

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.502 of 1977

Against the judgment and Final Decree dated 5.4.1977 passed by 1st
Subordinate Judge, Muzaffarpur in Partition Suit No. 11 of 1968

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Umesh Pd. Thakur & Ors

Defendants.... Appellant/s

Versus

Nand Kumar Singh & Ors

Plaintiffs.... Respondent/s

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Appearance :

For the Appellant/s : Dr. Harendra Kumar Singh, Adv.

For respondent no.1 Mr. Arun Sharma, Adv.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V JUDGMENT

Date: 26-04-2016

The defendants have filed this First Appeal against the judgment and Final Decree dated 5.4.1977 passed by the learned Subordinate Judge- 1st, Muzaffarpur in Partition Suit No. 11 of 1958 whereby the learned court below accepted the Pleader Commissioner's report as there was no objection to it.

2. The learned counsel for the Appellants submitted that while passing the final decree, the court below has not considered the settled principle of partition and simply accepted the Pleader Commissioner's report without assigning any reason. The parties were allotted different chaks in Chakbandi preceding but the Pleader Commissioner upset the said chaks. The court below would not have accepted the report of the Pleader Commissioner as it was filed belatedly and without following the direction of the Court given in the preliminary judgment and decree. A fictitious map was prepared and

was filed without giving the correct picture of physical feature of the agricultural land.

3. The learned counsel further submitted that the allotment of Takhta is wrong, mala- fide as the Pleader Commissioner was in collusion with the plaintiffs. He has not made correct valuation of different plots and has also not considered the convenience of the parties. All road side lands have been allotted to the plaintiffs causing loss to the defendants.

4. On the other hand the learned counsel for the respondents submitted that, in fact, all these points are being raised for the first time before this Court without any basis. No objection was filed by the appellants in the court below. Moreover, except general plea nothing has been brought on record by the appellants to substantiate his case. On these grounds the learned counsel submitted that the judgment and decree cannot be interfered with. As such First Appeal is liable to be dismissed.

5. In view of the above submissions of the parties, it appears that the only point which arises for consideration in this First Appeal is whether the judgment and decree is sustainable in the eye of law or not ?

6. It is admitted fact that the Pleader Commissioner has submitted his report before the Court below and thereafter sufficient time was granted to the parties for filing objection. No objection was



filed by the appellants. Ultimately, on 25.2.1977 the court below accepted the Pleader Commissioner's report and directed that final decree be prepared and the report shall form part of the decree. From perusal of the Pleader Commissioner's report it appears that the Pleader Commissioner visited the spot and then a draft Raibandi was prepared. The parties were invited to file objection to the Raibandi. Only defendant no.3 filed objection. After hearing both the parties on objection, the Raibandi was made final after making the valuation of the plots. The parties also filed their petitions showing their convenience and then the Pleader Commissioner heard them and considered the convenience of the parties and has made the allotment of the lands to the different parties.

7. After acceptance of the Pleader Commissioner's report the defendants filed objection to the said Pleader Commissioner's report on 8.3.1977 and prayed for recall of the same. Defendant nos. 3 and 4 filed separate objection on 22.3.1977. It is settled principle of law that the decree cannot be recalled. Therefore, no order was passed by the court below. So far the objections raised by the appellants are concerned; all these points are related to the fact. To prove the fact, as alleged by the appellants, there is no evidence on record. Moreover, when there was no objection there was no question of adducing the evidence. In such view of the matter on these general grounds it is

very difficult to record any finding regarding the convenience of the parties or valuation of the property or allotment in the road side.

8. The learned counsel for the appellants relied upon the decision of this court in the case of Rajesh Chandra Jha –v- State of Bihar, reported in 2016(1)PLJR 228, Jitendra Singh & ors –v- Ram Naresh Singh & ors reported in 2016(1) PLJR 391 and State Bank of Hyderabad –v- Rabo Bank reported in 2015 (4)PLJR 473.

9. From perusal of the decisions I find that none of the decisions is applicable in the present case.

10. A Division Bench of this Court in **AIR 1938 Patna 104 (Jugeshwar Singh-v- Rijhan Singh)** held as follows:

“ A first appeal to the High Court from a final decree in a Partition Suit is really in the nature of a second appeal in which only questions of law and principle can be considered and the High Court should only interfere when it is shown that the lower court in its decision has gone wrong on some question of principle in making the final allotment and in drawing up the decree”

11. In the present case, as stated above, whatever objections were raised before the Commissioner were all questions of fact. The Pleader Commissioner resolved all the questions of fact and then prepared the Takhta considering the principles of convenience. Thereafter the report was filed. No objection was raised before the

trial court prior to acceptance of Pleader Commissioner's report. Therefore, now on the ground that subsequently objections were filed it will not affect the merit of the Pleader Commissioner report or the final decree itself. After such a long period now it will be futile to remand the matter in the name of justice that too for the purpose of allowing the appellants to adduce the evidence in support of his grounds which are raised before this Court. Whatever grounds are raised are questions of fact and dependent on evidence.

12. In view of the above discussions I find that there is nothing on the record to substantiate the case before this Court by the appellants. The grounds are all general grounds which are dependent on evidence. This Court cannot presume the fact without there being any pleading or evidence to that effect. Except the question of fact, no question of law has been raised by the appellants. Therefore in view of the Division Bench decision I find no reason to interfere with the final decree passed by the court below.

13. In the result, this First Appeal is dismissed. In the facts and circumstances of the case, the parties shall bear their own costs.

(Mungeshwar Sahoo, J)

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