
(2019) 03 OHC CK 0056
In the Orissa High Court
Case No : C.M.P.No.285 Of 2018

Tulashi Mallik And Others

APPELLANT

Vs

Shri Jagannath Mallik And Others

RESPONDENT

Date of Decision : 29-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Order 20 Rule 18(2)

Citation : (2019) 03 OHC CK 0056

Hon'ble Judges : Dr. A. K. Rath, J

Bench : Single Bench

Advocate : Maheswar Mohanty, Samir Kumar Mishra

Final Decision : Allowed

Judgement

Dr.A.K.Rath, J

1. This petition challenges the order dated 1.2.2018 passed by the learned Senior Civil Judge, Balasore in C.S.No.191 of 2011 (F.D). By the said

order, learned trial court rejected the application of defendant nos.4 (ka) to 4 (ga), petitioners herein, to provide them opportunity to adduce evidence

for allotment of their share.

2. The plaintiff-opposite party no.1 instituted the suit for partition and permanent injunction. The defendant no.4 filed written statement claiming that

she has 1/6th share in Lot No.1, $\frac{1}{2}$ share in Lot Nos.4, 5 & 6 and 1/4th share in Lot No.3 of suit schedule properties. The suit was dismissed on

contest against defendants 1, 2, 4 & 8 to 20 and 26 to 30 and ex parte against other defendants. Felt aggrieved, the plaintiff filed RFA No.498 of 2014

in the Court of the learned District Judge, Balasore. Learned District Judge held that the suit property be partitioned amongst the co-sharers according

to their legitimate shares. The co-sharers may effect the partition amicably or through the process of the Court. The alienations made out of the suit

property be adjusted in the shares of the respective co-sharers/vendors. Held so, it allowed the appeal. The suit was decreed preliminarily. Thereafter

the plaintiff levid final decree proceeding. In the final decree proceeding, defendant 4 (ka) to 4 (ga), petitioners herein, filed an application to provide

them opportunity to adduce evidence regarding allotment of their share. No share was determined in the preliminary decree. It is not possible on the

part of the Civil Court Commissioner to submit report. In the absence of any determination of share, partition is not possible. Learned trial court held

that defendant no.4 is entitled to get his share. There is no cloud of suspicion with regard to the share of the parties. The parties can be heard on the

point of their respective shares from the pleading and evidence of the parties. No direction was issued by the appellate court to adduce further

evidence. Held so, it rejected the petition.

3. Mr.Maheswar Mohanty, learned Advocate for the petitioners submitted that in the preliminary decree share of the parties have not been

determined. Learned District Judge held that the suit property shall be partitioned amongst the co-sharers. In view of the same, the petitioners filed an

application for determination of the share. He further submitted that under Order 20 Rule 18 (2) CPC the Court shall pass a preliminary decree

declaring the rights of the parties interested in the property and giving such further directions as may be required. In absence of any specific share of

the parties, the Civil Court Commissioner cannot make allotment of share. He places reliance on a decision of the apex Court in the case of Shankar

Balwant Lokhande (dead) by L.Rs. v. Chandrakant Shankar Lokhande and another, AIR 1995 SC 1211.

4. Per contra, Mr.Samir Kumar Mishra, learned Advocate for opposite party no.1 supports the order. He contended that the judgment passed by the

learned District Judge, Balasore is perfectly in consonance with the law. The question of adduction of evidence by the petitioners does not arise at all.

5. Before advertng into the contentions raised by the counsel for the parties, it will be necessary to set out sub-rule 2 of Rule 18 of Order 20 CPC.

â??18. Decree in suit for partition of property or separate possession of a share therein.-Where the Court passes a decree for the partition of property or for the

separate possession of a share therein, then,-

(1) xxx xxx xxx

Â (2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.â??

6. The aforesaid sub-rule was the subject of interpretation in the case of Shankar Balwant Lokhande. The apex Court held :

â??xx xx xx Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without

further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The Court is also empowered

to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the"" final decree

is passed. In a suit for partition by a coparcener or co-sharer, the Court should not give a decree only for the plaintiffs share, it should consider shares of all the heirs

after making them parties and then to pass a preliminary decree. The words ""declaring the rights of the several parties interested in the property"" in sub-rule (2) would

indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property which is the subject-matter of the suit.

The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper.â?? (emphasis laid)

7. In *Jadunath Roy and others v. Parameswar Mullick and others*, A.I.R. 1940 P.C. 11, it was held that a partition suit in which a preliminary decree

has been passed is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree.

8. The same view was reiterated in *Ghanashyam Martha v. Brundaban Pradhan*

and another, A.I.R. 1977 Orissa 154. This Court held that any number of preliminary decrees can be passed therein.

9. In *Basu Behera v. Dombaru Behera and others*, A.I.R.1954 Orissa 223, this Court held that the Rule empowers the Court to pass a preliminary decree declaring the right of the parties and giving such further directions as may be required from time to time.

10. The inevitable conclusion is that Order 20 Rule 18 CPC envisages passing of a decree for the partition of property or for the separate possession of a share therein. Sub-rule (2) mandates that if the decree relates to any other immovable property or movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. The words ""declaring the rights of the several parties interested in the property"" in sub-rule (2) would indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing preliminary decree. Preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper. Unless the rights of the parties are declared, final decree proceeding cannot be levid.

11. In view of the forgoing discussions, the impugned order is quashed. The matter is remitted back to the learned trial court for determination of the shares of the parties and to pass a preliminary decree. No costs.

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