

ORISSA HIGH COURT: CUTTACK.

W.P.(C). NOS. 11550 & 11685 OF 2012

In the matter of applications under Articles 226 and 227 of the Constitution of India.

In WPC 11550/2012

Falcon Real Estate Pvt. Ltd. Petitioner

-Versus-

Janak Kumari Devi & others Opp. parties

For Petitioner : M/s. S.P. Mishra, Sr. Advocate,
S.Mishra, S.S. Kashyap,
J.K.Mahapatra &
S.K.Samantaray.

For opp. parties: M/s. B.H.Mohanty,
D.P. Mohanty,T.K.Mohanty &
P.K.Swain.

In WPC 11685/2012

Kalinga Marines & Transport Pvt. Ltd. Petitioner

-Versus-

Janak Kumari Devi & others Opp. parties

For Petitioner : M/s. Nirmal Ch.Mohanty &
P. Rajan.

For opp. parties: M/s. B.H.Mohanty,
D.P. Mohanty, R.K.Nayak &
T.K.Mohanty.

Decided on 27.11.2012

PRESENT :

THE HONOURABLE SHRI JUSTICE M.M. DAS

M. M. DAS, J.

These two writ petitions have been filed by the
petitioners, who are defendants 4 and 3 respectively in C.S. No.

361 of 1994-I (Final Decree) against a common order dated 19.5.2012 passed by the learned Civil Judge (Senior Division), Bhubaneswar in the said suit. Both the petitioners filed two separate applications under Order 18, Rule 17 C.P.C. seeking recalling of the P.Ws, who were examined in the suit at the stage of preliminary decree for cross-examination by the said defendants. The learned trial court recorded that the proceeding is one for making the preliminary decree final and in the meantime, the parties to the dispute have also entered into a settlement outside the court and accordingly, a petition for compromise has been filed in the final decree proceeding, concluded that the function of final decree is merely to restate and apply with precision what the preliminary decree has ordered. Thus, the final decree proceeding is only to enforce what has already been declared by the preliminary decree. A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted on the date of final decree. Relying upon the decision in the case of **Muthangi Ayyana v. Muthangi Jaggarao and others**, AIR 1977 SC 292, the learned trial court held that as has been held in the said case, the final decree cannot be amended or cannot go behind the preliminary decree on a matter determined by the preliminary decree. The learned trial court further relied upon the decisions in the cases of **Taleb Ali v. Abdul Aziz**, AIR 1929 Calcutta 689

and ***Bnwari Lal v. Shaikh Shukrullah***, AIR 1940 Patna, 204 and recorded that it has been held in the said decisions that final decree is based on and controlled by preliminary decree and cannot travel beyond the preliminary decree. On the above basis, the learned trial court came to the conclusion that recalling of P.Ws may disconcert the findings of preliminary decree. The learned trial court further noted that the claim of the defendants 3 and 4 arose from the sale deeds executed by one Mahendra Narayan Deo, brother of the present plaintiff and the father of the defendant no.1 being the Power of Attorney Holder of his father Harekrushna Harichandan Mohapatra. Thus concluding, the learned trial court rejected both the applications. The learned trial court, however, did not notice the peculiar and distinct facts of the case which are totally different from the facts involved in the decisions relied upon by him.

2. In order to appreciate the rival contentions raised before this Court, it would be appropriate to state the facts of the case in brief chronologically.

On 27.11.1946, Harekrushna Harichandan Mohapatra executed a registered Power of Attorney in favour of Mahendra Narayan Deo. On 18.2.1972, by a registered sale deed, Mahendra Narayan Deo sold part of the suit land, i.e., khata no. 224/3, plot no. 600/149 measuring Ac. 1.47 decimals, khata No. 224/4, plot no. 800 measuring Ac. 1.580 decimals, khata no.

224/4, plot no. 829 measuring Ac. 3.620 decimals, khata no. 224/4, plot no. 830/1495 measuring Ac. 4.648 decimals and khata no. 83, plot no. 828 measuring Ac. 1.950, in total, Ac. 15.000 in favour of one Hadunnav Venkat Raman Murthy, who filed Mutation Case Nos. 668 , 669 and 670 of 1972. On 4.12.1975, the Mutation Cases were allowed. On 7.12.1977, Hadunnav Venkat Raman Murthy by a registered sale deed sold the lands in favour of M/s. Paradeep Marine Pvt. Ltd. which applied for loan to the O.S.F.C. and IPICOL. The properties were mortgaged as security for the loan and the said company established a Prawn Processing Unit. On 3.2.1978, Harekrushna Harichandan Mohapatra filed affidavit before the O.S.F.C. acknowledging the power of attorney executed by him in favour of Mahendra Narayan Deo to sell the property. M/s. Paradeep Marine failed to repay the loan. On 27.1.1984, the O.S.F.C. took steps under section 29 of the S.F.C. Act and the properties under Prawn Processing Unit were put to auction. M/s. Kalinga Marine on becoming the highest bidder purchased the property from the O.S.F.C. and on 14.5.1984 possession was delivered to M/s. Kalinga Marine. On 31.10.1986, the O.S.F.C. executed regular conveyance deed and on 19.10.2005, M/s. Kalinga Marine sold the land by registered sale deed in favour of M/s. Falcon Real Estate.

3. The present petitioners, i.e., Kalinga Marines & Transport Pvt. Ltd. and Falcon Real Estate Pvt. Ltd. were not made as parties in the suit initially, but later on, the petitioners filed petition under Order 1 , Rule 10 C.P.C. praying therein to be impleaded them as parties in the suit in the final decree proceeding. The plaintiff – opp. party no. 1 filed objection to the said petition. However, the learned trial court allowed the petitions and impleaded them as defendants 3 and 4. The petitioners after being impleaded as parties filed their written statement stating therein the fact as to how they acquired title over the property and the O.S.F.C. handed over possession of the aforesaid land with plant and machineries in favour of Kalinga Marine and, accordingly, OSFC executed registered deed of conveyance on 31.10.1986 in respect of ‘A’ schedule property in favour of the said company. Thereafter, the Kalinga Marine being the absolute owner of the property sold the land bearing Sabik khata no. 223, sabik plot no. 800 which corresponds to hal khata no. 224/4, hal plot no. 800 area Ac. 1.580 decimals to the petitioner in WPC No. 11550 of 2012, i.e., Falcon Real Estate Private Ltd. Pursuant to the said sale, the said petitioner took over possession of the suit land and mutated the land in its favour. It was mentioned that the defendant no. 1 in the suit filed C.S. No. 998 of 2008 against the Kalinga Marine and Transport Pvt. Ltd. (defendant no. 3) which was subsequently abandoned by him.

4. The aforesaid suit, i.e., C.S. No. 361 of 1994-I was decreed preliminarily by judgment dated 27.11.1999 granting $1/4^{\text{th}}$ share to the parties from their father's share and half share from the mother's share. The said judgment was challenged by defendant nos. 1 and 2 in F.A. No. 76 of 2000 before this Court, which was dismissed modifying the order of the learned trial court. Against the order of dismissal passed in F.A. No. 76 of 2000, the defendant no. 1 preferred SLP No. 31245 of 2008 before the Hon'ble apex Court which also was dismissed. The further averments made in the written statement was that while the matter stood thus, the plaintiff – defendant no. 1 and defendant no. 2 filed a compromise petition before the learned trial court praying therein to partition the property as per the preliminary decree by passing the order as was passed in F.A. No. 76 of 2000, but the compromise was rejected by the learned trial court by order dated 14.5.2009. Thereafter, another compromise petition was filed which is pending. At this juncture, the applications were filed under Order 18, Rule 17 C.P.C. praying therein to recall all the P.Ws for cross – examination by the petitioners as they were not parties when the evidence was recorded before the preliminary decree was passed. Objection was filed to the said petitions stating therein that the petitions are not maintainable either in law or in fact as the proceeding is a final

decree proceeding and there is no scope for the court to decide any other issues in the present proceeding.

6. Mr. S.P. Mishra, learned senior counsel appearing for the petitioner in W.P.(C) No. 11550 of 2012 contended that the petitioner in the said writ petition having been added as a party in the suit on the basis of an application under Order 1, Rule 10 (2) C.P.C. which has become final, the newly added party, i.e., the petitioner, derives all the rights to defend its case. He further contended that after being impleaded as party as the written statement filed by the petitioner was accepted being satisfied that the petitioner is a necessary party, the learned court below should have recast the issues and should have given an opportunity to the petitioner to cross-examine the plaintiff's witness(s). According to Mr. Mishra, when admittedly, the petitioner was not a party in the suit when the preliminary decree was passed and its property has been included in the schedule of property in the decree and on that ground alone, the petitioner was impleaded as party, the learned trial court was required to adjudicate the matter as to whether the property of the petitioner is liable to be excluded from the preliminary decree and the same, in the facts of this case, would not amount to reopening the decree, but will amount to re-adjudication of the case in the interest of justice and the findings which have been arrived at in the preliminary decree contrary to such facts should be treated to be vitiated.

7. Mr. Mohanty, learned counsel appearing for the opp. party no. 1, however, contended that in a final decree proceeding, the court cannot go behind the preliminary decree and is only to work out the final decree and, therefore, the learned trial court was right in rejecting the applications filed by the petitioners. He relied upon the decision in the case of ***Neelakantha Pillai Ramachandran Nair v. Ayyappan Pillai Kumara Pillai***, AIR 1978 Kerala 152, in support of his contention that the Kerala High Court relying upon the decision of the apex Court has held in the said case that in suits for redemption or partition where the passing of a preliminary decree is contemplated, the power conferred under Order 1, Rule 10 C.P.C. is to be regarded as circumscribed by the provisions contained in section 2 (2) and section 97 of the C.P.C. The impleadment of additional parties subsequent to the passing of the preliminary decree is permissible only if none of the questions already settled by the preliminary decree would have to be reopened by the court as a consequence of such impleadment; the addition of parties can be allowed at that stage only on condition that the further proceedings to be taken in the suit will be only on the basis of the preliminary decree already passed, and none of the questions settled by the preliminary decree will be allowed to be re-agitated on the ground that the person newly impleaded was not before the court at the time of the passing of

the preliminary decree. As to whether or not the impleadment of a new party should be allowed on the aforesaid condition in the circumstances of a particular case will have to be considered by the court on the merits of each case as and when the said question arises. No party should be impleaded against his will if that would involve his being subjected to the terms of a preliminary decree which was passed without his being on the party array, particularly when there are pleas which the said party could have put forward in respect of the matters considered and settled by the preliminary decree .

8. It appears that in the said decision, the Kerala High Court on a reference made by a learned Single Judge with regard to the question of law as to whether subsequent to the passing of the preliminary decree for partition or redemption it is legally competent for the court to implead additional parties under Order 1, Rule 10 C.P.C. While deciding the said question, the Kerala High Court relied upon the decision in the case of **Venkata Reddi v. Pethi Reddi**, AIR 1963 SC 992 and held that the said decision clearly indicates that in respect of the matters covered by a preliminary decree, the said decree is to be regarded as embodying the final decision of the court passing it. It will not, therefore, be reasonable to understand the provision in Order 1, Rule 10 C.P.C. as empowering the impleadment of additional parties in a suit in circumstances which would necessitate the

ripping open of the determination made in the preliminary decree already passed in the suit. However, one can very well conceive of several situations where an impleadment of an additional party may be asked for or may be considered by the court to be necessary for a proper and complete adjudication of the matters in controversy in such a suit and such impleadment would not involve the reopening of the matters already finally settled by the preliminary decree.

9. Mr. Mishra, learned senior counsel, however, relied upon the provisions of Order 1, Rule 10 (5) C.P.C. which provides that subject to the provisions of the Indian Limitation Act, 1877, in section 22 (now the Limitation Act, 1963, section 21), the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons. Relying upon the said provision, he submitted that once the petitioners have been added as defendants under Order 1, Rule 10 (2) C.P.C. and have been permitted to file their written statements, it should be held that the suit for the petitioners should begin from the stage of issuance of summons to them and they should be given full opportunity to contest the suit for which, if required, the court can always reopen the preliminary decree as it is a settled law that in a partition suit, several preliminary decrees can be passed. He further relied upon the decision of this Court in the case of ***Palia Bewa v. Parbati Kumari Mohapatra and***

others, 59 (1985) CLT 552, where this Court though was dealing with a suit for permanent injunction, accepted the contention of the defendant no. 12 therein that the said defendant being allowed to be impleaded as a party and such impletion having not been challenged which have become final, under sub-rule (5) of Rule 10 of Order 1 C.P.C., the suit must be deemed to have begun against the said defendant no. 12 and, therefore, he has all the rights including asking for recalling of the witnesses already examined on behalf of the plaintiff for further cross-examination. Refusing defendant no. 12 to cross-examine the plaintiff would amount to negation of the right and would make the order allowing him to be impleaded as a party wholly infructuous. This Court in the said case held that once an order allowing an application under Order 1, Rule 10 C.P.C. is not challenged, the newly added party has all the rights to defend his case and so far as he is concerned, the case must be taken to have begun afresh. Further, in the said case, the contention of the defendant no. 12 that the order allowing recalling of the plaintiff for cross – examination will not be “any case which has been decided” was also accepted by this Court. This Court relied upon an earlier decision in the case of **Alekha Pradhan and others v. Bhramar Pal and another**, 45 (1978) CLT 75, wherein, it has been held that by allowing a witness to be examined, no right or obligation of the parties in controversy in the suit is being decided.

10. With regard to partition suits, in the case of **Gouri Bewa v. Ari Pradhan and others**, AIR 1987 Orissa, 212, a learned Single Judge of this Court held that a preliminary decree can always be corrected under section 152 C.P.C. In the case of **Ganduri Koteshwaramma and another v. Chakiri Yanadi and another**, AIR 2012 SC 169, the Supreme Court, while considering the right of daughter in coparcenary property categorically laid down as follows:-

“.....Section 97 provides that where any party aggrieved by a preliminary decree passed after the commencement of the 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 but that does not create any hindrance or obstruction in the power of the Court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree. As such by passing of preliminary decree in partition suit before stipulated date it cannot be said that the rights of daughter to share in coparcenary property is lost”.

11. With regard to the character of a preliminary decree, the Supreme Court in the said case held that a preliminary decree determines the rights and interest of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint

Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum, i.e., after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of the parties having regard to the changed situation.

(Emphasis supplied)

12. The Supreme Court in the said case relied upon an earlier decision of the said Court in the case of ***Phoolchand and another v. Gopal Lal***, AIR 1967 SC 1470, where it was held as follows:-

“We are of the opinion that there is nothing in the Code of Civil Procedure which 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 and shares of other parties are thereby augmented.....So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so;.....there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility.....for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly

in a partition suit due to deaths of some of the parties..... a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree.....”

13. Keeping the above position in law in view, this Court is of the opinion that in view of the changed circumstances, as narrated above, under which the property is stated to have come to the hands of the petitioner – Falcon Real Estate Pvt. Ltd. and the petitioners have already been impleaded as parties by allowing their applications under Order 1, Rule 10 (2) C.P.C. and their written statements filed have been accepted, the learned trial court should have construed that the suit is relegated to a position prior to passing the preliminary decree, where the defendants 3 and 4 entered appearance and filed their written statements. Hence, it was incumbent on the part of the learned trial court to recast the issues under the changed circumstances and to recall the witnesses examined by the parties before the preliminary decree was drawn up for being cross-examined by the petitioners. On such cross-examination and on the evidence adduced by the petitioners, both oral and documentary, the learned trial court was required to determine the issues recast to find out as to whether the property said to have been purchased by the defendant no. 3 and, thereafter, by the defendant no. 4 from him, is to be excluded from the preliminary decree.

14. In view of the above findings, the impugned order dated 19.5.2012 passed by the learned Civil Judge (Senior Division), Bhubaneswar in C.S. No. 361 of 1994-I (F.D.) is set aside and the learned trial court is directed to recall the witnesses for cross-examination by the petitioners – defendants 3 and 4, after recasting the issues and pass a fresh preliminary decree as per the directions/observations made above. The suit being of the year 1994, the learned trial court is directed to expedite the hearing of the same so as to conclude it by the end of June, 2013.

15. In the result, both the writ petitions are allowed. There shall be no order as to costs.

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M.M. Das, J.

Orissa High Court, Cuttack.
November 27th, 2012/ Biswal