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Court : Orissa

Decided On : Jul-31-2008

Reported in : AIR2008Ori185

Judge : Pradip Mohanty, J.

Appellant : Nilamani Pradhan and ors.

Respondent : Narottam Pradhan

Advocate for Pet/Ap. : Mr. Das

Judgement :
ORDER

Pradip Mohanty, J.

1. This civil revision is directed against the order dated 1-7-2006 passed by the Civil Judge (Junior Division), Athamallik rejecting an application (LA. No. 6 of 2005) filed by the judgment-debtor-petitioners under Sections 47 and 151 of the C.P.C. with a prayer not to proceed with the execution proceeding as the decree out of which it arose was a void one.

2. Case of the petitioners, as narrated in the impugned order, is that original defendant No. 1 - Bimbadhar Pradhan died on 8-7-1987 during pendency of the final decree proceeding. No attempt whatsoever was made by the decree-holder-

opposite party to substitute the legal heirs of said defendant No. 1. As such, final decree was passed against a dead man. According to law, a decree passed against a dead man is a nullity.

3. Further, during pendency of the final decree proceeding, an Amin Commissioner was deputed to the suit land who allotted the land and ignored the claim of the L.Rs. of defendant No. 1. That Amin had visited the suit land and took L.T.Is. and signature of some minor petitioner-judgment-debtors and thus the report of the said Amin Commissioner was not at all acceptable. Since the procedure adopted by the said Amin Commissioner was not according to law, the judgment-debtor-petitioners initiated a proceeding under Section 151, C.P.C. vide I.A. No. 4 of 2005 before the Civil Judge (Junior Division), Athmallik praying therein to initiate a fresh final decree proceeding. The said interim application was dismissed and against that the petitioners preferred a revision before this Court. In the said revision, the decree was challenged on the ground that it was not acceptable under law as the same was a nullity. Since this Court disposed of the Civil Revision with an observation that plea of death of the party be taken in the lower Court, the proceeding in question was initiated.

4. Case of the opposite party-decree-holder is that final decree was drawn during the lifetime of defendant No. 1. The Amin had served the spot notice on the said defendant and report of the Process Server is the evidence. In Execution Proceeding No. 10 of 1994 initiated by the decree-holder-opposite party, notice was sent through the Process Server, who had reported that the said defendant No. 1 was absent in his house and had been to some other place. Thereafter, fresh notice was issued through the Process Server, who reported that the said defendant was dead. Accordingly, L.Rs. of the said defendant were substituted. Further case of the decree-holder-opposite party is that the plea of death of defendant No. 1 was not taken by the judgment-debtor-petitioners either during the final decree proceeding or during pendency of I.A. No. 4 of 2005 and such plea taken at a belated stage is an afterthought and with a view to deprive the decree-holder-opposite party of enjoying the fruits of the decree. Moreover, the petition was also not maintainable.

5. The learned Civil Judge after hearing the parties, scrutinizing the materials available before him and considering the facts and circumstances of the case came to the conclusion that defendant No. 1 was alive, that he had received and signed the notice from the Process Server personally on 7-12-1987, that the death certificate was obtained on 3-3-2006 showing the date of death as 8-7-1987, and that the chits relating to 'Sudhi Kriya' are purely private documents and there are innumerable doubts regarding their genuineness. Therefore, the petitioner failed to prove that final decree was a nullity and dismissed the application.

6. Mr. Das, learned Counsel for the petitioners, submitted that the death certificate is a public document and admissible in evidence. The report given by the Process Server is not final without any proper inquiry and examination of the Amin. The Court below without any basis and application of mind adopted the principle relating to amendment to this case and held that the stand regarding nullity of the decree is an afterthought. The Court below lost sight of the provision of Section 13 of the Registration of Births and Deaths Act for delayed registration and disbelieved the death of defendant No. 1 before passing of the final decree.

7. Mr. Ghose, learned Counsel appearing for the opposite party submitted since in their first petition, i.e. I.A. No. 4 of 2005, the petitioners did not raise the point that defendant No. 1 had died before the final decree, raising of that plea in the second petition, i.e., LA. No. 6 of 2005, is hit by the principle of constructive res judicata because, as the death was within their knowledge, they could have taken that point in the first instance. This Court while dismissing the earlier civil revision observed that the petitioners can approach the trial Court again for relief claimed if such a petition is maintainable.

8. He further submitted that defendant No. 1 was alive when he received the execution notice from the process server. From the Process Server's report dated 12-2-1995 it is evident that at that time defendant No. 1 was absent and had gone to another village. In the fresh notice dated 16-10-1996, the report was that the defendant No. 1 was dead. So, defendant No. 1 was alive on 7-12-1987 and 12-2-1995, and the plea of the petitioners that defendant No. 1 died on 8-7-1987 is a false one. Moreover, the date of death was not mentioned in the original petition.

The death certificate was obtained on 3-3-2006. He further submitted that had defendant No. 1 died on 8-7-1987, his sons would have mentioned the date of death in their Misc. case and could not have waited till 2006 to manufacture a death certificate and chits relating to 'Sudhi Kriya'. He lastly submitted that had defendant No. 1 died before passing of the final decree, the judgment-debtors would have filed their objection when they were substituted in 1995 and received the notice in the Execution Case, without waiting till 2005 when the possession was delivered. Therefore, belated plea shows that they were taking false plea to drag the proceeding of 1981 to harass the plaintiff-opposite party.

9. Both the parties in support of their respective cases relied upon the decisions in Krushna Chandra Sahoo v. Indramani Sahu : AIR1984 Ori49 ; Hira Lal Patni v. Sri Kali Nath : [1962]2SCR747 , 41 CLT 894, Sri Damodar Das v. Gadadhar Mallik : AIR1982 Ori234 , Azeez Sait (Dead) by L.Rs. and Ors. v. Aman Bai and Ors. : AIR 2003 SC4444 .

10. Before going into the merits of the case, this Court feels it proper to decide first the maintainability of the Civil Revision in view of the recent amendment to Section 115, CPC. This Civil Revision is directed against the order dated 1-7-2006 by which the learned Civil Judge (Junior Division) rejected an application under Section 151, C.P.C. read with Section 47, CPC. In view of the ratio decided in Shiva Shakti Co-op. Housing Society, Nagpur v. Swaraj Developers and Ors. : [2003]3SCR762 and the provision of the CPC, if the petition filed by the petitioners had been allowed, then the final decree proceeding would have been terminated. In other words, if the civil revision is allowed in favour of the petitioners, the final decree proceeding will be finally disposed of. In view of the above, this civil revision is maintainable.

11. The crux of the dispute in this civil revision is, whether the final decree was drawn against a dead man. If it is against a dead man, the decree is a nullity and cannot be executed against the legal representatives of the deceased-defendant No. 1. Admittedly, the final decree proceeding was drawn on 3-5-1990. According to the petitioners, the date of death of defendant No. 1 was 8-7-1987. That means, the decree was drawn against a dead man without substituting the legal

representatives. But the decree-holder has categorically stated that the date of death of defendant No. 1 was incorrect and the death certificate has been obtained for the purpose of this case. In order to scan this position, this Court perused the records and the decisions cited by the parties. The petitioners did not disclose the date of death of Bimbadhar (defendant No. 1) in the first proceeding, i.e., I.A. No. 4 of 2005. But they took the plea in this proceeding for the first time after 15 years. If the death of Bimbadhar was before the final decree proceeding, the petitioners could have raised that plea in their first petition. They could have filed the death certificate along with the said petition. The second petition, i.e., the present proceeding, was filed subsequent to disposal of the earlier civil revision and in the said petition initially the factum of death of defendant No. 1 was not mentioned. By way of amendment, much after the institution of the present case, said pleading was added. Moreover, during the pendency of the proceeding the death certificate was obtained in the year 2006, i.e., much after the institution of the present proceeding. The Court below also scrutinized the record and found that in the final decree proceeding said Bimbadhar, defendant No. 1, had appointed a lawyer. That shows that he was alive after the final decree proceeding was initiated. The Process Server had reported on 12-2-1995 that the notice could not be served since defendant No. 1 (Bimbadhar) had been to some other place. Therefore, fresh notice was issued to Bimbadhar. On 18-10-1996 the Process Server reported about the death of said Bimbadhar. Necessary steps were taken by the decree-holder to substitute his legal heirs upon whom notices were duly served. But the legal heirs did not agitate such fact when they appeared. Therefore, the conduct of the petitioners in this proceeding is doubtful. Moreover, the petitioners had not challenged the wrong procedure and the earlier report of the Process Server and admittedly the death certificate was obtained during the course of the proceeding. There is no dispute that the death certificate is a public document. But that does not necessarily mean that the same is to be accepted as true without considering the circumstances.

12. In view of the foregoing discussions, this Court does not find any fault with the impugned order. Accordingly, the revision is dismissed being devoid of any merit.

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