

(2006) 04 PAT CK 0023

In the Patna High Court

Case No : Miscellaneous Appeal No. 141 of 1999

Shiv Kumari Devi and Others

APPELLANT

Vs

Birendra Singh and Others

RESPONDENT

Date of Decision : 10-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 25

Citation : (2007) 4 PLJR 107

Hon'ble Judges : Syed Md. Mahfooz Alam, J

Bench : Single Bench

Advocate : Prabhu Nath Roy and Ashish Ansu, for the Appellant; Pravin Kumar for the Respondent No. 1, M/s S.P. Srivastava, Rajiv Ranjan and Anil Kumar for Respondent Nos. 12 to 14, for the Respondent

Final Decision : Dismissed

Judgement

S.M.M. Alam, J.—This miscellaneous appeal has been preferred against the order dated 12.2.99 passed by the IInd Additional District Judge, East Champaran, Motihari, in Title Appeal No. 72 of 1988 whereby he has been pleased to set aside the judgment and decree passed by the learned Sub-Ordinate Judge Vth, Motihari, on 6.5.88 in T. Suit No. 123/82/149/87 and remanded the suit for rehearing with liberty to respondent Nos. 11 to 13 (defendant Nos. 9 to 11) to contest the suit. It has been submitted by the learned Advocate of the appellants that the property in dispute belonged to one Dasrath Rai, who had three sons, namely, Muneshar Raut, Dukhit Raut and Aklu Raut. The branch of Aklu Raut extinguished as his only son, Jhauri Raut, died issueless and thereafter the branch of Muneshar Raut and the branch of Dukhit Raut got half and half share in the property. The plaintiff is the purchaser of the suit property from the branch of Dukhit Raut, whereas, defendant No.1 was the purchaser of the same property from the branch of Muneshar Raut. Further argument was that since the original defendant No.1 was representing the interest of the branch of Muneshar Raut being the purchaser of the property from the heirs of the said branch, as such,

finding of the learned appellate court that the interest of respondent Nos. 11 to 13 (defendant Nos. 9 to 11) was not properly represented is not just and proper. His further argument was that the finding of the appellate court that the notice of the suit was also not properly served upon the respondent Nos. 11 to 13 (defendant Nos. 9 to 11) was also not correct in view of the clear finding of the trial court that in spite of notice served upon the defendant Nos. 9 to 11, they did not appear to contest the suit. Learned Advocate of the appellants further argued that as per the provision contained in Order 41 Rule 23 and Rule 25 of the Code of Civil Procedure, the proper course for the appellate court was to remand the suit on certain points after framing the issue or issues and not to remand the entire suit for fresh trial. In support of his argument, learned Advocate of the appellant has placed reliance upon the decision reported in AIR 1967 Patna page 377 (Chhatar Mahto vs. Chito Mahto).

2. On the other hand, contention of the learned advocate of the respondents is that the finding of the appellate court is correct and in accordance with law. The respondent Nos. 11 to 13 are necessary parties to the suit and though they were made party to the suit but no notice was ever served upon them and the learned first appellate court has rightly observed at para 12 of the judgment that notice/summons were not properly served upon them as provided under Order 5 Rule 20 of the Code of the Civil Procedure and as per the order contained in High Court's circular.

3. The admitted case of both the parties is that the suit property belongs to Dasrath Rai, who died leaving behind his three sons, namely, Muneshar Raut, Dukhit Raut and Aklu Raut. It is also admitted case of both the parties that the branch of Aklu Raut extinguished after the death of his only son, Jhauri Raut. Difference between the parties starts from this point. According to the plaintiffs, after the death of Aklu Raut, the branch of Muneshar Raut got half share in the property of Dasrath Raut, whereas, the branch of Dukhit Raut got half share but according to the case of the defendants, the branch of Dukhit Raut did not get any share of Aklu Raut as Dukhit Raut died before 1956 prior to coming of Hindu Succession Act leaving behind him no male issue as his only son Mahabir had predeceased him and the two daughters, namely, Dhanesri & Dhania were not entitled to inherit and, so, the entire interest of Aklu in the property devolved on Muneshar Raut and thus, the heirs of Muneshar Raut inherited the interest of Aklu Raut in the property. It is admitted position that Ram Khelawan was the only son of Muneshar, who died leaving behind his only son, Narayan Raut. Narayan Raut died leaving behind his widow, Khirodhari, and his three daughters, namely, Yasoda, Kausalya and Parwati. It is also admitted position that only Kausalya and Parwati executed the sale deed in favour of the defendant No.1 and Yasoda and her three sons, Kailash, Uma and Sukhal, who are respondent Nos. 11 to 13 did not execute any sale deed in favour of the defendant No.1 and, therefore, there remains no dispute that the respondent Nos. 11 to 13 have got subsisting right, title and interest in the property left by Dashrath Raut. It would be unjust and improper approach to come to the conclusion that although

respondent Nos. 11 to 13 had subsisting right, title and interest in the property left by Dasrath but even then they choose not to contest the suit in spite of service of notice upon them. The inference will be that proper notice or summons were not served upon them, otherwise, they would have appeared in the suit and contested the claim.

4. In this background, I am of the view that the finding of the learned first appellate court that the notice was not properly served upon the respondent Nos. 11 to 13 (defendant Nos. 9 to 11) is correct. I am also of the view that the judgment of the first appellate court whereby he has set aside the entire findings of the trial court and remanded back the suit to the trial court for fresh hearing is correct and in accordance with law as provided under Order XLI Rule 23-A of the CPC and the decision relied by the learned Advocate of the appellant i.e. AIR 1967 Patna page 377 is not applicable in this case because Rule 23-A of the CPC was added in the year 1976 with effect from 1.2.1977, whereas, the said decision was given in the year 1967.

5. In the result, I do not find any merit in this appeal and, as such, the same is hereby dismissed with direction to the court below to dispose of Title Suit No. 123/1982/149/1987 within a period of six months from the date of receipt/production of a copy of this order giving top priority. Let the lower court records be sent to the court below at once through special messenger at the cost of the respondents.