

(1945) 12 PAT CK 0020

In the Patna High Court

Narendra Nath Sen and Others

APPELLANT

Vs

Mahasay Ganesh Prasad Ray and Others

RESPONDENT

Date of Decision : 04-12-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Specific Relief Act, 1877 — Section 42

Succession Act, 1925 — Section 192

Citation : AIR 1946 Patna 408

Hon'ble Judges : Varma, J;Beevor, J

Bench : Full Bench

Judgement

Beevor, J.—This is an appeal against a decree of the Subordinate Judge of Cuttack, dated 25th March 1939. The appeal has been filed by defendants 1 to 3 and the plaintiff-respondents have raised a preliminary objection that this appeal is not maintainable. We have heard Mr. B.C. De for the plaintiff-respondents and Mr. M.S. Rao for the appellants on this preliminary objection. Both the appellants and the plaintiff-respondents are claiming the estate of one Rai Bahadur Govind Ballabh Rai who died in July 1896 leaving surviving him his second wife and an unmarried daughter by her and either one or two daughters by his first wife. The second wife Swarnamai succeeded to the estate on his death and remained in possession until her death on 14th September 1935. The plaintiff-respondents then claimed the estate as the nearest reversioners of Gobind Ballabh Rai, their case being that Gobind Ballabh had only one daughter by his first wife and had no descendants who were entitled to inherit still living on the death of the widow Swarnamai. The original defendant in the suit was named Binodini and after her death, her sons, the present appellants, have been substituted in her place. Their case is that Binodini was the second daughter of Rai Bahadur Gobind Ballabh Rai by his first wife and that she was entitled to the estate on the death of the widow Swarnamai and that on her death the appellants were entitled to the estate. They also denied the plaintiff's claim to be the nearest reversioners of Rai Bahadur Gobind Ballabh Rai.

2. Disputes arose almost at once after the death of the widow Swarnamai which took place on 14th September 1935. On 14th October 1935 the plaintiffs applied for registration of their names in the Land Registration Department. On 80th November 1935, they applied to the District Judge u/s 192, Succession Act, and their application was registered as Miscellaneous case No. 55 of 1935. A similar application was filed by Binodini on 13th January 1936, which was registered as Miscellaneous case No. 3 of 1936. On" 20th January 1936, the District Judge appointed an ad interim curator of the estate. On 15th April 1936, the plaintiffs filed the suit out of which this appeal arises. The main relief claimed in the plaint as originally filed was

that it may be declared that on the death of the widow Swarnamai Dasi the plaintiffs as the nearest reversionary heirs of her husband have succeeded to the disputed properties and that the defendant has no lawful title to the same.

3. The only other reliefs claimed were costs and any further relief the Court might award. On 16th May 1936, the District Judge decided Miscellaneous case No. 3 of 1936 in favour of Binodini and ordered the ad interim curator to hand over possession to her. On 19th May 1986 the plaintiffs applied in the suit for appointment of a Receiver and on the same day the Subordinate Judge asked the ad interim Receiver not to deliver possession until further orders and on 5th June 1986 the Subordinate Judge appointed Receiver in the suit to take charge of the estate. On 1st July 1986 the plaintiffs amended their plaint by adding to the main relief the words: "That the possession of the plaintiffs be confirmed or in the alternative a decree for recovery of possession be passed in favour of the plaintiffs." Binodini died on 17th January 1938 and the present appellants were substituted in her place, and on 25th March 1939 the trial Court gave the plaintiff-respondents a decree declaring that on the death of the widow Swanramai the plaintiffs were the nearest reversionary heirs of the late Rai Bahadur Gobind Ballav Rai and as such they succeeded to the properties described in Schedules Ka, Ga except lot No. 7 and Gha and that possession be declared or delivered to them over the said properties. There were certain incidental directions in the decree which are immaterial for the present purpose.

4. The present appeal was filed on 24th July 1939 and the prayer portion then claimed that the appeal be allowed and the plaintiffs' suit be dismissed with costs throughout. They paid court-fee of Rs. 30 on the memorandum of appeal. On 23rd December 1939 the Registrar as Taxing officer held that ad valorem court-fee was payable and called on the appellants to file deficit court-fee of Rs. 1735. On 20th January 1940 the appellants obtained extension of time for paying court-fees. On 24th January 1940 the plaintiff-respondents obtained delivery of possession of some of the properties decreed to them and on 4th April 1940 they obtained delivery of possession of the remainder. On 20th April 1940, the appellants applied to amend their memorandum of appeal and on 29th April 1940 they obtained an order from this Court permitting them to amend the memorandum of appeal at their risk and in accordance with that order they

amended the memorandum on 1st May 1940 by restricting the prayer portion of the memorandum through the addition of the words "(Except delivery of possession of Schedules Ka, Gha and Ga except lot No. 7 of the properties mentioned in the plaint)." They also added certain additional grounds which were additional grounds 1 to 7. The Registrar then held that the court-fee was payable ad valorem on two particular sums mentioned in additional grounds 6 and 7 but that the court-fee paid was sufficient on the remaining portion of the memorandum of appeal. On 31st July 1940, the appellants abandoned additional grounds 6 and 7 and were, therefore, not required to pay ad valorem court-fee on those two sums. On 23rd September 1940 a Bench of this Court directed that the question of maintainability of the appeal be determined at the hearing.

5. Now the arguments of Mr. B.C. De against the maintainability of the appeal as it stands may be summarised in three propositions. First, that if the appeal as it stands were to be allowed, it would be equivalent to granting a declaration in favour of the appellants and that such a declaration could not be granted firstly because it would be against the principle embodied in the proviso to Section 42, Specific Relief Act, and secondly that it would be infructuous. The second proposition is that Section 144, Civil P.C., or the principle embodied therein would be of no assistance to the appellants if their decree were allowed. His third proposition is that the trial Court's decree granted two reliefs--one a declaration of title and secondly a decree for possession and that the right to both these reliefs depends on the same facts; and that if there are two reliefs granted both involving the same facts and there is an appeal in respect of only one relief the decree for the other operates as *res judicata* in respect of those facts.

6. On the other side, the contentions of Mr. M.S. Rao are, first, that the suit was in substance one to alter or set aside a summary decision or order of any of the civil Courts not established by Letters Patent within the meaning of Schedule II, Article 17(i), Court-fees Act, and that, therefore, a fixed court-fee was payable both on the plaint and on the memorandum of appeal under that article. His second point was that at the time of the filing of the plaint and even at the time when the plaint was amended on 1st July 1936, the defendants were not in possession of the property but it was in *custodia legis* and, therefore, the plaintiff-respondents were neither required nor legally entitled to sue these defendants, now appellants, for possession and, therefore, the appellants were not required in appeal to get "the, redundant relief" granted to the respondents set aside.

7. He contended further that if the Court on appeal would allow his claim and set aside the declaration of title given to the plaintiff-respondents, then the Court in execution or acting on the principle of restitution would revoke the delivery of possession granted to the respondents.

8. Now Mr. B.C. De for the respondents conceded that if the suit had actually been a suit to set aside a summary order of the District Judge, then a fixed court-fee would have been payable on the plaint under Schedule II, Article 17, Court-fees Act. He urged, however, that this was not such a suit. On this point, I think,

he is clearly correct for two reasons, first, that at the date the suit was filed there was no decision yet given by the District Judge which could be set aside and after the District Judge gave a decision, although the plaint was amended no prayer was added to set aside that decision. Assuming that the plaintiffs had a right to bring a suit to set aside the decision of the District Judge made u/s 194, Succession Act, it does not follow that a suit brought by them in respect of the property after that decision must be treated as a suit to set aside that decision. A Full Bench of the Calcutta High Court in Loknarain Singh v. Rane Myna Kooer (67) Supp B L.R. 633 held that a summary order made under Act 19 [XIX] of 1841 did not operate as a bar to a regular suit to try the title and that such a suit might be brought within twelve years. The provisions of Act 19 [XIX] of 1841 have been replaced by part VII, Succession Act, including Sections 192 to 210. Section 209 which describes the effect of the decision of a District Judge in a summary proceeding under this part and Section 208 which saves the right of suit are almost exactly in the same wording as Sections 18 and 17 of Act 19 [XIX] of 1841 which are quoted in the judgment of that Full Bench delivered by Sir Barnes Peacock. It is noticeable that at the beginning of his judgment he reserved his opinion on the point whether any suit was maintainable to set aside the summary decision of the District Judge but that case is a clear authority to show that even though a suit may lie to set aside a summary decision, a suit may also lie to recover possession on the basis of title and that such a latter suit is of a different kind from a suit to set aside a summary decision. Although that is an old decision, it has been followed in recent times as for example, by the Madras High Court in Hyder Ali Sahib v. Amiruddin Sahib AIR 1929 Mad. 69 I am, therefore, satisfied that this is not a suit under Schedule II, Article 17(1), Courts-fees Act.

9. On his second point, Mr. M.S. Rao cited to us a number of decisions showing that when a property is in the custody of the Court either through a Receiver or by some officer such as a Curator, the plaintiff may bring a suit u/s 42, Specific Relief Act, without adding a prayer for consequential relief and the court-fee then payable on the plaint is a fixed fee under Schedule II, Article 17(iii), Court-fees Act. He also cited decisions of the Madras High Court in Vedanayaga Mudaliar v. Vedammal 27 Mad. 591, Malaiyya Pillai v. T. Perumal Pillai 36 Mad. 62 and I. L. R. (1939) Sundaresa Iyer v. The Sarvajana Sowkiabi Virdhi Nidbi Ltd. AIR 1939 Mad. 853 to show that that principle will continue to apply even though the Receiver or officer holding property on behalf of the Court has already been ordered by the Court, on whose behalf he holds, to hand over the property to the defendant before the plaint is filed, provided he has not by that date actually handed over possession. It does not appear that other High Courts have applied this principle in similar circumstances. It is, however, in my opinion unnecessary to deal with this question more fully because we are not now concerned with what should have been done by the plaintiffs in framing their plaint and paying court-fees thereon, but we are concerned with the memorandum of appeal which arises out of the plaint as it has actually been framed and the decree passed by

the lower Court. Even if the Madras view on this last point is accepted, it merely means that the plaintiffs were wrong in adding a prayer for possession in their plaint and that the lower Court was wrong in granting such a relief in the decree. It does not follow that the appellants can ignore that portion of the lower Court's decree which, on this view of the law, would be held to be wrongly granted. Even if the prayer for delivery of possession in the plaint could be considered redundant, I do not think that in effect the relief granted could be regarded as redundant.

10. As regards Mr. Rao's contention that if he succeeds in displacing the lower Court's decree for declaration of title in favour of the plaintiff-respondents he could succeed in recovering possession by restitution, it is certainly correct that the principle of restitution is not restricted by the exact words of Section 144, Civil P.C., but I do not think that in fact restitution would be an effective remedy if the appeal as it stands were allowed. Accepting for the purposes of argument Mr. Rao's contention on this point, it would follow that on the appeal being allowed the trial Court in restitution should restore the Receiver to possession, and if the Receiver was then directed to give possession to the defendant-appellants the decree for possession passed in favour of the plaintiff-respondents would remain intact and as soon as these defendant-appellants obtained possession the plaintiff, respondents could execute that decree.

11. I am also of opinion that the third contention of Mr. B.C. De is correct. The plaintiff-respondents have been granted two reliefs first, a declaration of title and secondly a decree for possession. Their right to the second relief depends on the very same facts which give rise to their title. The decree for possession would, therefore, operate as *res judicata* on the facts necessary to establish that title. So long, therefore, as the decree for possession remains intact it would operate as *res judicata* to prevent the appellants from challenging the decree for declaration of title. On this point, I think, the principle has been clearly set out by Anantakrishna Ayyar J. in *Pichai Konar Vs. Narasimha Rama Iyer*,

12. I come, therefore, to the conclusion that the appeal as framed is not maintainable. At the conclusion of the arguments Mr. M.S. Rao asked that in the event of the Court holding against his contentions regarding the maintainability of the appeal, his clients should be given an opportunity to amend the memorandum of appeal and pay deficit court-fees thereon. Mr. B.C. De opposed this prayer. We then on 28th November 1945, granted that prayer on certain terms and stated in our order that we would give reasons for our order in the judgment dealing with the maintainability of the appeal. I will now proceed to give the reasons. Under Order 6, Rule 17, Civil P.C., the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Although there are some limits to the exercise of this power, it has been stated by the Judicial Committee in *Ma Shwe Mya v.*

Maung Mo Hnaung AIR 1922 P.C. 249 that full powers of amendment must be enjoyed and should always be liberally exercised. One restriction is that there is no power to substitute one distinct cause of action for another as was stated by their Lordships of the Judicial Committee in that very case. Another principle is that ordinarily leave to amend will be refused where the effect of the proposed amendment is to take away from the respondent a legal right which has accrued to him by lapse of time, but this is a principle which will apply ordinarily and not in every case. This was recognised by the Judicial Committee of the Privy Council as far back as *Mohammed Zahoor Ali v. Mt. Roota Koer* (66) 11 M.I.A. 468. In the present instance it is quite clear that the real matter in issue between the parties has been clear to both sides throughout and the only question involved in the proposed amendment is whether the defendant appellants in order to have that matter tried would be forced to frame their prayer in a form which would render them liable to pay *ad valorem* court-fees, the amount of which is considerable. The question involved regarding the maintainability of the appeal or the necessity for amendment was, therefore, in substance a dispute between the appellants and Government or the revenue authorities and with this the plaintiff-respondents were only indirectly concerned.

13. It is for these reasons that I consider that the prayer for amendment should be allowed. As a result, if the amendment is made in accordance with the terms of our order dated 28th November 1945, the appeal would proceed, but if the terms of that order are not carried out, this appeal will stand dismissed with costs as not maintainable.

Varma, J.

I agree.