

GAHC010249442023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/359/2023

LALBABU SAH
S/O LATE LAKHI SAH, R/O TEZPUR TOWN, WARD NO. 6, ASEB ROAD, P.O.
AND P.S.-TEZPUR, DIST-SONITPUR, ASSAM, PIN-784001

VERSUS

PRADIP BHATTACHARJYA AND 3 ORS.
S/O LATE RAMESH CHANDRA BHATTACHARJEE, R/O ASEB ROAD, WARD
NO.-6, NEAR OLD POWER HOUSE, TEZPUR, DIST- SONITPUR, ASSAM, PIN-
784001

2:MRINAL KANTI BHATTACHARJEE
S/O LATE RAMESH CHANDRA BHATTACHARJEE
R/O ASEB ROAD
WARD NO.-6
NEAR OLD POWER HOUSE
TEZPUR
DIST- SONITPUR
ASSAM
PIN-784001

3:SMT. KALPANA BHATTACHARJYA
D/O LATE RAMESH CHANDRA BHATTACHARJEE
R/O ASEB ROAD
WARD NO.-6
NEAR OLD POWER HOUSE
TEZPUR
DIST- SONITPUR
ASSAM
PIN-784001

4:SMT. RATNA BHATTACHARJEE

D/O LATE RAMESH CHANDRA BHATTACHARJEE
R/O ASEB ROAD
WARD NO.-6
NEAR OLD POWER HOUSE
TEZPUR
DIST- SONITPUR
ASSAM
PIN-78400

Advocate for the Petitioner : MR. S SAHU

Advocate for the Respondent : MR. S BISWAS

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

Date : 09.04.2024

1. This is an application filed under Article 227 of the Constitution challenging the order dated 03.10.2023 passed by the learned Civil Judge (Junior Division) No.1, Tezpur in Title Execution Case No.08/2011.
2. The said order has been passed in two applications. The first application is an application filed under Order XXIII Rule 3 read with Section 151 of the Code of Civil Procedure, 1908 for recalling of the judgment and order dated 30.09.2005 passed in Title Suit No.82/2005 and the original decree dated 05.10.2005 as well as the compromise decree dated 30.09.2005 by way of petition No.2562/2005. The second application is an application which has been registered as Petition No.360/2022 which is a petition filed by decree holder for carrying out the execution with the help of the police force inasmuch as the said decree would not be executed as per the Court's order.
3. Vide the said impugned order, the Petition No.360/2022 filed by the decree holder was allowed and thereby directing the Civil Nazir to execute the decree

dated 30.09.2005. However, as regards the Petition No.361/2022, the learned Executing Court had rejected it on the ground that the said application is nothing but an afterthought that too after a period of 12 years from the date the execution proceedings have been initiated and for the first time, the allegation of fraud have been leveled.

4. Taking into account the grounds and reasons which have been assigned by the learned Executing Court in passing the order insofar as the Petition No.361/2022, this Court is of the opinion that no interference is required under Article 227 of the Constitution in view of the fact that the application seeking setting aside of the decree was filed after a period of 12 years from the initiation of the execution proceedings. It is pertinent herein to note that in the execution proceedings, the Petitioner as judgment debtor had appeared all along. Various applications have been filed from time to time which had also reached this Court. On 29.11.2021, this Court had in CRP No.118/2019 dismissed the said application so filed by the Petitioner observing the following at Paragraph Nos. 11, 12 and 13 which are reproduced herein below:

“11. I have heard the learned counsel for both the parties at length. I have also perused the terms and conditions of the compromise decree and more particularly Clause No. 4 whereby there was a specific arrangement between the parties to the effect that the petitioner/the Judgment Debtor/the Defendant agreed not to raise any construction in near future without keeping 3 ft from the boundary wall and also to keep the said area of 3 ft. vacant from the boundary wall. The said undertaking between the parties as mentioned in Clause 4 of the Compromise Decree is in the form of a perpetual injunction and taking into consideration the proviso to Article 136 of the Limitation Act, 1963 there being no period of limitation, the said execution application has been filed within time and consequently, the objection which has been raised by the

counsel appearing for the petitioner that it has been filed after a period of 5 years does not hold any merit. The second objection which has been raised as regards the identification of the wall, the same had already been settled vide Order dated 7/9/2012 as passed in Misc. (J) Case No. 297/2012 and the same had attained finality, wherein it has been categorically held that the wall in question is the western wall. The third objection which has been taken to the effect that the decree was not executable, inasmuch as it is an admitted fact that it has been duly complied with, does not hold water in view of the fact that a perusal of Clause 4 of the Compromise Decree categorically shows about the compliance to be made by the defendant in respect to future construction which is in the nature of a perpetual injunction. The last objection which has been raised out here as regards that there is no suit land on the fact of it, cannot be accepted pursuant to the order of compromise decree whereby the parties have amicably agreed to recognize the particular boundary wall. In the compromise decree, it being specifically spelt out that there shall not be any construction or anything put 3 ft from the boundary wall which is on the western side of the suit land, the said contention as raised by the counsel for the petitioner does not hold any water.

12. *In view of the above, I do not find any merit in the instant petition. Consequently the same stands dismissed.*

13. *At the time of passing of the above order, Mr. SP Roy, the learned counsel appearing on behalf of the petitioner upon instruction submits that demolition of the existing structures by the Civil Nazir may cause further damage to the existing structures and as such, he gives an undertaking before this Court that within a period of 45 days from today he shall demolish the structures and remove all temporary structures or anything within the area of 3ft from the western boundary wall of the plaintiff i.e. the offending constructions and temporary structures as specified in the Report of the Survey Commission. In view of the undertaking being given out here the petitioner is permitted to demolish the offending constructions as well as remove all the*

temporary structures which have been stated in the Survey Commission's report to be in violation of the compromise decree within a period of 45 days from today. Failing which, the Executing Court shall go ahead with demolition as directed in the impugned order. Further to that the Respondent shall also be entitled to initiate proceedings for contempt before this Court for violation of the undertaking given herein."

5. It is pertinent to observe that the Petitioner on the earlier occasion had given an undertaking before this Court. It is also pertinent to note that the decree in question is a compromise decree and the Petitioner was duly represented in the said suit proceedings when the decree was passed. Almost after 17 years from the date of the compromise decree and 12 years from the date of execution proceedings, the application was filed. There is nothing on the said application that the petitioner did not know about the contents of the decree. Under such circumstances, taking into account that the limitation period for filing an application under Section 151 of the Code is three years, the said application being Petition No.361/2022 was hopelessly barred by limitation.

6. Secondly, the said application was not maintainable before the Executing Court inasmuch as the Executing Court could not have set aside a compromise decree as the Executing Court cannot go behind the decree. Thirdly, from a perusal of the materials on record, it is seen that the Petitioner who is the judgment debtor by resorting to all means is only trying to deprive the decree holders of the fruits of a lawful decree.

7. Considering the above, the instant petition stands dismissed and this Court quantifies a cost of Rs.15,000/- to be paid by the Petitioner.

8. The interim order passed on 04.12.2023 stands vacated and as the parties are duly represented, they are directed appear before the learned Executing

Court on 13.05.2024 on which date, the judgment debtor who is the Petitioner herein shall deposit the said amount of Rs.15,000/- before the Executing Court. The learned Executing Court shall further proceed with the execution proceedings in accordance with law.

JUDGE

Comparing Assistant