

Debasis Jena and anr. Vs. Rajendra Kumar Das and ors.

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Court : Orissa

Decided On : Oct-12-2007

Reported in : AIR2008Ori49

Judge : L. Mohapatra, J.

Appellant : Debasis Jena and anr.

Respondent : Rajendra Kumar Das and ors.

Disposition : Petition dismissed

Judgement :

ORDER

L. Mohapatra, J.

1. This writ application is directed against the order dated 15-2-2007 passed by the learned District Judge, Balasore in RFA No. 138 of 2004 dismissing the appeal as not maintainable and consequently holding that the application filed under Section 5 of the Limitation Act is inconsequential

2. Opposite parties 1 to 4 filed Civil Suit No. 745 of 2004 in the Court of the learned Civil Judge (Senior Division), Balasore for declaration of right, title, interest over the suit schedule land and for permanent injunction. The petitioners and opposite parties 5 and 6 were defendants in the suit. The case of the plaintiff

opposite parties 1 to 4 is that the suit schedule land originally belonged to the defendants but the plaintiffs took over possession in the year 1990 and have been possessing the same by exercising their right of ownership openly, peacefully and continuously to the knowledge of the real owner. The case of the plaintiffs is that when the defendants attempted to take forcible possession of the suit land, the plaintiffs had no other option except to file the suit. During pendency of the suit, the petitioners, who are defendants in the suit, proposed for an amicable settlement since they were staying in West Bengal and on the request of the plaintiff opposite parties 1 to 4, they had signed in a blank paper as well as in the vakalatnama in good faith expecting that there was a mutual partition between the parties. The plaintiffs also assured the defendants that they will obtain a partition decree from the Court. However, later on, on inspection of records, it came to the knowledge of the petitioners that the plaintiff-opposite parties 1 to 4 by utilising the paper signed by the petitioners fraudulently got a decree on the basis of the compromise in the said suit. Accordingly, they filed an appeal challenging the said decree before the learned District Judge, Balasore. The said appeal was dismissed on the ground of maintainability holding that no appeal is maintainable against a consent decree passed by the Lok Adalat and otherwise also the appeal is not maintainable under the Code of Civil Procedure. There was delay in filing the appeal and an application under Section 5 of the Limitation Act had been filed. But the Court having held that the appeal is not maintainable also observed that the application under Section 5 of the Limitation Act become inconsequential. Challenging the said order, the present writ application has been filed.

3. The sole question to be decided by this Court is as to whether the appeal was maintainable before the learned District Judge, Balasore against the compromised decree or not. Shri S.P. Mishra, the learned petitioners submitted that the decree has in fact been passed by the learned Civil Judge (Senior Division), and not in the Lok Adalat. According to Shri Mishra, the learned senior Counsel appearing for the petitioners, the suit was decreed on compromise by the learned Civil Judge (Senior Division). In the order sheet, it was mentioned that the record be transmitted to the Lok Adalat for drawing of the decree. However, the order sheet shows that the decree has been signed by the learned Civil Judge (Senior Division) and, therefore, under no stretch of imagination it can be said that the

decree was passed by the Lok Adalat. On the above submission, it was contended that the appeal is maintainable. Shri R.K. Mohanty, the counsel appearing for the opposite parties 1 to 4, who are plaintiff in the trial Court, submitted that the order sheet is clear to the effect that the compromise petition was filed, the record was transmitted to the Lok Adalat and on consent of the parties, the decree was drawn by the Lok Adalat. The decree holding been drawn by the Lok Adalat, no appeal is maintainable under the Legal Services Authorities Act. 1987. Shri Mohanty, the learned Counsel appearing for the opposite parties also contended that against a consent decree no appeal is otherwise maintainable under the CPC.

4. In order to find out as to whether the decree was passed by the Lok Adalat or the Court, the records of the suit had been called for. As is evident from the order sheet, during pendency of the suit the petition for compromise was filed and prayer was made to decree the suit in terms of the compromise. The order dated 1-11-2004 runs as follows:

Record is put up today on the strength of an advance petition filed by the parties. All the defendants are appeared through advocate Sri D.P. Mohapatra. Defendant No. 1 also appeared on behalf of the D. 2 and files A/s with power. Plaintiffs and the defendants are present in the Court and they filed a joint petition praying to compromise the suit on the ground stated therein. Heard, perused the same, the terms and condition of the compromise petition is read over and explained to the present parties. So also holding power of attorney to which they admitted to be correct. Hence, the compromise being lawful and it is recorded and the same be put up before Lok Adalat at Baliapal High School on 7-11-2004 for passing necessary orders. Parties are directed to attend the said Court on the date fixed.

5. As is evident from the aforesaid order, the learned Civil Judge (Senior Division) having found the compromise to be lawful, he recorded the compromise and directed the matter to be placed before the Lok Adalat on 7-4-2004 for passing necessary orders. On 7-11-2004 the following order was passed:

As per order dated 1-11-2004 the case is put up before Lok Adalat. Advocate for the parties files hazira.

Hence it is ordered that the suit of the plaintiff is decreed in terms of compromise. The compromise petition do form part of the decree. Parties to bear their respective cost.

The said order has also been signed by the learned Civil Judge (Senior Division).

6. As is evident from the aforesaid two orders the compromise petition was filed in the Court and the learned Civil Judge being satisfied that the compromise is lawful, recorded the same. However, for the purpose of drawing up the decree, it was sent to the Lok Adalat. Therefore, for all practical purposes the compromise was recorded by the Court and not by the Lok Adalat and as it appears from the order dated 7-11-2004 only decree was drawn up by the Lok Adalat and it did not require any application of mind. The compromise having been recorded by the learned Civil Judge in Court, being satisfied that it is lawful, I am of the view that even though a decree has been passed by the Lok Adalat, it cannot be strictly said that the suit was compromised in the Lok Adalat followed by a decree. Apart from the above, the order dated 7-11-2004 has been signed by the learned Civil Judge and not by the said officer as Presiding Officer of the Lok Adalat. I am, therefore of the view that of all practical purposes the compromise was recorded and the suit was decreed on compromise by the regular Court and only drawal of the decree was drawn by the Lok Adalat, if at all it is accepted that the learned Civil Judge as Presiding Officer of the Lok Adalat has signed the order dated 7-11-2004. Therefore, the question as to whether an appeal can be filed against said decree under the Legal Services Authorities Act, 1987 or not will not arise. The other question to be examined is as to whether the appeal was maintainable under Order 43, Rule 1-A of the Code of Civil Procedure. The lower appellate Court held that the appeal is also not maintainable under Order 43, Rule 1-A, C.P.C. In the case of Banwari Lal v. Smt. Chando Devi (through L.R.) and Anr. reported in : AIR 1993 SC1139 the Apex Court held as follows:

Earlier under Order XLIII, Rule 1(m), an appeal was maintainable against an order under Rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction. But by the Amending Act of 1976 that Clause has been deleted; the result whereof is that now no appeal is maintainable against an

order recording or refusing to record an agreement or compromise under Rule 3 of Order XXIII. Being conscious that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1-A has been added to Order XLIII.

Rule 1-A (2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded.

It is true that Section 96(3) of the Code says, that no appeal shall lie from a decree passed by the Court with the consent of the parties. But when Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties.

A right has been given under Rule 1-A(2) of Order XXIII to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Therefore, it is clear that Section 96(3) shall not be a bar to an appeal under Rule 1-A (2) of Order XLIII because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

The same Court in the case of Pushpa Devi Bhagat v. Rajinder Singh and Ors. reported in : AIR 2006 SC2628 interpreting Section 96, C.P.C. as well as Order 23, Rule 3 held as follows:

The position that emerges from the amended provisions of Order 23 can be summed up thus:

- (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3), CPC.
- (ii) No appeal is maintainable against the order of the Court recording the compromise (or refusing to record a compromise) in view of the deletion of Clause (m), Rule 1, Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the Court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23. Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the Court which recorded the compromise and made a decree in terms of it and establish that there was no compromise. In that event, the Court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the Court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the Court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.

7. fThe teamed District Judge followed the decision in the case of Pushpa Devi Bhagat v. Rajinder Singh and Ors. : AIR 2006 SC2628 (supra) and held that the appeal is not maintainable. In the aforesaid case on the submission made by the counsel appearing for the parties in presence of the plaintiffs the suit was disposed of as settled. Subsequently, it was found that one of the counsel appearing for the defendants did not file vakalatnama for defendants 3 and 4 and one Shyam Kishore had entered appearance for them. Their application under Sections 151 and 152, CPC was moved and the earlier counsel Dinesh Garg filed vakalatnama on behalf of the said defendants. The learned Civil Judge after filing of the fresh

vakalatnama had drawn up a fresh decree. The second defendant in the suit filed an application under Section 151, C.P.C. for setting aside the decree alleging therein that she had not instructed her counsel Shri Dinesh Garg to enter into any compromise on her behalf and that there was no written compromise between the parties duly signed by the parties and therefore there was no lawful agreement or compromise. The said application was filed on 21-8-2001 but it was not pursued. However, the second defendant filed an appeal against the consent decree before the District Judge, Delhi and the appellate Court on 21-12-2002 set aside the consent decree on the ground that there was no agreement or compromise reduced to writing and signed by the parties. The matter was remitted to the trial Court with a direction to proceed with the trial of the suit in accordance with the law by ignoring the statement of the counsel made on 23-5-2001 on the basis of which, the suit was disposed of on compromise. The said judgment of the learned District Judge was challenged in High Court under Order 43, Rule 1(u) of C.P.C. The High Court held that the consent decree did not fall under the first part of Rule 3 of Order 23 requiring an agreement or compromise between the parties to be in writing and signed by the parties, but fell under the second part of Rule 3 of Order 23 relating to satisfaction of the claim of the plaintiff, which did not require any document in writing signed by the parties and that there was a valid compromise under Order 23, Rule 3, CPC. In paragraph-12 of the judgment, the Apex Court observed as indicated earlier. However, the decision of the very same Court in the case of Banwari Lal v. Smt. Chando Devi (through L.R.) and Anr. reported in : AIR 1993 SC1139 (supra) had not been taken note of. In the case of Banwari Lal v. Smt. Chando Devi (through L.R.) and Anr. the Apex Court held that a fresh suit being barred under Order 23, Rule 3-A, C.P.C., recourse should be taken under Order 23, Rule 1-A, CPC on the ground that the compromise should not have been recorded.

Shri S.P. Mishra, the learned Counsel Appearing for the petitioners submitted that the judgment of the Apex Court in the case of Pushpa Devi Bhagat v. Rajinder Singh and Ors. : AIR 2006 SC2628 (supra) is to be treated as a decision 'in curium', as the Supreme Court in the said decision did not take note of Order 23, Rule 1-A(2) whereas in the case of Banwari Lal v. Smt. Chando Devi (through L.R.) and Anr. : AIR 1993 SC1139 (supra) the said provision was taken note of to

say that right has been given to a party to challenge recording of compromise on the question of validity thereof while preferring an appeal against the said decree. In support of this contention, the learned Counsel relied upon some decisions and one such decision of this Court is the case of State of Orissa v. Hari Behera and Anr. reported in 1999 (II) O.L.R. 236. On perusal of the decision rendered in the case of Pushpa Devi Bhagat v. Rajinder Singh and Ors. (supra), it appears that the Supreme Court considered the Order 23, C.P.C. as a whole and held that the appeal is not maintainable, though there is no specific mention about Order 23, Rule 1-A(2).

8. I therefore disagree with the learned Counsel for the petitioners that the judgment in the case of Pushpa Devi Bhagat v. Rajinder Singh and Ors. : AIR 2006 SC2628 (supra) has to be treated as a decision 'in curium'. The aforesaid decision being the last decision on the point, the learned District Judge has rightly followed the same and held that the appeal is not maintainable. This writ application is accordingly dismissed.