

(1973) 07 OHC CK 0012

In the Orissa High Court

Case No : Civil Revision No. 449 of 1972

Mst. Teva Barihani and Others

APPELLANT

Vs

Mst. Chandantola Barihani and Another

RESPONDENT

Date of Decision : 13-07-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Limitation Act, 1963 — Section 5

Citation : AIR 1974 Ori 169 : (1973) 39 CLT 813

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

Bench : Single Bench

Advocate : B.L.N. Swamy, for the Appellant; B. Tarasia, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, C.J.—A preliminary, decree for partition was passed on 17-2-1965 by the learned Subordinate Judge of Bolangir in T. S. No. 1318 of 1963. In course of the final decree proceeding, defendants other than defendant No. 2 filed an application before, the Court that the final decree should be passed in terms of the compromise petition dated 22nd of January, 1966. Admittedly, the compromise had not been signed by the second defendant. Ultimately the trial Court refused to record the compromise as it had not been signed by the second defendant Other defendants filed Civil Revision No. 313 of 1969. The civil revision was dismissed as an appeal lay under Order 43, Rule 1 (m) of the Code of Civil Procedure. A miscellaneous appeal was fided before the District Judge with an application to condone the delay caused by prosecuting the civil revision in the High Court.

2. The learned District Judge dismissed the appeal on two grounds; that the appeal was barred by limitation and that the compromise cannot be recorded as it was not in accordance with law.

3. In the peculiar circumstances of this case when the civil revision was pursued

in good faith, the delay should be condoned. The explanation given here is quite satisfactory and is accepted.

4. Order 23, Rule 3, Civil P. C. with the Orissa amendment runs thus :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties in the token of their consent to such agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

Provided that the provisions of this rule shall not apply to or in any way affect the provisions of Order 34, Rules 3, 5 and 8."

As would be noticed, the compromise in order to be acted upon must be in writing and signed by the parties. Admittedly, the second defendant did not sign the compromise and consequently the compromise cannot be acted upon so far as it relates to defendant No. 2.

5. The further question for consideration is whether the compromise can be acted upon so far as other defendants are concerned. The position of law is that once defendant No. 2 has not signed the compromise the final decree proceeding must continue against all. If ultimately the Court comes to a conclusion that the compromise is not adverse to the interest of defendant No. 2, then the compromise would be recorded and the Court shall pass a decree in accordance with it and defendant No. 2 would be given his share not on the basis of the compromise but de hors it in accordance with the ultimate decision arrived at by the Court in the final decree proceeding. If, on the other hand, the Court ultimately reaches a decision whereby the second defendant gets an interest which cannot be reconciled with the terms of the compromise, then the entire compromise would be thrown out.

6. The result of the aforesaid discussion is that the compromise petition filed by the parties would be kept on the record. The learned Subordinate Judge would dispose of the final decree proceeding, hear arguments and determine whether the share or interest to be allotted to defendant No. 2 would in any manner be contrary to the compromise petition. If he finds that the share that will be given to defendant No. 2 is not consistent with the allotment given in his favour in the compromise petition, then the entire compromise would fail. Otherwise, he would act upon the compromise and dispose of the final decree proceeding in terms of the compromise so far as the plaintiffs and other defendants are concerned.

7. Subject to the aforesaid observations, the revision is dismissed on merits but not on the ground of limitation. There will be no order as to costs.