

(2017) 04 GAU CK 0020
In the Gauhati High Court
Case No : 184 of 2010

Smt. Kunti Choudhury & ors

APPELLANT

Vs

Sri. Nitai Patra & anr

RESPONDENT

Date of Decision : 20-04-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, Section 47,
Section 151

Citation : (2017) 04 GAU CK 0020

Hon'ble Judges : Kalyan Rai Surana

Bench : SINGLE BENCH

Advocate : D P Chaliha, S M Choudhury, B Banerjee, C Mazumdar, D Saikia, A Verma, R Bora, B Gogoi

Judgement

1. As per order dated 30.5.2016, the notices have been duly served. By filing this application under Article 227 of the Constitution of India, the petitioner has challenged the order dated 23.4.2010 passed by the learned Munsiff, Kaliabor in Title Execution Case No. 5(K)/2008.

2. It is submitted that the petitioners are the plaintiffs in Title Suit No. 2(K)/2005 and the said suit was filed for recovery of possession of the suit land described in Schedule-"Kha" of the plaint and for declaration of their right. The said suit was allowed by judgment and decree dated 21.12.2008 by declaring the plaintiffs' right over the suit land and for recovery of possession of the Schedule-"Kha" suit land in favour of the plaintiffs. The respondents herein did not file any appeal and the judgment and decree as aforesaid had attained finality. However, when the decree was put into execution by filing Title Execution Case No. 5(K)/2008, the respondents filed an objection under Section 47 of the CPC. However, the said objection was dismissed by the learned Munsiff, Kaliabor by an order dated 21.12.2008 passed in Title Execution Case No. 5(K)/2008. It is projected that in the proceeding of the suit, and an application was filed by the petitioner under

Order XXVI Rule 9 read with Section 151 of the CPC for appointment of a Survey Commission for the purposes of identification of the suit property.

3. The learned counsel for the petitioners submits that pursuant to the orders passed by the learned trial court, a local inspection was made to identify the suit land and pursuant to that, a memorandum was prepared on 19.8.2006, and only thereafter the suit was decreed as aforesaid on 21.12.2006. It is submitted that thereafter the petitioner herein again filed a petition No. 253 dated 18.7.2009 under Order XXVI Rule 9 of the CPC in the execution case for appointment of a Survey Commission for the purposes of identification of the decretal property as the Bailiff of the Court had submitted a report that the suit land is unidentifiable due to non mentioning of the Dag No. in the decree. However, the learned Executing Court by order dated 4.9.2009 dismissed the said application. The said order dated 4.9.2009 was challenged before this Court by the petitioner by filing CRP 357/2009. This court by order dated 23.11.2009 was pleased to set aside and quash the said order dated 4.9.2009 passed by the learned Executing Court with a direction to the said learned court to re-consider the petition filed by the petitioner under Order XXVI Rule 9, praying for appointment for a Survey Commission, further directing the said learned court to hear the matter afresh and pass appropriate order within a period of 3 (three) weeks from the date receipt of the order. Thereafter, the learned Executing Court issued a warrant for Survey Commission. Thereafter, the learned Circle Officer, Kaliabor Revenue Circle by letter under Memo No. Ka.Cha 14/2008/1489 dated 10.2.2010 submitted the report of the Commission by mentioning that the house was situated on 4 katha 18 lechas of land under Dag No. 41 of Patta No. Kismat/1874/F.S. of Salna Tea Company and that the houses were half built with brick without roof and there were two frames of window facing towards the west and doors were facing towards the south, and a cut pipe on the floor of the house is also there, and that towards the north of the house another G-I sheeted house is situated where the decree holder, her husband and three others are residing. Thereafter, the learned executing court by an order dated 23.4.2010 rejected the prayer of the petitioner herein on the ground that on perusal of the report of the Survey Commission, Kaliabor Revenue Circle, though indicated the Dag No. as being Dag No. 41, but the court found it difficult to put signature on the writ as Dag No. has not been mentioned in the plaint. The learned counsel for the petitioner submits that by passing the said order, the petitioner was relegated to the same position as was prevailing before the order dated 23.11.2009 was passed by this court in CRP No. 357/2009.

4. This court has perused the review petition as well as the LCR which has been received on requisition. It is seen that as per the provisions of Order XXVI Rule 9 of the CPC, it is the duty of the court to prepare a decree which is required to contain a description of such property sufficiently to identify the same and it is provided therein that where such property can be identified by boundaries or by numbers in a record of settlement of survey, the decree was specified such boundaries or numbers. However, from the LCR, it appears that the decree was

prepared by the learned trial court, it is no mention of Dag No. or Patta No. in Schedule Kha of the decreetal land. The Dag No. and the Patta No. was discovered only after the survey report dated 10.2.2010 came into record before the learned Executing Court.

5. On appreciation of the facts involved in this case, this court does not find any infirmity in the impugned order dated 23.4.2010, because in the decree there was absence of the Dag No. and Patta No. and the learned Executing Court was correct in not signing the writ to the Bailiff for possession containing the Dag No. and Patta No. as the same was not available in the decree. This is so because the learned Executing Court cannot go behind the decree. However, as the right of the petitioner herein over the suit land had fortified with obtaining of a decree for possession of the suit land described in Schedule-"Kha" and by declaration of their right, title, interest in respect of the said suit land, the deficiencies in the decree of not mentioning the Dag No. and Patta No. could have been permitted to be corrected in exercise of powers vested in the court under Section 152 of the CPC for incorporating the Dag No. and Patta No. in the decree. The mistake of not mentioning the Dag No. and Patta no. in the decree is not in consonance with the provisions of Order XX Rule 9 of the Civil Procedure Code, which ought not to be allowed to frustrate the lawfully passed decree.

6. This court, in the case of Kaloram Patar & Ors. -vs- Ghana Hira & Ors., in CRP 64/2006 which was decided by judgment dated 13.9.2012, had approved of the correction of the decree by correcting the name of the "Kissam" mentioned in the decree. The relevant paragraph-20 is quoted below: "The order dated 28.02.2006 was passed dismissing the execution case consequent upon the order passed on 22.02.2006 and therefore, with the setting aside of the order dated 22.02.2006, necessarily, the order dated 28.02.2006 is required to set aside and quashed. Accordingly, the same is set aside and quashed. The execution case is revived and the learned executing Court will now correct the decree by correcting the name of the Kissam as "Gamari" instead of "Rupahibori".

7. In view of the above, this court is of the view that it would be appropriate for the petitioner to approach the learned Executing Court and to file an appropriate application under the appropriate provisions of law for correcting the decree by incorporating the Dag No. and Patta No. therein. On such application being made, it would be appropriate for the learned court below to exercise jurisdiction under Section 152 of the Civil Procedure Code in accordance with law. Accordingly, no infirmity is found in the order of the learned executing court and this revision is therefore dismissed with the liberty as indicated above.

8. Send back the LCR forthwith.

9. The parties are directed to appear before the learned Court of Munsiff, Kaliabor on 15.05.2017 to seek further instructions from the said learned court.