

(2010) 09 OHC CK 0056

In the Orissa High Court

Case No : Writ Petition (C) No. 6482 of 2006

Bidhu Bhusan Nayak and Others

APPELLANT

Vs

Sarojini Nayak and Others

RESPONDENT

Date of Decision : 29-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 3, Order 32 Rule 3A, Order 32 Rule 4, Order 32 Rule 7(2), 10
Constitution of India, 1950 — Article 226

Citation : (2011) 111 CLT 158

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Judgement

Sanju Panda, J.—This writ petition is directed against the order dated 24.2.2006 passed by the learned Addl. District Judge, Bhadrak in Civil Revision Petition No. 13 of 2005 dismissing the revision which was filed challenging the order dated 8.11.2005 passed by the learned Civil Judge (Senior Division), Bhadrak in Misc. Case No. 93 of 1996 rejecting an application filed u/s 47 of the CPC Code.

2. The brief facts of the case are as follows:

The judgment debtor Nos. 1, 3 and 4 who are the sons of Defendant No. 1 in Title Suit No. 136 of 1976 filed an application u/s 47 read with Section 151 and Order 32 Rules-3, 3(A), 4, 7(2) read with Sections 10 and 15 of the CPC raising a question that Defendant Nos. 16 to 19 who are judgment-debtor Nos. 21 to 24 are family deities of the parties.

From the order dated 26.7.1985 of the final decree proceeding, it appears that the deities refused to receive the summons. In the suit, "Ga" Schedule properties were allotted to the parties but there was no instruction in the decree as to how worship and management of those deities should be done. The trial court though described the case of the deities who had been installed by the ancestor of the parties, the elder branch of the family generationwise enjoyed the said schedule properties and managed the day to-day affairs of the deities.

The Plaintiff and Defendant No. 3 were the employees of South Railways Department. Without making any arrangement for the deities, they included the suit properties for their mutual benefits. Defendant No. 15 was a minor. The trial court engaged an advocate for her guardian. However, he did not represent the said minor at the time of hearing. As she was set ex parte, her interest had been relinquished in favour of Defendant No. 3. Defendant No. 1(Ka) was declared dead vide order dated 14.12.1981. Accordingly, the said branch could not contest the case properly. Subsequently, some person filed an objection u/s 47 of the CPC as judgment-debtor 1(ka) to declare the judgment and decree passed in the suit as a nullity, void and the same was not capable of execution. The decree-holders filed their objection to the said application stating that the executing court could not go behind the decree and the allegations made by the judgment-debtors were false and baseless. The executing court, after hearing the parties and analyzing the facts and circumstances of the case, held that the present Petitioners are sons of Niranjana Nayak-Defendant No. 1 and the Plaintiff is the brother of Defendant No. 1. Defendant Nos. 2,4 and 5 are other brothers and sisters of the Plaintiff. The parties admitted that Defendant Nos. 16 to 19 (J Dr 21 to 24) are represented by Defendant No. 1 to 15 who are co-sharers. Therefore, there was no necessity for appointment of guardian when they had been properly represented. So far as Defendant No. 15 and other so-called persons are concerned, none of the parties challenged the preliminary decree. Hence, the final decree was drawn according to the preliminary decree and after long lapse of several years the present Petitioners challenged the preliminary decree only to linger the process by way of dilatory tactics. Therefore, the trial court rejected the said misc. case.

3. Challenging the said order, the Petitioners filed civil revision. The revisional court on scrutiny noticed that the deities are represented by their Marfatdars. The Marfatdari rights with respect to the deities' properties have been apportioned between the parties and the Seva Puja of the deities has been managed by the joint efforts apportioning the cost. The preliminary decree was passed in the year 1984. The final decree passed in the year 1987 had not been challenged. The allotments made by the Commissioner had also not been challenged by the parties. In the meantime the parties had already dealt with the properties separately by selling the same. Therefore, it can be held that the application u/s 47 of the CPC was filed only to delay the matter and the decree could not be held as a nullity. Therefore, there is nothing to be interfered with the impugned order. Accordingly, the revisional court dismissed the revision.

4. Learned Counsel for the Petitioners submitted that the suit was filed for partition of the joint family properties of the deities, Defendant Nos. 16 to 19, and they were set ex parte. As they were set ex parte their interest was not protected properly. They being perpetual minors, the court should have protected their interest by engaging a guardian. As the minors were not properly represented, the judgment and decree passed by the trial court was a nullity. Both the executing court as well as the revisional court failed to appreciate the

same and rejected the application of the Petitioners. Therefore, the impugned order is liable to be set aside. He further submitted that though the present Petitioners are very much alive, they were shown as dead leaving behind no legal heirs vide order dated 25.8.1980. The other legal heirs of Defendant No. 1 were substituted and the suit was disposed of in the absence of the Petitioners. The trial court allotted one-half share in favour of Defendants 3,6 and 15 and allotted one-half share to the Plaintiff, D-1/ Ka to D-1/Ta, D-2,D-4 and D-5. Plaintiff got 21/150 interest in the suit properties which is a part of the aforesaid half interest. In support of his contention, he cited a decision reported in Bhagabat Sahu Vs. Parbati Samal and Others, wherein this Court has held that when a decree is challenged as nullity because judgment-debtors were not duly represented, the matter is to be agitated in an independent action and not to be within the ambit of Section 47 of the CPC Code. Accordingly, the executing court as well as the revisional court should have held that the Petitioners may raise that question independently in respect of rejecting their application in the execution case.

5. Learned Counsel for the opposite party No. 1 submitted that the deities were duly represented and the suit being a partition suit, the preliminary decree having been confirmed in the final decree and the same not having been challenged in any manner, the Petitioners should not raise this question at a belated stage when the parties have already dealt with the properties independently. He further submitted that the only intention of the Petitioners is to drag the matter. As there is no error apparent on the face of the record, this Court should not interfere with the same in exercise of the jurisdiction under Article 227 of the Constitution of India.

6. The fact that the deities are family deities and the suit was filed for partition. The preliminary decree was passed in the year 1984 and the same was confirmed in the final decree in the year 1987. Allotment of share by the Commissioner had not been objected, the deities are represented by Indian Law Reports, Cuttack Series [2010] Marfatdars and the Marfatdary right with respect to the deities" properties had been apportioned between the parties. Therefore, the properties under "Ga" Schedule are enjoyed by the family and all these properties are partible. According to their claim, the trial court considered the case of the parties and passed a preliminary decree which was not challenged at all. The question now raised by the Petitioners is that the deities being perpetual minors were not properly represented and Defendant No. 15 being a minor was also not properly represented and hence the decree is to be declared as a nullity. The said question was raised by filing an application u/s 47 of the CPC Code. u/s 47 of the CPC the Court has to decide all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree.

7. From the above it is crystal clear that whether the decree was obtained validly

or not is within the scope of Section 47 of the CPC which is only to consider the discharge or satisfaction of the decree by the executing court. This Court in the case of Bhagabat Sahu's case (supra) has held that if the judgment-debtors contend that they were not properly represented and were not thus parties to the decree, they cannot come u/s 47 of the CPC as if they were parties to the suit. This is a matter, therefore, which has to be decided by a separate suit.

8. Therefore, considering the above principle and law and the fact that the present Petitioners are raising a question that the deities who are minors and other minors were not properly represented, this Court is of the view that they cannot raise those questions by filing a petition u/s 47 of the CPC Code. It is open to the parties to raise that question independently.

9. As there is no error apparent on the face of the impugned order, this Court is not inclined to interfere with the same. With the aforesaid observation, this writ petition is disposed of.