
(1965) 08 PAT CK 0012
In the Patna High Court
Case No : A.F.O.D. No. 453 of 1955

Mt. Kamla Devi	Vs	APPELLANT
Sheo Prasad Mishra and Others		RESPONDENT

Date of Decision : 13-08-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(1), Order 41 Rule 20, 11

Citation : AIR 1966 Patna 247

Hon'ble Judges : K. Sahai, J

Bench : Single Bench

Advocate : Shreenath Singh and Harilal Agarwal, for the Appellant; Kanhaiyajee and Rameshwar Prasad No. II, for the Respondent

Final Decision : Dismissed

Judgement

Sahai, J.—The plaintiff filed Title Suit No. 6/8 of 1953/54 in the Court of the Subordinate Judge at Arrah for partition of certain properties. Devendra Mishra was defendant No. 3 in the suit which was, ultimately, dismissed by a judgment and decree dated the 28th July, 1965. On the 18th October, 1955, the plaintiff filed this first appeal in this Court. It is unnecessary to give details; but the fact is admitted on all hands that service of notice was not effected upon minor respondent No. 3 Devendra Mishra. On the 3rd May, 1960, the case was placed for orders before Kanhaiya Singh, J. Two weeks' time was prayed for to take steps for fresh service of notice upon minor respondent No. 3 ; but the learned Judge granted only one week's time. He made the order peremptory. The order was not complied with in time, and, therefore, the appeal stood dismissed as against minor respondent No. 3. Thereafter, the plaintiff filed Miscellaneous Judicial Case No. 571 of 1960 for restoration of the appeal as against the minor respondent. By an order dated the 12th March, 1962, the learned Judge, Kanhaiya Singh, J., dismissed the application. The plaintiff then filed a Letters Patent Appeal against that order, and it was numbered as Letters Patent Appeal No. 20 of 1962. By an order dated the 12th May, 1965, the Bench, which heard

the Letters Patent Appeal, dismissed it. The plaintiff then filed an application under Order XLI, Rule 20 of the CPC for addition of respondent No. 3 as a respondent in this appeal. This was ordered to be heard at the time of final hearing of the appeal.

2. The first appeal has now been put up for hearing. The plaintiff has also filed an application under Order XXIII, Rule 1 of the Code for permission to withdraw the suit itself. The respondents have filed a counter affidavit.

3. The first point which Mr. Shreenath Singh has argued on behalf of the plaintiff-appellant is that the peremptory order of Kanhaiya Singh, J., under which the appeal was dismissed as against minor respondent No. 3, is without jurisdiction because the appeal could not be dismissed on a date which was not fixed for hearing of the case. I need not go into the merits of this argument because the plaintiff-appellant could take this point before the learned Judge himself in Miscellaneous Judicial Case No. 571 of 1960 and also in Letters Patent Appeal No. 20 of 1962. As this was a point of attack which she might and ought to have raised earlier, the principle of *res judicata* applies, and the plaintiff-appellant cannot be allowed to raise this point at this stage, i.e., a subsequent stage. This is quite enough to dispose of this argument.

4. So far as the application for addition of minor respondent No. 3 as a respondent in this case is concerned, I do not think that a party can be allowed to circumvent the orders of the Court. By a peremptory order, the Plaintiff was given a week's time to take steps for fresh service upon the minor respondent. She did not comply with the order, and the appeal stood dismissed as against that respondent. She took all possible steps for setting aside the dismissal and for restoration of the appeal as against the minor respondent by filing Miscellaneous Judicial Case No. 671 of 1960, and, when that was dismissed, by filing Letters Patent Appeal No. 20 of 1962. She failed in her efforts to bring respondent No. 3 again upon the record and to get the appeal restored against that respondent. If she is now allowed to add respondent No. 3 as a respondent, the result would be that the order in the miscellaneous judicial case as well as in the Letters Patent appeal would become nugatory and the entire proceedings would constitute mere waste of time. Rights have become vested in the respondents, and they cannot be divested of those rights by the plaintiff-appellant being allowed now to add respondent No. 3 as a respondent. The application is, therefore, dismissed.

5. All that now remains for me to do is to deal with the application filed under Order XXIII, Rule 1 for withdrawal of the suit itself. Mr. Shreenath Singh has admitted that he has not been able to find any authority in support of his contention that the appellant can withdraw the suit under Sub-rule (1) of Rule 1 of Order XXIII without the permission of the Court. I do not think that a plaintiff-appellant can be allowed to withdraw a suit under that sub-rule without the permission of the Court after a solemn decree of a Court has intervened in favour of the other party. The sub-rule reads:

"At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim."

In a partition suit, cause of action may arise at different times. As soon as a partition suit is decided against the plaintiff, he may make an application under Sub-rule (1) of Rule 1 of Order XXIII for withdrawal of the suit so as to deprive the defendant of what he has gained by the decree of the Court. Such a state of affairs cannot possibly be permitted. I do not, therefore, think that Mr. Shree Nath Singh is right in saying that the plaintiff can withdraw the suit in this case under Sub-rule (1) of Rule 1 of Order XXIII without the permission of the Court.

6. Learned counsel does not seek permission under Sub-rule (2) of Rule 1 of Order XXIII for withdrawal of the suit with permission of the Court on the ground that it has failed by reason of a formal defect. The question of granting permission under the sub-rule therefore, does not arise. He has made reference to the case of Domi Ram Chaudhuri Vs. Liquidator, Nawadah Bazar Co-operative Society, in which it was held that the Court dealing with an appeal--even a Letters Patent appeal--has the power to allow a plaintiff to withdraw the suit, but the Court would not be right in allowing the plaintiff to withdraw the suit when the matter has reached Letters Patent appeal stage. In my opinion, this decision is of no avail in the present case because, as I have said, Mr. Shreenath Singh has stated that he does not seek permission of the Court under Sub-rule (2) of Rule 1 of Order XXIII to withdraw the suit.

7. Admittedly, the entire appeal fails, inasmuch as it has failed against respondent No. 3. The suit being one for partition, all parties interested in the properties to be partitioned are necessary parties. It is not said that respondent No. 3 was not a necessary party. In these circumstances, the entire appeal fails, and it is dismissed.

8. In the circumstances of this case, there will be no order for costs.