
(1986) 02 PAT CK 0016
In the Patna High Court
Case No : S.A. No. 268 of 1980

Puran Sah and Another

APPELLANT

Vs

Buny Sah and Another

RESPONDENT

Date of Decision : 12-02-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : (1986) 34 BLJR 470 : (1986) PLJR 503

Hon'ble Judges : S. Ali Ahmad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S. Ali Ahmad, J.—This second appeal arises out of a suit filed by the plaintiffs-respondents for partition of the suit properties including 30,000 bricks. Their case in short was that the suit properties including plot No. 818 situated in village-Bhatwalia, belonged to Buny Sah the father of the plaintiff No. 1 and defendant No. 1. It is said that Buny Sah died leaving behind the two sons namely plaintiff No. 1 and defendant No. 1 and on his death the two brothers inherited half and half. It was further the case of the plaintiffs that 30,000 bricks were manufactured for construction of a house, which also should be partitioned. The case of the contesting appellants on the other hand was that Buny Sah was possessed some immovable properties situated in village Karnpura and in village Bhatwalia. So far as the lands of village Karnpur were concerned, they were sold in favour of Nathuni Sah, son of plaintiff No. 1. It was further said that so far the suit lands are concerned, they were situated in village-Bhatwalia and plot Nos. 364 and 818 were sold in favour of defendant No. 2, the wife of defendant No. 1. Therefore it was said that no decree for partition with respect to these two plots could be passed. With respect to the bricks, the case of the appellants was that the same were manufactured by them and that also could not be partitioned. With regard to other lands namely plot Nos. 365 and 419 of village-Bhatwalia, the appellants had no objection if the same was partitioned as claimed." The trial

court decreed the suit for partition as claimed in plot Nos. 365 and 419. It however held that so far plot No. 364 measuring 10 Kathas 12 Dhurs was concerned, the same had been sold by Buny Sah in favour of defendant No. 2. Accordingly, the court below dismissed the suit with regard to this plot. So far as plot No. 818 is concerned the trial court was of the view that only 2 decimals out of this plot was sold in favour of defendant No. 2. It, therefore, decreed the suit for partition with respect to the remaining areas of 1 Katha 10 dhurs. With regard to bricks, also the trial court accepted the case of the defendants and refused decree for partition of the same. The defendants thereafter filed an appeal before the District Judge; The appeal was confined to 1 K 18 dhurs of plot No. 818 as according to them, the trial court had misread the sale deed (Ext. B). According to them, under the sale deed 2 Kathas were conveyed and the trial court had misread 2 Kathas as 2 decimals. It may be mentioned that no appeal or cross objection was filed by the plaintiffs. But they argued before the lower appellate court that the sale deed (Ext. B) was invlaid and as such a decree for partition with respect to plot No. 364 and the whole of plot no, 818 also should be passed. The lower appellate court in exercise of powers under order 41 rule 33 reappraised the entire evidence and came to the conslusion that no consideration had been passed under Ext. B, the sale ded. It, therefore, held that the sale deed by Buny Sah in favour of defendant No. 2 was bad. He accordingly, while dismissing the appeal of the appellants, granted a decree for partition of plot No. 364 and whole of plot No. 818 as claimed by the plaintiffs. Thereafter this second appeal has been filed. I may, however mention here that the sale deed, Ext-B mentions 2 Kathas as the subject matter of the deed besides other plots.

2. Mr. Keshwa, learned Counsel for the appellant contended that the scope of the appeal in the lower appellate court was confined to plot No. 818 as according to him, the whole of it had been transferred under Ext-B. He says that the court below was not justified in absence of appeal or cross objection but the respondent to re-open the legality or otherwise of the sale deed, Ext-B. Learned Counsel for the respondents on the other hand says that the powers under order 41 rule 33 are very wide and it empowers that appellate court to re-appraise the entire evidence notwithstanding the fact that neither an appeal nor cross objection has been filed. He says that if on such appraisal the court of appeal below comes to a conclusion contrary to the one arrived at by the trial court, then he can pass a decree on the basis of his findings. In that connection learned Counsel has referred to the decision in the case of Pannalal Vs. State Bombay and Others, ,and Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others, . There can be no dispute that this provision gives wide powers to the appellate court not only to give or refuse to the appellant by allowing or dismissing the appeal but also to give such other reliefs to any of the respondents as the case may require. But that does not mean that the provision of this rule can be taken aid for defeating the appellant and passing a decree in favour of respondent who has not filed any appeal or cross objection. The two

cases referred to above by the learned Counsel for the respondents have no application to the facts of the present case. At this stage I may refer to another case of the Supreme Court reported in *Nirmala Bala Ghose and Another Vs. Balai Chand Ghose and Others*, wherein it has been said that "Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from" In this case as I have referred above the only question that needed consideration by the appellate court was as to whether under Ext.-B, 2 decimals of land were conveyed to defendant No. 2 or 2 Kathas were conveyed to him. The question as to whether Ext-B was a valid document and conveyed good title of the vended property of defendant No. 2 was not to be gone into, Therefore, there was no occasion to adjust the rights of the parties. The validity or otherwise Ext. B was, therefore out of the sweet of the court below. For these reasons, in my view, the lower appellate court erred in going into the validity or otherwise of Ext. B.

3. On the findings that 2 Kathas of plot No. 818 were conveyed to defendant no, 2 under Ext. B, this plot also cannot be partitioned.

4. In the result the decree passed by the lower appellate court is set aside and that of the trial court is restored with the modification that the whole of plot No. 818 belongs to the defendants and the plaintiffs have no share in that plot. The appeal is accordingly allowed. The parties will bear their own costs.