

Mahammed Saud and anr. Vs. Dr.(Maj) Shaikh Mahafooz and ors.

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Court : Orissa

Decided On : May-22-2010

Judge : V.Gopala Gowda; L.Mohapatra, Jj.

Acts : Code of Civil Procedure (CPC) - Section 151 Order 40, 43 Rule 1;
[Constitution of India](#) - Article 226, 227.

Appeal No. : WRIT APPEAL NO.107 OF 2009.

Appellant : Mahammed Saud and anr.

Respondent : Dr.(Maj) Shaikh Mahafooz and ors.

Advocate for Def. : M/s. B.Routray; D.K.Mohapatra; B.B.Routray; S.Jena; M/s. Yeeshan Mohanty; P.C.Biswal; S.N.Mishra; M.R.Samal; B.P.Das; M/s. A.P.Bose, Adv.

Advocate for Pet/Ap. : M/s. R.C.Sarangi; S.Das; P.K.Singh; M.K.Patnaik; S.S.Mohanty, Adv.

Judgement :

1. This writ appeal is directed against the order dated 3.7.2009 passed by the learned Single Judge in Misc.Case No.397 of 2009 arising out of F.A.O.No.386 of 2007.

2. Learned counsel for the respondents raised a preliminary objection with regard to maintainability of the appeal. In order to determine the question as to whether

this appeal is maintainable or not, it is necessary to look into the facts leading to filing of this appeal.

3. F.A.O.No.386 of 2007 had been filed before this Court challenging the order dated 9.9.2005 passed by the learned Ad hoc Additional District Judge, F.T.C.No.3, Bhubaneswar in Interim Application No.12 of 2005 arising out of C.S.No.492 of 2004 rejecting the application filed by the present respondents for appointment of receiver under Order 40, Rule 1 of the Code of Civil Procedure and directing both parties to maintain detailed accounts of the suit property and produce the same in future, if required by the Court. The learned Single Judge disposed of the aforesaid appeal by order dated 6.8.2008 directing the trial court to put the property into auction between the parties fixing the off-set price not less than Rs.50,000/- and further directing that the highest bidder, on depositing the bid amount, shall be given in possession of the property and the said arrangement shall continue each year till disposal of the suit. In pursuance of the said order passed by the learned Single Judge, the property was put to auction by the trial court and the parties participated in the auction. Defendant No.3- Shaik Mahfooz, who is respondent no.3 in this appeal, became the highest bidder, but he failed to deposit the bid amount in court. Even though time was extended up to 29.4.2009, the said respondent no.3 did not deposit the amount and plaintiff no.1, who is respondent no.1 before this Court, being the next highest bidder was directed to deposit the bid amount by 14.5.2009 and become the receiver of the property in question. He deposited the bid amount on 12.5.2009 and filed a memo for being appointed as receiver of the property. The present appellants, who are defendants 1 and 2 along with respondent no.3 objected to the said prayer on the ground that plaintiff- respondent no.1 cannot be given possession of the property in question as there is no such order. Before the said order dated 16.5.2009, Misc.Case No.637 of 2008 was filed in the aforesaid disposed of appeal before this Court for modification and in the said Misc.Case, a clarification was made by this Court to the extent that the property shall include the hotel and restaurant running in the name and style of M/s.Hotel Sahara(Unit of Hotel Oasis(P) Ltd.) and, therefore the trial court in the said order dated 16.5.2009 appointed the plaintiff-respondent no.1 as the receiver in respect of Hotel and restaurant as stated above. The present appellants were directed to hand over possession of the said property to plaintiff-

respondent no.1. The said order of the trial court was not complied with and an application was filed by the plaintiff-respondent no.1 alleging therein that though he has been appointed as receiver and the defendant-appellants were directed to hand over possession of the said hotel, they refused to hand over the possession for which the matter has been reported before the concerned Police Station and a prayer was made for police help to take possession of the said hotel. The petition was resisted on the ground that time till 22nd May, 2009 had been granted to take possession of the hotel and the said time had not expired. Therefore, by order dated 22.5.2009, the trial court rejected the petition as premature. On 22.5.2009, another similar application was filed by the plaintiff-respondent no.1 and when the matter stood thus, Misc.Case No.397 of 2009 was filed in this Court in the above disposed of F.A.O. and in the said Misc.Case, order was passed to provide adequate protection to the receiver appointed to take possession of the property in question. The said order is the subject matter of challenge in this appeal.

4. Learned counsel for the respondents relied on a Full Bench decision of this Court reported in 2008(II) OLR(FB)-725 arising out of the present case to substantiate his contention that the present appeal is not maintainable. The Full Bench in the aforesaid decision came to the following conclusions as reflected in paragraph 47 of the judgment, which is quoted below:-

"We have heard the learned counsel for the parties patiently, noted the citations carefully, perused the materials meticulously and considered the submissions pragmatically and for the discussions made above, we have arrived at the following conclusions :

(1) After introduction of Section 100-A in the Code of Civil Procedure by 2002 Amendment Act, no Letters Patent Appeal is maintainable against a

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/decree passed by a learned Single Judge of a High Court. (2) The decision of a Division Bench of this Court in Birat Ch. Dagra case (supra) has not laid down the correct position of law. On the other hand, the conclusions arrived at by Division Benches of this Court in V.N.N. Panicker and Ramesh Ch.Das cases (supra) are

held to be good law and are confirmed. (3) A writ Appeal shall lie against the judgment/orders passed by a learned Single Judge in a Writ Petition filed under Article 226 of the Constitution of India. In a Writ Application filed under Articles 226 and 227 of the Constitution, if any order/judgment/decreed is passed in exercise of jurisdiction under Article 226, a Writ Appeal will lie, whereas no Writ Appeal will lie against

/decree passed by a learned Single Judge of a High Court. (2) The decision of a Division Bench of this Court in Birat Ch. Dagra case (supra) has not laid down the correct position of law. On the other hand, the conclusions arrived at by Division Benches of this Court in V.N.N. Panicker and Ramesh Ch.Das cases (supra) are held to be good law and are confirmed. (3) A writ Appeal shall lie against the judgment/orders passed by a learned Single Judge in a Writ Petition filed under Article 226 of the Constitution of India. In a Writ Application filed under Articles 226 and 227 of the Constitution, if any order/judgment/decreed is passed in exercise of jurisdiction under Article 226, a Writ Appeal will lie, whereas no Writ Appeal will lie against

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/decree passed by a Single Judge exercising powers of superintendence under Article 227 of the Constitution.

(4) No Letters Patent Appeal shall lie against

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passed by a learned Single Judge in proceedings arising out of Special Acts."

5. With reference to the aforesaid judgment, Shri Sarangi, learned counsel appearing for the appellants submitted that after disposal of F.A.O., learned Single Judge has become focus officio and could not have entertained any further Misc.Cases for further orders and only Misc.Cases for the purpose of correction or modification could be entertained after disposal of the appeal. It was further submitted by the learned counsel for the appellants that the order passed by the

learned Single Judge after disposal of the appeal has no connection with the issue involved in the F.A.O. and, therefore, such orders could only be passed in exercise of jurisdiction under Article 226 of the [Constitution of India](#) and, therefore, the present appeal is maintainable in view of the Full Bench decision. Reference was made to several decisions by the learned counsel for the appellants in order to substantiate the above contention and the said decisions are as follows:

A.I.R.2008 S.C.77 (Narpat Singh Vrs. Rajasthan Financial Corporation), 2008(72)AIC 183(S.C.) (Sachida Nanda Lal @ Sachida Nand Shah Vrs. State of Bihar (Now Jharkhand), 1 (2008) CLT 194(SC) (Gaudiya Mission Vrs. Shobha Bose and another), 1 (2008) CLT 199(SC) (State of M.P. and others Vrs. Madhukar Rao), (2008) 7 Supreme Court Cases 738 (M.V.Janardhan Reddy Vrs. Vijaya Bank and others), 2003 SAR (Civil) 583 SC (Sh.Dwark Prasad Agarwal(D)) by L.rs. and another Vrs. B.D. Agarwal and others), AIR 1988 Supreme Court 1531 (A.R.Antulay Vrs. R.S.Nayak and another), 2009 AIAR (Civil) 235 (U.P.State Road Transport Corporation Vrs. Assistant Commissioner of Police (Traffic) Delhi), AIR 2008 SC 690 (State of Rajasthan Vrs. Ganeshi Lal), AIR 2008 Supreme Court 863(Government of Karnataka and others Vrs. Gowramma and others), AIR 2008 Supreme Court 403(Oriental Insurance Co. Ltd. Vrs. Smt.Raj Kumari and others) and 2009(2) CCC 73 (SC) (Rajasthan State Road Transport Corporation and another Vrs. Bal Mukunda Bairwa).

6. After careful perusal of the decisions cited by the learned counsel appearing for the appellants, though we find that there is no direct bearing of the issues involved in these reported cases with the issue involved in this appeal, there is substance in the submission of the learned counsel appearing for the appellants that after disposal of F.A.O., learned Single Judge could not have entertained the Misc. Petitions for different purposes and only applications for modification or correction of orders could be entertained. Therefore, even if it is construed that the order impugned in this appeal is without jurisdiction, the learned Single Judge having become functus officio after disposal of the appeal, the said order is not appealable. The only conclusion one can arrived at is that the impugned order has been passed in exercise of inherent powers under Section 151 of the Code of Civil Procedure and, therefore, the writ appeal against the said order cannot be

maintained. The learned counsel for the appellants made a reference to Section 100-A of the Code of Civil Procedure and also Clause 10 of the Letters Patent Appeal to substantiate his submission that the appeal is maintainable. The submissions made by the learned counsel Shri Sarangi in this regard were also argued by him before the Full Bench but such submissions were not accepted and the Court specifically came to a conclusion that only an order passed by the learned Single Judge under Article 226 of the [Constitution of India](#) can be subjected to an appeal, but any order passed by the High Court in exercise of its power superintendence under Article 227 of the [Constitution of India](#) is not appealable. The Full Bench also held that no Letter Patent Appeal shall lie against any judgment/order passed by the learned Single Judge in proceedings arising out of Special Acts. The F.A.O. had been filed under Order 43, Rule 1 of the Code of Civil Procedure and the order passed by the learned Single Judge after disposal of the appeal can only be construed to be one in exercise of jurisdiction under Section 151 of the Code of Civil Procedure. Therefore, applying the principles laid down by the this Court in the aforesaid Full Bench decision, this appeal is not maintainable. Accordingly, we dismiss the appeal as not maintainable.

7. Before parting with the case, we would like to make an observation that after disposal of a case, as observed by the Hon'ble Supreme Court in some of the decisions referred to above, no further Misc. Cases should be entertained except for the purpose of correction or modification. Writ appeal dismissed.

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