

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10596 of 2015

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Pramod Singh

.... Petitioner/s

Versus

Vijay Kumar Rai & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Jitendra Kumar

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

4 30-11-2015

Heard learned counsel Mr. Jitendra Kumar on behalf of the petitioner and learned counsel Mr. J.S. Arora on behalf of the respondent no.3 on the Interlocutory Application No.6466 of 2015. Heard learned counsel Mr. Ashish Giri on behalf of respondent 1st set also.

2. At the time of hearing of this interlocutory application the learned counsel for the petitioner submitted that this interlocutory application has become now infructuous but it is submitted by the learned counsels that writ application may itself be heard on merit in admission matter and accordingly I heard them on merit in admission matter.

3. This application under Article 227 of the Constitution of India has been filed by the petitioner against the order dated 22.05.2015 passed by Subordinate Judge-V, Gopalganj in Miscellaneous Case No.55 of 2015 arising out of Execution Case

No.07 of 2009 which was registered on the basis of objection under Section 47 of the Code of Civil Procedure.

4. It appears that the plaintiffs-respondents filed Partition Suit No.175 of 1981/05 of 1989. In the said partition suit the father of the present petitioner was defendant no.9. The father of the petitioner did not appear and contest the partition suit. Against the said decree the father of the present petitioner did not file any appeal, therefore, it becomes final. Final decree was then prepared and thereafter execution case was filed by one intervener.

5. In the said execution case the present petitioner filed application under section 47 CPC which is registered as Miscellaneous Case No.55 of 2015. After hearing the parties the court below by the impugned order has rejected this application.

6. Learned counsel Mr. Jitendra Kumar appearing on behalf of the petitioner submitted that without substituting the legal representatives or the heirs of deceased defendant no.9 the final decree was passed, therefore, it is a nullity being passed against a dead person. The learned counsel further submitted that because the petitioner was not substituted, therefore, a valuable right accrued to him to file objection against the Pleader Commissioner's report. The court below has wrongly rejected the

application under section 47 CPC. In support of his contention the learned counsel relied upon a decision of this Court in the case of **Ramsewak Mishra and another v. Mt. Deorati Kuer and others, A.I.R. 1962 Patna 178.**

7. On the other hand, learned counsel Mr. J.S. Arora appearing on behalf of respondent no.3 and learned Ashish Giri appearing on behalf of respondent 1st set submitted that the application filed by the petitioner itself was not maintainable because his father neither appeared nor contested the suit and, therefore, there is no question of objection under section 47 CPC arises. The learned counsel further submitted that earlier the petitioner himself made an application for being added as party in the execution case and it was rejected by the executing court but the petitioner never challenged the order rejecting the application filed by the petitioner.

8. Admittedly the father of the present petitioner was defendant no.9 in the partition suit. The father did not appear. He did not file written statement nor contested the suit. So far the objection filed by the present petitioner is concerned, the ground taken that the petitioner was not substituted after the death of his father is concerned, it may be mentioned here that it is not necessary to substitute the legal representative of a party who



neither appeared nor filed contesting written statement nor contested the suit. The provision as contained in Order 22 Rule 4(4) CPC provides that the Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place. Admittedly in the present case at the time of passing the preliminary decree the father was alive. The father even did not file appeal against the preliminary decree.

9. So far the petitioner's right to file objection to the Pleader Commissioner's Report is concerned, it may be mentioned here that against the final decree also the petitioner has never filed any appeal before any Court. So far the scope under Section 47 CPC is concerned, the Hon'ble Supreme Court in the case of **Dhurandhar Prasad Singh v. Jai Prakash University and others, A.I.R. 2001 SC 2552** has held that under Section 47 all questions arising between the parties to the suit in which the decree was passed or their representatives relating to the

execution, discharge or satisfaction of decree have got to be determined by the Court executing the decree and not by a separate suit. The powers of Court under Section 47 are quite different and much narrower than its powers of appeal, revision or review. The exercise of powers under Section 47 is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing Court can allow objection under Section 47 to the executability of the decree if it is found that the same is void ab initio and nullity. In the present case, in view of the above admitted fact that the father neither contested nor challenged the preliminary decree and that the present petitioner also neither filed objection to the Pleader Commissioner's Report nor even filed the appeal against the final decree, the court below considering all aspects of the matter has rightly rejected the application and, therefore, in exercise of jurisdiction under Article 227 the impugned order cannot be interfered with.

10. Thus, this writ application is dismissed. Consequently, the interlocutory application is also rejected.

(Mungeshwar Sahoo, J)

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