

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.408 of 2005

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1. Rajendra Prasad, son of late Sheo Bachan Bhagat, resident of Village – Haranatar, P.S.-Darauli, District –Siwan
 2. (a) Most. Radha Kunwar, wife of late Jagat Narain Prasad.
(b) Vijay Kumar Prasad, son of late Jagat Narain Prasad, resident of Village- Haranatar, P.S.- Darauli, District- Siwan
(c) Kaushal Kishore Prasad, son of late Jagat Narain Prasad, resident of Village- Haranatar, P.S.- Darauli, District- Siwan
(d) Poonam Devi, wife of Shri Anil Kumar Singh, (daughter of late Jagat Narain Prasad) resident of village – Hajpurawa, P.S.- Pachrukhi, District- Siwan.
(e) Dharmashila Devi, wife of Shri Balendra Bhagat (Daughter of late Jagat Narain Prasad) resident of Village- Tarwa Parasia, P.S.-Darauli, District – Siwan.
(f) Nirmala Devi, wife of Shri Bhagwan Das Maurya (Daughter of late Jagat Narain Prasad) resident of Village + P.S.- Khampur, district-Deoriya (Uttar Pradesh)

.... Appellants

Versus

1. (Name deleted since deceased)
2. Gaya Prasad
3. Rameshwar Bhagat
4. Rama Shankar Bhagat
5. Nandji Bhagat
all sons of late Raj Banshi Bhagat, all are residents of Village – Tariwani, P.O.- Tariwan, Via- Done, P.S.-Darauli, District- Siwan.
6. Chhote Lal Bhagat, son of late Raj Banshi Bhagat
7. Smt. Ramawati Kumari
8. Kalawati Kumari
9. Chandrawati Kumari
all daughters of late Raj Banshi Bhagat, all residents of village _ Tariwani, P.O.- Tariwan, Via- Done, P.S.- Darauli, District- Siwan.

..... Defendants-appellants-respondents

10. (name deleted since deceased)
11. Krishna Mohan Nath Tiwari, son of late Brijraj Nath Tiwari
12. Awadhesh Nath Tiwary, son of late Manan Nath Tiwary
13. Vaijnati Devi
14. Nirmala Devi
Both daughter of Manan Nath Tiwari and residents of Village- Khairati, Udho, P.O.-Mattira, Via- Done, P.S.-Darauli, District- Siwan.
15. (name deleted since deceased)

.... Respondent/s

with

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Miscellaneous Appeal No. 938 of 2010

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1. Gaya Prasad
 2. Rameshwar Bhagat
 3. Rama Shankar Bhagat
 4. Nandji Bhagat
 5. Chhote Lal Kushwaha, son of late Raj Banshi Bhagat
all sons of late Raj Banshi Bhagat, all are residents of Village – Tariwani, P.O.-
Tariwan, Via- Done, P.S.-Darauli, District- Siwan
- Appellants

Versus

1. (name deleted)
2. Krishna Mohan Nath Tiwari, son of late Brijraj Nath Tiwari
3. Awadh Kishore Nath Tiwary, son of late Manan Nath Tiwary
4. Vajjnati Devi
5. Nirmala Devi
Both daughter of Manan Nath Tiwari and residents of Village- Khairati, Udho,
P.O.-Mattira, Via- Done, P.S.-Darauli, District- Siwan.
6. Most. Girija Devi, widow of late Shankar Roy
7. Sanjay Singh, son of late Shankar Roy
8. Prahalad Singh, son of late Shankar Roy
respondent nos. 6 to 8 are resident of village-Mura, P.O.-Mathia, P.S.-Darauli,
District- Siwan.
9. Kanti Devi, daughter of Shankar Roy and wife of Rajesh Singh, resident of
Village-Phulwaria, P.O- Phulwaria, P.S.-Bhatpar, District- Deoria (U.P.)
10. Jitendra Singh, husband of Shanti Devi, who was daughter of late Shankar Roy
11. Shailesh Singh
12. Prakash Singh
respondent nos. 11 and 12, minor sons of Jitendra Singh, under the natural
Guradianship of their father Jitendra Singh
13. Anshu Kmari, minor daughter of Jitendra Singh, under the natural guardianship
of her father Jitendra Singh
respondent nos. 10 to 13 are resident of village- Domdih, P.S.- Bhatpar,
District- Deoria (U.P.)

..... plaintiffsrespondents.....

14. Rajendra Prasad
15. (a) Most. Radha Kunwar, wife of late Jagat Narain Prasad.
(b) Vijay Kumar Prasad, son of late Jagat Narain Prasad, resident of Village-
Haranatar, P.S.- Darauli, District- Siwan
(c) Kaushal Kishore Prasad, son of late Jagat Narain Prasad, resident of
Village- Haranatar, P.S.- Darauli, District- Siwan
(d) Poonam Devi, wife of Shri Anil Kumar Singh, (daughter of late Jagat
Narain Prasad) resident of village – Hajpurawa, P.S.- Pachrukhi, District-
Siwan.
(e) Dharmashila Devi, wife of Shri Balendra Bhagat (Daughter of late Jagat
Narain Prasad) resident of Village- Tarwa Parasia, P.S.-Darauli, District –
Siwan.
(f) Nirmala Devi, wife of Shri Bhagwan Das Maurya (Daughter of late Jagat
Narain Prasad) resident of Village + P.S.- Khampur, district-Deoriya (Uttar
Pradesh)
16. Smt. Ramwati Kumari
17. Kalawati Kumari
18. Chandrawati Kumari

respondent nos. 16 to 18 are daughters of late Raj Banshi Bhagat and are resident of Village- Tariwani, P.O.-Tariwani, P.S.-Darauli, District -Siwan

.... Respondents

Appearance :

(In MA No. 408 of 2005)

For the Appellant/s : Mr. Uma Shankar Prasad, Sr. Advocate
Mr. Bhuneshwar Pandey, Advocate

For respondent nos. 1 to 9 : Mr. Dineshwar Prasad Singh, Advocate
Mr. Kamala Kant Tiwary, Advocate

For respondent nos. 10 to 14 : Mr. Chandra Kant, Advocate
Mr. Subhash Patel, Advocate

(In MA No. 938 of 2010)

For appellants : Mr. Dineshwar Prasad Singh, Advocate
Mr. Kamala Kant Tiwary, Advocate

For respondent nos. 1 to 5 : Mr. Chandra Kant, Advocate
Mr. Subhash Patel, Advocate

For respondent nos. 14 and 15, 16 to 18 : Mr. Uma Shankar Prasad, Sr. Advocate
Mr. Bhuneshwar Pandey, Advocate

CORAM: HONOURABLE MR. JUSTICE AKHILESH CHANDRA

ORAL JUDGMENT

Date: 05-02-2015

Heard the parties.

2. These two Appeals preferred against order dated 27th June 2005 in Title Appeal No. 306 of 1970 by the ADJ (FTC-5), Siwan declaring the same abated due to none substitution of heirs of one of the plaintiff respondent Brijraj Nath Tiwari.

3. The brief relevant facts of the case is the property in question, originally belonging to the one Ram Sahai Bhagat whose son and grand-son died, consequently, one deed of gift was brought



into existence in favour of his daughter-in-law Most Maharajiya executed by said Ram Sahai Bhagat. The lady transferred some of the property to one Brijraj Nath Tiwari and Shanker Rai. The authorities of these three were challenged by one Raj Banshi Bhagat and Sheo Bachan Bhagat. Of course, on two different footings, Raj Banshi Bhagat came in as purchaser of same land from Ram Sahai Bhagat and Sheo Bachan Bhagat claimed as his next reversioner giving rise to filing of Title Suit No. 93 of 1965 by three interested persons Most. Maharajiya, Brijraj Nath Tiwari and Shankar Rai, who are none else than here purchaser with respect to distinct lands by different sale deeds.

4. The suit was vehemently contested but ultimately decided in favour of the three plaintiffs denying the rival claims giving rise to filing T.A. N0. 306/70 but that too was filed by Raj Banshi Bhagat and other contesting defendant Sheo Bachan Bhagat did not join as appellant.

5. By lapse of time, one of the plaintiff respondent Brijraj Nath Tiwari died on 15th June 1993 and his only son Manan Nath Tiwari died on 10th June 1994 but no step was ever taken for substitution of heirs of Brijraj Nath Tiwari or even after death of his son who was not made party.

6. One petition of compromise was also filed before

the lower appellate court entered into between the surviving parties but one application was filed there by the counsel representing deceased respondent intimating his death and appeal being abated.

7. It is also to be noticed one that Ram Kailash Bhgat as a purchaser of the land from the deceased respondent Brijraj Nath Tiwari by virtue of sale deeds executed in 1980s tried to intervene and impleaded as one of the respondent by filing the petition dated 19.02.1988. But some how or the other, it was dismissed in default vide order dated 19.06.2002. Thereafter, he again filed another petition with same prayer on 26th August 2003 that is yet to be disposed of. But the lower appellate court after hearing others on the issue of abatement without taking into notice pendency of such petition, filed by the intervenor, claiming himself as a person representing interest of the deceased respondent Brijraj Nath Tiwari, as purchaser of the lands involved, decided the issue against the parties to compromise and declared entire appeal abated.

8. It is brought to the notice by leaned counsel representing other heirs of natural heirs of Brijraj Nath Tiwari respondent nos. 10 to 14 and another plaintiff respondent Shankar Rai respondent no.5 in former appeal that the former appeal is not maintainable since it was preferred by the heirs of Sheo Bachan Bhagat, who did not prefer any appeal in spite of finding against

him that he is not a reversioner of said Ram Sahai Bhagat.

9. It further appears, when on initial hearing such issue was raised before but it could take final shape later appeal was filed by the appellants with a prayer seeking condonation of delay of roughly five years on the ground of improper legal advice.

10. True it is, former appeal is preferred by the respondents, who in spite of a vital finding against did not prefer the appeal but had the right to contest such findings in view of the findings as contemplated under Order XLI Rule 22 and 33 of the Code of Civil Procedure, which read as:-

"22 . Upon hearing, respondent may object to decree as if he had preferred a separate appeal— (1) 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, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[Explanation.—A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

(2) Form of objection and provisions applicable thereto— Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

[***]

(4) *Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.*

(5) *The provisions-relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.*

33 . Power of Court of Appeal— *The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection[and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:*

[Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

11. As stated above, the petition filed by Ram Kailash Bhagat claiming right, title and interest over the said property from one of the plaintiff respondent Brijraj Nath Tiwari, it was incumbent upon the Court below to take into consideration such a prayer and decide whether he represents the interest of deceased respondent or not ? But the said petition cannot be left abundant without any finding and declaring the appeal abated as a whole.

12. It has also come into notice that before making

efforts to intervene in instant appeal the said self-claimant here by virtue of transfer by deceased respondent Brijraj Nath Tiwari has already filed T.S. No. 30 of 1992 which is still pending before the trial court for proper adjudication.

13. It is a matter of shock and surprise that litigations are continuing for different decades had the lower appellate court taken into consideration filing of such application by the intervener and simultaneously contested position could have been different. But in absence whereof order impugned cannot be permitted to sustain. Consequently, order impugned dated 27th June 2005 in Title Appeal No. 306 of 1970 by the ADJ (FTC-5), Siwan is set aside.

14. The court below is directed to decide the appeal on all issues along with such application. Parties are directed to appear before the lower appellate on or before 9th March 2015. The matter should preferably be decided within a period of three months from the date of communication of order and receipt of records.

15. The Courts below are further directed to also examine the possibilities to decide the appeal as well interlinked Title Suit No. 30 of 1992 between the parties, preferably by amicable settlement especially in view of the time elapsed and the sufferings.

16. Registry is directed to transmit the Lower Court Records within the period.

17. With all such directions, both the Appeals including pending interlocutory application, if any, stand disposed of.

18. Parties shall bear their own costs.

(Akhilesh Chandra, J)

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