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Court : Orissa

Decided On : Sep-23-2005

Reported in : 100(2005)CLT590; 2005(II)OLR623

Judge : A.S. Naidu, J.

Acts : [Constitution of India](#) - Article 227; Code of Civil Procedure (CPC) - Sections 47

Appeal No. : W.P.(C) No. 6782 of 2004

Appellant : Surendranath Pandit and anr.

Respondent : Harekrishna Pandit and ors.

Advocate for Def. : Dr. Akshaya Kumar Rath and; N.M. Praharaj, Advs.

Advocate for Pet/Ap. : S.P. Misra, Adv.

Disposition : Petition dismissed

Judgement :

A.S. Naidu, J.

1. The dispute in the present case cropped up during execution of a decree passed in Title Suit No. 110 of 1985 of the Court of the Civil Judge (SD), Baripada in Execution Case No. 9 of 1996.

2. T. S. No. 110 of 1985 was one for partition. Preliminary decree was passed in the suit and thereafter final decree proceeding was initiated. A Civil Court Commissioner was deputed to measure the land and make the allotments. The report submitted by the said Commissioner was accepted after hearing objection and the decree was made final. Opposite party No. 1 and others filed the aforesaid Execution Case to execute the final decree. In the said Execution Case once again another Civil Court Commissioner was deputed to deliver possession of lands in consonance with the BADAR and trace maps prepared earlier. In course of delivery of possession the Commissioner was confronted with a construction existing on a portion of the suit land. As the decree was silent with regard to demolition of any construction, the Commissioner reported to the executing Court with regard to existence of a portion of the cow-shed over Sabik plot Nos. 288 and 291 corresponding to Hal plot Nos. 407/4 and 410. While matter stood thus the present petitioners filed MJC No. 63 of 2002 under Section 47, CPC before the Court with a prayer to dismiss the Execution Case as there is no decree for demolition or eviction. According to the petitioners, who are sons of one Arjun Pandit, the entire suit property was the joint family property of the parties who are descendants of a common ancestor. In the year 1961 a partition suit was filed which was registered as O.S. No. 12 of 1961. A preliminary decree was passed in the said suit on compromise. According to the preliminary decree, except the properties described in Schedule 'C' of the plaint of Title Suit No. 110 of 1985, all other properties were allotted to the share of Arjun Pandit, father of the petitioners. It was also submitted that the compromise petition filed in O.S. No. 12 of 1961 would further reveal that a cow-shed was existing on plot No. 410 which was adjacent to plot No. 407/4, Plot No. 410 was allotted in favour of the father of the petitioners; whereas plot No. 407/4 had been partitioned among the opposite parties. According to the petitioners, as a cow-shed was existing on the land appertaining to plot No. 410 and a portion of plot No. 407/4 for the last twenty years or more, the same could not be demolished in the absence of a decree for eviction and/or demolition. On the basis of such pleading it was prayed that the cow-shed existing on an area of Ac. 0.01 dec. on Plot No. 407/4 should not be demolished and the Execution Case should be dismissed to that extent.

These averments are strongly repudiated by the decree holder-opposite parties. According to them, neither the petitioners nor their father Arjun Pandit has any semblance of right, title or interest over any portion of plot No. 407/4. The said plot was not allotted in favour of Arjun Pandit in O.S. No. 12 of 1961 and was in fact allotted to the branch of the opposite parties. It is further submitted that the father of the petitioners was a defendant in T.S. No. 110 of 1985 out of which the present Execution Case arises and he had never raised any objection with regard to partition of the lands appertaining to plot No. 407/4 along with other lands among the opposite parties. According to the decree-holders, as the petitioners have no semblance of right, title or interest over any portion of plot No. 407/4, the construction existing on a portion of the said plot was raised after passing of the final decree and before execution should be demolished and possession of the land should be handed over to the decree holders.

3. The executing Court after discussing the materials available on record and relying upon the reports of the Civil Court Commissioners arrived at a conclusion that the cow-shed in question had been constructed after the final decree was sealed and signed and on that basis dismissed the MJC. An appeal filed by the petitioners against the order of the executing Court dismissing MJC No. 63/ 2002 under Section 47, CPC was registered as FAO 1/52 of 2004/ 2003 which was heard and dismissed by the Ad hoc Addl. District Judge, FTC, Baripada with the finding that the evidence clearly reveals that the cow-shed in question was constructed on plot No. 407/4 not in the year 1966, but after the final decree in T.L.S. No. 110 of 1985 was sealed and signed and during the execution proceeding.

The aforesaid confirming order is assailed in this Writ Petition.

4. Mr. S. P. Misra, Learned Senior advocate appearing for the petitioners, strenuously took this Court through the plaint of O.S. No. 12 of 1961, the compromise decree and also the plaint of T.S. No. 110 of 1985 and forcefully submitted that the cow-shed in question was existing on the aforesaid plot for more than thirty years and as such, the Courts below acted illegally and with material irregularity in dismissing the MJC filed under Section 47, CPC. He further

submitted that even admitting that the petitioners have no right on plot No. 407/4, but as the said plot adjoins plot No. 410 which belongs to them and the cow-shed in question is in possession of the petitioners for more than 30 years, the decree for partition cannot be executed without a decree for eviction and/or demolition of the said construction.

5. Dr. Rath, Learned Counsel appearing for the opposite parties, at the other hand submitted that it would be evidence from the BADAR and trace maps prepared by the Civil Court Commissioner deputed during the final decree proceeding that no construction was existing on plot No. 407/4. But then when the Commissioner deputed in the Execution Case went to the spot for effecting delivery of possession, the aforesaid construction was found. Thus the reports of the aforesaid two Civil Court Commissioners would clearly reveal that the constructions were made after the visit of the Civil Court Commissioner during the final decree proceeding and before the visit of the Commissioner deputed in the Execution Case for effecting delivery of possession. This aspect was dealt with by the executing Court in extenso and the conclusions are just and proper. Relying on the evidence of three witnesses and Exts. 1 and 1/a, the executing Court rightly observed that the construction was raised by judgment-debtor Nos. 2 and 3 after the final decree was sealed and signed. The said finding was also confirmed by the Appellate Court. According to Dr. Rath, this Court in exercise of jurisdiction under Article 227 of the [Constitution of India](#) may not interfere with the concurrent findings of fact and the Writ Petition may be dismissed in limine.

6. I have heard Learned Counsel for the parties at length and have perused the materials available on record. Law is no more res integra that if any construction and/or obstruction is created after a final decree is passed and before execution of the decree, the executing Court has the right and authority to direct demolition of the said construction and effect delivery of possession. In view of the said clear position of law, the only point that needs determination in this case is as to whether the portion of the cow-shed existed on Ac. 0.01 decimals of land on plot No. 407/4 prior to passing of the preliminary decree or it was constructed during the interregnum period. According to Mr. Mishra the said construction was existing even prior to 1961; whereas according to Dr. Rath the same was constructed after

the Civil Court Commissioner was deputed in the final decree proceeding to measure the land, prepare BADAR and trace map and before the decree was executed in other words, after the final decree was signed and sealed and before the Civil Court Commissioner was deputed to deliver possession in the Execution Case.

7. To appreciate the aforesaid submissions, before delving into the real dispute, it would be just and prudent to re-appraise the principles for issue of Writ of Certiorari.

In the case of Syed Yakoob v. K.S. Radhakrishnan and Ors., reported in : [1964]5SCR64 , Gajendragadkar, J. held as follows :

'The jurisdiction of High Court to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, writ of certiorari can be issued if it is shown that in recording the said finding the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.'

8. In the touch-stone of the ratio of the aforesaid decision and carefully considering the submissions made and perusing the materials available as also the orders of the Courts below, it appears that the petitioners though claimed that the cow-shed in question was existing on the disputed plot for more than twenty years, failed to adduce any evidence in that regard. At the other hand, the decree-holders apart from getting examined three witnesses exhibited the report of the Civil Court Commissioner who had been deputed to the disputed land during the final decree proceeding. Besides, the BADAR, trace map and the report of the Civil Court Commissioner deputed to the disputed land during execution proceeding were

available on record. Considering the evidence and other materials available on record, the executing Court arrived at the conclusion that it was not possible to believe that the disputed cow-shed was actually in existence on the plot in question during the final decree proceeding of T.S. No. 110 of 1985. It further held that the cow-shed had been constructed by judgment-debtors 2 and 3 after the final decree was sealed and signed. The plea of adverse possession raised by the petitioners with regard to plot No. 407/4 was also negatived. The Appellate Court after scrutinizing the materials available on record has confirmed the finding of the executing Court that the cow-shed had been constructed on plot No. 407/4 not in the year 1966, but after the final decree in T.S. No. 110 of 1985 was sealed and signed and during the execution proceeding. The aforesaid findings are based on cogent materials. The Courts below have vividly discussed the evidence on record, both oral and documentary and the conclusions arrived at by them do not suffer from any infirmity or illegality. This Court also does not notice any error apparent on the face of the orders of the Courts below.

9. In view of the aforesaid discussions, this Court declines to interfere with the impugned orders and dismisses the Writ Petition.

Parties shall bear their respective costs.