

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.46 of 2008



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1. Mostt. Rizwana Perween, wife of late S.M. Shamim Ahmad.
 2. Syed Tanweer Ahmad
 3. Kasif Ahmad @ Syed Asif Ahmad, both sons of late S.M. Shamim Ahmad all residents of Pili Kothi, Raman Road P.O. Bankipur, P.S. Peerbahore, District-Patna.

.... Appellant/s

Versus

1. Zaffar Ahsan@ Zaffir Ahsan son of late Munir Ahsan and Late Most. Bintul Fatma.
2. Nayyer Ahsan, son of late Naiyyer Ahsan and late Most. Bintul Fatma, both residents of Rajendra Nagar, Road No. 8 P.S. Kadam Kuan, P.O. Rajendra Nagar, District-Patna.
3. Sarwar Ahsan son of late Munir Ahsan and Late Mostt. Bintul Fatima.
4. Manawar Ahsan son of late munir Ahsan and late Mostt. Bintul Fatima.
5. Quisen Ahsan son of late Munir Ahsan and late Mostt. Bintul Fatima.
6. Amir Jahan wife of Prof. Zaya Ahmad daughter of late Munir Ahsan and late Most. Bintul Fatma.
7. Farhat Naim wife of late Naseem Ahmad and daughter of late Munir Ahsan and late Most. Bintul Fatma heirs and legal representative of late Mostt. Bintul Fatima all resident of village-Ugawan P.S. Asthawan District-Nalanda and presently residents of Aman Nursing Home, Anisabad P.O. Anisabad, P.S. Gardanibagh, District-Patna.
8. Syed Shafi Ahmad husband of late Most. Bibi Khursheed Fatma and son of Syed Abu Ahmad.
9. Syed Shakil Ahmad son of late Most. Bibi Khursheed Fatma and Syed Shafi Ahmad.
10. Bibi Nilofer Ahsan @ Nilam wife of Chunnu.
11. Bibi Nikahat Suleiman daughter of late Most Bibi Khursheed Fatma and Syed Shafi Ahmad.
12. Bibi Nahid Jamal @ Dolly wife of shahid heirs of legal

representative of late Khursheed Fatma, all residents of Deep Ganga Apartment, Flat No. 101 Ashok Raj Path, Patna, P.O. Bankipur, P.S. Peerbahore, District-Patna.

13. S.M. Mahtab Ahmad son of late S.M. Aftab Ahmad, resident of Pili Kothi, Ramna Road, P.O. Bankipur, P.S. Peerbahore, District-Patna.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Md. Anisur Rahman

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL ORDER

19 22-05-2015

Heard Mr. Raghib Ahsan, the learned senior counsel appearing on behalf of the appellants and Mr. Waliur Rahman, the learned counsel appearing on behalf of the plaintiff-respondents.

The defendants in the suit are the appellants in this appeal against the judgment and decree of affirmance of the final decree passed in favour of the plaintiffs.

At the out set, it would be pertinent to take into notice that by earlier order dated 19.05.2009 the prayer of the appellants to hear this appeal along with S.A. No. 39 of 2008 on the ground that the said appeal also arose out of the same judgment and decree, was allowed and both the appeals were directed to be placed for hearing under Order 41 Rule 11 C.P.C. By the said order, the prayer of the



appellants to stay the further proceeding of the Execution Case No. 19 of 2006 was also allowed and the notice was issued to the respondents in the interlocutory application for stay. It transpires from the later order sheet that this appeal stood dismissed for default for non-compliance of the direction as contained in the order dated 19.05.2009. However, the Second Appeal No. 39 of 2008 was placed for hearing under Order 41 Rule 11 C.P.C. and has been dismissed by the judgment and order dated 04.09.2013. The present appellants were also respondents in Second Appeal No. 39 of 2008 and it was on their prayer that the Second Appeal No. 39 of 2008 was directed to be heard with this appeal. But it does not appear from the records nor it is the case of the present appellants that this fact was brought to the notice of the court when the Second Appeal No. 39 of 2008 was taken up for hearing under Order 41 Rule 11 C.P.C. It is further apparent from the records that the step for restoration of the present appeal had been taken only after the dismissal of the Second Appeal No. 39 of 2008. The lack of due diligence on the part of the appellants is writ



large and in this backdrop this Court is not inclined to grant indulgence to the appellants by accepting the prayer for adjournment of this appeal sine die in view of the pendency of the special leave petition filed by the appellants of the Second Appeal No. 39 of 2008 before the Apex Court particularly in view of the fact also that this appeal is pending since 2008 and arises out of a final decree passed in the suit for partition of the year 1959.

In order to appreciate the submissions on behalf of the appellants, it would be apt to take into notice the facts in brief along with the different orders passed by the courts which appear from the materials on record. The plaintiff-respondents filed the suit for partition against their brother S.M. Aftab Ahmad. The suit property consisted of agricultural land at village-Moujipur and houses at village Bahpura and Patna. During the pendency of the suit, the defendant S.M. Aftab Ahmad died and his sons namely S.M. Shamim Ahmad and S.M. Mahtab and his widow Syeda Khatoon were substituted as defendants nos. 1, 3 and 2 respectively. The partition suit was decreed and a



preliminary decree of partition holding the plaintiffs to be entitled to half share in the suit property was passed. The preliminary decree stood affirmed up to the Apex Court in the appeals filed by the defendants with the modification which was done at the first appellate stage by this Court to the extent that 50 acres of land in village-Moujipur in the name of S.M. Aftab Ahmad was excluded from the suit property declaring that the plaintiffs could not have a share in the same. This fact has been accepted by the present appellants in para-10 of the memo of this appeal. The final decree proceeding thereafter was initiated and the pleader commissioner, appointed to carve out the separate Takhta in accordance with preliminary decree, submitted his report. It would be seemly to take into notice that during the final decree proceeding, the defendant no. 1, S.M. Shamim Ahmad died and was substituted by the his heirs who are the appellants in the present appeal. The defendant no. 2 Syeda Khatoon, one of the substituted heirs of the deceased defendant, also died and her name was expunged as her heirs and legal representatives were already on

record.

The defendants including the present appellants raised their objections to the report of the Pleader Commissioner. Those objections mainly related to the adjustment of the parts of the suit land transferred by the plaintiffs in his share. The defendant no. 3, S.M. Samim Ahmad, however, also filed a petition on 25.08.2003 praying for a direction to the Pleader Commissioner to carve out a separate Takhta of his share from the Takhta allotted to the widow and sons of S.M. Shamim Ahmad (defendant no. 1 (a) to 1 (d)). The defendant no. 1 (a) to 1 (d) filed their rejoinder to the petition dated 25.08.2003 contesting the prayer of the defendant no. 3 on the basis of the case of oral hibba by the deceased defendant no. 2 Syeda Khatoon and also oral partition.

The trial court, after considering the objections of the defendants to the report of the Pleader Commissioner, rejected the objections and confirmed the report of the Pleader Commissioner. The trial court took into notice that the objection of the two sets of the defendants primarily



related to the transfer of more land by the plaintiffs than their share. It has been further found that as those transfers by the plaintiffs had been made with regard to the property of village-Moujipur which stood excluded from the suit property, the claim of adjustment as made out in the objections by the two sets of defendants had no merit. The trial court also declined the prayer of the defendant no. 3 with regard to carving out his separate Takhta in the suit property.

It would be condign here to mention that the defendant no. 3 S.M. Mahtab preferred C.R. No. 1174 of 2006 before this Court against the aforesaid order dated 24.06.2006 whereby his petition dated 25.08.2003 for carving out a separate Takhta of his share was rejected. By order dated 10.05.2007, the revision application was allowed with a direction to the learned court below to carve out separate Takhta of defendant no. 3 and defendant no. 1 (a) to 1 (d) in accordance with law after considering the issue of oral hibba and oral partition as raised by the parties. From the perusal of the order dated 10.05.2007 in C.R. No. 1174 of



2006 (a copy of which has been annexed with I.A. No. 2071 of 2015), it appears that a definite finding was recorded by this Court that “the preliminary decree or the final decree with respect to the plaintiffs’ share would not be touched in the process of carving out the shares of the defendants among themselves”. In the last portion of the said order again the same restriction was reiterated that the court below would not in any manner touch the preliminary and final decree so far as it related to the share of the plaintiffs.

In the background of aforesaid facts, now the submission on behalf of the appellants is to be examined in this second appeal the scope of which in the case of final decree according to the well laid principles, is very limited. In this regard it would be apt to notice the two Bench decisions of this Court in the case of **Jugeshwar Singh Vs. Rijhan Singh, A.I.R. 1938 Pat. 104** and in the case of **Ambika Bhawani Devi Vs. Sm. Gouri Kumari Devi, A.I.R. 1947 Pat. 271**. Their lordship in Jugeshwar Singh (supra) has ruled as follows:-

“.....A first appeal to this Court from



the order of the Subordinate Judge is really in the nature of a second appeal in which only questions of law and principle can be considered. It is quite impossible for the Court to go down to the area in question, inspect the land, hear the various objections and in fact review the decision of the Commissioner on fact. The power to review the decision of the Commissioner on the facts is a matter for the Subordinate Judge, and his view of the facts ought to be final as a first appellate decision on fact. The High Court should only interfere when it is shown that the Judge in his decision has gone wrong on some question of principle in making the final allotment and in drawing up the decree, and I think much money and trouble would be saved to parties to partition suits if they realize that principle and they would in the

*majority of cases refrain from coming
before the High Court in an attempt to
upset the allocation of the takhtas.....”*

The same view was reiterated in **Ambika Bhawani Devi** (supra).

After perusal of the judgments of both the courts below and considering the submissions, it is manifest that by order dated 10.05.2007 passed in C.R. No. 1174 of 2006, this Court has directed the learned court below to decide the issue of oral hibba and oral partition as raised by the defendants inter se along with the claim of the defendant no. 3 to carve out his separate share but in the process not to touch the preliminary decree and final decree in favour of the plaintiffs. This order has attained finality between the parties as it is not the case of the appellants that this order has been overturned, modified or varied in any manner subsequently. As such, the submission that the appellate court below should have considered the issue of oral hibba and partition has now no substance after the order and direction of this Court in the civil revision application as



above. The other surviving objection related to the allegation of excess land sold by the plaintiffs in Village Moujipur and the prayer for adjustment of the same in the Takhta of the plaintiffs in the final decree. The trial court turned down this objection on the ground that the transfer/alienations alleged to have been made by the plaintiffs were with regard to the property at village-Moujipur which stood excluded from the suit property by the judgment and decree in the first appeal against the preliminary decree.

As above-noticed, this fact of exclusion of the property of village-Moujipur has also been accepted by the appellants in paragraph 5 at page 5 of this memo of appeal. It has, thus, been rightly held by the trial court that the defendants (appellants) in their objection had sought variation/adjustment in the Takhta of the plaintiffs on the basis of the sale of the property by them which was not the subject matter of the suit and such adjustment could have been made only with regard to the suit properties included in the preliminary decree. This Court has not been

persuaded to find error or illegality in this finding. It does not appear from the judgment of the trial court that on the basis of any other objection, the variation of Takhta allotted to the plaintiffs has been sought by the appellants. Both the courts below have considered the entire materials on record including different orders passed at the instance of the appellants before rejecting the objection of the appellants. The history of this litigation unmistakably demonstrates the ways and means adopted by the defendants to elongate the proceeding and deprive the plaintiffs, the fruits of the decree. This Court is of the firm opinion that the dispute now deserves a quietus.

For the aforesaid reasons and discussions, this second appeal is dismissed as no substantial question of law is arising for consideration in this appeal.

(V. Nath, J)

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