

(2012) 08 PAT CK 0066

Patna High Court

Case No: Second Appeal No. 412 of 1998

Alfred Bernard Thakur

APPELLANT

Vs

Mery Hilarian Bernard and
Others

RESPONDENT

Date of Decision: Aug. 8, 2012

Hon'ble Judges: Mungeshwar Sahoo, J

Bench: Single Bench

Advocate: T.N. Maitin, Advocate and Mr. Khatim Reza, for the Appellant; Ganapathy Trivedi, Advocate For the Respondent No. 1, Mr. Shyam Narayan Sinha, Advocate For the Respondent No. 11 and Mr. S.S. Dwivedi For other Contesting Respondent, for the Respondent

Final Decision: Dismissed

Judgement

Mungeshwar Sahoo

1. The second appeal has been filed by the plaintiff against the lower appellate Court Judgment and Decree dated 17.08.1998 passed by 5th Addl. District Judge, West Champaran in title appeal No. 9 of 1997 dismissing the appeal and confirming the final decree dated 19.9.1994 passed by Subordinate Judge I, Bettiah, West Champaran in title suit No. 42 of 1980 rejecting the objection of the plaintiff-appellant. On 05.04.1999, the following substantial question of law was formulated while admitting the appeal :

Whether failure on the part of the Pleader Commissioner to make separate allotment for the plaintiff and the defendant Nos. 3 to 6 has vitiated the order in the final decree.

2. The learned senior counsel, Mr. T. N. Maitin appearing on behalf of the appellant submitted that the Pleader Commissioner's report forming part of the final decree is not according to the preliminary decree and, therefore it is vitiated. In the preliminary decree, it has been held that the plaintiff is entitled to 1/8th share and

the defendant No. 3, 4 and 5 who are respondent No. 8 to 11 are entitled for 1/8th share but the Pleader Commissioner allotted one compacted block for the plaintiff and respondent No. 8 to 11. Although the said respondents had also filed application for curving out their separate thakta. In such view of the matter the entire final decree is vitiated. According to the learned counsel, the final decree must be in conformity with the preliminary decree. The learned counsel further submitted that the appellant's case have been discarded on flimsy ground that they themselves pray that the share of the plaintiff may be allotted along with the defendant No. 3 to 6. The learned counsel submitted that they never prayed for one block but their prayer was only to give the share of the plaintiff continuous to the share of respondent No. 8 to 11, defendant No. 3 to 6. On the basis of these submissions, the learned counsel submitted that the substantial question of law formulated be answered in favour of the appellant and the final decree be set aside.

3. The learned counsel, Mr. Ganapathy Trivedi submitted that they also prayed for their separate takhta but it was not separated. The learned counsel supported the case of the appellant.

4. On the other hand, the learned senior counsel, Mr. S.S. Dwivedi appearing on behalf of the contesting respondent submitted that the substantial question of law formulated is not at all a substantial question of law. Before the Pleader Commissioner, the plaintiff appellant himself filed application that the lands of defendant No. 3 to 6 may also be allotted in one place and the Pleader Commissioner has allotted the land at one place for the plaintiff and the defendant No. 3 to 6. The learned counsel submitted that the plaintiff is the power of attorney holder of defendant No. 3 to 6. Now, if the plaintiff and the supporting defendants want that their share may also be separated there is no difficulty in curving out their share out of land allotted by the Pleader Commissioner but on that score, the entire final decree proceeding cannot be said to be vitiated.

5. It may be mentioned here that the lower Court record was not called for in this case. At the time of hearing of this appeal, the appellant have produced their application which was filed before the Pleader Commissioners. A copy of memo of appeal is being produced by the learned counsel for the respondent and likewise the photocopy of the Judgment dated 7.7.1992 passed by Ist A.D.J. in title appeal No. 29 of 1989 / 3 of 1991 has been produced by the appellant to show that the Judgment was set aside earlier but again the same Judgment has been repeated in the present case.

6. From perusal of the application filed by the appellant which has been annexed as Annexure 1 with the affidavit filed at the time of hearing, it appears that before the Pleader Commissioner, the plaintiff filed an application on 6.6.1993 alleging that the plaintiff holds power of attorney on behalf of his sisters defendant No. 3 to 6 and all these defendant No. 3 to 6 have claimed that their share be allotted along with plaintiff's share vide paragraph 3. At paragraph 4, the plaintiff again mentioned that

on his behalf as well as on behalf of his sisters, defendant No. 3 to 6 in the capacity of power of attorney holder want that at the time of preparation of separate thakta for defendant No. 1, 2 and 7 to 12, it should be done in such a manner that the remaining properties of defendant No. 3 to 6 and the plaintiff be in one block meaning thereby that the same to attach to each other. Considering his application, one block has been allotted in favour of the plaintiff and his sisters defendant No. 3 to 6. It is not the case of the plaintiff that any less share has been allotted to them. The only ground raised is that the final decree is not according to the preliminary decree. So far this question is concerned, the application referred to above filed by the appellant before the Pleader Commissioner is complete answer to the appellants contention. The appellant himself submitted that in one block share of plaintiff and defendant No. 3 to 6 be allotted. Accordingly, in one block, the same has been allotted. Admittedly, plaintiff is the power of attorney holder of his sisters, defendant No. 3 to 6. If now, they so like they may pray before the Court to carve out their share out of the said block but the contention of the plaintiff-appellant as well as the supporting defendant No. 3 to 6 who are supporting respondent in this second appeal is that because no separate thakta has been allotted, final decree proceeding should be set aside. In my opinion, the appellant cannot be allowed to approbate and reprobate. At one place, he prayed that his share be allotted along with share of his sisters which has been allotted. I, therefore find that by no stretch of imagination, it can be said that the final decree is contrary to the preliminary decree. After getting benefit on the basis of the application, now the plaintiff and the defendant No. 3 to 6 supporting each other are praying that because the share has not been separated, the entire final decree be set aside which they cannot be allowed to raise now.

7. It may be mentioned here that the defendant No. 3 to 6 never filed any objection to the Pleader Commissioner's report. The plaintiff filed the objection raising the ground that the final decree proceeding was lacking in procedural frequency factual accuracy, error of record and contrary to existing facts and the settled principle of law. So far the objection raised before the second appellate Court that the final decree is contrary to preliminary decree is cornered, it appears that it was not even mentioned in the memo of appeal before the lower appellate Court. From perusal of the lower appellate Court Judgment, it appears that the lower appellate Court also has considered the application filed by the plaintiff. The learned counsel, Mr. T.N. Maitin submitted that the last line of paragraph 4 of the application filed before the Pleader Commissioner was not given its true meaning by the Pleader Commissioner. So far this submission is concerned also, I find no force because one line will not make any difference. The whole application has to be read. The plaintiff himself prayed for allotment of share of his sisters which has been allotted. There is no bar for getting their share separated. But on that ground, the final decree proceeding cannot be set aside. In view of the above discussion, in my opinion, only on the ground that plaintiffs and his sisters have been allotted one block land that too on

the prayer of the appellant, it cannot be said that the final decree is contrary to the preliminary decree and the entire final decree proceeding cannot be set aside on this ground. In the facts and circumstances of the case, the substantial question of law formulated is, therefore answered against the appellant. Thus, this second appeal has got no merit and accordingly it is dismissed.