

(2008) 09 PAT CK 0065
In the Patna High Court

Mansoor Alam and Others

APPELLANT

Vs

Nasseeruddin Khan and Others

RESPONDENT

Date of Decision : 03-09-2008

Acts Referred:

Citation : (2008) 09 PAT CK 0065

Final Decision : Allowed

Judgement

Mihir Kumar Jha, J.—Heard Counsel for the petitioners.

2. The plaintiff-petitioner is aggrieved by the operative portion of the impugned order dated 11-8-2008 whereby and whereunder the Court below has transferred the case to Nawadah Judgeship in purported exercise of power u/s 37 of the Code of Civil Procedure.

3. Counsel for the petitioner has submitted that the records of Partition Suit No. 29 of 1959/24 of 1956 were pending before the trial Court, namely, Court of Sub-Judge IV, Gaya at the stage of final decree proceeding and therefore, they ought to have not been transferred only because bifurcation of Gaya District and the suit land becoming part and parcel of Nawadah District. In this context he has also emphasized that a decree of the year 1961 arising out of the suit of the year 1956 ought to have been not transferred from Gaya, inasmuch as the Court at Gaya had still jurisdiction in terms of proviso (2) of Section 37 of the Code of Civil Procedure.

4. In order to appreciate the submissions of the learned Counsel for the petitioner it would be necessary to take following facts into consideration:

(i) The partition suit of the year 1956 was decreed on 20-6-1961 by the Court of 1st Addl. Sub Judge, Gaya and accordingly, a preliminary decree was prepared.

(ii) The judgment and decree dated 20-6-1961 remained intact when the title appeal was dismissed on merits on 4-9-1973 by the 3rd Addl. District Judge, Gaya.

(iii) The plaintiff thereafter had filed application for appointment of Pleader Commissioner for carving out their share and the Pleader Commissioner having issued notice on 24-12-1974 had proceeded to complete the Raibandi proceeding in course of preparation of the final decree.

(iv) In the meantime, the second appeal preferred against the judgment of the lower appellate Court dated 4-9-1973, being Second Appeal No. 805/1973, was also dismissed by this Court on 12-3-1980 and when the records were received in the original Court on 19-12-1980 steps were taken for completion of final decree proceedings.

(v) There is no explanation as to why the final decree proceeding was not completed between December, 1980 to April, 2006 but then it appears that somehow the final decree was lost and was not on record. The plaintiff-petitioners thereafter had approached the District Judge, Gaya in the; month of January, 2007 and their Misc. Case No. 2/2007 was disposed of by the District Judge, Gaya on 12-2-2007 directing the petitioners to approach the original Court for the purposes of preparation of final decree.

(vi) Pursuant to the aforementioned direction when the petitioners had approached the original Court with a prayer for appointment of Pleader Commissioner for preparation of final decree for carving out separate Takhta, a Pleader Commissioner was appointed by an order dated 5-4-2007 by the Sub Judge IV leading to appointment of one Sheo Kumar Prasad, a survey knowing Pleader Commissioner, who was issued a writ on 9-7-2007.

(vii) Thereafter when the Pleader Commissioner had fixed his date to visit, the locality on 29-7-2007 certain objections were raised by the defendants and a prayer was made for stopping Takhtabandi and restraining the Pleader Commissioner not to complete his assignment as per the writ issued by the Court on 9-7-2007.

(viii) The original Court by an order dated 26-7-2007 had restrained the Pleader Commissioner from undertaking and completing the Takhtabandi till further order.

(ix) It was after this order dated 26-7-2007 that one Muneshwar Yadav, being wholly stranger to the suit, had filed an application under Order 21, Rule 97, CPC on 6-1-2008 and yet another objection of territorial jurisdiction on 10-7-2008 on the ground that the properties to the suit are situated within the jurisdiction of Nawadah which was said to have been carved out of old Gaya District in the year 1973-74.

(x) By the impugned order even though the application filed by Muneshwar Yadav both under Order 21, Rule 97, CPC as also territorial jurisdiction were rejected, yet the Court below on its own relying on the provisions of Sections 16 and 20, CPC had held that it had no jurisdiction to continue with the final decree proceedings as the suit properties were situated in the district of Nawadah and accordingly, directed his office to take steps to transfer the suit from Gaya

District to Nawadah District.

5. A brief outline of the partition suit which has already been celebrated its golden jubilees would only go to show as to how a common litigant taking recourse to civil litigations being made to suffer in this state. There seems to be no explanation whatsoever as to why even after disposal of the second appeal in the year 1980 the final decree proceedings could not be completed in the next 28 years. What is still more shocking is that if the final decree proceedings on the ground of territorial jurisdiction had to be transferred from Gaya District to Nawadah District, the same ought to have been done immediately after parving out of Nawadah District way back in the year 1973-74. It is really strange that the final decree proceeding was kept pending even after 34 years of creation of Nawadah District and after long gap the Court below found it appropriate to transfer the case from Gaya District to Nawadah District. If this is not shirking of responsibility then what else would be?

6. It is not the mandate of law either u/s 16 or 20 or 37 that in every suit where the decree was passed by a Court which ceased to have territorial jurisdiction after passing of the decree would become functus officio only because after preliminary decree the suit property was found to have been situated in another district. Section 16 only lays down as to where the suit has to be instituted and in that context it has been provided that ordinarily the suit shall be instituted in the Court within the local limits of whose jurisdiction the property is situated. Admittedly when the suit was instituted in the year 1956 the suit property was situated in the Gaya District. Thus, Section 16 will have no application for justifying the impugned order.

7. Section 20 also will not be covering the case in hand which only carves out an exception that certain suits could be instituted in a Court within the local limits of whose jurisdiction the defendant at the time of commencement of the suit actually or voluntarily resides or carries on business or personally works for gain or where the cause of action wholly or in part arises. Admittedly Section 20 also refers to the situation as prevailing at the time of institution of the suit and therefore, the Gaya Court cannot be said to have been stripped of its Jurisdiction on creation of Nawadah District.

8. That would now leave this Court to examine the provisions of Section 37, CPC. Before what would go to the scope of Section 37 it would be necessary to first find out as to what is the intent and purpose of Part II of the CPC pertaining to "execution" beginning from Section 36 to Section 74. It would be found that in Section 38 it has been provided that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 39 further makes it clear that the Court which passed a decree may on the application of the decree holder send it for execution to another Court of competent jurisdiction on fulfillment of certain terms and conditions. Section 39(2), however, vests power in the Court which had passed a decree to send it for execution to any subordinate Court of competent jurisdiction even of its own

motion.

9. That would leave this Court to examine only now the scope of Section 37 which only defines "Court which passed a decree". In this context it would be necessary to quote Section 37, CPC which reads as follows:

37. Definition of Court which passed a decree.- The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include.-

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Explanation.-The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court, but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.

10. A bare perusal of the aforementioned provisions u/s 37, CPC would by itself go to show that the Court of first instance which had passed the decree will not cease to have jurisdiction to execute a decree merely on the ground that after institution of the suit wherein the decree was passed or after passing of the decree any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court. It is true that a conjoint reading of Section 37 including its explanation also makes such other Court to have jurisdiction to execute the decree if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit. However, in any event it cannot be said that the original Court which had passed the decree will cease to have powers to execute the decree.

11. In any event a combined reading of Sections 37, 38 and 39 of the CPC would by itself reveal that unless the prayer is made by the decree holder for sending it for execution to another Court, the Court which had passed the decree will have no jurisdiction to transfer the decree for execution to a Court of same jurisdiction. Admittedly the Court at Nawadah was not subordinate Court and there was no prayer on behalf of the plaintiff petitioner, the decree holder, to transfer the decree for execution from Gaya District to Nawadah District. Thus, on a plain reading of the provisions of the CPC and in the backdrop of the facts mentioned above, it would be clear that the Court below had committed a

jurisdictional error in directing transfer of the records of the suit including the decree to Nawadah District.

12. This aspect of the matter is well settled even in absence of the explanation in Section 37 which came to be inserted by the CPC (Amendment) Act, 1976 with effect from 1-2-1977. Reference in this connection may be made to the judgment of this Court in the case of Dasrath Prasad Singh and Another Vs. Baijnath Prasad Singh, wherein this Court following the ratio laid down by the Apex Court in the case of Merla Ramanna Vs. Nallaparaju and Others, , had held that:

The proper Court to execute the decree is the Court which passes it, and, simply because a new Court is subsequently created which gets territorial jurisdiction in regard to the property in question is no ground to hold that the Court which had passed the decree has no jurisdiction to give delivery of possession.

13. Apart from the aforementioned ratio laid down by the Apex Court and followed by this Court, it has to be taken note of that when an explanation in Section 37 was added by insertion by the CPC (Amendment) Act, 1976 with effect from 1-2-1977 any and every doubt with regard to lack of territorial jurisdiction for the Court at Gaya which had passed the decree would stand automatically repelled. In fact the objects and reasons of the amendment in Section 37 was to tide over some sort of a conflict of decisions of different High Courts on the point of jurisdiction over the subject-matter of a decree when it is transferred to another Court. In this context Clause 18 laying down objects and reasons for amendment needs to be gone into as was originally incorporated in the statement of objects and reasons (Bill) of the Gazette of India, Ext. dated 8-4-1974, Part II, Section 2, P. 303, which reads as follows:

There is a conflict of decisions on the point as to whether in cases where jurisdiction over the subject matter of a decree is transferred to another Court that Court is also competent to entertain an application for execution of the decree. The Calcutta High Court has held that both the Courts would be competent to entertain an application for execution of the decree but the Madras High Court has held that in the absence of an order by the Court which passes the decree that Court can alone entertain an application for execution and not the Court to whose jurisdiction the subject-matter has been transferred. The Supreme Court has left the point open. Proposed Explanation to Section 37 seeks to give effect to the Calcutta view.

14. Having thus given anxious consideration of the facts of this case and the law discussed above, this Court is of the view that a final decree proceeding arising out of a preliminary decree proceeding in a partition suit being akin and exactly in the nature of execution proceeding, the original Court at Gaya, where the records of partition suit of the year 1956 is pending, cannot be said to have become functus officio and accordingly, the impugned order transferring the records from Gaya District to Nawadah District must be held to be vitiated both by material irregularity as also jurisdictional error.

15. In the result, this application is allowed. The impugned order is set aside and the Court below at Gaya is directed to ensure that the final decree proceeding must be completed within a period of six months from the date of receipt/production of a copy of this order.