

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 555 OF 2019

Bhagaban Behera

....

Petitioner

Mr. Amitav Tripathy, Advocate

-versus-

Malika Behera and others

....

Opp. Parties

Mr. Prasanta Kumar Satapathy, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

13.07.2022

Order No.

- 6.
1. This matter is taken up through hybrid mode.
 2. This CMP has been filed assailing the order dated 17th January, 2019 passed by learned Senior Civil Judge, Nayagarh in I.A. No.53 of 2011 (arising out of Execution Case No.20 of 2009), whereby an application under Section 47 of C.P.C. filed by the present Petitioner has been rejected.
 3. The sole contention of Mr. Tripathy, learned counsel for the Petitioner is that although the Petitioner as Defendant No.1 contested the suit, but no notice was ever served on him during the final decree proceeding. He also refers to the observation made by learned Senior Civil Judge, Nayagarh in the impugned order to that effect which reads as follows:

“Further on the subsequent date vide order dated 12th April, 2007 no order was passed so far as Defendant No.1- Petitioner is concerned. Of course, the order sheet clearly reveals that in fact no notice was served on the present Petitioner but now the thing is to determine is that for the aforesaid reason only a decree can be declared as nullity or not.....”

He, therefore, submits that the final decree proceeding is vitiated for non-service of notice on the present Petitioner. Thus, the decree cannot be executed. This material aspect was not considered by learned executing court while rejecting his application under Section 47 of the C.P.C.

4. Mr. Satapathy, learned counsel for the contesting Opposite Party Nos.2 and 3 submits that although notice on the Petitioner-Defendant No.1 was not served in the final decree proceeding, but he was well aware of the same and has participated in the allotment process and demarcation proceeding without raising any objection to the same. Pursuant to the notice issued by the civil court commissioner, the Petitioner remained present during allotment of share and has also signed the allotment sheet. Thus, non-service of notice on the Petitioner does not affect the final decree proceeding itself. It is further submitted that the Petitioner has never challenged the final decree proceeding by filing appeal. In that view of the matter, the impugned order warrants no interference and the CMP being devoid of any merit is liable to be dismissed.

5. Taking into consideration the submission made by learned counsel for the parties, this Court is of the considered opinion that when the Petitioner without raising any objection has participated in the allotment process as well as demarcation proceeding and signed the allotment sheet without any objection, non-service of notice on him in the final decree proceeding cannot be fatal. It further appears that after signing the allotment sheet, the Petitioner has also not filed any objection to the same in Court.

6. Mr. Tripathy, learned counsel for the Petitioner does not dispute this factual aspect. The Petitioner also does not state as to how he is prejudiced by non-service of notice in the Final Decree Proceeding.

7. In that view of the matter, non-service of notice on the Petitioner-Defendant No.1 in the final decree proceeding cannot be said to be fatal to the sustainability of the decree itself. Thus, the contention raised by the Petitioner-Defendant No.1 is not sustainable in law.

8. In view of the above, I find no infirmity in the impugned order under Annexure-1. Accordingly, the CMP being devoid of any merit stands dismissed.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

bks