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Ct. 18
05.07.2022

C.O. No. 3081 of 2019
Sri Amal Kumar Basu & Ors.
Vs.
Kenaram Dutta & Ors.

Mr. Mahendra Prasad Gupta,
Mr. Abhishek Banerjee,
Mr. Ayan Mitra,
Mr. Chandan Mondal,
Ms. Antara Panja,
Ms. Supriya Mahajan

.. For the petitioners.

Mr. Anirban Mitra,
Mr. Amit Haldar,
Md. Wasim Akram ... For the O.P. Nos. 2 to 5.

The instant application under Article 227 of the Constitution of India is at the instance of the plaintiffs/decreed-holders in a suit for partition being Title Suit No. 40 of 2002.

The said suit was decreed ex parte in preliminary form on April 24, 2006.

The application filed by the opposite parties under Order IX Rule 13 of the Code of Civil Procedure for setting aside the said ex-parte decree was dismissed and the said order of dismissal was affirmed in C.O. 3094 of 2008.

The said preliminary decree was made final on February 11, 2009 on contest. The appeal against the said final decree was affirmed in second appeal being S.A. 254 of 2016.

The final decree when was put into execution gave rise to Title Execution Case No. 02 of 2016 before the learned Civil Judge, (Senior Division) at Basirhat, District – 24 Parganas (North).

The opposite parties in the said execution case filed an application under Section 47 of the Code being Miscellaneous Case No. 40 of 2018.

The Executing Court by the order impugned dated August 13, 2019 has allowed the said misc. with the following orders:-

“Hence, it is, Ordered:

***That the petition u/s 47 CPC is Allowed on Contest;*

~ on cost Rs. 5000/- [Five thousand] to the OP;

~ with condition to proceed in Original Suit on weekly basis;

~ with a rider that defaulting side is liable for cost of Rs 500/- on each default date.”

The execution and satisfaction of the final decree was questioned, *inter alia*, on the grounds that the said decree was obtained by practicing fraud, no summons of the preliminary decree was served upon the judgment debtors, the description of the suit schedule property is incorrect and the decree was passed against minors.

None of the said grounds of challenge except the ground that the said preliminary decree was passed against the minors are sustainable in an objection under Section 47 of the Code.

Objection to the execution, discharge and satisfaction of the final decree of partition is not available to the opposite party nos. 3 and 4 on the ground of their minority since the said opposite parties participated in the proceeding for setting aside the ex-parte preliminary decree, represented by their natural guardian, father and also challenged the final decree of partition as such without any challenge to the legality and/or validity of their such representation in those proceedings.

The learned Trial Judge has therefore acted with material irregularity in allowing the said objection,

in consequence the order impugned is set aside.

The application under Section 47 of the Code filed by opposite parties is dismissed. C.O. 3081 of 2019 is allowed without any order as to costs.

It is made clear that this order will not prevent the opposite parties to take appropriate steps for allotment of their shares in accordance with law.

The executing Court is requested to proceed with the execution case expeditiously.

The Lower Court Records be sent down to the Court below immediately by Special Messenger at the costs of the petitioners to be put in within two weeks from date.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Biswajit Basu, J.)