

SUPREME COURT OF INDIA

Ganapati Madhav Sawant

Vs.

Dattur Madhav Sawant

C.A.No.583 of 2008

(Arijit Pasayat and P. Sathasivam JJ.)

22.01.2008

JUDGMENT

Arijit Pasayat, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Bombay High Court Aurangabad Bench, dismissing the appeal filed by the appellant under Section 100 of the Code of Civil Procedure, 1908 (in short the CPC). The appellants, heirs of the original Defendant Nos. 1 to 3 questioned correctness of the decree and judgment passed learned Additional District Judge, Osama bad in Regular Civil Appeal No. 89 of 1999 confirming the decree in Regular Civil Suit No. 62 of 1981 passed by the Civil Judge, Jr. Division, Kallam. The High Court dismissed the Second Appeal holding that there was no question of law involved and therefore, the Second appeal was without merit.

3. Learned counsel for the appellant submitted that while issuing notice in the Second appeal, the High Court categorically observed as follows:

“The next ground argued by the learned counsel for the appellant is that the plaintiff did not pray for an inquiry with the mine profit to be held under Order XX Rule 12 in the plaint and in the absence of specific prayer for an inquiry into the mine profits the same should not have been granted by the courts below. The said directions are contained in clause IV in the operative part of the judgment and decree of the trial court. The learned counsel for the appellant has placed reliance of the judgment of the Apex Court reported in

AIR 1952 Supreme Court 358 Mohammad Amin and Others v. Vakil Ahmed and Others and to precise para 20 thereof. In this view of the matter issue notice before admission returnable in six weeks touching only clause IV of the operative part of the order passed by the trial court directing the inquiry in regard to mine profits under Order XX Rule 12. The respondents are intimated that the appeal will be finally heard and decided at admission stage.”

4. It was, therefore, pointed out that the grant of mine profit without any enquiry in terms of Order XX Rule 12 CPC was not permissible.

5. There is no appearance on behalf of respondent.

6. In *Mohammad Amin and Ors. v. Vakil Ahmed and Ors*¹. It was, inter-alia, observed as follows.

“It was however pointed out by Shri S.P. Sinha that the High Court erred in awarding to the plaintiffs mine profits even though there was no demand for the same in the plaint. The learned Solicitor General appearing for the plaintiffs conceded that there was no demand for mine profits as such but urged that the claim for mine profits would be included within the expression awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto. We are afraid that the claim for mine profits cannot be included within this expression and the High Court was in error in awarding to the plaintiff’s mine profits though they had not been claimed in the plaint. The provision in regard to the mine profits will therefore have to be deleted from the decree. We dismiss the appeal of defendants 1 to 5 and affirm the decree passed by the High Court in favor of the plaintiffs, deleting there from the provision in regard to mine profits. The plaintiffs will of course be entitled to their costs throughout from defendants 1 to 5.”

7. The High Court while deciding the Second Appeal, failed to notice that while issuing notice it was categorically noted that the plaintiff had not prayed for an inquiry relating to mesne profit in terms of Order XX Rule 12 CPC and in the absence of any specific prayer for any inquiry into that aspect, the same could not have been granted.

8. As rightly contended by learned counsel for the appellants that though at the time of issuance of notice the High Court had noted that this substantial question of law did arise for consideration, while deciding the second appeal, this aspect was lost sight of. In the circumstances it would be appropriate to remit the matter to the High Court to consider that aspect.

9. The appeal is allowed to the aforesaid extent with no order as to costs.

Cases Referred

¹AIR 1952 SC 358