

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.731 of 2011

- =====
1. PRADEEP SINGH @ JAMUNA SINGH, SON OF LATE RAMSUNHAWAN SINGH.
 2. BINOD KUMAR
 3. RITESH KUMAR @ RITESH KUMAR SINGH.
 4. TUNNE SINGH @ TUNA JI
ALL SONS OF PRADEEP SINGH @ JAMUNA SINGH AND ALL RESIDENTS OF VILLAGE+P.O.-GOSHALDIH & P.S.-SURAJPURA, DISTRICT-ROHTAS.

.... APPELLANT/S

VERSUS

1. MANIRAJ SINGH SON OF LATE RAMSUHAWAN SINGH.
2. ASHOK KUMAR SINGH
3. KAMLESH KUMAR SINGH
BOTH SONS OF MAHIRAJ SINGH.
4. NEERAJ KUMAR SINGH, SON OF ASHOK KUMAR SINGH
5. GUNJAN PRAKASH SINGH, MINOR SON OF ASHOK KUMAR SINGH, UNDER THE GUARDIANSHIP OF ASHOK KUMAR SINGH FATHER AND NATURAL GUARDIAN. ALL R/O VILLAGE-SHSALDIH, P.O. & P.S.-SURAJPURA, DISTRICT-ROHTAS.
6. MOST KAMALA DEVI, WIFE OF LATE DILIP KUMAR SINGH RESIDENT OF VILLAGE-SUSHALDIH, P.O. & P.S.-SURAJPURA, DISTRICT-ROHTAS.
7. RAMESH KUMAR SINGH.
8. AKHILESH KUMAR SINGH
9. ANIL KUMAR SINGH
10. ARUN KUMAR SINGH
ALL SONS OF DIILIP KUMAR SINGH
11. BIRENDRA KUMAR
12. HARENDRA KUMAR
BOTH MINOR SONS OF ANIL KUMAR SINGH UNDER THE GUARDIANSHIP OF ANIL KUMAR SINGH FATHER AND NATURAL GUARDIAN AND ALL ARE R/O VILLAGE-SUSHALDIH, P.O. & P.S.-SURAJPURA, DISTRICT-ROHTAS.
13. DEEPAK KUMAR
14. PRADEEP KUMAR
BOTH SONS OF SATYANARAYAN SINGH & R/O VILLAGE-JITPURA, P.S.-PIRO, DISTRICT-BHOJPURA.
15. JAGESHWAR SINGH
16. RAMESHWAR SINGH
BOTH SONS OF RAM BACHHAN SINGH, R/O MOHALLA-NEW SIDHANK, DALMIYANAGAR, P.S.-DEHRI, DISTRICT-ROHTAS.
17. BIMLA DEVI.
18. MATURA DEVI
BOTH DAUGHTERS OF LAKSHMAN SINGH & R/O-VILLAGE-DAYALGANJ, P.O. & P.S.-RAJPUR, DISTRICT-ROHTAS.
19. RANGBAHADUR SINGH
20. SRINIWAS SINGH
21. KAMLA DEVI
22. BANSIAY DEVI
23. SUMITA DEVI

24. SUNITA

ALL SONS AND DAUGHTERS OF RAM SINGHASAN SINGH, R/O-
VILLAGE-CHHOPRA, P.O. & P.S.-AKORHIGOLA, DISTRICT-ROHTAS.

**25. LAKSHMINA DEVI, W/O-NATHUNI SINGH, R/O-VILLAGE-MOJRORH,
P.O. & P.S.-MOJRORH, P.S.-MOKHA, DISTRICT-ROHTAS.**

.... RESPONDENT/S

with

=====

Miscellaneous Appeal No. 732 of 2011

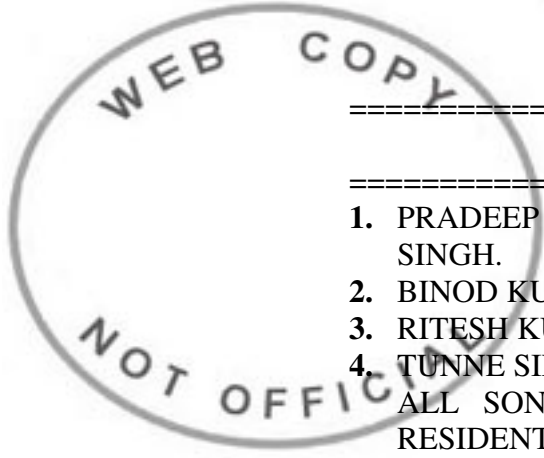
=====

1. PRADEEP SINGH @ JAMUNA SINGH, SON OF LATE RAMSUNHAWAN SINGH.
2. BINOD KUMAR
3. RITESH KUMAR @ RITESH KUMAR SINGH.
4. TUNNE SINGH @ TUNA JI
ALL SONS OF PRADEEP SINGH @ JAMUNA SINGH AND ALL
RESIDENTS OF VILLAGE+P.O.-GOSHALDIH & P.S.-SURAJPURA,
DISTRICT-ROHTAS.

.... Appellant/s

VERSUS

1. MANIRAJ SINGH SON OF LATE RAMSUHAWAN SINGH.
2. ASHOK KUMAR SINGH
3. KAMLESH KUMAR SINGH
BOTH SONS OF MAHIRAJ SINGH.
4. NEERAJ KUMAR SINGH, SON OF ASHOK KUMAR SINGH
5. GUNJAN PRAKASH SINGH, MINOR SON OF ASHOK KUMAR SINGH,
UNDER THE GUARDIANSHIP OF ASHOK KUMAR SINGH FATHER
AND NATURAL GUARDIAN. ALL R/O VILLAGE-SHSALDIH, P.O. &
P.S.-SURAJPURA, DISTRICT-ROHTAS.
6. MOST KAMALA DEVI, WIFE OF LATE DILIP KUMAR SINGH
RESIDENT OF VILLAGE-SUSHALDIH, P.O. & P.S.-SURAJPURA,
DISTRICT-ROHTAS.
7. RAMESH KUMAR SINGH.
8. AKHILESH KUMAR SINGH
9. ANIL KUMAR SINGH
10. ARUN KUMAR SINGH
ALL SONS OF DIILIP KUMAR SINGH
11. BIRENDRA KUMAR
12. HARENDRA KUMAR
BOTH MINOR SONS OF ANIL KUMAR SINGH UNDER THE
GUARDIANSHIP OF ANIL KUMAR SINGH FATHER AND NATURAL
GUARDIAN AND ALL ARE R/O VILLAGE-SUSHALDIH, P.O. & P.S.-
SURAJPURA, DISTRICT-ROHTAS.
13. DEEPAK KUMAR
14. PRADEEP KUMAR
BOTH SONS OF SATYANARAYAN SINGH & R/O VILLAGE-JITPURA,
P.S.-PIRO, DISTRICT-BHOJPURA.
15. JAGESHWAR SINGH
16. RAMESHWAR SINGH
BOTH SONS OF RAM BACHHAN SINGH, R/O MOHALLA-NEW
SIDHANK, DALMIYANAGAR, P.S.-DEHRI, DISTRICT-ROHTAS.
17. BIMLA DEVI.
18. MATURA DEVI
BOTH DAUGHTERS OF LAKSHMAN SINGH & R/O-VILLAGE-



DAYALGANJ, P.O. & P.S.-RAJPUR, DISTRICT-ROHTAS.

19. RANGBAHADUR SINGH

20. SRINIWAS SINGH

21. KAMLA DEVI

22. BANSIAY DEVI

23. SUMITA DEVI

24. SUNITA

ALL SONS AND DAUGHTERS OF RAM SINGHASAN SINGH, R/O-VILLAGE-CHHOPRA, P.O. & P.S.-AKORHIGOLA, DISTRICT-ROHTAS.

25. LAKSHMINA DEVI, W/O-NATHUNI SINGH, R/O-VILLAGE-MOJRORH, P.O. & P.S.-MOJRORH, P.S.-MOKHA, DISTRICT-ROHTAS.

.... RESPONDENT/S

Appearance:

(In MA No.731 of 2011 with MA No.732 of 2011)

For the Appellant/s : Mr. Shashi Shekhar Dvivedi, Sr. Adv.

Mr. Ranjan Kumar Dubey, Adv.

Mr. Parth Gaurav, Adv.

Mr. Rakesh Chandra, Adv.

Mrs. Sangeeta Sharma, Adv.

Mr. Satyendra Nath Shukla, Adv.

For Respondent no.1 to 5 : Mr. Keshaw Shrivastava, Adv.

Mr. Ramadhar Singh, Adv.

For Respondent no.6 to 12 : Mr. Ramesh Jha, Adv.

Mr. S.C. Yadav, Adv.

For Respondent no.13 to 25: Mr. Jitendra Kishore Verma, Adv.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 24-06-2016

Against the common order dated 04.08.2009 passed in Title Suit No.265 of 1995 (final decree proceeding) two appeals were preferred before the appellate court bearing Title Appeal No.59 of 2009 as well as 60 of 2009 which were decided on the same day 04.07.2011 by two different judgments with same finding by way of allowing the appeal and remitting the matter to the learned lower court to appoint Survey Knowing Pleader Commissioner, afresh for equitable allotment of share amongst co-sharer in accordance with the preliminary decree passed in Title Suit No.265 of 1995 and further directing the court to proceed on a subsequent report submitted by the

fresh appointed Survey Knowing Pleader Commissioner which has been challenged independently under two appeals bearing Misc. Appeal No.731 of 2011 as well as 732 of 2011 by Additional District Judge, F.T.C., Vth, Rohtas at Sasaram accordingly, analogously heard and are being disposed of by the common judgment.

2. Bereft of unnecessary details, the facts of the case as is evident from respective pleadings is that respondent 1st set/plaintiff filed Title (Partition) Suit No.265 of 1995 for identifying their 1/3rd share with regard to properties detailed therein which was resisted at the end of Appellants/Defendants after their appearance and the same was allowed followed with preparation of preliminary decree which was contested up to second appeal but was confirmed as has been submitted, however the memo speaks pendency of Appeal No.25 of 2005. Subsequently thereof, respondent 1st set/plaintiff filed petition for preparation of final decree whereupon pleader commissioner was appointed who submitted his report and the said report was confirmed vide order dated 15.09.2007 and in pursuance thereof, final decree was directed to follow as stamp was deposited on 20.09.2007. It is also evident that against acceptance of report of Survey Knowing Pleader Commissioner, civil revision was filed and the same was disposed off with an observation that petitioner will have an opportunity to file an appeal against final decree. Subsequently thereof, the final decree was signed and sealed on 04.08.2009 on

account of follow up of clerical process against which Title Appeal No.59 of 2009 as well as 60 of 2009 have been filed and the same has been allowed by the judgment impugned, subject matter of instant appeal.

3. It has been submitted on behalf of learned counsel for the appellant that the judgment impugned happens to be bad in law as well as on facts, hence is fit to be set aside. It has also been submitted that title appeal would not have been entertained by the learned appellate court in the background of the fact that appeal against the final decree which by way of engrossing over stamp is not at all recognizable in the eye of law as, the aforesaid activity happens to be mere a clerical job and further, as there happens to be no limitation prescribed therefor i.e. for filing stamp by the decree holder, would cause disadvantage to the contesting party as after filing of due stamp, engrossing thereupon would follow which may take years together pricking interest of judgment debtor on account of having been powerless for the intervening period so, said incidence has not been found favour for entertaining an appeal. Consequent thereupon, it has been settled at rest by the Hon'ble Apex Court that appeal should be preferred against the order by which, the report submitted by Survey Knowing Pleader Commissioner in pursuance of Order-XXVI Rule-14 of the CPC is accepted as, that happens to be the incidence which found pre-judicial to the interest of an aggrieved. For that the learned

counsel for the appellant has relied upon Dr. Chiranjil Lal (deceased) by legal representatives Vs. Haridas (deceased) by legal representatives reported in (2005) 10 SCC 746.

4. It has also been submitted that aforesaid view has also been followed in subsequent decision Ram Bacchan Rai and Ors. Vs. Ram Udgar Rai and others reported in AIR 2006 SC 2248.

5. Under the garb of aforesaid legal principal as referred above, it has been submitted on behalf of appellant that report of Survey Knowing Pleader Commissioner was confirmed vide order dated 15.09.2007, on account thereof, the appeal would have been filed against the aforesaid order which, neither been filed nor, during filing of Title Appeal No.59 of 2009 as well as 60 of 2009 same has been taken on record, and so, respective appeals were not at all maintainable hence, the respective judgments happens to be contrary to law and are fit to be set aside.

6. At the other end, the learned counsel representing respondent 1st set/plaintiff has submitted that appeal was maintainable as final decree is challengeable and not the acceptance of report submitted by the Survey Knowing Pleader Commissioner. In likewise manner, it has also been pleaded that the judgment impugned, in the aforesaid background happens to be just, legal and proper and are accordingly, fit to be confirmed.

7. It has also been submitted that in a partition suit two



kinds of decree is recognizable, the first one relating to identification of the share followed with preliminary decree and the second event, after preparation of final decree in terms of finding so recorded under preliminary decree followed with proper demarcation of the suit properties by way of appointment of Survey Knowing Pleader Commissioner of Order-XXVI Rule-14 of the CPC as well as acceptance of report as final decree and that happens to be reason behind presence of two independent stages governed by aforesaid event, whereupon appeal is to be filed, respectively.

8. In the aforesaid background, it has been submitted that where ambiguity persists needs proper interpretation contrary, the law will command its sphere. Furthermore, it has been submitted that facts of the relevant decision referred by the learned counsel for the appellant suggest that same was not adjudicated upon while considering the appeal on its merit rather over limitation. Hence, proposition of law as enunciated by the Hon'ble Apex Court is not applicable in the facts and circumstances of the present case.

9. It has also been submitted that while adjudicating upon the matter, the Hon'ble Apex Court had not wiped off provision of appeal against final decree, nor annul the same, hence even having the acceptance of report having not challenged under appeal, will not shut the statutory right vested to the appellant, to be availed. Therefore, in the background of principle laid down by the Hon'ble Apex Court, it

could be said that utmost care and caution is to be taken at the stage of acceptance of Pleader Commissioner's report, to be challenged, even though presence of right of appeal against the final decree, so, it could not be said that appeal against final decree is not maintainable.

10. It has further been submitted that the facts of the instant case has got different twist, against the acceptance of Pleader Commissioner's report, Civil Revision No.2360 of 2007 was filed and the same was disposed of with an observation that proceeding of the final decree is not going to put the appellants to any irreparable loss as if final decree is prepared and if so aggrieved, they will definitely have an opportunity of challenging the said final decree in an appeal and so, the appeal has been preferred in pursuance of aforesaid observation. There was no lapses on the part of the respondent in getting the Pleader Commissioner's report challenged at an earliest within the period of limitation as per provision of law. Had there been any challenge at the end of the appellant/respondent/defendant at that very occasion in the background of judicial pronouncement that of (2005) 10 SCC 746, the respondent would have challenged the maintainability of civil revision which they never did. Furthermore, had there been, then in that event, respondent would have converted the same under appeal, and so, it could be inferred that appellants have waived the same and now, are forbidden under principle of estoppel. In likewise manner, it has been submitted that the finding so

recorded under civil revision has not been challenged hence met with finality. Therefore, in the peculiar facts and circumstances of the case, the plea raised on behalf of appellant happens to be misconceived and is fit to be rejected.

11. With regard to propriety of the judgment impugned, it has been submitted that same has been passed after considering the deficiency persisting in the report submitted by the Survey Knowing Pleader Commissioner's inconsonance with the preliminary decree as well as on account of violation of principle of equitable partition/allotment, distribution of the land. So submitted that appeal is fit to be dismissed.

12. There happens to be a legal maxim.

“Actus curiae neminem gravabit. – An act of the Court shall prejudice no man. No litigant is responsible for the acts of the Court, and can take no prejudice by obeying its orders, which he is bound to obey. If, for example, in a multiple pointing the Court should order payment to be made to a claimant, and payment is made under that order, the holder of the fund cannot be required to repeat the amount in the event of its being shown that the claimant preferred had no title to the sum paid, or that another had a better title than he. Again, certain acts by a litigant outwith the *cursus curia* might be sufficient to bar a subsequent appeal, but if these acts are performed not voluntarily, but under the orders of

Court, the appeal will not be barred.”

13. The aforesaid maxim has become relevant in the present context as, admittedly against the order dated 15.09.2007 whereby and whereunder Survey Knowing Pleader Commissioner’s report was accepted by the learned lower court, Civil Revision No.2360 of 2007 was filed and the same was decided keeping the right of the respondent 1st set/plaintiff immuned by way of identifying an opportunity for filing an appeal against the final decree going to be passed in terms of Survey Knowing Pleader Commissioner report, as accepted under para-6 thereof. The aforesaid judgments which have been referred at the end of appellant were available at the relevant moment which were never cited nor question over maintainability of civil revision was raised in view of the principle so laid down by the Hon’ble Apex Court in the aforesaid two decisions. The aforesaid finding also not been challenged at the end of the appellant/respondent/defendant so, it met with finality. In Mahesh Chandra Sharma Versus Raj Kumar Sharma reported in AIR 1996 SC 869 it has been held:

“32. The plea of limitation raised by the defendant-appellant cannot be upheld for more than one reason. The reasons are the following:

(a) Among the issues framed in the suit. Issue No.5 pertains to the plea of limitation put forward by Defendants Nos.2 to 5. The issue runs thus: “Whether the suit is within time?”



On this issue, the learned single Judges (Trial Judge) recorded a finding in favour of the plaintiff. He found the suit within limitation. The decision on the above issue was not contested by the parties before the Division Bench. The Division Bench has expressly recorded that ‘the decisions on the above issues (Issues 1,2,3,4,5 and 6) are not contested by the parties in this appeal and, therefore, the findings of the learned single Judge are hereby affirmed’. Once this is so, it is not open to the third defendant-appellant in these appeals to seek to re-agitate the said plea. We cannot allow him to do so. A party who abandons a particular plea at a particular stage cannot be allowed to re-agitate in appeal. ”

14. In the aforesaid background it could be fairly considered that once waiving the issue and further refraining to challenge the same is found duly barricaded and protected, subsequently. Furthermore, it is evident from the revisional order that right of the petitioner has been duly identified to file an appeal against the final decree. Had there been an objection of the end of appellant on that very score at that very juncture, certainly some sort of order, than the present one might have been passed. In likewise manner, had appellants any sort of grievances against the observation so made in the revisional order, would have challenged the same to nullify the same. Thus, having deficient on that score, it could be said as well as

inferred and rightly been argued that appeal has been filed under garb of revisional court order, and on account thereof, could not be resisted.

15. Now coming to the propriety of the judgment impugned, it is evident that learned appellate court had taken into consideration the exercise having been conducted by the Commissioner under para- 11,12 of the judgment and further found deficient one which, is found duly substantiated and so, rightly remitted the matter after setting aside the final decree.

16. That being so, these appeals are found merit less and are accordingly dismissed. However, in the facts and circumstances of the case, parties will bear their own cost.

(Aditya Kumar Trivedi, J)

PN/-

AFR/NAFR	AFR
CAV DATE	15.02.2016
Uploading Date	24.06.2016
Transmission Date	N/A