

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6600 of 2015

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1. Sachidanand.
 2. Jai Kishore Prasad Singh. Both sons of late Devi Lal Singh, both resident of Village- Kashnagar, P.S.- Sonbarsa, District- Saharsa, at present resident of Opposite Bari Masjid, Thana road, Khagaria, P.O., P.S. & District- Khagaria.

.... Petitioners.

Versus

1. Indra Deo Prasad, son of late Ayodhya Prasad Sah.
2. Sanjay Kumar.
3. Ritesh Kumar. Both sons of Indradeo Prasad, All resident of Mohalla- Hajipur, Ward No. 4 (Old), New Ward No. 20, P.O., P.S. & District- Khagaria.
4. Manju Prasad, wife of Dr. Awadhesh Prasad, daughter of late Yugal Kishore Mahto, resident of Mohalla- Ram Chandrapur, P.O. & P.S.- Biharsharif, District- Nalanda.
5. Raj Kishore Prasad, son of late Yugal Kishore Mahto, resident of Mohalla- Hajipur, Ward No. 4 (Old), New Ward No. 18, P.O., P.S. & District- Khagaria.
6. Dr. Braj Kishore Prasad, son of late Yugal Kishore Mahto, resident of Village- Kashnagar, P.S.- Sonbarsa, District- Saharsa, at present Daud Nagar dispensary, P.O. & P.S.- Daudnagar, District- Aurangabad.
7. Radha Devi @ Anuradha Devi, wife of late Yugal Kishore Mahto, resident of Village- Kashnagar, P.S.- Sonbarsa, District- Saharsa.

.... Respondents.

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Appearance :

For the Petitioner/s : Mr. Dronacharya, Adv.

For the Respondent/s : Mr. S.S.Dwivedi, Sr.Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT

8 08-10-2015 Heard Mr. Dronacharya, the learned counsel appearing for the petitioner and Mr. S.S.Dwivedi, the learned senior counsel for the decree holder-respondents. With the consent of the parties, the present writ application has been heard on merits and is being disposed of by this order at this stage itself.

Calling in question the legal acceptability of the

impugned order dismissing the petition dated 18.01.2014 filed under Order 21 Rule 97 C.P.C. by the petitioners, the present application under Article 227 of the Constitution of India has been filed.

The factual matrix of the case as demonstrated from the pleadings and submissions on behalf of the parties is that the Title Suit No.06/1993 was filed by the plaintiff-respondents for declaration of their title and recovery of possession over the suit land consisting of a house in Mohalla-Hajipur of Khagaria town. The suit was dismissed but on appeal the appellate court, allowed the appeal, set aside the judgment and decree of dismissal of the suit and granted the decree as prayed. The plaintiff-decree holder thereafter filed Execution Case No.01/2012 after the unsuccessful challenge to the appellate decree by the defendant in second appeal before the High Court and in special leave petition before the Hon'ble Supreme Court. The prayer in the execution case was for delivery of vacant possession over the suit property through the process of the court.

The present petitioners filed the petition dated 18.01.2014 under Order 21 Rule 97 C.P.C. claiming their independent right, title and possession over the suit property. The prayer for stay of the execution case was also made till the final

determination of their claim. The plaintiff decree holder-respondents field their rejoinder contesting the claim of the petitioners denying their right, title, interest and possession in the suit property. The learned court below by the impugned order has dismissed the petition dated 18.01.2014 filed by the petitioners at the initial stage.

From the perusal of the impugned order , it is manifest that the learned court below has not at all applied his mind to the facts pleaded by the petitioners and has dismissed their prayer without assigning any reason. It is also apparent that though the petition was filed by the petitioners under Order 21 Rule 97 C.P.C. but the learned court below treated the said petition to be a petition for addition as interveners in the proceeding which further strengthens the facet of non-application of mind by the learned court below.

The nature, ambit and scope of the provisions contained in Rule 97 -106 have been authoritatively explained and determined by the apex court in several decisions holding the same to be a self-contained code for adjudication of the claim of a stranger to the decree apprehending his dispossession or complaining of dispossession from the immovable property subject matter of the decree. It would be fruitful here to notice the

principles laid down by their lordships in *Noorduddin Vs. K.L. Anand* , 1995 (1) SCC 242 in which case the application by the stranger was rejected by the executing court on the ground that the High Court had already adjudicated the lis. It has been ruled as follows:

“...Thus , the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding the Civil Procedure Code (Amendment) Act, 1976 , right of suit under Order 21 Rule 103 of 1908 Code

was available which has been now taken away.

By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution...”

It has also been laid down in the aforesaid decision that the adjudication before execution is an efficacious remedy to prevent fraud or miscarriage of justice and the execution court is enjoined to adjudicate the claim or objection or the claim to resistance by a person making such claim independent of the judgment debtor and in possession of the property under execution proceeding in his own right.

Similar pronouncement was reiterated by the apex court in ***Babulal Vs. Raj Kumar***, (1996)3 SCC 154 holding that an adjudication is required to be conducted under Order 21, Rule 98 before removal of the obstruction caused by the objector and a finding is required to be recorded in that behalf. It has also been

observed that the procedure prescribed under Order 21 Rule 98 to 106 is a complete code in itself, and therefore, the executing court is required to determine the question.

In the recent decision in ***Sameer Singh Vs. Abdul Rab, (2015)1 SCC 379*** the apex court has opined as follows:

“26.....The court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained code, as has been emphasized by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the executing court.....”

The learned senior counsel for the plaintiff-respondent by referring to the averments made in the interlocutory



application (I.A.No.7176/2015)-cum-counter affidavit has strenuously endeavoured to establish that the petitioners have no prima facie case in view of the facts and findings by the court in the Title Suit No.06/1993 filed by the plaintiff-decree holder. It has been submitted that the petitioners are the sons of the brother of Late Yugal Kishore Mahto and are claiming the interest in the suit property asserting the same to be the joint family property even when it has been held that the suit property was the self-acquired property of Late Yugal Kishore Mahto. It has also been urged that even Munilal Mahto the full brother of Late Yugal Kishore Mahto deposed in the said suit as D.W.6 stating that the suit property was the self-acquired property of Yugal Kishore Mahto and none of his brothers had a share in it . It has also been argued that the claim of the petitioners was barred by res judicata in view of the Explanation-VI of Section 11 C.P.C. It has also been submitted that in view of the Rule 459 of Civil Court Rules, the petitioners were required to file a miscellaneous judicial case and not an intervention application as has been done in the present case. The learned senior counsel has finally submitted that the petitioners have been set up by the judgment debtors and the claim made by them is simply frivolous and intended to prolong the litigation. The reliance has been placed upon the decisions in the

case of *Mostt. Gayatri Devi Vs. Sri Kant Kumar*, 2006(2) PLJR 191 and in the case of *Lalit Prasad Sah Vs. Mahendra Sah*, 2007 (4) PLJR 427 as well as in the case of *R. Devadass Vs. Subordinate Judge*, AIR 2004 Madras 249.

Mr. Dronacharya, the learned counsel appearing for the petitioners, however, has led stress on the failure of the executing court to adjudicate the claim of the petitioners by rejecting the same summarily on the ground that the same cannot be done at the stage of execution. It has also been submitted that in a case where the executing court has failed to exercise the jurisdiction vested in it by virtue of Order 21 Rule 97-106 C.P.C and rejected the petition filed by the petitioners without adjudication on merits as enjoined, the legality and validity of the impugned order cannot be tested on the basis of the facts and materials supplemented by the respondents at this stage as the same were required to be taken into notice by the court below before passing the impugned order. The learned counsel has also submitted that the question of bar of res judicata or the maintainability of the petition filed by the petitioners in view of the Rule 459 of Civil Court Rules are the issues which were to be determined by the executing court which has clearly failed to do so abdicating its jurisdiction. The learned counsel has placed

reliance on the principles enunciated by the apex court in the case of *Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi, AIR 1978 SC 851*.

After careful consideration of the matter, submissions on behalf of the parties and also the pronouncements by the apex court as above noticed, this Court is of the opinion that the executing court below has failed to exercise its jurisdiction in rejecting the petition under Order 21 Rule 97 C.P.C filed by the petitioners dated 18.01.2014 by holding that the same was not maintainable at the stage of execution. From the impugned order it is also apparent that the learned court below has treated the petition filed by the petitioners as intervention petition ignoring the averments and prayer made therein. The principle of law is well established that the form or nomenclature in an application or petition is not material rather the substance of the same and the competence of the court which are relevant to be considered. The power of a court is always referable to its real power in accordance with law and is not circumscribed by the mention of the provision in the petition. The impugned order manifestly is vulnerable as the learned court below has failed to exercise the jurisdiction vested in it by law. This Court, therefore, refrains from entering into the merits of the claim and submissions of the parties, and remits the

matter back, after setting aside the impugned order, to the learned court below for consideration afresh of the petition dated 18.01.2014 filed by the petitioners in accordance with law. The learned court below is further directed to expeditiously proceed in the matter after granting opportunity of hearing to the parties.

The writ application is, accordingly, allowed with aforesaid directions.

(V. Nath, J)

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