

(1974) 12 OHC CK 0009

In the Orissa High Court

Case No : Civil Revision No. 116 of 1974

Ajoy Kumar Moharana

APPELLANT

Vs

Ghanashyam Moharana and Others

RESPONDENT

Date of Decision : 17-12-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 14, Order 20 Rule 14(1), Order 20 Rule 3, 148, 152
Partition Act, 1893 — Section 4

Citation : (1975) 41 CLT 438

Hon'ble Judges : G.K. Misra, C.J

Bench : Single Bench

Advocate : N. Mukherjee, for the Appellant; S.S. Basu and D.K. Sen, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—Opposite party No. 1 filed Title Suit No. 16 of 1961 in the Court of the Munsif, 1st Court, Cuttack, for partition of Kha Schedule property. Ga schedule property constituted a part of the Kha schedule and measured 0049 acre. It was an undivided homestead of the Petitioner's family. The first Defendant (Petitioner) was a stranger purchaser of the Ga Schedule land excluding an area of 0.003 acre and 1 Kadi. He purchased the same in title Suit No. 39 of 1955 of the 1st Munsif's Court. Opposite party No. 1 besides asking for partition of the Kha Schedule property asked for repurchasing the Ga Schedule land u/s 4 of the Partition Act. On 30-9-1963 a preliminary decree was passed in his favour.

The operative decretal order passed in that suit was as follows:

With regard to partition the Petitioner shall be entitled to a decree for partition in respect of the whole Kha schedule land and with respect to Ga schedule land which is a part of the Kha schedule land he shall have to pay the price for it. No evidence has been adduced before me with regard to valuation and so in the

absence of any evidence I would fix the price for which Defendant No. 1 has purchased it as the valuation of the property. Plaintiff will deposit the amount within 2 months from today failing which the relief of pre-emption in the decree shall stand as withdrawn and partition of the Kha schedule property minus the Ga will only be effected.

Hence ordered that the suit of the Petitioner be decreed on contest against Defendant No. 1 with costs and ex parte against the rest without costs. A preliminary decree be drawn up in the light of the observation made above and the Petitioner be called upon to deposit Rs. 50/- towards the fees of the Commissioner also within two months from today and in case he does not pay the price for which the Defendant No. 1 had purchased the property which shall be calculated from the records within that period, the results as indicated above will follow but on deposit the Court shall cause transfer of the same by caning upon the Defendant No. 1 to execute a conveyance in favour of the Petitioner whereupon the title shall only pass.

In the trial Court decree the following reliefs were granted:

- (i) Plaintiff was conferred right of re-purchase of Ga Schedule land from the first Defendant.
- (ii) The consideration for re-purchase was the price for which the first Defendant purchased the Ga schedule land.
- (iii) The exact amount of consideration was not determined in the judgment. The same was directed to be calculate from the records within two months from the date of the decree.
- (iv) The consideration was to be deposited within two months from the date of the decree.
- (v) On failure to deposit the consideration as directed the decree shall stand withdraw.

The first Defendant preferred Title Appeal No. 12 of 1964 against the aforesaid decree which was allowed on 16-12-1965 by the Additional District Judge, Cuttack. The appellate Court set aside the trial Court decree with the following directions:

- (i) Out of the Ga Schedule property 0.024 acre and 5 Kadis of land is liable to be partitioned according to the shares, claimed by the Petitioner.
- (ii) The Petitioner is entitled to purchase 0.021 acre and 4 Kadis out of 0.024 acre and 5 Kadis from the ancestral homestead from the first Defendant for a value of Rs. 835.50 P.

Opposite party No. 1 preferred Second Appeal No. 166/66 in the High Court which was dismissed on 24.9.1970. The Second Appeal was confined to rejection of the Petitioner's claim to purchase u/s 4 of the Partition Act the balance area of

0.024 acre and 5 Kadis.

On 15-4-1972 opposite party No. 1 tendered a Chalan for Rs. 835-50 P. to re-purchase 0.021 arce and 4 Kadis from Defendant No. 1 as was directed by the appellate Court. On 16-12-1972 he filed an application for extension of time u/s 148, CPC for depositing the money. The Petitioner filed objection on the ground that the appellate Court not having granted any time and the time of two months granted by the trial Court having long since expired opposite party No. 1 was not entitled to deposit the money as directed in the appellate Court decree and that he has not entitled to extension of time u/s 148, Code of Civil Procedure.

G. The learned 1st Additional Subordinate Judge held that as the trial Court decree was modified in appeal and the appellate Court had not fixed any time for deposit of the consideration, opposite party No. 1 was entitled to make the deposit after expiry of the time fixed by the trial Court. He also held that the Court had power to extend time u/s 148, Procedure Code.

He accordingly passed the Chalan and permitted opposite party No. 1 to deposit the amount,

It is against this order dated 10-12-1973 that the civil revision has been filed.

3. Mr. Mukherjee for the Petitioner contends that the learned Subordinate Judge exercised his jurisdiction illegally in holding that opposite party No. 1 was entitled to deposit the consideration beyond the time of two months granted by the trial Court which will be calculated from the date of the appellate Court decree and in further holding that the Court had power to extend time u/s 148, Code of Civil Procedure.

Both the contentions require careful examination.

4. In this case the trial Court decree was reversed in part by the appellate Court. While the trial Court granted the decree for pre-exe option in respect of the entire Ga Schedule land the appellate Court confined the decree of pre-emption to an area of 0.021 acre and 4 Kadis.

While the trial Court did not fix the quantum of consideration and directed that the same would be calculated from the records within two months the appellate Court fixed the consideration for re-purchase at the specific amount of Rs. 835.50 P.

With regard to the time for deposit of the purchase money the trial Court fixed two months while the appellate Court did not fix any time.

5. Law is now well settled that where a trial Court decree is reversed, modified or confirmed in appeal it is the decision of the appellate authority which is operative in law. The principle is simple and clear when the trial Court decree is reversed or modified by the appellate authority. The position is not in any way different when the appellate Court decree is one of affirmance. The trial Court decree merges in the appellate decision which alone subsists and is capable of

enforcement. There are certain exceptions which do not call for examination in this case. It is not necessary to refer to a large number of authorities. The latest decision reported in *Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh*, , reviews all the previous decisions.

Both Mr. Mukherjee and Mr. Basu accept the aforesaid legal position as being well settled.

There is, however, some controversy as to the application of the doctrine of merger when in respect of certain essential conditions the appellate Court decree is silent.

In this case the time granted by the trial Court for deposit of the consideration was two months while the appellate Court decree was silent on the point. In other words, the appellate Court decree did not say within what period opposite party No. 1 would deposit Rs. 835. 50 P. for repurchase of O. 021 acre and 4 Kadis out of the Ga schedule property. According to Mr. Mukherjee in such a case the period of two months granted by the trial Court decree should be construed as being bodily lifted into the appellate Court decree by the theory of merger and" opposite party No. 1 should have deposited the consideration within two months from the date of the appellate Court decree. This contention is well founded and is fully supported by *Dattaraya Tawalay Vs. Shaikh Mahboob Shaikh Ali and Another*, .

In paragraph 4 their Lordships dealt with this aspect of the question and observed thus:

xxxx In the present case, when the High Court dealt with the Second Appeal filed by the Respondents, the time limited by the trial Court for making the sit had expired. It was open to the Respondents to press this point in the Second Appeal and for the High Court to decide, that the time having expired, it was not open to the Petitioner to make the deposit and there was nothing before the High Court for decision. It was equally open to the High Court to dismiss the appeal and expressly extend the time for making the deposit. When the High Court refrained from following the first course and confirmed the trial Court's decree, what was its intention? Surely it wanted to give the Petitioner an effective decree in his favour. If se, we are justified in holding that the High Court intended to exercise its power of extending the time for making the deposit, and incorporated in its decree the relevant provisions of the trial Court's decree. That is to (sic) this is a case in which we must hold that a fresh starting point is implied in the decree of the High Court in the Second Appeal. xx xv

The time for depositing the consideration would, accordingly be two months from the date of the appellate decree which was passed on 16-12-1965.

The Chalan was filed for depositing Rs. 835. 50 P. on 15-4-1972 about six years after the passing of the appellate decree. Consequently, the decree passed by the trial Court that on failure to deposit the consideration in time the decree for

re-purchase of the Ga schedule land would stand withdrawn would be operative. That apart of the trial Court's direction would be taken to be bodily lifted into the appellate Court decree. The default clause operated and the Petitioner's right to repurchase was extinguished by failure to deposit the consideration within time.

6. Order 20, Rule 14(1), CPC so far as relevant, runs thus:

Rule 14(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall

(a) specify a day on or before which the purchase money shall be so paid, and

(b) direct that on payment into Court of such purchase money, together with this costs (if any) decreed against the Petitioner, on or before the day referred to in Clause (a), the Defendant shall deliver possession of the property to the Petitioner, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

The trial Court decree was in accordance with Order 20, Rule 14(1). The appellate Court did not make a variation thereof and the same should be construed as part of the appellate Court decree on the theory of merger.

That apart, in *Naguba Appa Vs. Namdev*, their Lordships held that the dismissal of the suit for failure to deposit the consideration within the time granted is as a result of the mandatory provisions of Order 20, Rule 14 and not by reason of any decision of the Court and the omission to incorporate the decision in the decree could not in any way affect the rights of the parties.

On the aforesaid analysis opposite party No. 1's relief to pre-emption must be rejected for failure to deposit Rs. 835. 50 P. within two months from the appellate decree.

7. The next question for consideration is whether the Court has power to extend time u/s 148, Code of Civil Procedure. This question was examined at length in *Kanhu Charan Behera and Another Vs. Jagabandhu Behera and Others*, . The following observation was made:

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The question is whether time can be extended under this section where a period is fixed or granted by a decree. Order 20, Rule 3, CPC lays down that once a judgment or decree is signed, it shall not afterwards be altered or added to, save as provided by Section 152, CPC or on review. It has accordingly been held in many cases that Section 148, CPC cannot be allowed to take away the effect of this rule, though if the decree is varied or reversed by the appellate Court, it can fix a period different from the one fixed by the lower Court. This doctrine has, however, an important exception. Where the decree fixing the time is not intended, to be final and the Court still retains control over proceeding, the Court

may extend the time granted under the decree under this section.

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8. This distinction is to be drawn between a case, where the proceeding has come to a close and another case where it has not terminated and the Court still retains control over it. Whether a proceeding has come to a close or is still alive, would again depend upon the nature of the proceeding and the order passed thereon. If the order is a final order the Court is functus officio, otherwise the Court can enlarge time. The same view was taken in *Surajmal Marwari and Another Vs. Bhubaneshwar Prasad and Others*, .

The point for consideration is whether the Court is "functus officio after passing the decree for pre-emption or it still retains power to extend time. As has already been discussed, under Order 20, Rule 14 CPC the Court fixes a time for depositing the consideration and on failure to deposit, would give a direction for dismissal of the relief of pre-emption. The same was done in this case by the trial Court which would be construed as part of the appellate decree as the latter was silent on the" point. Besides as was observed in *Naguba Appa Vs. Namdev*, , the mandatory character of the direction flows from the statutory prescription in Order 20, Rule 14 CPC and not from incorporation of such a term in the decree itself. That question is however, academic in the present case as the trial Court "decree gave a clear and positive direction that on failure to deposit the consideration within two months the relief would stand withdrawn. No injustice was caused to opposite party No. 1 as the time could be calculated from the date of the appellate Court decree. On the aforesaid analysis, the Court has no power to extend time u/s 148, Code of Civil Procedure.

8. Thus, both the contentions of Mr. Mukherjee must prevail. In the result, the impugned order passed by the learned Additional Subordinate Judge is set aside and the civil revision is allowed. In the circumstances, parties to bear their own costs throughout.