
(1985) 11 OHC CK 0004
In the Orissa High Court
Case No : Civil Revision No. 705 of 1982

Sri Laxman Naik and Others

APPELLANT

Vs

Smt. Ashamoni Dei and Others

RESPONDENT

Date of Decision : 06-11-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (1985) 2 OLR 574

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R. Mohanty, A.C. Mohanty and Debasis Das, for the Appellant; Y.S.N. Murty and K.T. Rao, for the Respondent

Judgement

S.C. Mohapatra, J.—The decree-holders are the petitioners against an order under Section, 47, Code of Civil Procedure, allowing the objection of the judgment-debtors that the decree is not executable.

2. Plaintiffs' suit was for a declaration of title and recovery of possession against the defendants. The matter came upto this Court in Second Appeal No. 12 of 1975 and the decree was confirmed. During the pendency of the Second Appeal, respondent No. 5, who was defendant No. 5, died leaving behind his legal representatives. However, no substitution was made in his place in the Second Appeal nor was the fact brought to the notice of this Court. The decree was confirmed without taking note of the death of respondent No. 5. When an application for execution was filed, the application u/s 47, C. P. C. was filed objecting to the executability of the decree. This objection has been found favour with the Executing Court and it was held that the decree is not executable. Hence this Civil Revision.

3. Law is now settled that the Executing Court can go behind the decree to find out whether the decree is a nullity. In Seth Hiralal Patni Vs. Sri Kali Nath, , it has been held :

"...The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree, passed or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it...."

The same principle has also been decided in A. I. R. 1970 S. C. 1975 (Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rebman and Ors., where it has been observed :

" When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree.....is sought to be executed an objection in that behalf may be raised in a proceeding for execution. ..."

Thus, the Executing Court has rightly held that it has jurisdiction to go behind the decree to examine the effect of non-substitution vide deceased-respondent No. 5 in the second appellate Court. It would not be sufficient for a Court to throw away a decree merely because there is no substitution of a deceased respondent. The Court is also to find out what is the effect of such non-substitution. Merely from the fact that there was death of one of the parties to a decree, which was a composite one, a conclusion cannot be arrived at that the decree becomes unexecutable. The interest of the deceased person is required to be left to some third parties who are not bound by the decree for non-executability of the same. This aspect of the matter has not been effectively gone into by the Executing Court.

4. In the result, while confirming the decision of the Executing Court that it can go behind the decree, I direct the Executing Court to examine the effect of the death of respondent No. 5 making it clear that in absence of specific evidence as to the existence of the legal representatives the decree would be executable against the other judgment debtors. The Civil Revision is disposed of with the above directions. There shall be no order as to costs.