
(1972) 09 OHC CK 0002

In the Orissa High Court

Case No : Second Appeal No. 234 of 1969

Gobinda, Chandra Naik and Others

APPELLANT

Vs

Das and Naik and Others

RESPONDENT

Date of Decision : 18-09-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 2(2), 47, 96

Citation : (1972) 38 CLT 1275

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : R.N. Das, P.K. Das and J. Swain, for the Appellant; S.C. Ghose and U.N. Sahu, for the Respondent

Judgement

S. Acharya, J.—The Defendants have preferred this second appeal against the decision dated 6-2-1969 of the Additional District Judge, Dhenkanal in Title Appeal No. 276 of 1965 confirming the order dated 25.10.1965 passed by the Munsif Angul in Title Suit No. 1 of 1957.

2. In this suit for partition the preliminary decree has been passed, a Civil Court Commissioner has been appointed to effect partition, and the final decree has not yet been drawn. At this stage the Plaintiffs filed a petition in the trial Court to direct the Civil Court Commissioner to take accounts of the yields and profits of the suit properties in the hands of the Defendants and their predecessors in-interest since the institution of the suit, and to equitably divide the same so as to form a part of the final decree. The learned Munsif by his order dated 25-10-1965 directed the Civil Court Commissioner to take accounts of the yields and profits of the suit properties received by the Defendants since the institution of the suit and to equitably divide the same between the parties as to form a part of the final decree. Against the aforesaid order the Defendants filed Title Appeal No. 276 of 1965. The Appellate Court finds that the order passed by the learned Munsif is not correct as he had not made any enquiry as to the extent of the suit properties in the possession of the parties. Having arrived at the

aforesaid finding the lower Appellate Court has dismissed the appeal on the finding that the order passed by the learned Munsif directing the Civil Court Commissioner to take accounts does not amount to a decree and so the appeal preferred against the aforesaid order is not maintainable.

3. The only question for determination in this second appeal is whether the first appeal before the Court below was maintainable against the aforesaid order dated 26.10.1965 passed by the Munsif. On bearing the counsel appearing for both the parties I am of opinion that the aforesaid order dated 25.10.1965 of the learned Munsif is only an interlocutory order in the final decree proceedings, and the said order does not amount to a decree as defined in Section 2(2) of the Code of Civil Procedure.

4. The prayer before the learned Munsif was to direct the Civil Court Commissioner to take accounts of the yields and profits of the Suit properties received by the Defendants and their predecessors in interest and to equitably divide the same so as to form a part of the final decree. This prayer was made before the passing of the final decree. On the aforesaid prayer, the learned Munsif, in effect, has directed the Civil Court Commissioner to take accounts of the yields and profits of the suit properties in the hands of the Defendants since the institution of the suit, and after taking accounts of the same the said Commissioner is to equitably apportion the amount, so accounted for, between the parties and after the said apportionment is made by the Commissioner that will be incorporated in the final decree. Until the said yields and profits and the respective share of the parties therein are determined and the same ill incorporated in the final decree to be passed by the Court, nothing can finally affect the rights of the parties relating to the matter in question. After accounts are taken and apportionment of the shares are made by the Civil Court Commissioner the parties can agitate the correctness of the same before the Court which passed the order. All that the Civil Court Commissioner will do in accordance with the order in question has to be incorporated in the final decree and before that is done the parties will have the opportunity to question the property and the correctness of all that is to be done by the Civil Court Commissioner in accordance with the said order. Therefore, by the passing of the order, the rights of the parties relating to the matter in question have not yet been conclusively determined. Determination of the rights of the parties as is well settled refers to the conclusive determination of the rights of the parties with reference to the subject matter in controversy. Incidental orders, directing an enquiry regarding mesne profits and the respective shares of the parties in the same, and some such incidental and interlocutory orders which have to be passed as and when matters arise for consideration, cannot be said to be orders which conclusively determine the rights of the parties with reference to the subject matter in controversy. That being so, the order in question, by which nothing conclusively has yet been determined, cannot be said to be a decree coming within the meaning of Section 2(2) Code of Civil Procedure.

5. In the Fun Bench decision reported in AIR 1951 Mad 561, their Lordships have laid down the following three conditions on the existence of which alone an appeal would lie against an order covered by Section 47, Code of Civil Procedure:

(1) the order must relate to execution, discharge or satisfaction of the decree between the parties to the suit;

(2) it shall conclusively determine the rights of the parties with regard to all or any of the matters in controversy;

(3) such conclusive determination of the rights is with reference to the Court in which such rights are decided.

The present order in question does not, for reasons stated above, satisfy the above mentioned second and third condition.

6. On the above considerations the order in question does not amount to a decree within the meaning of Section 2(2), CPC and so no appeal lies against the same u/s 96, Code of Civil Procedure.

7. Under Order 43, Rule 1, CPC also no appeal lies against the said order.

8. Accordingly the appeal against the aforesaid order dated 25.10.1965 in the Court below was not maintainable, and hence this second appeal preferred against the judgment and decree of the Appellate Court is not maintainable.

9. It is needless for me to mention that the Civil Court Commissioner, while assessing the yields and profits of the suit properties and in determining the respective shares of the parties in the same, must take care to take into account the extent of the suit properties in the possession of the Defendants and whether they are actually in possession of properties more than their legitimate shares after ascertainment of the yields and profits as directed by the Court must be done in the perspective of the above facts.

10. The appeal accordingly is dismissed, but in the circumstances there will be no order as to costs of this appeal.