Kamal Chaudhary and Another Vs Rajendra Chaudhary and Others

Court: Patna High Court

Date of Decision: May 12, 1976

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 40 Rule 1

Citation: AIR 1976 Patna 366 : (1977) 25 BLJR 21

Hon'ble Judges: Muneshwari Sahay, J; B.D. Singh, J

Bench: Division Bench

Advocate: Kailash Roy and Binod Kumar Roy, for the Appellant; Gorakh Nath Singh, M.M. Chaturvedi and Arun Kumar Jha, for the Respondent

Final Decision: Dismissed

Judgement

B.D. Singh, J.
This appeal by Kamal Chaudhary and Lakhan Chaudhary under Order 43, Rule 1 (S) of the CPC (hereinafter referred to

as "the Code") is directed against an order passed by the learned Subordinate Judge under Order 40, Rule 1 of the Code appointing the

appellants, who are defendants, as receivers to manage the suit properties till the pendency of the suit

2. In order to appreciate the points involved in this appeal, it will be necessary to state some material facts. Rajendra Chaudhary, Sat Narain

Chaudhary and Sheo Nandan Chaudhary (plaintiffs 1 to 3) instituted Title Suit No. 82 of 1969 alleging, inter alia, that the properties mentioned in

the schedule of the plaint were joint family properties and, therefore, they prayed for partition of the joint family properties. The relationship of the

contesting parties would be apparent from the following genealogical table:--

NANDAN CHAUDHARY

Defendant No. 1

(Died during pendency of

Suit on 4-9-72)

_____|_____

| | |

Rajendra Kamal Lakhan

Chaudhary Chaudhery Chaudhary

(Pltf. 1) (Deft. 2) (Deft. 3)

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| |

Sat Narain Sheo Nandan

Choudhary Choudhary

(Pltf. 2) (Pltf. 3)

3. It may be noticed that respondents Nos. 4 to 10 were defendants 4 (ka) to 9 as defendants second party, whereas respondents Nos. 11 to 17

were the intervening defendants. Therefore, in this appeal they are respondents 3rd party.

4. According to plaintiff No. 1, father of plaintiff No. 1 was in clutches of defendants 2 and 3 and the entire pro-parties came under the

management of defendants Nos. 2 and 3, who are brothers of plaintiff No. 1. Defendants Nos. 2 and 3, in collaboration with other defendants,

were making capital out of the income from the suit properties and were making illegal gains completely ignoring the plaintiffs and they were getting

nothing out of the income of the joint family properties. In the suit the plaintiffs prayed for the following reliefs.

(a) That the Court below be pleased to pass a decree for partition allotting a separate takhata of 3/16th share in the suit properties by appointed

survey knowing pleader commissioner and the plaintiffs be put in possession of the same.

(b) that the court be further pleased to declare that the so called deeds of gift in favour of the defendant 3rd party are null and void and not binding

on the plaintiffs.

(c) that a decree for cost of the suit be passed in favour of the plaintiffs;

(d) that any other relief or reliefs the Court under the facts and circumstances of the case may deem fit and proper be granted to the plaintiffs.

The suit properties are mentioned in Schedule I of the plaint, including sudhbharna lands. Subsequently, the plaintiffs filed an amendment petition

for amendment of the plaint, including the schedule attached thereto, which was allowed. After institution of the suit the plaintiffs had also filed an

application under order 40, Rule 1 of the Code for appointment of the receiver. A rejoinder thereto was filed by defendants 2 and 3. After the

death of defendant No. 1 during the pendency of the suit, another application was filed by the plaintiffs, inter alia mentioning therein that after the

death of defendant No. 1 the relationship between the plaintiffs and the defendants had become strained and the defendants had begun to put all

sorts of obstructions and hindrances in the peaceful enjoyment of the joint family properties. Some of the lands of the suit were being cultivated by

the bataidars on behalf of the joint family, but the defendant s had brought them under clutches, and in collusion with them they were depriving the

plaintiffs of the usufructs of the lands. In this application the plaintiffs further stated that the matter with respect to the appointment of receiver was

pending, and due to the receiver not having been appointed, the defendants, in collusion with each other as well as with the bataidars and

mortgagors, intensified the action of mismanagement and misappropriation of the receipts resulting in destruction of the properties and loss to the

plaintiffs. In the suit land in that particular year there had been bumper paddy crops, and if the receiver would not be appointed, the defendants

would deprive the plaintiffs of their legitimate share and there would be loss to the plaintiffs to a great extent. Therefore, the plaintiffs prayed that

orders should be passed in the receivership matter expeditiously.

5. A rejoinder to the above petition was also filed by defendants 2 to 3. Separate written statement was filed by defendant No. 1. Another written

statement was filed by defendants 2 and 3 together. Third written statement was filed by Sarjug Sah and lastly another written statement was filed

on behalf of defendants 11 to 15.

6. The learned Subordinate Judge, after hearing the contesting parties, and considering the materials on the record, inter alia, observed that plaintiff

No. 1 was completely deprived of his share in the income and that the plaintiff"", were suffering and were likely to suffer further irreparable loss and,

therefore, he passed the impugned order, appointing the appellants as receivers to the suit properties, and also directed them to render accounts

six monthly, that is, by 15th of April and by 15th November, every year. He also directed them to give the plaintiffs their share in the income

approximately after deduction of the cost of management, payment of revenue and taxes, etc.

7. Mr. Kailash Roy, learned counsel appearing on behalf of the appellants, has assailed the impugned order and submitted that the learned

Subordinate Judge failed to consider the pre-requisite conditions for appointment of a receiver in a partition suit. He submitted that it is well settled

that for appointment of a receiver a strong prima facie case is required to be established by the plaintiffs and also that irreparable injury would be

caused to them if no receiver is appointed. In the instant case, learned counsel submitted that the plaintiff"s have miserably failed to establish both

the essential requirements. Nowhere in the application he submitted, that the plaintiffs have alleged that the defendants 2 and 3 have transferred any

of the ancestral properties. He referred to the rejoinder and the written statement filed on behalf of defendants 2 and 3 as well as the written

statement filed on behalf of defendant No. 1, wherein it was stated that the ancestral property, which was joint, consisted of only about 2 kathas of

homestead land and 6 kathas and odd consisting of a tank as stated in paragraph 9 of the written statement filed on behalf of defendant? 2 and 3.

According to them, the ancestral property was partitioned between plaintiff No. 1 and defendants 1 to 3 in the year 1933 and each one of them

got his separate karbar and separate lands, which were cultivated by them separately through bataidars, and each of them enjoyed the produce of

his own field. According to them, none of the suit lands was or is joint family property. Each party acquired property separately after separation.

They also stated that there was no joint shop business either in the name of the plaintiff or defendants or any partnership with others. After partition

defendant No, 1 out of self-acquired property transferred some of the properties under registered deeds of gift to his daughters-in-law, namely,

Ram Sakhi Devi (defendant No. 7) wife of plaintiff No. 1, Asha Devi (defendant No. 3) wife of Kamal Choudhary (defendant No. 2) and Dukhni

Devi (defendant No. 9) wife of Lakhan Choudhary (defendant No. 3), Nandan Choudhary (defendant No. 1) had no doubt left 5 bighas of lands

which are in possession of defendants 2 and 3. According to oral will of defendant No. 1 his sons, who would per form his sradh would get those

lands. It was defendants Nos. 2 and 3, who had per formed the sradh of defendant No. 1, were legally entitled to hold and possess those lands. In

those circumstances, learned counsel urged that there was no prima facie case nor any occasion for appointment of a receiver nor the defendants

can be asked to manage the proper ties of others.

8. Mr. Roy referred to the impugned order in paragraph 8 whereof the learned Subordinate Judge observed that the self-acquired properties,

which the defendants have alleged in their written statement, had blended with the joint family properties. Mr. Roy submitted that there was no

sufficient nucleus of the joint family, and, as stated earlier, the ancestral properties limited to only few kathas and, therefore, it would be difficult to

imagine that the members of the joint family had acquired any of the properties with the help of ancestral properties. He also commented upon the

observation of the learned Subordinate Judge made in paragraph 9 of his order wherein, inter alia, he held that the deeds of gift made by defendant

No. 1 in favour of his daughters-in-law were merely paper transactions, because, they were executed in 1968, but curiously enough the properties

covered by them were acquired not only in the name of the father but also in the name of his other sons, that is other defendants. He further

observed in the said paragraph; ""..... I am not inclined to hold that there was partition in the year 1933. On this ground also under the

circumstances set forth above, I find that the plaintiffs have got a good prima facie case that he has got share in the properties sought to be

partitioned. Of course my this finding is limited for the purpose of receivership matter and it is left open to be finally decided at the time of hearing

of the suit on the evidence adduced in the case .....

9. Learned counsel submitted that the learned Subordinate Judge has erred in appointing receiver only on a find- ing of merely prima facie case.

According to him, he could have appointed receiver only on a finding of a strong prima facie case. He pointed out that there is distinction between

the case in which temporary injunction may he granted, and the case in which a receiver may be appointed, while in either case it must be shown

that the property should be preserved from waste or alienation. In the case of temporary injunction it is sufficient if it is shown that the plaintiff in a

suit has a fair question to raise as to the existence of the right, alleged, while in the case of appointment of receiver a strong prima facie title to the

property over which receiver is sought to be appointed has to be made out.

10. In my view, in some of the judgments instead of strong prima facie case a good, prima facie case has been used. Therefore, too much

emphasis cannot be laid on the word "strong". Reference may be made to Bokaro and Ramgur Ltd. Vs. State of Bihar, on which reliance was

placed by Mr. Roy. It may be noticed that the case had come up before G. N. Prasad, J. on the difference in opinion between U. N. Sinha and S.

N. P. Singh, JJ. Their Lordships while dealing with the provision under Order 40, Rule 1 of the Code, observed that in the matter of appointment

of receiver of the property in dispute before it, the court had a wide discretion. But it would net appoint a receiver unless from the materials

brought to its notice it was satisfied that it was just and convenient to do so. Different considerations would arise in different cases, but in a case of

disputed title, where the plaintiff sought recovery of possession, the Court would appoint a receiver if it was satisfied on two matters: (1) that the

title which the plaintiff had set up was prima facie good; and (2) that the property was in danger of being wasted or dissipated or being so dealt

with as to get irretrievably out of the reach of the plaintiff who was prima facie entitled to its possession. In the particular case, as noted, the trial

court has found that the plaintiffs had got a good prima facie case. Therefore, on that ground, the impugned order cannot be said to be bad.

11. Mr. Roy, however, submitted that according to the case of the contesting defendants, the partition had already taken place in the year 1933

and there was subsequently some exchange of the properties in the year 1943. It may be noticed that the partition had been alleged to be oral and

so also the exchange of the properties thereafter. In that view of the matter it was open to the trial court to give a prima facie finding only for the

purpose of appointment of a receiver that the claim of the plaintiffs, as alleged in the plaint for partition of the suit properties, appeared to be

correct. Besides, good prima facie case would depend upon facts and circumstances of each case. In the present case, according to the

defendants, the ancestral properties consisted of only few kathas of land as mentioned earlier and it was only after oral partition in 1933 that the

different co-sharers acquired considerable property, out of the separate funds and business, which was prima facie unacceptable.

12. Mr. Roy has also emphasised that in view of the observation in Bokaro and Ramgur Ltd. Vs. State of Bihar, it was incumbent upon the

plaintiffs to establish that the suit properly was in danger of being wasted or dissipated or was being dealt with as to get irretrievably out of the

reach of the plaintiffs. In my view, the submission of learned counsel for the appellants, on the facts and circumstances of the instant case, is not

tenable. In a partition suit when one co-owner occupies the whole property and excludes other co-owners from the shares of rents and profits of

the property, a case of appointment of receiver is made out although no waste or mismanagement by the other co-owners in possession is proved.

Reference may be made by Nihalchand L. Jai Narain and Others Vs. Ram Niwas Munna Lal and Others, where Tekchand, J. observed that

where a partner excluded another from the management of partnership affairs a case was made out for appointment of a receiver and this doctrine

was acted upon even where defendant contended that the plaintiff was not a partner or that he had no interest in the partnership assets (vide also

Ramji Ram v. Salig Ram (1910) 5 Ind Cas 9 (Cal)). Reference may be made to the statements of the plaintiffs in paragraphs 5, 6, 7 and 8. which

read thus:

5. That since recently the defendants Nos. 2 and 3 with some dishonest and selfish motive have gained over the defendant No. 1 and brought him

in their complete clutches and influence and set him up against the plaintiffs in order to deprive the plaintiffs their due and legal share of the joint

family properties and thereby causing wrongful loss to them so that the plaintiffs have been experiencing difficulties and hindrance in due enjoy-

merit of the usufruct of the joint family properties.

6. That the plaintiffs under the circumstances stated above demanded partition and requested the defendant first party for making partition of the

suit properties but they gave no heed to this.

7. That the defendants 2 and 3 having learnt of the plaintiff''s desire and demand for partition of the joint family properties instigated and influenced

the plaintiff''s first wife and his son from her and brought them in their complete clutches and control.

8. That sometime after the aforesaid demand for partition the plaintiffs came to learn that the defendant No. 1 at the instance and instigation of the

defendants Nos. 2 and 3 has created and brought into existence some fraudulent, fictitious and Illegal documents purporting to be the deeds of gift

in favour of the defendants 3rd party with respect to some joint family properties and the plaintiff No. 1 made enquiries in the sub-registration

office and thereafter took certified copies of the said documents, which it appears, were executed on one or the same day i.e., on 6-9-1968.

The above averments indicate that the plaintiffs have been completely excluded from the enjoyment of the usufruct of the joint family properties. In

the first application, which the plaintiffs had filed for appointment of receiver, there are similar allegations in paragraphs 3, 4, 5 and 6. It will be

relevant to mention some of the allegations made in paragraph 6 of the said petition, wherein it was alleged that defendants 2 and 3 were not

allowing any share of the joint family property to the plaintiffs since after the death of the defendant No. 1. The plaintiffs finding themselves in

difficulty, mostly living in Bharahi for their safety, were not allowed any hand or deal in the property or to know of the income from the suit

properties as a result of which the petitioners were at the verge of starvation, and it had become difficult for them to meet both ends and thereby

they were reduced to pauperism and were not in a position to contest and fight the suit. In the subsequent petition, which the plaintiffs filed for

expediting the appointment of receiver, as mentioned earlier, they stated that after the death of defendant No. 1 the relationship between the

plaintiffs and the defendants had become strained and the defendants began to put all sorts of obstruction and hindrance in the peaceful enjoyment

of the joint family property and some of the lands of the suit have been cultivated by batai-dars on behalf of the joint family, but the defendants

have brought them under their clutch and collusion and thus are depriving the plaintiffs in the proper enjoyment of the usufruct of the lands. No

doubt, rejoinders have been filed by the defendants 2 and 3 denying the allegations contained in those petitions. Although, those allegations have

been denied, in my opinion, for the purpose of appointment of receiver on the ground that the plaintiffs were completely excluded from the

enjoyment of the usufruct of the alleged joint family properties, it was open to the trial court to hold that it was a fit case for appointment of

defendants 2 and 3 as receivers. In the particular case, it may be noticed that plaintiff No. 1 being, the eldest son of defendant No. 1, ought to

have been Karta of the alleged joint family property, but the allegation is that defendants 2 and 3 had taken control of the alleged joint family

properties. We, were also told that plaintiff No. 1 has married a second wife. Therefore, the relationship of the plaintiff with his first wife, defendant

No. 7, was also strained. Therefore, there was acute difference between plaintiff No. 1 and his first wife, defendant No. 7, as well.

13. Mr. Roy then challenged the impugned order also on the ground that V the firm and shop, which the plaintiffs have sought for partition,

belonged to different persons altogether as it would appear from the written statement filed on behalf of defendants 10 to 15. In my opinion, this

submission of learned counsel for the appellants is also not acceptable. It is firmly settled that by appointment of a receiver the court takes upon

itself management of the property during continuation of the litigation. Receiver"s possession is on behalf of all the parties to the action. Therefore,

the title of the real owner is in no way affected either in theory or on principle by the appointment of a receiver. Besides, in the particular case,

none of the defendants, except defendants 2 and 3, had filed rejoinder to the application filed by the plaintiffs for appointment of receiver. In this

Court also no other persons than the appellants had objected to the appointment of receiver. If, after final hearing of the suit and after considering

evidence adduced by the parties, trial court would come to the conclusion that the version of defendants Nos. 2 and 3, as given in the written

statement, was correct, and, in fact some of the suit properties, mentioned in the written statement, were self-acquired properties of defendants 2

and 3, no substantial prejudice would be caused to the appellants, as, when the owners of the properties are themselves appointed receivers, they

do not lose their right as proprietors while dealing with the properties during their receivership, except that they cannot impair the value of the

properties in their hands or cause interference with their possession of properties as- receivers.

14. Mr. Roy then referred to Schedule I to the written statement filed on behalf of defendants 2 and 3 wherein it is shown that the plaintiff No. 1

has self-acquired the property after alleged partition in the year 1933, and his first wife, defendant No. 7, as mentioned earlier, received about 5

bighas of land as gift from defendant No. 1. Therefore, he submitted that at least for the properties, which the plaintiff No. 1 has self-acquired as

well as for the properties gifted to his wife, defendant No. 7, plaintiff No. 1 himself should be made receiver. In my view, this submission also

cannot be accepted. Prima facie the said statement in the written statement about the self-acquired property of plaintiff No. 1 does not appear to

be correct, as the plaintiffs in their plaint have treated those properties as joint family properties and have not mentioned a word about self-

acquisition by plaintiff No. 1. As regards gift by defendent No. 1 to defendant No. 7 the trial Court has come to the conclusion that it was a paper

transaction. Even assuming that it was a gift to defendant No. 7, it was expected that defendant No. 7 ought to have filed a rejoinder and ought to

have assailed the order of appointment of receiver in this Court, but she did not do so. That apart, as mentioned before, the relationship of plaintiff

No. 1 with his first wife was not cordial, as the former has married a second wife. In that view of the matter, it would not be proper to appoint

plaintiff No. 1 as receiver for those properties T alleged to belong to defendant No. 7. I would have appointed plaintiff No. 1 along with

defendants 2 and 3 as joint receivers but that also would not work, as, it appears, the feelings between the plaintiffs and defendants 2 and 3 are

strained. In that view of the matter it will be just and convenient in the present case to ap- point defendants 2 and 3 alone as receivers for the suit

properties.

15. Learned counsel for the appellants then submitted that some of the suit properties, for example, most of the Sudhbharnas, have already been

redeemed and they do not exist. In my opinion, whether some of the properties do exist or not, receivers would report before the trial court while

taking charge of the suit properties and the trial court will decide accordingly.

16. Mr. Roy then made a grievance that the trial court, in the concluding portion of the impugned order, had directed the defendants to give plaintiff

No. 1 his share in the income approximately after deduction of the total cost of management, payment of revenue, tax, etc. Therefore, according to

learned counsel, by the said direction the trial court has decided the case itself. In my opinion, on the facts and circumstances of the instant case,

the said direction cannot be considered as unjust, since, as already mentioned, the court has prima facie found the case of ouster of the plaintiffs

and that they are not getting any rent or shares in the suit properties and it has become difficult for them to maintain themselves. Besides, it is well

known that the suit would not be decided soon. It may take sometime. Therefore, during the pendency of the suit the trial court has directed

defendants 2 and 3 to give share in the income out of the suit properties. In my opinion, by the said observation the trial court has not decided the

suit itself. In my view, however, it would be better if the trial court, after submission of the accounts by the defendants 2 and 3, as directed, would

fix the quantum of rents and profits payable to the plaintiffs either in cash or kind or both during the pendency of the suit.

17. After careful consideration from various aspects I find that the appellants have failed to show that the trial court has exercised its discretion

improperly by appointing the appellants as receivers. Reference may be made to Shavax A. Lal and Others Vs. Syed Masood Hosain and Others,

where it was observed at page 157 that the. exercise of the power being discretionary, it would be difficult, even if it were possible, to define with

any precision, the limits of that power. The exercise of that discretion in the ultimate analysis must be guided by the circumstances of each particuar

case. The opinion of the Court of first instance in these matters was of great weight. It was probably the best tribunal to decide whether it was

necessary or expedient, having regard to the circumstances of the case, that a receiver should be appointed, and a party, who, in appeal, attacked

the exercise of that discretion, should show that the discretion had been improperly exercised.

18. Before I part with this judgment, I would mention that while dealing with the application under Order 40, Rule 1 of the Code, the Court does

not, at the time of appointment of receiver, arrive at any final decision on the merits of the case, its aim being merely to preserve status quo ante

during the litigation. Therefore, I wish to make it clear that whatever the trial court has observed and whatever I have observed in this judgment is

exclusively meant for disposal of the application for appointment of receiver and it will not affect the case of either party in the suit itself. I,

however, direct that the suit should be disposed, of expeditiously.

19. In the result, therefore, I dismiss the appeal and affirm the impugned order. In the circumstances, however, there will be no order as to costs.

Muneshwari Sahay, J.

20. I agree.