

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.946 of 2019

Baidhar Sethy

.....

Petitioner

Mr. Samir Kumar Mishra, Advocate

-versus-

Rabindra Sethy

....

Opp. Party

Mr.S.S.K.Nayak, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

03.08.2022

Order No.

10. 1. This matter is taken up through Hybrid mode.
2. Order dated 30th July, 2019 (Annexure-7) passed by learned Additional District and Sessions Judge, Anandapur in Civil Revision No.1 of 2019 is under challenge in this CMP, whereby order passed on 16th January, 2019 (Annexure-5) passed by learned Civil Judge (Senior Division), Anandapur rejecting an application under Section 47 CPC, was set aside.
3. CS No.60 of 2013 was filed by the Petitioner for partition. The suit was decreed by learned Civil Judge (Senior Division), Anandapur on compromise between the parties and preliminary decree was accordingly drawn up. Subsequently, final decree was also drawn on 22nd December, 2013. As the Opposite Party failed to adhere to the final decree, Execution Case No.1 of 2017 has been filed by the Petitioner. Upon receipt of notice under Order XXI Rule 22 CPC, the Opposite Party filed his show cause stating that the Execution Case is not maintainable, as the map appended to the final decree was not

prepared in terms of the compromise. Learned Civil Judge (Senior Division), Anandapur, while entertaining the application, came to hold that the Opposite Party had not raised any objection to the allotment sheet and map prepared by the private Amin deputed by both the parties. It is also observed that both the parties have signed on each and every page of the final decree proceeding and map appended to it. The Opposite Party had not raised any objection with regard to acceptance of the allotment sheet and map prepared by the Amin nor had challenged the final decree in appellate forum. Thus, he rejected the petition under Section 47 CPC vide order dated 16th January, 2019 (Annexure-5). Assailing the same the Opposite Party preferred Civil Revision No.1 of 2019 under Section 115 CPC. Learned Additional District Judge, Anandapur holding the revision to be maintainable, came to a categorical finding that if a party has not agitated any matter in the final decree proceeding, it does not preclude him to agitate the same in the execution proceeding. It is also held that it is the duty of the executing Court to give finding on the objection raised before proceeding in the execution case. Hence, the revision was allowed vide order dated 30th July, 2009 (Annexure-7) remitting the matter back to the executing Court to adjudicate the petition/objection filed by the Opposite Party afresh.

4. Learned counsel for the parties do not dispute the aforesaid factual aspect.

5. Mr. Mishra, learned counsel for the Petitioner submits that learned executing Court was correct in his approach in holding that an objection not raised during final decree

proceeding in spite of opportunity being available, cannot be raised at any subsequent stage, more particularly in the execution proceeding. It is his submission that the Opposite Party had never raised any objection either to the allotment sheet or to the map prepared during final decree proceeding. He has signed the same without raising any objection to the same. The final decree was also never challenged in any higher forum and thus it attained finality. Thus, the objection to the final decree cannot be raised in the execution proceeding. He, therefore, prays for setting aside the order under Annexure-7 and to uphold the execution order passed under Annexure-5.

6. Mr. Nayak, learned counsel for the Opposite Party submits that allotment sheet as well as the map was not in consonance with the preliminary decree, which was drawn up on compromise. The common passage (road) has not been shown in accordance with the preliminary decree. As such, the decree itself is not executable. Thus, learned Additional District Judge, Anandapur has committed no error in holding the revision to be maintainable and setting aside order under Annexure-5 passed by learned Civil Judge (Senior Division), Anandapur.

7. Taking into consideration the rival contentions of the parties and the scope of Section 47 read with Order XXI Rule 23 CPC, this Court is of the considered opinion that the objection with regard to executability of the decree can be considered by the executing Court if raised by the JDr. Provision under Section 47 CPC does not permit the executing Court to adjudicate correctness of the decree (final decree in the

instant case). It is apparent on record that allotment sheet as well as the map prepared by the private Amin deputed by both parties, was signed by them without any objection. It also transpires from record that neither any objection was raised with regard to allotment during final decree nor any appeal was filed against the said final decree. Thus, correctness of the allotment sheet as well as map cannot be gone into at the stage of execution. Law is well-settled in this regard in the case of ***Rahul S. Shah Vs. Jitendra Kumar Gandhi and others***, reported in (2021) 6 SCC 418, wherein Hon'ble Supreme Court held as follows:-

“ 42.8 The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant. ”

(emphasis supplied)

Thus, the objection which could have been raised during adjudication of the suit, i.e., during final decree proceeding and not raised by the Opposite Party, cannot be permitted to be raised in an execution case.

8. In view of the above, the observation and finding of learned Additional District Judge, Anandapur in the impugned order under Annexure-7 is not sustainable in the eyes of law. Accordingly, the impugned order is set aside and order passed under Annexure-5 is upheld.

8.1 Learned executing Court shall also make an endeavour for early disposal of the Execution Case in accordance with law.

9. The CMP is allowed to the aforesaid extent.

Urgent certified copy of this order be granted on proper application

(K.R. Mohapatra)
Judge



s.s.satapathy