

(1984) 08 OHC CK 0020

In the Orissa High Court

Case No : Civil Revision No. 568 of 1980

Uamash Chandra Guru and Others

APPELLANT

Vs

Dinabandhu Guru and Others

RESPONDENT

Date of Decision : 06-08-1984

Acts Referred:

Orissa Land Reforms Act, 1960 — Section 40(3), 40A

Citation : AIR 1985 Ori 115

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : C.A. Rao and C.V. Murty, for the Appellant; P.K. Mishra and L. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—Defendants 2 to 2(h) in Title Suit No. 69 of 1972 pending in final decree proceeding before the Subordinate Judge, Bargarh are the petitioners in this revision petition, challenging the order dt. 11-8-1980 rejecting their prayer to drop the final decree proceeding.

2. The opposite party No. 1 filed the above mentioned suit for partition of the suit properties. The said suit by judgment dt. 4-1-1977 was decreed preliminarily, ex parte against defendants 1, 2 and 4 and on contest against defendant No, 3. Under the preliminary decree, the plaintiff was to get 1/5th share and defendants 1, 2, 3 and 4 were to get 1/5th each in the suit schedule properties. The total extent of land involved in the suit is above 27.50 acres. Admittedly no appeal was carried against the preliminary decree. The parties having failed to demarcate the lands by mutual arrangement the opposite party No. 1 (plaintiff) filed a petition for making the decree final and to appoint a Commissioner for effecting partition by metes and bounds in accordance with the directions contained in the preliminary decree. In course of the said proceeding while steps were being taken by the Civil Court Commissioner to demarcate the properties and objection was filed on behalf of the petitioners that the final

decree proceeding cannot proceed in view of the provisions of Section 40 of the Orissa Land Reforms Act (hereinafter referred to as "the Land Reforms Act") and Section 4(4) of the Orissa Consolidation of Holdings & Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as "the Consolidation Act"). The said objection was rejected by the court below by the impugned order holding that the same was not maintainable at such a belated stage.

3. At the outset Mr. C.A. Rao, the learned counsel for the petitioner concedes that there is no merit in the objection raised by the petitioner that the final decree proceeding abates u/s 4(4) of the Consolidation Act, in view of the decision of the Full Bench of this Court in the case of Srinibas Jena and Others Vs. Janardan Jena and Others, Thus there remains only the question whether Section 40 of the Land Reforms Act affects the maintainability of the final decree proceeding. Reliance has been placed for this purpose on Section 40(3) of the Act which reads as follows : --

"(3) All suits for partition of land instituted in a Civil Court after the 26th day of Sept. 1970 and pending on the date of commencement of the Orissa Land Reforms (Second Amendment) Act, 1975 shall if the land forming the subject matter of the suit exceeds the ceiling area in respect of the person who is liable to submit a return u/s 40-A in relation to such land, abate."

From the provision quoted above it is clear that it does not provide an absolute bar to the maintainability of a suit for partition. It only provides for abatement of such suits filed after 26-9-1970 if the land forming the subject matter of the suit exceeds the ceiling area in respect of the person who is liable to submit a return u/s 40-A in relation to such land. Ex facie the provision is not made applicable to execution proceedings or final decree proceedings. Even if a partition suit can be said to be pending during the continuance of the final decree proceeding, the determination of the question whether the suit concerns any property in excess of ceiling area in respect of which the person concerned is liable to submit a return, is to be determined before the suit can be held to have abated. This is not such a question that arises only after passing of the preliminary decree. If the point had been raised during the trial and the necessary materials placed before the court he could have determined it while passing his judgment. In this regard some observations of the Full Bench in the case referred to above can be appropriately quoted (at p, 4 of AIR) :

"If the preliminary decree had become final and conclusive, it is not open to the Consolidation Authorities to reopen the matter and come to a different conclusion. The legislature never intended to deprive a party of the fruits of the decree which has already become final. It is a widely accepted principle of law what there would be no taking away of rights of citizens by implication and whenever the legislature intends to disturb or affect such rights clear provision is made. In case the Legislature really intended that final decree proceedings would abate, provision could have been made for the Consolidation Authorities to continue the final decree proceeding so that the decree was not disturbed and

the consolidating process could also work out and keeping the preliminary decree in view allotments could be made giving effect to the Act.

In view of our above discussions we give our full assent to the view expressed by one of us in the case of *Nayanasundari Bewa v. Subash Chandra Behera* (47) 1979 CLT 488 that final decree proceeding is not a proceeding as contemplated under Sub-section (4) of Section 4 of the Act and hence it cannot abate. This view gains support from a decision of the Allahabad High Court in the case of *Rudra Pal Singh Vs. Ram Pal Singh and Others*, ".

In my view, the above observations equally apply to the provisions of Orissa Land Reforms Act also. It is beyond controversy that a preliminary decree becomes final u/s 97 of the Civil P.C. and it is not available to be reopened at any subsequent stage. There is also no provision in the Orissa Land Reforms Act providing for continuance of a final decree proceeding in a suit for partition and for giving effect to a preliminary decree. From these it can reasonably be inferred that it was not the legislative intent to deprive the successful litigant of the fruits of the decree while making provision for abatement of partition suits. As such the court below cannot be said to have committed any error in rejecting the objection of the petitioners, and directing the final decree proceeding to continue.

4. For the reasons stated above the revision petition is dismissed as devoid of merit, but in the circumstances of this case without costs of this proceeding.