
(2008) 08 JH CK 0121

In the Jharkhand High Court

Case No : Writ Petition (C) No. 139 of 2008

Amiya Bhushan Mahato

APPELLANT

Vs

Smt. Santi Mahto and Others

RESPONDENT

Date of Decision : 08-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18(2), Order 26 Rule 14, Order 43 Rule 1, 114, 144
Constitution of India, 1950 — Article 226

Citation : (2008) 56 BLJR 2726 : (2008) 3 JCR 720

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : S.K. Ughal and Tapas Kabiraj, for the Appellant; D.K. Chakravorty, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—Heard the learned Counsels appearing for the parties.

2. This application under Article 226 of the Constitution of India is directed against the order dated 25.9.2007 passed by the District judge, East Singhbhum at Jamshedpur in Title (Partition) Appeal No. 3 of 2007 whereby the appeal preferred by the petitioner-appellant against the final decree passed in Title (Partition) Suit No. 47 of 1984 has been dismissed as not maintainable.

3. The facts of the case lie in a narrow compass:

The plaintiff (respondent No. 5) filed Title Suit No. 47 of 1984 against the petitioner-defendant seeking partition of joint family properties. The said suit was decreed and a preliminary decree of partition was passed holding that the plaintiff and the defendants are entitled to share in the properties. The petitioner did not prefer any appeal against the preliminary decree dated 04.5.1993. Thereafter, the plaintiff proceeded for preparation of final decree and a Pleader Commissioner was appointed. The Pleader Commissioner submitted his report

and thereafter a final decree was drawn up on 26.8.2006 by Subordinate Judge-V, Jamshedpur in the said Partition Suit No. 47 of 1984. The defendant-petitioner preferred an appeal against the final decree in the Court of District Judge, East Singhbhum, Jamshedpur which was registered as Title Appeal No. 03 of 2007. The plaintiff-respondent challenged the maintainability of the appeal filed by the petitioner. The learned District Judge, after hearing the parties, passed the impugned order dated 25.9.2007 holding that the appeal against the final decree is not maintainable, as because no appeal against the preliminary decree was filed. For better appreciation, the relevant portion of the impugned order is quoted herein below:

11. Next, it is to be seen whether this appeal could have been filed or can be taken to have been filed u/s 96 of C.P.C. or not against an order confirming the report of the Pleader Commissioner or against the final decree. In the aforesaid context, Section 97 C.P.C. itself is very specific wherein a clear stipulation has been made debarring a person from filing appeal u/s 96 of C.P.C. after the final decree, if the person has not moved by filing appeal against the preliminary decree.

Our own Hon"ble High Court in a judgment reported in 1995 PLJR 670 has already considered the said question and by making elaborate discussions on all the relevant aspects and also by noticing all the relevant provisions of C.P.C. has observed that if a person is not aggrieved by the judgment/preliminary decree, he cannot agitate the matter relating to confirmation of Pleader Commissioner's report after the final decree, by filing appeal u/s 96 of C.P.C. in view of the provisions of Section 97 of C.P.C. Thereafter, the Hon"ble Court made the consideration as regards forum or the remedy available to a party in such event and then held that the only remedy against such order is revision as envisaged u/s 115 of C.P.C.

12. It, thus, becomes evident that even if the present appeal would have been filed u/s 96 of C.P.C., the same would not have been maintainable and as per the aforesaid judicial pronouncement of the Hon"ble Court, it is the revisional forum that can be availed of for challenging the final decree or the order of confirmation of Pleader Commissioner.

4. Section 2(2) C.P.C. defines the term "decree" which reads as under:

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

5. From the aforesaid definition, it is clear that the decree may be either

preliminary decree or final decree. Section 96 of the Code lays down the provisions of appeal against every decree including preliminary decree and final decree. Section 97, however, provides that where any person is aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal against the final decree. Section 97 reads as under:

97. Appeal from final decree where no appeal from preliminary decree. -- Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

6. From bare reading of these provisions, it is manifestly clear that appeals lay both against the preliminary decree and also against a final decree, but the scope of these two appeals are limited. In an appeal against the preliminary decree, one can challenge the legality and entitlement of the share adjudicated by the Court in the preliminary decree, whereas in an appeal against the final decree, one can challenge the allotment of the property and the Takhtabandi done by the Pleader Commissioner. In other words, omission of appeal from a preliminary decree precludes a party from disputing the correctness of the preliminary decree or raising any objection to it in appeal filed against the final decree. Certainly, therefore, an appeal against the final decree is maintainable like that of an appeal against a preliminary decree. It is a different thing that in an appeal against the final decree, the disputes decided in a preliminary decree cannot be questioned.

7. In the instant case, it appears that although the appeal was filed by the petitioner against the final decree, but the provisions as contained in Order 43, Rule 1 CPC has wrongly been mentioned in the memo of appeal. Because of wrong labelling of provisions, the Court of Appeal below also held that the appeal is not maintainable. In my considered opinion, wrong labelling of section is not fatal and on that ground, an appeal which is maintainable under other provisions of the Code, cannot be thrown out as not maintainable. Admittedly, the appeal is maintainable u/s 96 of the Code, but the scope of the appeal is confined or limited to an extent mentioned in Section 97 of the Code.

8. In the case of Mool Chand and others Vs. Dy. Director, Consolidation and others, the Supreme Court considered the distinction between preliminary decree and final decree and observed:

15. The definition of "decree" contained in Section 2(2) read with the provisions contained in Order 20 Rule 18(2) as also Order 26 Rule 14 of the Code indicate that a preliminary decree has first to be passed in a partition suit and thereafter a final decree is passed for actual separation of shares in accordance with the proceedings held under Order 26. There are, thus, two stages in a suit for partition. The first stage is reached when the preliminary decree is passed under

which the rights of the parties in the property in question are determined and declared. The second stage is the stage when a final decree is passed which concludes the proceedings before the court and the suit is treated to have come to an end for all practical purposes.

9. The Court has considered the provisions of Section 97 C.P.C. and held that if an appeal is not filed against the preliminary decree and its correctness is not challenged, it becomes final and the parties aggrieved thereby will not be permitted to challenge its correctness in an appeal against the final decree. It is therefore, obvious that in an appeal against the final decree, the appellant can challenge only the correctness of the division of the property and allotment of share as per the preliminary decree and equitable right to maintain possession.

10. In the case of Uma Kant Jha and Ors. v. Shital thakur and Ors. preliminary decree 1995 (1) PLJR 670 upon which the Court of Appeal below put reliance, a Bench of this Court has not correctly appreciated the provision of Section 97 C.P.C. by holding that if an appeal is not filed against a preliminary decree, he cannot file appeal against the final decree u/s 96 of the C.P.C.

11. In my considered opinion, the aforesaid decision is per incuriam inasmuch as, it is against the law laid down by the Supreme Court and the provisions of Section 97 of the Code.

After having considered the entire facts of the case and law discussed herein above, the impugned order cannot be sustained in law.

12. This application is, therefore, allowed and the impugned order is set aside. The matter is remitted back to the Court of Appeal below to treat the appeal as an appeal u/s 96 of the Code and to decide the appeal in accordance with law.