

Netramani Dibya and ors. Vs. Dasarathi Misra and ors.

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Court : Orissa

Decided On : Nov-21-1985

Reported in : AIR1986Ori235; 61(1986)CLT27

Judge : S.C. Mohapatra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 6, Rule 17 - Order 21, Rule 11; Court-fees Act, 1870 - Sections 6

Appeal No. : Civil Revn. No. 689 of 1985

Appellant : Netramani Dibya and ors.

Respondent : Dasarathi Misra and ors.

Advocate for Def. : J.P. Misra and ;A.K. Mohakuda, Advs. (for No. 1)

Advocate for Pet/Ap. : R. Mohanty and ;P. Mohanty, Advs.

Judgement :

ORDER

S.C. Mohapatra, J.

1. This Civil Revision arises out of an order of the learned Subordinate Judge, Nayagarh, refusing to permit the petitioners to file their objection under Section 47, Civil P.C. to the execution of a final decree in a suit for partition. While accepting

the revision for further hearing, interim stay of further proceeding in the execution case was passed. Decree-holder-opposite party No. 1 appeared and filed an application for vacating the order of stay. While considering the said petition, I directed the matter to be heard finally without waiting for the service return of notice to the other judgment-debtors who did not have any grievance against the impugned order.

2. Execution Proceeding No. 13 of 1982 was filed for execution of the final decree dt. 17-8-1982 in the partition suit. The said decree was set aside by this Court on 8-11-1982. The proceeding in execution remained stayed pending disposal of the final degree proceeding after the final decree was cated (sic) by this Court. The second final decree was passed on 2-9-1983. One year thereafter on 14-11-1984, the Executing Court vacated the interim stay granted. On 5-12-1984, the certified copy of the second final decree was filed in the execution proceeding. From the record it is seen that notice of filing of the certified copy of the second final decree had been given to one Advocate. The case of the petitioners judgment-debtors is that their Lawyer Mr. S. C. Mohapatra who was entrusted with the conducting of the entire execution proceeding having joined judicial service, they could not know about the further stages of the Execution Proceeding. Coming to know that the said proceeding was pending, they filed an application on 23-9-1985 to get an opportunity to file objection to the execution case. The said prayer having been refused, the present Civil Revision has been filed.

3. Mr. Mohanti, the learned counsel for the petitioners may be technically correct to submit that the Execution Proceeding cannot continue when the decree sought to be executed had been vacated. This question, however, need not be given much importance as there would be no bar for the decree-holder to file a fresh execution proceeding since such a proceeding would not be barred by limitation or on any other ground. When there is a second decree which is alleged to be substantially the same as the first one, the ends of justice would be served by allowing the decree-holder to amend the petition giving the correct particulars.

4. All the judgment-debtors have been served with notice of the Execution Proceeding. Some of them have filed objection. When I am giving opportunity to

the decree-holder to amend the execution petition, there will be no prejudice to give opportunity to the petitioners to file objection, if any, to the execution.

5. I find that the certified copies of the decree dt. 17-8-1982 and decree dt. 2-9-1983, do not bear the proper fees under Schedule 1, Article 7 of the Court-fees Act which provides that no document under Section 6 of the Court-fees Act is to be received by the court on which proper fee has not been paid. Under the Court-fees Act, no power is left with the court to avoid Section 6 of the Act. Inherent power of the Court would not give such a power which would be contrary to the provisions of law itself. In a Republic governed by rule of law, this provision cannot be ignored till the provision exists. However, where it is possible to give chance to a party to get the defect rectified, harsh view would not be taken.

6. In the peculiar facts and circumstances of this revision, I direct the decree-holder to pay the proper fee under the Court-fees Act on the certified copies of the decree on or before 2nd Dec., 1985. The decree-holder shall be given opportunity to amend the execution petition on 2nd Dec. 1985 on filing a proper petition. The judgment-debtors including the petitioners who have not filed their objections shall be given opportunity to file the same by the 15th Dec., 1985. No objection thereafter shall be entertained by the Executing Court. The trial court shall do well to dispose of all the objections received as expeditiously as possible preferably by the 15th Feb., 1986. All endeavour should be made for completing the execution proceeding by 31st Mar., 1986.

7. I may make it clear that no objection relating to the maintainability of the execution case, on account of the earlier decree having lost its force or absence of notice to those judgment-debtors who have received the notice already shall be entertained.

8. Mr. J. P. Misra, the learned counsel for the decree-holder submitted that the litigation is continuing since the year 1951 to the detriment of the decree-holder and some arrangement relating to the standing crop should be made to protect the interest of the decree-holder. Since I have disposed of the Civil Revision, I am not entertaining such a prayer. It is open to the decree-holder to move the Executing Court for dealing with the question in accordance with law.

9. The Civil Revision is accordingly disposed of. There shall be no order as to costs. Send back the records at once to the Executing Court on or before 30th Nov., 1985. Parties are directed to appear before the Executing Court on 2-12-1985 for further orders by that Court.

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