

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.279 of 1980

(Against the judgment and decree dated 02.02.1980 passed by 3rd Additional Subordinate Judge, Siwan in Title Suit No.38 of 1971/10 of 1979).

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Jaleshwar Chaudhary & Ors.

.... Defendants-Appellants

Versus

Rambelash Chaudhary & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. B.K.M.Tripathy, Advocate

For the Respondent/s : Dr. Uma Shankar Prasad, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date:19-08-2015

1. The defendants have filed this First Appeal against the judgment and decree dated 02.02.1980 passed by the learned 3rd Additional Subordinate Judge, Siwan in Title Suit No.38 of 1971/10 of 1979 whereby the learned court below decreed the plaintiff's suit in part.

2. The plaintiffs-respondents filed the aforesaid suit claiming partition of his half share in the suit properties described in Schedules. The plaintiff's case in short is that one Mahabir Ahir died leaving behind his two sons, Ramanandan Chaudhary and Ramadhari Chaudhary. The plaintiffs are the descendants of Ramanandan Chaudhary whereas the defendants are the descendants of Ramadhari Chaudhary. Ramadhari Chaudhary also died in jointness. During



lifetime, Mahabir Chaudhary was the karta and after his death, Ramadhari Chaudhary became the karta and on the death of Ramadhari, the defendant No.1 Narsingh Chaudhary i.e. son of Ramadhari became the karta of the family. There was separation between both the branches just three months before the filing of the suit but there had been no partition by metes and bounds.

3. The further case of the plaintiffs is that the joint family properties were very fertile and there was sufficient income out of which some properties were acquired by sale deed and also by Zerpeshgi deed. The Schedule-1 properties are the ancestral property. The properties which were purchased out of joint family income are described in Schedule-2. The homestead properties have been described in Schedule-3 whereas the Zerpeshgi properties have been described in Schedule-4. The other properties with their details and income thereof have been mentioned in Schedule 5 to 7. There is unity of title and possession and the plaintiffs therefore, claimed half share in the suit properties.

4. The defendants filed contesting written statement. Their main case is that in fact, after the death of Mahabir, Ramanandan Chaudhary, the original plaintiff No.1 was the karta. After death of Mahabir, the two sons separated themselves although, there was no partition by metes and bounds. Since the joint family



lands were not fertile and the joint family was facing economic hardship, the defendants went to Calcutta for earning. By their hard labour, they were earning money and out of their savings they were sending the money to Ramanandan Chaudhary, the original plaintiff No.1. Out of the said money, Ramanandan Chaudhary acquired properties by sale deeds and Zerpeshgi deed and thereafter, the defendants returned in the year 1968. When they desired to cultivate their lands separately, some dispute arose and then there was a partition through panchayati between the parties in the month of January, 1968. In this partition, the ancestral property and the properties which were purchased jointly during lifetime of Mahabir Chaudhary were partitioned half and half. Schedule 1(ka) lands to the written statement were allotted to the defendants whereas the lands of Schedule 1(kha) were allotted to the plaintiffs. The properties which were purchased after death of Mahabir Chaudhary were also partitioned wherein the plaintiffs got 1/4th share and the defendants got 3/4th share. The properties allotted to defendants are mentioned in Schedule 2(ka) of the written statement and the properties allotted to plaintiffs are mentioned in Schedule 2(kha) of the written statement. The homestead property i.e. Schedule-3 property were also divided according to the shares. The properties mentioned in Schedule-4 is concerned, it is the case of the defendants that these properties



remained in possession of those persons in whose name, the Zerpeshgi stood. The defendants further denied the existence of Schedule 5 to 7 properties. The defendants also pleaded that some properties have not been included in the suit, as such, the suit is bad for partial partition and further, the lands purchased by the defendants along with the plaintiffs wherein the plaintiffs have got only 1/4th share. In the written statement, the properties belonging to defendants have been shown in Schedule 3(ka) of written statement and the properties belonging to the plaintiffs have been shown in Schedule 3(kha) of the written statement.

5. On the basis of the aforesaid pleadings of the parties, the learned court below framed the following issues:

- I. Whether the suit, as framed, is maintainable?
- II. Whether the plaintiffs have got a valid cause of action for the suit?
- III. Whether the suit suffered for misjoinder and non-joinder of parties?
- IV. Whether the suit is hit by the principles of partial partition and by non inclusion of some of the properties in the suit?
- V. Whether there is unity of title and unity of possession with regard to the suit properties between the parties?
- VI. Whether the suit properties have already been partitioned in the manner as alleged by the defendants?
- VII. Whether the suit properties of Schedules 2 and 4 of the plaint were acquired out of joint family fund?

VIII. Whether the plaintiffs are entitled to the reliefs as claimed by them and, if so, to what extent?

6. After trial, the learned court below came to the conclusion that the defendants failed to prove partition and accordingly, granted decree to the extent of half share in the joint family property. The court below granted 1/4th share in respect of the properties acquired in the name of both the branches jointly. The court below also held that so far Schedule-4 properties are concerned, those are the properties acquired by Zerpeshgi and, therefore, in whose name Zerpeshgi stands, will continue in possession of that land. Accordingly, the learned trial court decreed the plaintiff-respondent's suit.

7. The learned counsel, Mr. B.K.M. Tripathy for the appellants submitted that the court below has misread the evidences and has wrongly recorded the finding that there had been no partition. The defendants adduced overwhelming evidences to prove the fact that there had already been partition between the parties. Further, the witnesses examined on behalf of the appellants have all stated that there had been separation between the parties but the court below misunderstood the word "separation" and held that none of the witnesses had stated that there was partition. Admittedly, since the partition was through punches and no paper was prepared, there was

no question of any documentary evidences arises. Therefore, the court below has wrongly appreciated the oral evidences and wrongly came to the conclusion that there had been no partition. On these grounds, the learned counsel submitted that the appeal be allowed and the plaintiff's suit be dismissed.

8. The learned senior counsel, Dr. Uma Shankar Prasad appearing for the respondents submitted that there is presumption of jointness in Hindu family, therefore, unless the contrary is proved by the defendants by leading cogent evidence that presumption cannot be rebutted by mere denial only. The defendants only pleaded that there had been partition and the witnesses examined have only stated that there had been partition. According to the learned senior counsel, there are joint acquisition in the name of both the parties in 1969 also which clearly indicate that the parties were joint. If in fact, there had been partition, there was no question of acquisition of property in joint name arises. The learned senior counsel further submitted that the court below has wrongly not granted any share in some of the properties covered under Exhibit B/3, B/4, B/5. According to the learned counsel, since the family was joint, all these properties were acquired out of the joint family fund in the name of different members of the family, therefore, the court below should have granted decree to the extent of half share in the

aforesaid properties covered under the aforesaid sale deeds but the court below has wrongly not granted the decree. In such circumstances, in exercise of jurisdiction under Order 41 Rule 33 C.P.C., this Court can grant relief to the respondents although, they have not filed any cross-objection.

9. The learned senior counsel further submitted that many properties have been acquired in the name of the plaintiffs and the defendant's branch but the court below has granted only 1/4th share to the plaintiffs instead of granting half share as claimed by the plaintiffs-respondents. According to the learned counsel, since the original plaintiff No.1 had only one son, his name is mentioned, whereas the names of three sons of Ramadhani Chaudhary were mentioned. This indicates that the properties were purchased jointly to the extent of half and half share to both the branches which has wrongly been misinterpreted by the trial court. On these grounds, the learned senior counsel submitted that the impugned judgment and decree be modified granting half share to the plaintiffs in all the properties.

10. In view of the above submission of the learned counsels for the parties, the following points arises for consideration in this First Appeal:

I. "Whether there is unity of title and possession between the

parties as there had been no partition as claimed by the plaintiffs” or “whether there had already been partition as claimed by the defendants?

- II. “Whether this Court in exercise of jurisdiction under Order 41 Rule 33 C.P.C. can modify the judgment and decree in favour of the plaintiffs-respondents without there being any cross-objection” and “whether the impugned judgment and decree are sustainable in the eye of law?”

Point No.I

11. The simple case of the plaintiffs is that there had been no partition. The defendants admitted the genealogy. It is also admitted that Schedule-1 properties are ancestral properties whereas Schedule-2 properties are purchased properties according to the plaintiffs which stands in the name of different persons and Schedule-3 properties are the homestead property. Schedule-4 properties are the Zerpeshgi properties. According to the defendants, there had already been partition in the year 1968 and prior to that there had already been separation in the year 1945. In support of their respective cases, the parties have adduced oral as well as documentary evidences. From perusal of the statements of the witnesses examined by the plaintiffs, P.W.1 who is plaintiff No.3, P.W.2, P.W.4, who is plaintiff No.1, P.W.5 and P.W.6 all have stated that the parties are joint and that there had been no partition of the joint family properties by metes and bounds. On the contrary, the defendant's witnesses i.e.



D.W.1 has supported the case of the defendant. D.W.5, D.W.6, D.W.7 and D.W.8 all have stated that the defendants and plaintiffs are separate since last 10-11 years. None of these witnesses have stated that there was partition by metes and bounds. The defendant No.1 is D.W.11. So far these oral evidences are concerned, it is oath vs. oath. The presumption of jointness is in favour of the plaintiffs. Here, original plaintiff No.1 is the brother of Ramadhari Chaudhary i.e. father of the defendant. The presumption of jointness between the brothers is stronger and the farther we go from the founder, the weaker is the presumption. According to the defendants, the separation took place in the year 1945 and there was partition by panchayati in the year 1968.

12. We have discussed the oral evidences. The defendants have not produced any documentary evidences in support of the panchayati partition. The plaintiffs have produced Exhibit I, the certified copy of sale deed which is dated 28.12.1967 by which Nagina Chaudhary, the 3rd son of Ramadhari Chaudhary and Ramashish Chaudhary, son of Ramadhari Chaudhary have purchased jointly the land and Exhibit 1/A is the sale deed dated 27.06.1952. The plaintiffs have produced these sale deeds which are in the name of both the branches to show that they were not separate till this period when these two sale deeds were registered. The defendants



claimed that there was separation in the year 1945. It is not their case that even after separation they jointly contributed and then the properties have been acquired. Further, from the documentary evidences of the defendants themselves which is Exhibit B, the sale deed is of the year 1969 i.e. 20.12.1969, Exhibit B/1 is sale deed dated 23.05.1969, it appears that the properties were being acquired by both the parties jointly. It is not the case of the defendants that although, there had been partition, they were contributing jointly and the properties have been acquired. These documentary evidences clearly show that there was no separation in the year 1945. Had there been separation, the parties could not have purchased jointly several properties. Here, it is not a case of single transaction but many acquisitions have been made jointly upto 1969. Had there been partition by metes and bounds in the year 1968, as claimed by the defendants, then also there was no question of any joint acquisition by both the parties. There is no explanation as to how and why they purchased jointly if there had been partition in the year 1968. The only case pleaded is that the defendants were sending the money and the properties were acquired in the names of different persons. In view of the above discussion, I find that there had been no partition between the parties by metes and bounds. The finding of the trial court on this point is, therefore, confirmed.

Point No.II

13. So far the share is concerned, it appears that Exhibit B is the sale deed which stands in the name of Narsingh Chaudhary, Munilal Chaudhary, Nagina Chaudhary who are defendants and Ramashish Chaudhary who is son of Ramanandan Chaudhary. Likewise, Exhibit B/1 is the another sale deed dated 23.05.1969, Exhibit B/6 is sale deed dated 14.09.1961 which are in the name of aforesaid four persons. Now, when there is no specification of contribution in the sale deed, the presumption will be that all of them are the owners to the extent of equal share. Therefore, the learned court below granted 1/4th share with respect to these properties to the plaintiffs. Exhibit B/3 is the sale deed which stands only in the name of defendant No.8. Likewise, the Exhibit B/4 is also in the name of defendant No.8 and Exhibit B/5, the sale deed is in the name of defendant No.1. Therefore, the court below came to the conclusion that in these properties, the plaintiffs have got no share.

14. Admittedly, in this case, although the plaintiffs claimed half share in all these properties, the court below granted only 1/4th share with respect to the properties covered under the aforesaid sale deeds and refused to grant any decree of partition with respect to the aforesaid sale deeds which are exclusively stand in the name of defendant No.1 and defendant No.8. Therefore, so far this part of the

decree of the court below is concerned, it is against the plaintiffs-respondents. Accordingly, the plaintiffs-respondents had the right to challenge this part of the decree by filing separate appeal or by filing cross-objection.

15. Order 41 Rule 22 C.P.C. provides that “any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal.” Here, the decree aforesaid which have been refused to the plaintiff is not finding on an issue rather it is a part decree.

16. So far this provision as contained in Order 41 Rule 22 C.P.C. is concerned, the Hon’ble Apex Court has already settled the matter **in the case of Banarsi and Others v. Ramphal (2003) 9 Supreme Court Cases 606**. The Hon’ble Supreme Court in this decision at **paragraphs 9 to 12** has held as follows:

“9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has



*been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging the finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of the defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross-objection. A right to file cross-objection is the exercise of right to appeal though in a different form. It was observed in *Sahadu Gangaram Bhagade v. Special Dy. Collector, Ahmednagar* that the right given to a respondent in an appeal to file cross-objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross-objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him. Appeal and cross-objection-both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended CPC.*

10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The

difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations: (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent. (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent. (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been

withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.

12. The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross-objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage. The law continues to remain so post-1976 amendment. In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the court unless it has been specifically claimed in the plaint by the plaintiff. Certainly the relief of specific performance is a larger relief for the plaintiff and more onerous to the defendant compared with the relief for compensation or refund of money. The relief of compensation or refund of money is a relief smaller than the relief of specific performance. A plaintiff who files a suit for specific performance claiming compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a



person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary from the abovesaid statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross-objection."

17. In view of the above settled proposition of law, in the present case, the plaintiffs-respondents cannot be allowed to challenge that part of the decree by which the claim of the plaintiffs has been negatived. In other words, in this First Appeal, the decree of the court below cannot be amended without there being any cross-objection, in exercise of jurisdiction under Order 41 Rule 33 C.P.C.

18. The Hon'ble Supreme Court in the aforesaid decision has also at paragraph 15 considered the provision as contained in Order 41 Rule 33 C.P.C. and held that the power is subject to at least three limitations: firstly, the power cannot be

exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. Accordingly, in my opinion, the argument of the learned counsel for the respondents that they are also entitled to the relief under Order 41 Rule 33 C.P.C. is devoid of any merit. Accordingly, I find no force in the submission, as such, this point is answered against the plaintiffs-respondents.

19. In the result, I find no merit in this First Appeal and accordingly, this First Appeal is dismissed.

(Mungeshwar Sahoo, J)

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