives of Ram Narayan Sahu on the record, the whole appeal had abated. That Division Bench decision, therefore, cannot be cited as an authority in this case in support of the view that the whole appeal should not be regarded as incompetent. Recently, I and Das J. have followed that Full Bench decision in --"A. F. O. D. No. 501 of 1946" (p). In this connection, I should like to cite a decision of the Judicial Committee in -- AIR 1927 252 (Privy Council) . Referring to the provisions of Order 41, Rule 20 their Lordships" remarked as follows:

"The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in Order 41, Rule 20, on which the plaintiff relied both in the Appellate Court and before their Lordships. That rule empowers the Court to make such party a respondent when it appears to the Court that he is interested in the result of the appeal. Giving these words their natural meaning -- and they cannot be disregarded -- it seems impossible to say that in this case the defendants against whom these suits have been dismissed, and as against whom the right of appeal has become barred, are interested in the result of the

appeal filed by the plaintiff against the other defendants."

And referring to the provisions of Order 41, Rule 33, their Lordships observed as follows:

"The Appellate Court was then asked to take action under Order 41, Rule 33. That rule empowers an Appellate Court to pass any decree and make any order which ought to have been passed or, made, and to make or pass such further decree or order as the case may require, and provides, further, that this power may be exercised notwithstanding that the appeal is as to part only of the decree, and "may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." Here the plaintiff, whose suits had been dismissed against all the defendants, failed to appeal against the decrees in so far as they affected some of them and allowed the appeal as against them to become barred. In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them."

It cannot be disputed that a very valuable right has now been acquired by respondent 15, and he can execute the decree for partition because of the order passed by the learned Subordinate Judge irrespective of the decision that might be made in this appeal. And because there cannot be two inconsistent decisions in one and the same litigation, this appeal cannot, be allowed to proceed in absence of respondent 15. A Bench decision of this Court reported in -- Badri Narain and Others Vs. East Indian Railway and Another, appears to be relevant for our present purpose, and it will be in consonance with the view taken in that case to hold that the right created in favour of this respondent 15 is a valuable right, because as he is no party to this appeal he cannot be bound by any decision made in this appeal and will be free to execute the decree for partition.

4. My conclusion, therefore, is that this appeal has become entirely incompetent and must be dismissed as such. There will be no order for costs.

5. AHMAD J.: I agree with the order proposed. All the same, I wish to express my view that the decision given in the Pull Bench case of this Court in Ramphal Sahu and Others Vs. Babu Satdeo Jha and Another, , deserves reconsideration by a larger Bench. The law laid down therein has not been followed uniformly in the decisions given by this Court subsequent to the judgment of the Pull Bench case. On some ground or other that case has been side-tracked or by-passed. In Radha Mohan Singh Vs. Shree Kishun Gir and Others, , Meredith J. has shown his disagreement with it and has given very strong reasons for the reconsideration of that case. The present matter is, however, a short one and it can be disposed of with the same result on other grounds as well. Therefore, I at present reserve my opinion about the matter.