

Tapan Kumar Bhattacharjee Vs. Ratan Kr. Bhattacharjee and ors.

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Court : Guwahati

Decided On : Sep-18-2003

Judge : T. Vaiphei, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 97

Appeal No. : R.F.A. No. 12 of 2003

Appellant : Tapan Kumar Bhattacharjee

Respondent : Ratan Kr. Bhattacharjee and ors.

Advocate for Def. : D.C. Roy and S. Bhattacharjee, Advs.

Advocate for Pet/Ap. : A.M. Lodh, Sr. Adv., A. Lodh and A. Dutta, Advs.

Disposition : Appeal dismissed

Judgement :

T. Vaiphei,J.

1. Heard Mr. A. Lodh, learned counsel for the appellant and Mr. D.C. Roy, learned counsel for the respondents.

2. The short question of law to be determined in this case is whether this appeal lies in view of Section 97 of C.P.C.

3. The facts relevant for determining this appeal may be summarised as follows :--

The respondent No. 1 in this case had instituted a partition suit bearing No. T.S. (P) 174 of 1992 before the learned Civil Judge (Senior Division), Court No. 1, Agartala, West Tripura against the appellant and other pro-forma respondents for partition of the suit property claiming 3/9 share therein. The appellant contested the suit by filing a written statement of defence. After hearing the parties, the learned Civil Judge (Senior Division) passed a preliminary decree on 18-5-1994 holding that the respondent No. 1 is entitled to get 1/3 shares of the suit property while the defendant Nos. 1 to 6 are entitled to have 1/9 shares each of the suit property. It was also pointed out therein that the respondent No. 1 was entitled to file a petition before the learned Civil Judge after the expiry of six months to draw up the final decree and to appoint a Survey Commissioner to survey the suit land and to demarcate the respective shares of the parties to the suit by meets and bounds. On the petition of the respondent No. 1, a Survey Commissioner was appointed to survey the suit land and demarcate the shares of the parties thereof. The Survey Commissioner accordingly submitted a report on 5-11-2002 along with a hand sketch map before the learned Civil Judge. On coming to know this, the appellant filed a petition before the learned Civil Judge for filing objection against the report of the Survey Commissioner, but the same was rejected by the learned Civil Judge vide order dated 25-1-2003. Thereafter the report of the Survey Commissioner was accepted and final de-

cree was passed in terms of the report of the said Survey Commissioner.

Aggrieved by an dissatisfied with the final decree passed by the learned Civil Judge, the appellant has now preferred this appeal contending, inter alia, that the learned Civil Judge should not have acted upon the report of the Survey Commissioner which did not take into consideration the admitted position that the appellant has constructed a pucca construction in Plot No. 1 of the hand sketch map and also without taking into consideration the valuation of the said construction and also that the report of the Survey Commissioner was made in violation of the provisions of Order 26, Rule 16 and 16A of C.P.C. by not examining the parties or any witness to determine the values of the land. Even

though the appellant had submitted before the Commissioner that the pucca construction in Plot No. 1 was done at the cost of not less than Rs. 4,00,000/-, which was not even objected by the respondent No. 1 before the Survey Commissioner, the same was not taken note of by him. It was also contended by the appellant that inasmuch as the tenants already in the suit premises were not made parties in the suit, the final decree is not executable. The appellant also asserted that he has been in possession of the plots of land earmarked as Nos. 1 and 2 for long with the knowledge of the respondent No. 1, who never objected to the same, hereby failing to apply the well known principle of equity that where partition is inconvenient the property must be left in the possession of the parties in occupation and that compensation should be paid to the others not in occupation. For all these reasons, the appellant submits that the impugned final decree cannot be sustained in law.

4. The respondent No. 1 has entered his appearance through his learned Counsel and filed a written objection against the memo of appeal. In the written objection, the respondent No. 1 submits that the appeal is not maintainable being barred by Section 97 of C.P.C. and raises preliminary objection regarding the maintainability of the appeal and prays for hearing on the maintainability before proceeding further. He also raised other pleas which I do not propose to mention here since I have decided to dispose of the appeal at the preliminary stage. For better appreciation of the controversy involved in this appeal, Section 97 of C.P.C. may be reproduced hereunder :--

'97. Appeal from final decree where no appeal from preliminary decree.

Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.'

5. It is the contention of the respondent No. 1 that the final decree dated 25-1-2003 has been passed on the basis of the preliminary decree dated 18-5-1994 inasmuch as the appellant did not file any appeal against the said preliminary decree, the correctness of the preliminary decree cannot now be questioned by

him in this appeal in view of the clear mandate of Section 97 of C.P.C. On the other hand, the learned counsel for the appellant vehemently argues that the impugned final decree was not passed in terms of the said preliminary decree and that he was never given an opportunity to make objection against the report of the Survey Commissioner dated 5-11-2002 upon which the learned Civil Judge passed the final decree.

6. A perusal of the provision of Section 97 of C.P.C. will go to show that any party aggrieved by a preliminary decree is under an obligation to file an appeal from such decree, but if he declines to avail of this opportunity, he cannot thereafter dispute the correctness of the preliminary decree when preferring an appeal against the final decree. In other words in the event of failure to prefer an appeal against a preliminary decree, the preliminary decree is deemed to have attained finality. Admittedly, the appellant did not file any appeal against the preliminary decree dated 18-5-1994. It is also admitted position that there has been variation of the shares of the respective parties, in terms of the report of the Survey Commissioner, upon which the final decree was made by the learned Civil Judge.

7. Mr. D.C. Roy, learned counsel for the respondents points out that the appellant was given full and adequate opportunity by the learned Civil Judge to make objection

against the report of the Survey Commissioner. In this connection, he refers to the orders dated 4-12-2002, 10-1-2003 and 25-1-2003, wherein the appellant was given time for filing of written objection, but he failed to file the written objection. In view of this, it cannot be said that the appellant was denied of any opportunity to dispute the correctness of the report of the Survey Commissioner. Even though the preliminary decree dated 18-5-1994 is held to be final, there are circumstances in which the parties can dispute the correctness of the Survey Commissioner calling for the decision of the Trial Court before final decree is passed.

8. In *Phoolchand v. Gopal Lal*, reported in AIR 1967 SC 1470, the Hon'ble Apex Court while dealing with a case somewhat similar to the instant case has observed as follows :--

'So far as partition suits are concerned, if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; and if there is a dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed in a decree in itself which would be liable to appeal. However this can only be done so long as the final decree has not been passed.'

9. From the aforesaid observations of the Hon'ble Apex Court, there can be no doubt that nothing in the Code of Civil Procedure prohibits the passing of more than One preliminary decree if circumstances Justify the same and that it may be necessary to do so particularly In partition suits when after the preliminary decree some parties die or the nature of possession changes on among the parties thereby augmenting or discreasing (sic) the respective shares of the parties. In any case, it would be convenient to the Court and advantageous to the parties, in partition suit, to have disputed rights finally settled or specification of shares in the preliminary decree varied before the final decree is prepared. However, the Hon'ble Apex Court unambiguously also points out that such second preliminary decree or disputed shares arising after the preliminary decree must be adjudicated upon by the Trial Court before the final decree is prepared. In other words, once a final decree is passed, the

dispute concerning variation in shares, on the basis of the report of the Survey Commissioner, cannot be raised in appeal against the final decree.

10. In the Instant case, it is found from the materials on record that the report of the Survey Commissioner was made on 5-11-2002. The order dated 25-1-2003 reveals that no attempt was made by the appellant to file written objection against the report of the Survey Commissioner. From the written objection of the respondent No. 1 it is evident that the Survey Commissioner submitted his report on 5-11-2002 and the learned Civil Judge adjourned the case from time to time i.e. on 4-12-2002, 10-1-2003 and 25-1-2003 for enabling the appellant to file written objection against the report of the Survey Commissioner, but the appellant did not avail of this opportunity. This assertion of facts made by the respondent No. 1 has not been controverted by the appellant. If the appellant had raised objection

against or disputed the correctness of the report of the Survey Commissioner, the learned Civil Judge would have been duty bound to decide the said objection or dispute raised by the appellant and such a decision made by the learned Civil Judge, if prejudicial to him, would have been appealable in terms of law laid down by the Hon'ble Apex Court in Phoolchand Case (Supra). In the instant case, when the appellant consistently failed to make objection against the report of the Survey Commissioner, the learned Civil Judge after considering the report of the Survey Commissioner passed the final decree in terms of the said report. Consequently, the appellant cannot now question the correctness of the report of the Survey Commissioner in view of law laid down by the Hon'ble Apex Court in Phoolchand Case (Supra). Accordingly, I hold that the instant appeal is barred by Section 97 of C.P.C.

11, In the view that I have taken, this appeal is not maintainable and is hereby dismissed. However in the facts and circumstances of the case, there shall be no order as to costs.

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