
(1979) 08 OHC CK 0001
In the Orissa High Court
Case No : Misc. Appeal No. 108 of 1976

Padmalaya

APPELLANT

Vs

Shyamsundar Sahu and Others

RESPONDENT

Date of Decision : 21-08-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 47, 96

Citation : AIR 1980 Ori 1 : (1980) 49 CLT 41

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : S.C. Mohapatra, for the Appellant; R.K. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—This is a second appeal by the decree-holder challenging the appellate order of the learned District Judge reversing the rejection of an objection u/s 47 of the CPC by the executing court,

2. Title Suit No. 109/63 of 1965/1966 was one for partition wherein defendant No. 4 had been appointed as receiver. The suit terminated by compromise on 6-12-1966 and a compromise decree was passed which absolved the receiver from liability for mesne profits. An attempt of the plaintiff to have a receiver appointed by application dated 6-5-1967 failed on the ground that there was and proceeding then pending in court. On 7-7-1967, an application for final decree was filed where an application for appointment of receiver was made. That application was rejected on 23-9-1969. A fresh application was filed on 25-11-1969 for appointment of receiver which was registered as Miscellaneous Case No. 64 of 1969 and by order of the Court dated 22-12-1970, defendant No. 4 was appointed as receiver. On 4-5-1971, plaintiff applied to the trial court for ascertainment of mesne profits for the period between 6-12-1965, when the suit terminated by compromise and 22-12-1970, when defendant No. 4 came to be appointed as receiver. A Commissioner was appointed for the purpose and he

furnished a report which was objected to. Overruling the objection, the learned Trial Judge directed a final decree to be drawn up on 1-5-1972. Execution Case No. 49 of 1972 was filed seeking to recover a sum of Rs. 36,650/- on account of mesne profits for the period when there was no receiver. There was objection to the executability of the decree on the ground that there was and direction in the final decree for the recovery of the said sum. The objection was overruled by the executing court.

3. Against the decision of the executing court, a revision was filed being Civil Revision Nd. 55 of 1974 in this Court and a Miscellaneous Appeal being No. 7 of 1974 was carried before the learned District Judge. The Civil Revision was dismissed on 10-4-1975 at the stage of admission. The learned District Judge after hearing parties allowed the appeal and held that final decree had not fixed the liability for mesne profits against defendant No. 4.

4. At the hearing Mr. S.C. Mohapatra, counsel for the decree-holder-appellant contends:---

(i) With the dismissal of Civil Revision No. 55 of 1974 in this Court, the original order of the executing court had merged with the decision of the Civil Revision and the appeal to the District Court was no more maintainable and the learned District Judge had no jurisdiction to reverse the decision of the executing court.

(ii) While dismissing the Civil Revision at the admission stage, this Court had observed:--

"Heard the learned advocates. The learned Subordinate Judge has merely overruled the objection of defendant No. 4 judgment-debtor. He has not passed any final order granting relief to the plaintiff-decree-holder. After final order is passed, it would be open to both the parties to seek redress in proper forum to the extent they are aggrieved. I am, therefore, not inclined to interfere at this interlocutory stage even though notice of admission and hearing had been issued. The revision is not fit to be admitted and is accordingly dismissed. No costs."

Therefore, Mr. Mohapatra's next contention is that it was not open to defendant No. 4, the judgment-debtor, to dispute the order of the executing court in an appeal.

(iii) By implication, the amount determined as mesne profits was recoverable from defendant No. 4 and since the executing court is entitled to construe a decree in the event of ambiguity, the executing court had exercised its jurisdiction properly and the learned Appellate Judge took an unreasonable view of the matter.

5. Judicial view seems to be almost unanimous that dismissal of a proceeding in the higher forum at the stage of admission does not have the effect of merger of the decision of the subordinate forum with that of the higher forum. The principle to be applied, when such a question arises has been indicated in the decision of

the Supreme Court in the case of State of Madras Vs. Madurai Mills Co., Ltd., . In the case of Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, . a revision application was dismissed on merit after hearing both sides. Therefore, it was pointed out:

"Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.

It may be useful to refer to certain other decisions which by analogy can be of some assistance in deciding the point before us. In U.J.S. Chopra Vs. State of Bombay, the principle of merger was considered with reference to Section 439 of the Criminal Procedure Code which confers revisional jurisdiction on the High Court. In the majority judgment it was held, inter alia, that a judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing, in the presence of both the parties would replace the judgment of the lower court thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below....."

In a recent Bench decision, this Court adopted the general principles indicated in these authorities while considering the question of merger. Thus there is no force in the first contention of Mr. Mohapatra.

6. Mr. Mohapatra for the appellant does not dispute the position that the appeal to the District Court lay against the order of the executing court. In view of the fact that an appeal was maintainable and actually been filed, the Civil Revision in this Court should not have been entertained. The jurisdiction of the appellate forum in a tenable appeal cannot be affected by any observation in a non-maintainable Civil Revision before this Court. No objection was raised in the appellate forum when the appeal was heard as to maintainability of the appeal on the ground that the appeal had ceased to be maintainable on the principle of merger or in view of what had been observed by the learned Chief Justice while disposing of the Civil Revision at the admission stage. There is no force in the second contention.

7. The final decree did not clearly indicate liability of the fourth defendant for the amount under execution. There was obviously no direction in the preliminary decree in relation to mesne profits. The question of quantification of mesne profits arose on an application for mesne profits subsequent to the preliminary decree. It is true that a Commissioner was appointed for determining the mesne profits and his report was accepted by the trial court. Mere acceptance of the

Commissioner's report does not give rise to liability unless there be a clear determination that for the entire mesne profits as decreed by the court, the liability is of defendant No. 4. In the instant case, on the basis of ambiguity, liability of the fourth defendant cannot be found out by construing the decree. It is open to the plaintiff to move the trial court for suitable amendment of the final decree passed by it fixing the liability of any of the parties for the mesne profits and until that is done, in execution defendant No. 4 cannot be proceeded against on the basis of liability arising out of construing of the decree.

8. In order to facilitate determination by the trial court, it is appropriate that the decisions of the executing court and the appellate court should not be made binding on the trial court and the trial court should be free to deal with it if any when moved. The appeal fails and is dismissed. There will be no order for costs.