

IN THE HIGH COURT OF ORISSA AT CUTTACK
C.M.P. No.847 of 2017

Narayan Malik & Anr.

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Petitioner(s)
Mr.M. Mohanty,
Advocate

-versus-

Sadashiv Malik & Ors.

....

Opp.Party(s)
Mr.B.C.Panda, Advocate
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CORAM:
JUSTICE BISWANATH RATH

ORDER
09.05.2022

Order No.

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1. Heard learned counsel appearing for the parties.
2. Undisputedly, in the pendency of final decree proceeding defendant no.1 dies on 18.06.2011. It appears that in the natural course substitution application is brought in respect of L.Rs. of defendant no.1 by filing appropriate application, which application was taken up for consideration. Order-sheet discloses there was direction for issuance of notice in the matter of substitution vide order dated 27.12.2021 available at page-38 & 39 of the brief. It appears, after service of notice on the L.Rs. of defendant no.1 substitution application was ultimately taken up on 6.3.2013 on which date trial court declared L.Rs. 1(a) to 1(h) set ex parte. Further, the matter was taken up on 25.3.2013 and vide this order, there is allowing of the application under Order 21, rule 4 of the Code of Civil Procedure. Taking this Court to the further order-sheet, Mr.Mohanty alleges that the matter was taken up thereafter on several dates and finally by impugned order dated 12.1.2017 there is direction to its Office for finalization of preliminary decree on the basis of drawing already prepared in the meantime. In the said order, office was directed to draw the final decree in the suit for preparation of final decree. Mr.Mohanty, learned counsel for the petitioner here alleges that

even assuming the L.Rs. of Defendant no.1 did not appear on the basis of notice on substitution, even after declaring the L.Rs. of defendant no.1 ex parte such declaration must confine the substitution application. Since the final decree proceeding was pending, it becomes the duty of the court to give opportunity of hearing to the L.Rs. in final decree proceeding only after issuing fresh notice in the final decree proceeding.

3. Mr.Panda, learned counsel appearing for the opposite parties taking this Court to the order-sheet again submits that the issue involving preparation of drawing had already undertaken in the previous exercise by which time the defendant no.1 was already set ex parte. For the further development, the L.Rs. of defendant no.1 declared ex parte by order dated 6.3.2013. There was no necessity of further noticing the L.Rs. of defendant no.1. It is in this view of the matter, Mr.Panda, learned counsel objected the entertainability of the Civil Miscellaneous Petition.

4. Considering the rival contentions of the parties, this Court finds undisputedly defendant no.1 was ex parte before his death. But fact remains in the meantime the defendant no.1 dies as a consequence steps for substitution of L.Rs. of defendant no.1 has been undertaken . No doubt, the substitution application has been allowed again in absence of L.Rs. of defendant no.1. This Court here finds strength in the submission of Mr.Mohanty, learned counsel for the petitioners that the order allowing substitution confines the substitution petition and has nothing to do with the hearing and consideration of final decree proceeding. This Court again finds in allowing the substitution application in the event the L.Rs. of defendant no.1 remain absent, since there was requirement of further proceeding in the final decree proceeding, it was necessary to notice again the L.Rs. of defendant no.1. In the process, this Court finds there is illegal obstruction preventing the L.Rs. of defendant no.1 having their contest in the final decree proceeding.

5. In the result, this Court finds there has been mechanical decision involving the impugned order without compliance of the niceties of the Code of Civil Procedure. As a consequence, this Court interfering in the impugned order dated 12.01.2017 sets aside the same and remits the matter back to the state of 27.4.2017 as there is necessity for noticing the L.Rs. of defendant no.1. As the matter is decided in the presence of the plaintiff, plaintiff is directed to serve copy of the brief on L.Rs. of defendant no.1 on the next date of appearance of both the parties in the trial court on 18.05.2022. Considering there is inordinate delay, Mr.Mohanty, learned counsel for the petitioners undertakes appearance of L.Rs. of defendants in the executing court on 18.05.2022 and upon receipt of brief L.Rs. also file their objection, if any, within fifteen days thereafter. The executing court shall attempt to clear the proceeding within six months

6. The Civil Miscellaneous Petition stands disposed of with the observation and direction made hereinabove.

(Biswanath Rath)
Judge

Sks