

(1979) 08 PAT CK 0017
In the Patna High Court
Case No : Civil Revision No. 870 of 1978

Secretary, Bihar State Sunni Waqf Board	APPELLANT
Vs	
Leela Devi and Others	RESPONDENT

Date of Decision : 01-08-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11
Waqf Act, 1954 — Section 1, 57(3)

Citation : AIR 1980 Patna 141

Hon'ble Judges : B.P. Jha, J

Bench : Single Bench

Advocate : S.S. Asghar Hussain and Abdus Salam, for the Appellant; C.B. Sahay and Deogovind Prasad, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Jha, J.—In a civil revision petition, the Secretary of the Bihar State Sunni Waqf Board (hereinafter referred to as "the Waqf Board") has challenged the validity of the Order dated 15th April, 1978, passed by the Lower Appellate Court.

2. The relevant facts are these:

The plaintiff-decree-holder (opposite party No. 1) filed Title Suit No. 127 of 1962 in the Court of the Second Munsif, Arrah. The suit was decreed in favour of the plaintiff. The judgment and decree of the trial court were affirmed in Title Appeal No. 94 of 1967 by judgment and decree of the appellate court dated 9th December, 1976. The judgment and decree of the lower appellate court were also affirmed by the High Court in Second Appeal No. 29 of 1977 by order dated 27th January, 1978.

3. The petitioner-Waqf Board filed an application under Sub-section (3) of Section 57 of the Wakf Act, 1954 (29 of 1954) (hereinafter referred to as "the Act") for a declaration that the decree passed in Title Appeal No. 94 of 1967 was void. This petition was filed by the Waqf Board within one month of its coming to

know of such appeal. This petition was filed before the lower appellate court after the order of the High Court dismissing Second Appeal No. 29 of 1977 under Order 41, Rule 11 of the CPC (hereinafter referred to as "the Code") on 27th January, 1978. The petition was filed within one month from the date of the knowledge before the lower appellate court. In any event, the petition was filed after the order of the High Court dismissing the second appeal in limine.

4. The question for consideration in this petition is : Whether the application u/s 57 (3) of the Act is required to be filed before the lower appellate court or before the High Court?

5. In my opinion, such petition u/s 57 (3) of the Act is required to be filed in the High Court. At this stage, it is relevant to quote Sub-sections (1) and (3) of Section 57 of the Act which run as follows:

"57. (1) In every suit or proceeding relating to a title to wakf property or the right of a mutawalli, the court shall issue notice to the Board at the cost of the party instituting such suit or proceeding,

XX XX XX XX

(3) In the absence of a notice under Sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the court in this behalf."

6. In this connection, learned counsel of the petitioner has relied on two decisions, namely, one of the Patna High Court and the other of the Andhra Pradesh High Court. In *Batuk Prasad Singh Vs. Ambica Prasad Singh*, , a Division Bench of this Court has held that a decree is prepared even if the appeal is dismissed under Order 41, Rule 11 (1) of the Code. The Division Bench of the Patna High Court was of opinion that if a party intends to amend the decree, then he is required to file an amendment petition before the lower appellate court for the simple reason that it is the substantial decree which is required to be amended. The Division Bench of the Andhra Pradesh High Court in *Annapu Ramanna v. Ponduri Sreeramulu* (AIR 1958 AP 768) has held that a petition for amendment of the decree is required to be filed before the High Court for the simple reason that the decree of the lower appellate court merges with the decree passed by the High Court. The Andhra Pradesh High Court is of opinion that even though an appeal is dismissed in limine under Order 41, Rule 11 (1) of the Code, it amounts to a judgment and decree, and, as such, such amendment petition is required to be filed before the High Court.

7. The ratio decidendi of both the decisions (referred to above) is that the order passed by the High Court under Order 41, Rule 11 (1) of the Code is a decree. In the present case, the Waqf Board intends to get the decree set aside by filing a petition u/s 57 (3) of the Act. According to both these decisions, the order passed under Order 41, Rule 11 (1) of the Code is a decree. In the present case, the petitioner filed an application u/s 57 (3) of the Act to set aside the decree of

the lower appellate court. Even if the decree of the lower appellate court is set aside, the decree of the High Court remains intact and, therefore, no purpose will be served to the petitioner in filing a petition u/s 57 (3) of the Act before the lower appellate court. It is also an admitted case that the petitioner filed such a petition after the High Court dismissed the appeal under Order 41, Rule 11 (1) of the Code. If it is so, the petitioner is required to file such a petition in the High Court and not before the lower appellate court. If there would have been no order under Order 41, Rule 11 (1) of the Code, then certainly the petitioner was entitled to file such a petition before the lower appellate court; but so far as present case is concerned, the order passed under Order 41, Rule 11 (1) of the Code is also a decree and, therefore, he is required to file such a petition before the High Court u/s 57 (3) of the Act and not before the lower appellate court.

8. The provisions of the Act have been made applicable to the State of Bihar since 12th April, 1973 and not before that. In the present case, the appeal and the second appeal were dismissed after coming into effect of this Act. Hence, the petitioner is entitled to file such a petition before the High Court and not before the lower appellate court. The scheme of the Act is that no suit shall be instituted against the Board until the expiration of two months next after a notice in writing has been delivered at the office of the Waqf Board. Section 57 (1) of the Act provides that in every suit or proceeding relating to a title of wakf property or the right of a mutawalli, the court shall issue notice to the Board. If no notice has been issued to the Board u/s 57 (1) of the Act, any decree or order passed in the suit or proceeding shall be declared void, provided the Board files such a petition for setting aside the decree within one month from the date of knowledge of such suit or proceeding. Therefore, in my opinion, the order passed by the High Court under Order 41, Rule 11 (1) of the Code on 27th January, 1978 in Second Appeal No. 29 of 1977 is the main decree which can be set aside by the High Court. The High Court can set aside the decree of the lower appellate court as well. The lower appellate court cannot set aside the decree passed by the High Court under Order 41, Rule 11 (1) of the Code. Hence, in my opinion, the petition u/s 57 (3) of the Act must be filed in the High Court and not before the lower appellate court.

9. In the result, the petition is dismissed and the impugned order dated 15th April, 1978, passed by the lower appellate court is upheld. There will be no order as to costs.