
(1931) 04 PAT CK 0007
In the Patna High Court

Mahindra Narain and Others

APPELLANT

Vs

Mt. Lal Jhari Kuer and Others

RESPONDENT

Date of Decision : 22-04-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 95, 47

Citation : AIR 1931 Patna 296

Hon'ble Judges : Wort, J

Bench : Division Bench

Judgement

Wort, J.—This appeal arises out of an action in which the plaintiff sought to recover possession of some 16 kathas of bhit land. It was contended, and I think it is clearly established by the decision of the Courts below, that this 16 kathas fell to the takhta of the plaintiff in a partition suit. The plaintiff's contention was this: that although the batwara paper in the partition suit clearly stated and showed this land to be within the plaintiff's takhta, when the map came to be prepared, instead of colouring this portion red which was the plaintiff's colour, the commissioner, who prepared the map, by mistake, coloured it yellow which was the defendant's colour. In consequence delivery of possession was made to the defendant, and the plaintiff therefore brought this action and the relief which he claimed was for an amendment of the map, delivery of possession to the plaintiff, and further and other reliefs.

2. The facts that I have indicated have been found by the lower appellate Court in favour of the plaintiff; but the learned Judge has come to the conclusion that the action was not maintainable. The learned Judge states in his judgment:

The decree in terms of the map cannot therefore be ignored by the plaintiffs and it is necessary for the plaintiffs to have the map and thereby the decree corrected in order that they may have the reliefs they want.

3. Relying upon certain decisions he comes to the conclusion that a suit does not lie for the rectification of the decree.

4. Now the decision upon which reliance is placed in this Court is the case of Janakdular Saran Misser v. Ambica Prasad Singh [1917] 2 Pat. L.J. 313. In that case a reference was made to the decision of Sir Francis Maclean and Pargiter, J., in Jogeshwar Atha v. Canga Bishan [1904] 8 C.W.N. 473.

5. As I have indicated, the case before me was brought on the basis that it was an action, the substance of which was the amendment of the decree, and in the judgment in the case to which I have just referred in the Calcutta High Court I have come across this very surprising proposition that an action of this character lies in England and that there is no provision in the Indian law to the contrary; in other words the law in England and in India is the same in this respect. I respectfully disagree with the judgment, of that Court, and I should have been prepared to say without any hesitation that the statement as to the English law is incorrect. I am not entirely unacquainted with these matters, and even apart from authority, in my judgment, no possible controversy can arise regarding the proposition that an action of that character does not lie in England. But the matter which I have to decide is whether such an action lay in India.

6. As regards the decision to which I have just made reference, Mr. Manohar Lal has called my attention to a decision of Kusodhaj Bhukta v. Braja Mohan Bhukta [1915] 43 Cal. 217 where that decision was expressly dissented from. The decision reported in Janakdular Saran Misser v. Ambica Prasad Singh [1917] 2 Pat. L.J. 313, which has also been called to my notice, discusses this question in some detail and comes to the same conclusion. Reference was made in the case of Jogeshwar Atha v. Ganga Bishan [1904] 8 C.W.N. 473 to the case of Ainsworth v. Wilding [896] 1 Ch. 673, and it would appear that it was upon that decision that the statement of the learned Chief Justice was based. The slightest examination of that authority however shows that the statement of the law was without basis. The very first words of the judgment of Romer, J., are:

This is a motion to discharge a judgment given at the trial of the action, notwithstanding such judgment has been passed and entered;

in other words it was a motion to set aside a judgment, and a motion in these circumstances is comparable only to the procedure under the CPC to either rectify or modify a judgment when sufficient-cause is shown, and the only question which came to be decided in Ainsworth v. Wilding [896] 1 Ch. 673 was whether a judgment which had been entered by consent of the parties could be set aside on the ground of mistake. It was rightly held, if I may say so with respect, by Romer, J., that such a motion could succeed only in such circumstances as were provided in Order 23, Rule 2, of the Rules of the Supreme Court in England. This obviously is no authority for the proposition that an action lies to vary or alter a decree. Later in the judgment it is noticed that the motion was in the action itself.

7. Reference was also made in the case in Janakdular Saran Missir v. Ambica Prasad [1917] 2 Pat. L.J. 313 to the Haddersfield Banking Co: v. Lister [1876] 2

Ch. D. 272. Again that was an application on motion in a debenture-holder's action in which the Banking Company had sought to set aside an agreement on the ground that it was brought about under a mutual mistake of fact and both Vaughan Williams, J., and the learned Lord Justices in the Court of appeal, held that the mere fact that a judgment or decree had been pronounced did not prevent their setting aside the agreement which was brought about under mutual mistake of fact. That case does not establish the proposition that an action lies for rectifying a decree.

8. Two arguments have been addressed to me: one was that the decree in the partition action is correct. It seems to me therefore that if that be so the answer to the plaintiff's suit is that the plaintiff must execute his decree. That argument being unsuccessful, I am presented with the argument that the decree is not correct. If it is not correct, then the obvious procedure which the plaintiff is to adopt is to proceed under Order 47, Rule 1, for review, or if it is a mere question of mistake made by the Court, then let him proceed u/s 152. On the other hand, assuming that it is merely an action for possession in pursuance of the decree and assuming that the decree is not right, then before the plaintiff could execute it would be necessary for the plaintiff to have the decree amended. But assuming that it is right, and to repeat myself if it is an action for possession in pursuance of the decree, the question that immediately arises is as to whether it is a matter relating to the execution, discharge or satisfaction of the decree u/s 47, Civil P.C.

9. Now in the Pull Bench decision in the case of Tribeni Prasad Singh and Others Vs. Ramasray Prasad Chaudhari and Others, , in which judgment was delivered yesterday, but which has not been reported, it has been decided that a decree-holder purchaser, who seeks possession, may bring a suit and is not limited to the procedure provided by the CPC under Order 21, Rule 95, because it has been held by all the Judges who delivered judgments in that case that it does not relate to the execution, discharge or satisfaction of the decree. But from the reasoning given in these judgments it is quite clear that although a plaintiff may seek possession in pursuance of a decree, depending upon the circumstances, the matter may relate to the execution, discharge or satisfaction of the decree and that is obviously the case in which the decree itself is for possession.

10. In order to execute the decree in this partition action, if the party sought the aid of the Court, that aid, if given, would relate to the execution, discharge or satisfaction of the decree. It seems to me that this case being based on a decree in a partition action, the remedy which the plaintiff now seeks does relate to the execution, discharge or satisfaction of the decree and consequently the action in its present form is barred, the plaintiff's remedy being in the executing Court, or if in circumstances it is established that the decree is incorrect then the plaintiff can adopt the procedure which I have indicated in the earlier part of my judgment.

11. For these reasons the appeal fails and must be dismissed with costs.