

(1998) 12 PAT CK 0028
In the Patna High Court
Case No : Civil Revision No. 1520 of 1997

Smt. Savitri Devi

APPELLANT

Vs

Arun Prakash Pandey and Others

RESPONDENT

Date of Decision : 10-12-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 21 Rule 58, Order 21 Rule 90, Order 26 Rule 13, Order 26 Rule 14(2)

Citation : AIR 1999 Patna 125 : (1999) 1 PLJR 168

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : Uma Kant Shukla, Shakti Sumar Kumar and Paras Nath, for the Appellant; Ram Balak Mahto Pandit Jee Pandey, Rita Kumari and Ravi Shankar Prasad, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—This Civil revision application is directed against the order dated 30-7-1997 passed by the Subordinate Judge VI, Motihari, in F.D.-17 of 1976, by which he has allowed the petition of the Intervenor-Opposite party purported to be under Order XXVI, Rules 13 and 14(2) as well as under Order XX, Rule 18 of the CPC (for short "CPC) holding that the preliminary decree dated 19-7-1978 passed in Partition Suit No. 17 of 1976 in favour of the plaintiff is collusive and fraudulent and the final decree proceeding initiated on the basis of the said preliminary decree is collusive and nullity.

2. The facts of the case lie in a narrow compass.

3. The plaintiff-petitioner filed Partition Suit No. 17 of 1976 for a decree of partition in respect of her 2 annas share in the said property. The said suit was contested by the defendant and a contested preliminary decree was passed on 19-7-1978 declaring 2 annas share of the plaintiff in the suit property. By the said decree the share of defendant Nos. 1, 7 and 8 have also been declared to the extent of 10 annas, 2 annas and 2 annas respectively. The Court below on

the basis of the preliminary decree started final decree proceeding and a pleader commissioner was appointed to carve out Takhta of the shares of the respective parties. The pleader commissioner submitted his report dated 30-5-1992 and the same was pending for confirmation before the Court below. At this stage, a petition dated 6-5-1995 was filed on behalf of the Intervenor-Opposite party under Order XXVI, Rules Band 14(2) of the CPC read with Order XX, Rule 18, CPC for declaration that the final decree proceeding is fraudulent, null and void. The Intervenor-Opposite party in his petition stated, inter alia, that he is the auction-purchaser of the suit property which was attached in Execution Case No. 65 of 1987 arising out of Mortgage Suit No. 88/9 of 1977/1980 filed by the State Bank of India against defendant-Opposite party No. 1 and his wife. He further stated that the petitioner and her other two sisters, namely, Opposite party Nos. 7 and 8 filed Misc. Case No. 11 of 1988 u/s 47 of the CPC for setting aside the auction sale. The said petition was dismissed on 27-8-1988 against which the petitioner filed Civil Revision No. 1700 of 1990 before this Court. The petitioner filed rejoinder opposing the prayer of the Intervenor and disclosing the fact that this Intervenor has already filed Title Suit No. 4 of 1994 for the same relief. It was further stated in the rejoinder that the Intervenor has no locus standi to file application in the final decree proceeding because the auction-purchase, sale certificate and delivery of possession in favour of the Intervenor had already been set aside by this Court and confirmed by the Hon'ble Supreme Court. However, the learned Court below after hearing the parties allowed the Intervenor's petition holding that the preliminary decree passed in Partition Suit No. 17 of 1976 is collusive and fraudulent and the final decree proceeding on its basis is also collusive and nullity. Accordingly, the learned Court below by the impugned order dropped the final decree proceeding. Hence this revision application.

4. Mr. Uma Kant Shukla, learned counsel appearing on behalf of the petitioner assailed the impugned order as being illegal and wholly without jurisdiction. Learned counsel firstly submitted that the Court below has committed serious illegality in setting aside the preliminary decree and dropping the final decree proceeding on an application purported to have been filed under Order XXVI, Rules 13 and 14(2) read with Order XX, Rule 18 of the C.P.C. Learned counsel submitted that the application itself was wholly misconceived and not maintainable. Learned counsel further submitted that the Court below has exceeded in the exercise of his jurisdiction and, in fact, sat over the order of the High Court, inasmuch as the petitioner's claim as auction-purchaser has been set aside by this Court and affirmed by the Hon'ble Supreme Court. Learned counsel further submitted that the Court below has failed to consider that the Intervenor-Opposite party No. 9 has already filed Title Suit No. 4 of 1994 for declaration that the decree passed in Title (Partition) Suit No. 17 of 1976 as well as the order passed in C.R. No. 1700 of 1990 is fraudulent and in such circumstance by the impugned order the Court below virtually allowed the relief prayed in the suit. Learned counsel further submitted that against the decree

passed in the Mortgage suit, the petitioner preferred First Appeal No. 150 of 1981 and this Court in terms of the judgment and decree dated 22-5-1988 modified the judgment and decree passed in Mortgage Suit No. 88 of 1977 to the extent that the decretal amount shall be paid by the appellant in instalments. It is contended by the learned counsel that in terms of the judgment and order of this Court the decretal amount has been paid by the petitioner.

5. On the other hand, Mr. Ram Balak Mahto, learned Senior Advocate appearing on behalf of the contesting opposite party No. 9 submitted that the Court below has rightly exercised its jurisdiction in setting aside the preliminary decree and final decree proceeding after recording finding of fact that the preliminary decree was obtained by the petitioner by practising fraud. Learned counsel mainly based his submission on the decision of the Apex Court in the case of S.P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853. Learned counsel further put much stress on the scope of Section 115 of the CPC and contended that in any case this Court in exercise of revisional jurisdiction should not interfere with the impugned order.

6. Before appreciating the rival contentions made by the learned counsel appearing for the parties, it would be proper first to state the admitted facts of the case. Opposite party No. 1 Arun Prakash Pandey and Chandra Devi took loan from the State Bank of India and executed various documents and gave in security some landed properties for repayment of loan. When the loan was not repaid by them, the Bank filed Mortgage Suit No. 18 (or 88 ?) of 1977. Prior to this, sister of Arun Prakash Pandey filed Partition Suit No. 17 of 1976 seeking a preliminary decree for partition in respect of those family properties including the land mortgaged to the Bank. The aforesaid partition suit was decreed in terms of the judgment and decree dated 19-7-1978. A preliminary decree was passed declaring the petitioner's share in the suit property holding that the petitioner and opposite party Nos. 7 and 8 are entitled to 2 annas share each. The mortgage suit filed by the Bank against opposite party Nos. 1 to 6 for recovery of loan was decreed on 22-6-1981. It is pertinent to mention here that in the said mortgage decree it was held that the mortgage deed executed by defendant No. 1 was not binding on the sisters i.e. petitioner and opposite party Nos. 7 and 8 and the same would not affect their interest in the property. The Bank then levied Execution Case No. 65 of 1987 and in execution of the decree 30 acres of land under mortgage was auction sold and was purchased by opposite party No. 9 fixing 7-7-1988 as the date of confirmation of the sale. The petitioner and opposite party Nos. 7 and 8 filed objection in the aforesaid Execution Case No. 65 of 1987 which was registered as Misc. case No. 11 of 1988. At the same time the petitioner and other two sisters filed another petition for stay of confirmation of sale which was rejected by order dated 26-7-1988. Against the said order the petitioner preferred C.R. No. 1555 of 1988 which was admitted and further proceeding of Execution Case No. 65 of 1987 was stayed. However, while the petitioner and her two sisters were pursuing their Civil Revision before this Court, their Misc. Case No. 11 of 1988 was rejected by order dated 27-8-1988 ignoring

the order of stay passed by this Court. Consequently C.R. No. 1555 of 1988 was disposed of as infructuous. The petitioner and opposite party Nos. 7 and 8 had already filed C.R. No. 1700 of 1990 and notices were issued to the opposite parties including opposite party No. 9 in the limitation matter. In the meantime opposite party No. 9 took steps for getting delivery of possession of the land which was auction purchased. Thereafter C.R. No. 1700 of 1990 was allowed by this Court on 21-5-1992 whereby the objection u/s 47, C.P.C. filed by the petitioner was allowed and this Court held that the petitioner and her two sisters are co-sharers of the joint family property and as such any portion of the property could not be attached on auction sale. This Court further held that unless the suit for partition is finally decided and share of opposite party No. 1 is specified the execution of the decree cannot proceed. Against the aforesaid order dated 21-5-1993, two separate SLP bearing SLP No. 10800 of 1992 and SLP No. 8119 of 1992 were filed before the Hon"ble Supreme Court. SLP No. 10800 of 1992 was dismissed on merit and SLP No. 8119 of 1992 was withdrawn. The opposite party No. 9 then having no alternative filed Title Suit No. 4 of 1994 seeking a relief for setting aside the decree passed in Partition Suit No. 17 of 1976 and also for setting aside the order passed by this Court in C.R. No. 1700 of 1990 on the allegation that the decree has been obtained by practising fraud. In that suit opposite party No. 6 also filed an application for temporary injunction which was dismissed by order dated 19-4-1994. Against the aforesaid order opposite party No. 9 filed Misc. Appeal No. 190 of 1994 before this Court which was also dismissed by a reasoned order. Although the aforesaid Title Suit No. 4 of 1994 was pending, opposite party No. 9 filed a petition purported to be under Order XXVI, Rules 13 and 14(2) read with Order XX, Rule 18, CPC for setting aside the preliminary decree and final decree proceeding which was allowed by the impugned order and the preliminary decree has been set aside and final decree proceeding have been dropped.

7. In the light of the aforesaid admitted facts, now I shall consider the legality and validity of the impugned order passed by the Court below.

8. As noticed above the Court below entertain the petition filed by the Intervenor under Order XXVI, Rules 13 and 14(2) and Order XX, Rule 18 of the C.P.C. and set aside the preliminary decree declaring it nullity and void as being obtained by practising fraud. At this stage it is necessary to quote Order XX, Rule 18 of the C.P.C. which reads as under :

Order XX, Rule 18 :

"Decree in suit for partition of property or separate possession of a shareholder.--

(1) Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then;--

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to

be made by the Collector, or any Gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54.

(2) if and in so far as such decree relates to any other Immovable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

9. From bare perusal of the aforesaid provision it is manifest that this provision does not confer any power to a Court to set aside a preliminary decree on the ground that it was obtained by practising fraud. This rule simply provides that when after a preliminary decree, the Court finds that the decree relates to any estate assessed to the payment of revenue to the Government, the Court may direct partition or separation to be made by the Collector. In respect of other properties the Court may pass a preliminary decree declaring the rights of several parties in the estate in the property and give such further direction as may be required.

10. Similarly Order XXVI, Rules 13 and 14(2) of the C.P.C. does not speak about the power of the Court for setting aside the preliminary decree or final decree proceeding. The aforesaid rules reads as under :

Order XXVI, Rule 13 :

"Commission to make partition of immovable property:-- Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree."

Order XXVI, Rule 14(2) :

"The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share, (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same."

11. As noticed above, this provision does not confer any power to a Court to drop a final decree proceeding at the instance of the Intervenor who is not party to that preliminary decree. Curiously enough the Court below assumed jurisdiction ignoring the mandate of the Court and illegally exceeded in the exercise of his jurisdiction ignoring the judgment and order passed by this Court as also the Hon"ble Supreme Court. The Court below has not only exercised his power arbitrariness but also sat over the order of this Court and the Hon"ble Supreme

Court.

12. By way of recapitulation I must state here again that in C.R. No. 1700 of 1990 the Intervenor-opposite party No. 9 was party and this Court disposed of the Civil revision and set aside the auction sale and subsequent proceeding including delivery of possession. The Intervenor-Opposite party then filed two Special Leave petitions in the Hon'ble Supreme Court one of which was dismissed and another was withdrawn. The Intervenor then filed a suit being Title Suit No. 4 of 1994 for setting aside the preliminary decree passed in partition Suit No. 17 of 1976 on the ground that the decree was obtained by practising fraud. In that suit, the Intervenor opposite party made a prayer for temporary injunction which was refused by the Court below. The Intervenor then filed Misc. Appeal being Misc. Appeal No. 190 of 1994 which was ultimately dismissed in terms of the order dated 14-11-1994. In the said order this Court considered the contentions made by the Intervenor appellant on the question of fraud and observed as under :--

"Reverting to the question of fraud, Ram Chandra Singh, appellant, was a party in the said Revision (C.R. No. 1700 of 1990) and the same was allowed by this Court by order dated 21-5-1992 and he also filed SLP No. 8119 of 1992 before the Supreme Court (Ramchandra Singh v. Savitri Devi), which was dismissed as withdrawn on 25-6-1992, and similarly SLP No. 10800 of 1992 filed by the State Bank of India against Smt. Savitri Devi was dismissed on 29-3-1993 on merits. The order of this Court in Revision merged in the order of the Supreme Court dismissing the said Special Leave Petitions. There was no question of fraud in this matter."

learned Judge further observed :

"15. S.P. Chandgaivaraya Naidu v. Jagannath, AIR 1994 SC 853 was based on particular facts, where withholding of vital document relevant to the litigation was held to be fraud committed on the Court. The facts in this appeal are entirely different as no prima facie case, balance of convenience or irreparable injury or fraud was made out. This case is of no assistance to the appellant."

13. Even assuming that the petitioner obtained a decree in a partition suit by practising fraud, for that Intervenor has already filed a regular suit for such declaration. Then pending that suit, I fail to understand how the Court below exercised power under Order XXVI, Rules 13 and 14(2) and Order XX, Rule 18 of the CPC and set aside the preliminary decree. The Court below has completely overlooked the order passed by this Court in the aforesaid appeal filed by the Intervenor-opposite party wherein prayer was made for grant of temporary injunction on the ground that the preliminary decree was obtained by practising fraud.

14. I am of the definite opinion that the application filed by the Intervenor-opposite party under Order XX, Rule 18 and Order XXVI, Rules 13 and 14(2) of the CPC for setting aside the preliminary decree and the final decree proceeding

was totally misconceived, and was not maintainable and further the Court below has no power to set aside the preliminary decree and the final decree proceeding under that provisions on the ground of fraud or misrepresentation.

15. Be that as it may, as discussed above, against the decree passed in the mortgage suit in favour of the Bank, the defendant preferred an appeal before this Court being F.A. No. 150 of 1981. The said appeal was finally heard and disposed of in terms of the judgment dated 20th May, 1988, whereby the mortgage decree was modified by a decree for payment of the decretal amount instalments. In that view of the matter also, the mortgage decree passed by the Court below merged with the decree passed in appeal by this Court. Consequently the impugned order passed by the Court below cannot be sustained in law on this ground also.

16. For all these reasons, this revision application is allowed and the impugned order passed by the Court below is set aside.