

(1991) 11 PAT CK 0008

In the Patna High Court

Case No : Appeal From Original Order No. 128 of 1987

Nagina Singh and Others

APPELLANT

Vs

Most. Sheojoti Kuer and Others

RESPONDENT

Date of Decision : 19-11-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 43 Rule 1, Order 47 Rule 7

Citation : AIR 1993 Patna 12 : (1992) 40 BLJR 790

Hon'ble Judges : Binod Kumar Roy, J

Bench : Single Bench

Advocate : Bindeshwari Prasad Bhagat, for the Appellant; Akhouri Baidyanath Prasad and Kamla Prasad Roy, for the Respondent

Final Decision : Dismissed

Judgement

Binod Kumar Roy, J.—In this appeal defendants Nos. 7 to 9 assail validity of an order dated 7-5-1987 rejecting their petition filed against appointment of a receiver.

2. It appears that respondents Nos. 1 and 2 filed the suit in question for partition of their shares in Schedules II, III and IV properties of their plaint. The plaint was admitted on 29-11-1985 and the notices were issued to the defendants on 10-5-1986. Respondents Nos. 1 and 2 filed an application for appointment of an Advocate Commissioner Receiver for preparing a list of the disputed lands and for managing them and for directing him to get the standing crops thereon cut and divided. Notice of the said petition was directed to be issued to the defendants on 10-4-1986. The hearing of the said petition, however, was deferred because of non-service of notice on the defendants. From the record it appears that on 11-9-1986 the notices were issued under registered cover. It further appears that on 24-9-1986 the petition aforementioned was heard and 27-9-1986 was fixed for orders after noticing that no one had appeared on behalf of the defendants nor any show cause was filed. On 27-9-1986 an order was passed appointing one Vinod Kumar Singh, Advocate as Receiver with certain

other directions. It further appears that the writ was received by Shri Binod Kumar Singh on 1-10-1986. On 8-10-1986 defendants Nos. 4 and 7 to 9 appeared and defendants Nos. 7 to 9 filed an application against the appointment of Receiver. Defendant No. 4 (respondent No. 6 herein) also filed an application praying to recall the order dated 30-9-1986, even though no order was passed on 30-9-1986 rather, as already stated, the order appointing Receiver was passed on 27-9-1986. In their petitions, the appellant and respondent No. 6 stated, inter alia, that they came to know of the suit and appointment of Receiver when the latter went in the village on 2-10-1986 etc.; that the defendant were not served with any notice; that they were deprived to put their case before the court; and that the continuance of the said order has caused sufficient loss and difficulty to them. Respondent No. 6 (defendant No. 4) also alleged that the plaintiffs have got defendants Nos. 7 to 9 in their collusion. Appellants Nos. 1 and 2 also filed a rejoinder dated 19-11-1986 to the petition of the respondent No. 6 denying the allegations and further alleged that they are not stranger to the family as alleged by them and that the properties in question are joint family properties. By the impugned order, the prayer of the appellants have been rejected after rising an issue as to whether the circumstances warrants just and convenient to maintain the ex parte order of appointment of Receiver or to vacate that. The court below in doing so took into account the widowhood of the respondent No. 1, respondent No. 2 being her daughter, and they being Pardanashin ladies and that they have got an excellent chance of success; and that the properties are being damaged or wasted by the defendants who are misappropriating their shares.

3. Mr. Akhouri Baidyanath Prasad, learned counsel appearing for respondents Nos. 1 and 2, raised a preliminary objection about the maintainability of the appeal itself alleging that the order in question was not passed under Order XL, Rule 1 of the CPC (hereinafter referred to as the Code) and thus no appeal lies under Order XLIII, Rule 1(s) of the Code and this appeal is liable to be dismissed for this reason.

4. Mr. B.P. Bhagat, learned counsel appearing on behalf of the appellants, on the other hand, submits that the impugned order was passed under Order XL, Rule 1 of the Code and thus this appeal is maintainable.

5. Mr. Kamla Prasad Roy, learned counsel for the other respondents, submits that since by the impugned order the court below has refused to review its earlier order, therefore, an appeal lies before this Court.

6. On merit Mr. Bhagat as well as Mr. Roy assail the legality and/or propriety of the impugned order whereas Mr. Prasad argues that in the facts and circumstances the court below was correct in appointing the lawyer receiver and the earlier order not having been challenged, no interference is required by this Court.

7. Under Order XLIII, Rule 1(s) of the Code, an appeal lies against an order

under Order XL, Rule 1 of the Code. An appeal under Order XLIII, Rule I(w) lies against an order granting an application for review whereas under Order XLVII, Rule 7 of the Code an order of rejection is not appealable. The application filed by the appellants was for recall of the earlier order by which an Advocate was appointed Receiver.

8. From the impugned order it does not appear that the question in regard to the service of notice on the defendants was argued. No specific ground has been taken in that regard even in the memorandum of appeal.

9. It is a settled law that an appeal is a creation of statute. It is difficult to hold that the impugned order refusing to recall the earlier order was appealable under Order XLIII, Rule I(s) of the Code.

10. The earlier order of appointment of Receiver not having been assailed by filing an appeal, it is difficult for this Court to grant any relief to the appellants or even to other respondents represented by Mr. Roy, who have not filed any cross-objection appeal.

11. In the aforementioned view of the matter, this appeal is dismissed as not maintainable.

12. There shall be no order as to cost.

13. In the interest of justice, I direct the trial court to take up the hearing of the suit itself as it has remained pending by now for about six years and direct the parties to file their list of witnesses and their list of documents along with the documents on which they intend to rely within two months from today and thereafter the court below shall proceed to take up its hearing.

14. Let the records of the suit be sent down at once.