

PATNA HIGH COURT

Nilkanth Mahton

Vs

Munshi Singh

Letters Patent Appeals Nos. 134 of 1958 and 3 of 1959

(H. Mahapatra and A.B.N. Sinha, JJ.)

07.10.1964

JUDGMENT

H. Mahapatra ,J.

1. These two appeals arise out of First Appeal No. 64 of 1952 which was decided by a learned Judge of this Court on the 2nd. December, 1958. Appeal No. 134 is by defendants 1 to 4 and 7 and appeal No. 8 is by defendants 19 to 51. Plaintiffs brought suit to partition of their shares in respect of the properties which they mentioned in the schedules given in their plaint, and their suit was decreed. Against that, defendants 19 to 51 came in appeal to this Court in First Appeal No. 64 of 1952. There those defendants compromised with the plaintiffs and filed a petition of compromise which was recorded by the learned Judge. By the terms of the compromise plaintiffs' decree for partition as passed by the trial court was modified to the extent that khata No. 889 and plot Nos. 2602, 2606, 0.08 acre out of plot No. 2588 and 0.10 acre out of plot No. 2543, all of khata No. 898 and plot No. 2542 of khata No. 897 were to be excluded from partition. The first appeal was disposed of as between the plaintiffs and defendants 19 to 51 (who were the appellants) in the terms of the compromise. The appeal stood dismissed as against other respondents, namely, defendants 1 to 18 who were respondents in that first appeal. The result of the judgment and decree passed in First Appeal No. 64 of 1958 was that the plaintiffs' share in respect of the suit properties as decreed by the trial court stood intact except the lands mentioned in the compromise petition which we have stated above. In the original suit the defendants did not ask for their respective shares to be carved out and, as such the preliminary decree did not mention either their shares or their right to have a partition of their respective shares in the suit properties. The way in which the preliminary decree was modified by compromise in First Appeal No. 64 of 1952 will determine the scope of the final decree that will be passed in the original partition suit.

2. Learned Counsel for the appellants in both these appeals wanted to challenge the finding of the learned Judge that khata No. 889 was Bakashat malik khata and not the ancestral occupancy holding of the defendants and as such it was liable to partition. The scope of Letters Patent Appeal against the judgment and decree passed by a learned Judge of the High Court in a First Appeal (appeal from an original decree) does not permit any challenge to be raised against any

clear and specific findings on facts. Its scope cannot be wider than that of a second appeal under Section 100 read with Section 101 of the Code of Civil Procedure . Letters Patent of this High Court came when the scope of a second appeal had been well determined by the Code of Civil Procedure and a consistent and uniform practice was followed in that regard in all the High Courts in this country. What the Letters Patent provided was the right of an appeal from the judgment of a single Judge of the High Court. The scope of such appeal will depend upon the nature of the appeal; if it is against a judgment in an original jurisdiction case, the scope of the Letters Patent appeal will be that of a first appeal; if it is against the appellate judgment of a single judge, its scope will be that of a second appeal, Section 101 of the Code of Civil Procedure says that no second appeal shall be except on the grounds mentioned in Section 100. Unlike Section 98(3) there is no exception made there with reference to the Letters Patent. In a decision of a Division Bench of this Court (*Ramswarup Singh v. Muneswar Singh*¹), a similar view about the limited scope of an appeal under the Letters Patent against the judgment of a single Judge in a First Appeal was taken. Several other reasons given in support of that view in that case need not be restated here. The contention that the view expressed in that decision was obiter or not shared by both the members of the Bench is invalid. Reference to factual aspect of the case by them in that judgment was only to demonstrate additionally the futility of the challenge to the finding on facts of the learned single Judge. Such a course is very often adopted to emphasize upon the correctness of the final result pronounced in the case. An examination of a reasoning advanced in argument is undertaken at times to expose its hollowness, although the factual or legal basis of such reasoning is held not to exist. The decision about the scope of Letters Patent appeal in that case was the main and essential part of that judgment. We concur with that view and hold that the appellants in these Letters Patent Appeals cannot challenge the findings of fact as arrived at by the learned Single Judge.

3. In Letters Patent Appeal No. 134 of 1958 learned Counsel appearing for the appellants (defendants 1 to 4 and 7) contended that the appellants should have their respective shares in the suit properties carved out in the proceedings for the final decree. We do not think that will be permissible. They did not enter appearance in the trial Court; they did not raise any issue about their shares and the preliminary decree did not specify either their shares or any direction for carving out their shares as a separate allotment out of the suit properties. Final decree will be in pursuance of the preliminary decree.

4. Learned Counsel further contended that in their future actions for partition of their shares, the appellants shall not be bound by what has been stated in the compromise recorded in the judgment under appeal. That is correct because they were not parties to the compromise. But the findings of the trial court as confirmed in the First Appeal will bind them as well as the other defendants (19 to 51) who are appellants in Letters Patent Appeal No. 3 of 1959.

5. The result is that both the appeals are dismissed but without costs.
Appeals dismissed.

Cases Referred.

¹ AIR 1964 Pat 76