
(1970) 03 OHC CK 0022

In the Orissa High Court

Case No : Miscellaneous Judicial Case No. 103 of 1967

Purna Chandra Bhanj of Jurka

APPELLANT

Vs

Ram Chandra Bhanj and Others

RESPONDENT

Date of Decision : 12-03-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 44 Rule 1

Citation : (1970) 36 CLT 794

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

Bench : Division Bench

Advocate : R.C. Patnaik and B.G. Das, for the Appellant; H.G. Panda, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—The Petitioner was the Plaintiff in the Court below. He filed a suit for partition claiming one-sixth share in share in ?Ka? and ?Go? schedule lands and claiming exclusive title to ?Gha? and ?Una? schedule properties. The suit for partition was decreed in respect of one-sixth share in ?Ka? and ?Go? schedule properties. Even though exclusive title was claimed in respect of ?Gha? schedule, partition was decreed in respect of one-sixth share of ?Gha? schedule. The entire ?Una? schedule property was decreed in favour of the Plaintiff. Having lost in respect of five-sixths interest in ?Gha? schedule property, the Plaintiff has filed the present appeal and along with the memorandum of appeal has filed this application for permission to file the appeal in forma pauper is, alleging that his total means comes to Rs. 125/- and he has no resources to pay the sum of Rs. 321/- towards court fee in respect of the value of the five-sixths share of ?Gha? schedule property ascertained at Rs. 2083/-. The opposite parties contend that as the Plaintiff has got a decree in respect of ?Ka? ?Ga? ?Gha? and ?Una? schedule properties they would be available at his disposal for raising the means to pay the requisite court fee. Accordingly the Plaintiff cannot be decreed to be a pauper in the appeal even though he was allowed to bring the suit as a pauper.

2. The sole question for determination is whether the Plaintiff is a pauper despite his partial success in the suit whereby one-sixth of Ka, Ga, and Gha schedule properties and the whole of Una schedule properties were made available to him for obtaining the means to pay the court fee.

3. By virtue of Order 44, Rule 1, Code of Civil Procedure, the provisions of order 33 are made applicable to Order 44, so far as relevant Order 33 Rule 1, Explanation defines 'pauper' thus:

A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fees prescribed by law for the plaint in the suit or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees, other than his necessary wearing apparel and the subject-matter of the suit.

By Orissa amendment, two provisos were to the Explanation. The first proviso says that in determining whether such a person is possessed of sufficient means of property that is the subject-matter of the suit shall always be excluded.

4. The question is whether one-sixths of Ka, Go., and Gha, and the whole of "Una" schedule properties still continued to be the subject-matter of the litigation after the Plaintiff obtained a decree in respect of the same.

Mr. Patnaik contends that until the pauper application is allowed or dismissed, there is no competent first appeal. If the pauper application is allowed, the appeal would become competent without payment of the court fees and the opposite parties would get thirty days time for filing cross-objection, from the date of service of notice on them, regarding the filing of the first appeal. As the opposite parties have the opportunity of filing cross-objection in respect of the properties regarding which the Plaintiff has got a partial decree, these properties cannot be said to have ceased to become the subject-matter of the litigation. Mr. Patnaik's contention appears to be well founded and is supported by the decision reported in *Nasir Ahmad Khan v. Mst. Saidan* AIR 1941 Oudh 113. Mr. Panda, appearing for the opposite parties, does not dispute the correctness of this proposition.

Mr. B.B. Mohanty, appearing for the opposite parties in M.J.C. No. 100 of 1967, in which the identical is involved however, contends that the aforesaid view may lead to absurd results. According to him there is a possibility that the opposite parties may not file any cross-objection, and in that event, the question whether the Applicant was pauper or not cannot be subsequently reviewed nor can there be a determination of the same question once again. This argument, though ingenious is without substance. The point of time when the question of pauperism is relevant is the date on which the pauper application is filed. The question whether the properties in respect of which the Plaintiff obtained a decree are the subject-matter of litigation would have to be determined with reference to that point of time on that day it would certainly not be possible for the Court to say that these properties ceased to be the subject-matter of litigation. The properties, in respect of which partial decree was obtained, would

cease to be the subject-matter of litigation only after the expiry of thirty days from the date of service of notice on the Respondents regarding the filing of the first appeal. The court cannot record such a finding on the date of filing of the pauper application. The mere possibility that ultimately no cross-objection may be filed would therefore make no difference to this position. Mr. Mohanty's objection has accordingly no force. With respect, we would say that the aforesaid Oudh decision lays down the law correctly.

5. It has recently been held by a Full Bench of this Court in M.J.C. 37 of 1967, that is no longer open to the opposite party to challenge this Court's prima facie view, taken at the time of admission, that the judgment is contrary to law, or some usage having the force of law, or is otherwise erroneous or unjust on the aforesaid analysis we must hold that the Petitioner is a pauper. He is accordingly permitted to file the appeal in forma pauper is.

The application is allowed, but in the circumstances without costs.

S. Acharya, J.

6. I agree.