

(1939) 08 PAT CK 0019

In the Patna High Court

Suraj Prakash Puri and Another

APPELLANT

Vs

Sant Lal Singh and Others

RESPONDENT

Date of Decision : 22-08-1939

Acts Referred:

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

Citation : AIR 1940 Patna 137

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

Bench : Full Bench

Judgement

Varma, J.—This is an appeal on behalf of the plaintiffs. They had filed a suit for a declaration that the property in dispute was the property dedicated to God Shiva appertaining to the muth in village Mirzapur Damodar of which mohant Ramavatar Puri, defendant 20, was the mahant and that the mokarrari lease executed by him on 25th May 1926 in favour of the defendants first party was invalid and illegal as the mohant had no right to create that mokarrari as it was created without legal necessity. The defendants first party transferred the lease to the defendants second: party. The plaintiff alleged that as mahant Barnavatar Gir had abdicated in his favour on 20th January 1934, he was entitled to file this suit.

2. The reliefs sought in the plaint were that the mokarrari lease should be set aside and that he should be allowed to recover possession of the property valued at Rs. 300 and also for a money decree for a sum of Rs. 800 against the defendants on the ground that the defendants had cut away almost all the trees on the land. The defendants first party did not contest the suit. The suit was mainly contested by the defendants second party, although written statements were filed on behalf of the minor defendants 22 to 24 and on behalf of defendant 15 to 18 and on behalf of one Lachmi Rai. The defence was that the plaintiff had no right to sue because Mahant Ramavatar Gir was still the mahant of the muth and that he had not abdicated. It was also alleged that they had not cut away the trees and the defendants second party urged that if the trees had been cut

away they must have been cut away by the defendants first party before the defendants first party transferred the property to them; that the property which was the subject-matter of the mokarrari lease was the personal property of the mahant and therefore the transfer could not be questioned.

3. The trial Court held that the property appertained to the muth and as in the absence of any legal necessity no permanent lease should be created and as no legal necessity was proved in this case, therefore it held that the transfer was not valid against the successors. He also held in favour of the plaintiff on the question of abdication by Mahant Ramavatar Gir. Therefore he decreed the suit as against the defendants second party for possession and he decreed the suit against the defendants first party for money because he held that the trees were cut away before the defendants first party transferred the mokarrari property to the defendants second party. Then there was an appeal to the lower Appellate Court on behalf of the defendants second party.

4. When the memorandum of appeal was looked at it appeared that the defendants second party had not paid court-fee on the full valuation of the appeal and when their attention was drawn to it they put in a petition praying that the appeal be valued only at Rs. 300 and not at Rs. 1100 which was the amount of the decree. The memorandum of appeal was also allowed to be amended as prayed for by the defendants second party with the result that only the defendants second party remained as appellants on the record and the defendants first party did not appear anywhere on that memorandum of appeal as a party to the appeal. The lower Appellate Court came to the conclusion that there was no abdication by Mahant Ramavatar Gir and therefore the plaintiff's suit was premature because at least for the lifetime of the mahant the alienation was valid and binding.

5. So far as the nature of the property was concerned, he came to the conclusion that there being no presumption that the properties were trust properties, it must be assumed, in the absence of any evidence to the contrary, that the mahant was dealing with them as his personal properties; and then he holds that even if it were not so, the transfers were valid for the lifetime of the mahant. After having come to these findings, he dismissed the suit altogether and it is this order that has chiefly been attacked by Mr. S.M. Mullick appearing on behalf of the plaintiff.

6. Mr. Mullick's argument is that Order 41, Rule 33 although it is very wide should be read along with the provisions of other enactments like the Court-fees Act or the Limitation Act and for this purpose he has drawn our attention to a number of decisions beginning with Rangam Lal v. Chandu (1912) 34 All 32 where a Bench consisting of three Judges held that the words of Order 41 Rule 33 are no doubt very wide; but they remarked as follows:

The words are no doubt very wide, but we think that care and judicial discretion must be used by Appellate Courts in the exercise of the powers conferred by the

rule. In a proper case the Court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule. We think, however, that one principle may be safely stated. The Courts in the exercise of the powers conferred by Order 41, Rule 33, should not lose sight of the other provisions of the CPC itself, nor of the Court-fees Act nor of the law of limitation.

7. Now this decision has been referred to in some of the decisions of our own High Court, for example, in *Kesho Prasad Singh Vs. Narayan Dayal and Others*, where Dawson-Miller C.J., reiterated the remark that although the provisions of Order 41, Rule 33 are very wide, he remarked that the object of that order is, speaking generally, to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court, unless it is necessary in the interests of justice to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before us then it seems to me that the Appellate Court has no right whatever to interfere.

Their Lordships also referred to the case in *Rangam Lal v. Chandu* (1912) 34 All 32 and also to the decision in *Attorney-General v. Simpson* (1901) 2 Ch D 671. The next Patna case is very much like the case in *Ram Prasad Singh v. Mohan Mandal* AIR (1934) Pat 524 where Mohamad Noor J., has emphasized the fact that Order 41, Rule 33, Civil P.C., is intended to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from that decision of the trial Court, but it ought not to be applied to cases where there has been a distinct and separate decree against those defendants who have not chosen to appeal, it is on the latter part of the observation that I chiefly rely. In the present case, before I go to any other cases, I will just observe that there are two distinct decrees, one against the defendants second party and the other against the defendants first party.

8. The defendants second party, when they filed the appeal were reminded that there was a decree for Rs. 800 more, deliberately avoided to pay court-fee on that amount which was realizable from the defendants first party. The defendants first party did not choose to come before the lower Appellate Court and in these circumstances I am of opinion that no order should have been passed in favour of the defendants first party on this state of the record. The Court could certainly bring the defendants first party on the record under Order 41, Rule 20 and after the proper steps were taken by the defendants first party, he should have passed the orders that he has passed now.

9. On this point I want to make my meaning clear. Supposing the whole decree was passed against the defendants second party instead of themselves and the

defendants first party, and that the defendants second party did not appeal against that amount of money about which the decree was passed against the defendants first party, could the Court as an Appellate Court pass a decree in their favour with regard to the other item that was left out deliberately by the defendants second party? I am of opinion that it could not and here the force of the observation in the cases which I have cited becomes apparent because they emphasize the fact that although the wording of Order 41, Rule 33 gives wide powers to the Court, still it should not be exercised in such a way as to interfere with the provision of other enactments.

10. In this case I may point out the enactment against the provision of which the lower Court's judgment has offended seems to be the Court-fees Act.

The following cases were also cited; *Mt. Chanda Bibi Vs. Mohanram Sahu and Others*, : *Ramlingam Chettiar v. Subramania Chettiar* AIR (1927) Mad 620 and *Mukund Dharman Bhoir Vs. Shantaram Rajo Bhoir and Others*, . On this point the opinion of most of the High Courts is that the view which I have expressed is the real interpretation of Order 41, Rule 33. But as against this Mr. Nirsu Narain Sinha has drawn our attention to two cases, chiefly *Kamalakanta Debnath and Others Vs. Tamijaddin and Others*, . It appears that there it was an appeal against the whole decree and the provisions of Order 41, Rule 4 were referred to, in that connexion. The case that seems to support the view of Mr. Sinha most strongly is *Bhutnath Deb v. Sashimukhi Brahmin* AIR (1926) Cal 1042.

11. Looking at the placitum itself, it does appear that it supports the contention raised by Mr. Sinha that an Appellate Court could pass an order affecting the parties to the suit even if they were not parties to the appeal. But from the judgments it is clear that Page J. has struck a note of warning in the following terms:

Care of course must be taken in each case to see that Rule 33 is not utilized as a mode of evading) the provisions of other statutory rules or orders.

So far as this point is concerned, it seems that there is a good deal of force in the contention of Mr. Mullick. As to what orders we are going to pass, I will indicate later after I have dealt with the second point.

12. The second point is that the lower Appellate Court may be perfectly justified in dismissing the suit as premature because the mahant was still alive; but Mr. Mullick questions the correctness of the finding of the lower Appellate Court that the property was the personal property of the mahant. For this he has drawn our attention to the findings of the trial Court where the trial Court after referring to the various pieces of evidence has also referred to two entries in survey papers. The trial Court said as follows:

The disputed mukarrari land bears C.S. Khata No. 1252, Plot No. 16 measuring 3.41 acres corresponding to R.S. Plot No. 243. The R.S. Khatian Ex. 6(a) shows that the property is a "birit" land. A "birit" land has been defined as a grant or

endowment to a person for his maintenance or for religious or charitable objects; and after referring to another exhibit, he has come to the conclusion that the properties are math properties and not the personal properties of any particular mahant. Mr. Mullick urges that the judgment of the lower Appellate Court being a judgment of reversal, it should have discussed or at least mentioned the evidence upon which the trial Court relied. The lower Appellate Court's judgment is silent with regard to the evidentiary value of these two documents upon which the trial Court has relied. As against this, Mr. Nirsu Narain Sinha urges that as the finding of the lower Appellate Court is a finding of fact and as these two documents contradict each other, it might be that they were not referred to in the course of the arguments and therefore the lower Appellate Court has not referred to them in its judgment.

13. There is a statutory presumption of correctness attaching to the record of rights and when the trial Court had relied upon it as a piece of evidence, the lower Appellate Court should not have come to a finding of its own after ignoring this important piece of evidence altogether. I am therefore of opinion that the finding arrived at by the lower Appellate Court has not been arrived at in a satisfactory manner and in view of the fact that the old mahant was alive at the time the suit was filed, I am of opinion that this question as to whether the property belonged to the math or was the personal property of the mahant did not really arise and should be left open at this stage.

14. But the matter does not end here. Mr. N.N. Sinha, although he appears for the defendants second party (the minor defendants of the first party have however appeared before this Court), has suggested that the defendants first party should be brought on the record and if necessary proper court-fee may be demanded from them; and for this purpose he has referred to the case in Padarath Mahton Vs. Hitan Singh and Others, where it was laid down that the High Court has power in second appeal to add as respondents to the appeal persons who were parties to the suit in the original Court, who were not impleaded as respondents in the lower Appellate Court, although the time in which the appeal might have been preferred as against them has expired. It was also laid down that no question of limitation arose under Order 41, Rule 20, In the present case I feel that the order passed by the lower Appellate Court dismissing the suit even against the defendants first party on the state of the record as it was at the time before him was not right. He could, in he wanted, have brought the defendants, first party on the record under Order 41, Rule 20.

15. I would therefore set aside the order of dismissal of the suit against defendants first party and send back the record of this case to the lower Appellate Court who may add them as parties under Order 41, Rule 20 and the defendants first party will be entitled to file a cross-objection provided they pay the proper court-fee within time and then the matter may be disposed of in accordance with law so far as the defendants first party are concerned. If no cross-objection is presented within time, it will be the duty of the lower Appellate

Court to affirm that part of the decree of the Munsif by which the defendants first party are directed to pay Rs. 800 to the plaintiff.

16. The appeal, however, as against the defendants second party will stand dismissed because we have held that the suit is premature inasmuch as the mahant was alive at the time the suit was instituted. The defendants second party are entitled to their costs of this-second appeal. The defendants first party are entitled to the costs actually incurred; by them in this Court.

Rowland, J.

17. I agree.