

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 474 OF 2022

Kandha @ Adhikanda Pradhan and others* *Petitioners

Mr. Jiban Ranjan Dash, Advocate
-versus-

Kaikei Pradhan @ Saraswati @ Tulasi Dei and others* *Opp. Parties

Mr. Manoj Kumar Mohanty, Advocate
(For Opp. Party No.1)

**CORAM:
JUSTICE K.R. MOHAPATRA**

**ORDER
01.11.2022**

Order No.

5. 1. This matter is taken up through hybrid mode.
2. Order dated 5th October, 2021 (Annexure-4) passed in final decree proceeding of T.S. No.12 of 1960 is under challenge in this CMP, whereby learned Additional Civil Judge (Senior Division), Dhenkanal rejected an application filed by the Plaintiff-Opposite Party No.1 challenging the maintainability of the final decree proceeding.
3. Mr. Dash, learned counsel for the Petitioners submits that T.S. No.12 of 1960 was filed for partition. On 28th February, 1962 preliminary decree was passed. Thereafter, repeated final decree proceedings were filed, which were dropped vide orders dated 4th August, 1965, 27th June, 1966, 23rd October, 1970 and 22nd April, 1988. On the last occasion i.e. on 22nd April, 1988, the final decree proceeding was dismissed for default. The final decree proceeding being a continuation of the suit, a fresh final

decree proceeding could not have been entertained ignoring the order of dismissal of the final decree proceeding for default. The Plaintiff was required to file an application to restore the said final decree proceeding. Instead of filing a petition to restore the final decree proceeding, the Plaintiff-Opposite Party No.1 filed a fresh petition to initiate a final decree proceeding. Assailing the same, the Petitioner had moved this Court in CMP No.290 of 2017, which was disposed of on 5th February, 2021 with the following direction:

“Upon hearing learned counsel for the parties, it appears that the petitioners have not raised any objection with regard to maintainability of the instant final decree proceeding before learned Addl. Civil Judge (Senior Division), Dhenkanal before whom it is pending. In that view of the matter, this Court without expressing any opinion on the merits of the case of the respective parties, disposes of this CMP with an observation that in the event the petitioners raise any objection with regard to maintainability of the final decree proceeding in T.S. No.12 of 1960 initiated on 09.03.2016 by filing properly constituted petition, learned Addl. Civil Judge (Senior Division), Dhenkanal shall do well to consider the same on its own merit in accordance with law, giving opportunity of hearing to the parties concerned.

The interim order dated 20.03.2017 passed in Misc. Case No.324 of 2017 stands vacated.”

Accordingly, the Petitioners-Defendant Nos.1 to 3 filed an application assailing the maintainability of the final decree proceeding. The said application has been rejected vide order dated 5th October, 2021 under Annexure-4. Hence, this CMP has been filed.

4. Relying upon the decision in the case of **Kirpal Singh and other –v- Dalip Singh and others**, reported in AIR 1936

Lah 875, Mr. Dash, learned counsel for the Petitioners submits that once a preliminary decree has been passed, a suit cannot be dismissed for default. But, if an order dismissing the suit for default has been passed by a Court, it cannot be ignored by the same Court or any other Court. An application for restoration of the final decree proceeding has to be filed. The High Court of Lahore held as under:

“In my opinion, this appeal must fail on the first point. No doubt the Privy Council has held in 4 Pat 61 [Lachmi Narain Marwari v. Balmakund Marwari, 1924 PC 193 : 81 IC 747 : 51 IA 321 : 4 Pat 61 (PC).] , that once a preliminary decree has been passed the suit cannot be dismissed in default, but if an illegal order has been passed by a Court, it cannot be ignored either by that Court or by any other Court unless it is set aside in due course of law, that is to say, either by review or by an application to set aside the dismissal in default or by an appeal or revision. The order dismissing the suit in this case was not set aside by the trial Court by any order expressly or impliedly passed. The learned Counsel for the appellants contends that the order appointing a Commissioner must be deemed to be tantamount to an order setting aside the dismissal of the suit in default. I do not agree with this contention. An express order in this case should have been passed having regard to its previous history. It appears that the Court failed to notice the previous order dismissing the applications for restoration of the suit and the fact that the suit had been dismissed.”
(emphasis supplied)

5. He further submits that along with the petition with regard to maintainability of the final decree proceeding, the Petitioners had also filed a written note of submission stating that the Plaintiff-Opposite Party No.1 did not comply with the direction of learned trial Court in producing the records with

regard to ceiling case in OLR Misc. Case No.19 of 1978 of the Court of Additional District Magistrate, Dhenkanal, which clearly disclosed that some portion of the suit property has been declared ceiling surplus and is distributed by the State Government. He further submits that the final decree proceeding in absence of legal representative of the deceased co-sharers is a nullity and is liable to be ignored. It is his submission that in the meantime, sixty-two years have already been elapsed and most of the parties to the suit have already expired in the meantime. All of their legal heirs are not been brought on record. In view of the passage of time, there is **also** change in Khata number, Plot number, Kissam and area of the plot numbers. After the preliminary decree has been passed, settlement operation has already been held in the village. The Plaintiff-Opposite Party No.1 has also suppressed material fact with regard to filing of the C.S. No.75 of 2013 for partition of the self-same land in the Court of learned Civil Judge (Senior Division), Athamallik, which was withdrawn subsequently in the year, 2017. Although notices on the parties to the final decree proceeding have not been served, it has been wrongly held to be sufficient by learned trial Court. All these points raised by the Petitioners were not properly considered by learned trial Court and the impugned order under Annexure-4 has been passed holding the final decree proceeding to be maintainable. When in one hand learned trial Court held the final decree proceeding to be maintainable, on the other hand, it directed the Office to submit a report as to whether the final

decree petition has been properly filed. Thus, in a way learned trial Court has kept the maintainability of the final decree proceeding open to be considered at a subsequently stage, which is an outcome of total non-application of judicial mind. As such, the impugned order under Annexure-4 being not sustainable and is liable to be set aside.

6. Mr. Mohanty, learned counsel for the Plaintiff-Opposite Party No.1 vehemently objects to the same and contends that once a preliminary decree has been passed, the suit cannot be dismissed for default. In a preliminary decree the rights of the parties are determined. But, the actual fruit of the decree is enjoyed by the parties after a final decree is drawn up. Hence, the Court is obliged under law to draw up a final decree proceeding. Relying upon the decision in the case of ***Chetram Agarwalla and another –v- Budhu Mallik and others***, reported in 1972 (1) C.W.R. 140, Mr. Mohanty, learned counsel for the Plaintiff-Opposite Party No.1 submits that even if earlier final decree proceedings are dropped or dismissed for default, a subsequent final decree proceeding is maintainable. He verily relied upon Paragraph-7 of the said case law, which reads as under:

“7. Law is well settled that the suit must be deemed to be pending until the decree is made final. It is equally well settled that after the preliminary decree is passed the suit cannot be dismissed. The learned Subordinate Judge in this case by his earlier order had only dropped the proceeding and had not dismissed the suit. When a fresh application was made he should have allowed it in the interests of justice and proceeded to make the preliminary decree final, otherwise the hardship referred

to by the Judicial Committee in the aforesaid decision would really set in. a preliminary decree for partition cannot be enforced (See A.I.R. 1935 P.C. 12, L Guran Ditta –v- T.R. Ditta). A fresh decree for partition cannot be obtained. The consequence would be disastrous. That is why Courts in India have followed the dictum of their Lordships of the Judicial Committee in the aforesaid case (A.I.R. 1924 P.C. 198) and the consensus of judicial authority is in support of restoring the proceeding. Even where a learned single Judge of the Lahore High Court in A.I.R. 1936 Lahore 875 (Kirpal Singh –v- Dalip Singh) took a slightly different view, it was stated:

“Once a preliminary decree has been passed the suit cannot be dismissed in default, but if an illegal order dismissing a suit in default has been passed by a Court, it cannot be ignored either by that Court or by and other Court unless it is set aside in due course of law; that is to say, either by review or by an application to set aside the dismissal in default or by an appeal or revision.”

The learned single Judge referred to the Privy Council decision and yet said in the aforesaid way. His view does not receive support from majority of the High Courts as I have already indicated above. I would accordingly hold that the learned Subordinate Judge went wrong in refusing to continue the final decree proceeding on the basis of the subsequent application dated 5.2.66. The impugned order of the learned Subordinate Judge is not only contrary to law, but is the outcome of exercise of jurisdiction with material irregularity also.”

7. Mr. Mohanty, learned counsel for the Opposite Party No.1 also relied upon the case of ***Kattukandi Edathil Krishnan and Another -V- Kattukandi Edathil Valsan and Others***, reported in 2022 SCC OnLine SC 737, wherein it is held as under:

“31. Final decree proceedings can be initiated at any point of time. There is no limitation for initiating final decree

proceedings. Either of the parties to the suit can move an application for preparation of a final decree and, any of the defendants can also move application for the purpose. By mere passing of a preliminary decree the suit is not disposed of. [See: Shub Karan Bubna v. Sita Saran Bubna⁹; Bimal Kumar v. Shakuntala Debi¹⁰]

32. Since there is no limitation for initiating final decree proceedings, the litigants tend to take their own sweet time for initiating final decree proceedings. In some States, the courts after passing a preliminary decree adjourn the suit sine die with liberty to the parties for applying for final decree proceedings like the present case. In some other States, a fresh final decree proceedings have to be initiated under Order XX Rule 18. However, this practice is to be discouraged as there is no point in declaring the rights of the parties in one proceedings and requiring initiation of separate proceedings for quantification and ascertainment of the relief. This will only delay the realization of the fruits of the decree. This Court, in Shub Karan Bubna (supra), had pointed out the defects in the procedure in this regard and suggested for appropriate amendment to the CPC.

33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings.”

He, therefore, submits that there is no bar for the Court to entertain a subsequent final decree proceeding to see that the suit has reached its logical end. Hence, he prays for dismissal of the CMP.

8. It is his submission that, even if, no application is filed, the Court should intimate *suo motu* final decree proceeding in exercises of power under Order XX Rule 18 C.P.C. to see that a civil litigation reaches at its logical conclusion. He, therefore, submits that learned trial Court has committed no error in holding that the final decree proceeding is maintainable.

9. Upon hearing learned counsel for the parties and on perusal of the record, it appears that the objections with regard to maintainability of the present final decree proceeding was on the ground that earlier final decree proceedings are either dropped or dismissed for default. Such an objection is not sustainable in view of ratio deiced in ***Chetram Agarwalla and another*** (supra). So far as the objection with regard to non-compliance of the previous order of the Court for production of information relating to ceiling surplus case is concerned, the same can be looked into by learned trial Court in course of the final decree proceeding. The Court can also *suo motu* call for relevant records of OLR Misc. Case No.19 of 1978 from the Court of learned Additional District Magistrate, Dhenkanal or concerned records from the Tahasildar, Athamallik to adjudicate the

final decree proceeding, if at all the same is required. Mr. Dash, learned counsel for the Petitioner also raised objection with regard to non-impletion of legal representatives as parties to the final decree proceeding. The same can also be taken care of in course of the final decree proceeding and that being a curable defect cannot affect the maintainability of the final decree proceeding. Change of khata number, plot number, kissam etc. due passage of time cannot be a ground to hold that the final decree proceeding is not maintainable as subsequent events can be taken into consideration by learned trial Court in the view of the ratio decided in the case of ***Debendra Jena and others –v- Umakanta Jena and others***, reported in AIR 1988 Ori 11, wherein it is held as under:

■ *“It, therefore, appears to be the settled position of law that the final decree proceeding is a stage in continuation of the suit for partition. The partition suit should be deemed to be pending until a final decree is passed. The preliminary decree declares and determines the shares of parties, but all other equities which requires determination and adjustment amongst them are to be decided in the final decree proceeding with the objective of not driving the parties to institute separate suits. Events which have happened subsequent to the passing of the preliminary decree can also be taken into consideration and decided at the stage of the final decree proceeding. If rights of parties are decided during the final decree proceeding, such decision will amount to another preliminary decree in the suit for partition. Thus, all disputes of the parties are intended to be settled once for all in the final decree proceeding, so that the parties thereto shall not again approach the court by instituting fresh suits in respect of the subject matter of partition.”*

(emphasis supplied)

10. It is also contended that the Plaintiff-Opposite Party No.1 had filed C.S. No.75 of 2013 for partition of the self-same property. But subsequently, realizing that such a suit may not be maintainable, the same has already been withdrawn in the year, 2017, as observed by learned trial Court in the impugned order. Accordingly, such an objection is also not maintainable.

11. Service of notice on the parties is a matter to be looked into during adjudication of final decree proceeding by learned trial Court. The same cannot be a ground for holding the final decree proceeding to be not maintainable. Accordingly, this Court finds that instant final decree proceeding is maintainable in the eyes of law in view of the ratio decided in the case of ***Chetram Agarwalla and another*** (supra). Hence, this Court has no hesitation to hold that the impugned order under Annexure-4 warrants no interference.

12. Accordingly, this CMP being devoid of any merit stands dismissed.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

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