

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1409 of 2016**

=====

Anand Kumar

.... Appellant/s

Versus

Sri Lal Babu Rai & Ors

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Ambuj Nayan Chaubey

For the Respondent/s : Mr. Partha Sarthy

=====

**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER**

2 13-12-2016 **1.** Heard the learned senior counsel, Mr. K. N. Chaubey,
for the petitioner.

2. This application under Article 227 of the Constitution of
India has been filed by the petitioner praying for the following
reliefs :

(i) For quashing the Judgment dated 13.09.2012 and decree
dated 26.09.2012 as contained in Annexure '5'

(ii) For issuance of an order quashing the order dated
12.08.2016 as contained in Annexure '6' and

(iii) For setting aside the execution proceeding including the
order dated 02.09.2016 and 30.09.2016 as contained in
Annexure '6'.

3. For better understanding the facts, it may be stated that



the plaintiff respondent filed eviction suit being Title Suit No.30 of 2011 against the petitioner and his mother. The said suit was decreed ex.-parte by the Judgment and order dated 13.09.2012 and decree was followed. This is the judgment which is under challenge

4. It appears that after obtaining the ex.-parte Judgment and decree, the plaintiff respondent filed execution case being Execution Case No.1 of 2013. In the said Execution case, an objection under Section 47 CPC was filed by the present petitioner and the Court below by the order dated 12.08.2016 rejected the objection petition under section 47 of the Code of Civil Procedure. This order is also under challenge. Accordingly, the petitioner prayed for their relief to the effect that the execution proceeding itself may be set aside.

5. The learned senior counsel relying on the various decisions of the Hon'ble Supreme Court, Allahabad High Court, Andhra Pradesh High Court and Calcutta High Court submitted that the plaintiff respondent by playing fraud on the Court obtained an ex.-parte decree. If the ex.-parte decree is fraudulently obtained by playing fraud then it is a nullity and the same can be interfered with even under Article 227 of the



Constitution of India and even under the writ jurisdiction of the High Court. The decisions relied upon by learned senior counsel for the petitioner are : -

(i) AIR 2002 SC 1165 (ii) AIR 1977 Calcutta 281 (iii) AIR 1974 Andhra Pradesh 1 Full Bench (iv) AIR 2002 SC 2082 (v) AIR 1977 SC 1222 (vi) AIR 2000 Allahabad 58 (vii) AIR 2005 Guwahati 58 (viii) AIR 1998 SC 128 (ix) AIR 1999 SC 683 (x) AIR 2005 SC 3330 (xi) AIR 2007 (2) PLJR 201 (xii) AIR 1996 SC 1819.

6. On the strength of these decisions, the learned senior counsel, Mr. Chaubey, for the petitioner submitted that the Judgment which is nullity can be challenged even in co-lateral proceeding and even in execution case but the learned Court below rejected the application under Section 47 CPC also. The Executing Court also did not take into notice of the fact that the mother of the petitioner has filed an application under Order 9 Rule 13 CPC for setting aside the ex.-parte Judgment and Decree. According to the learned counsel, in some of the decisions relied upon by the petitioner, it has been held if the proceeding under Order 9 Rule 13 CPC is set aside then person who succeed in the Order 9 Rule 13 CPC proceeding is entitled for the restitution of



the possession of the property. According to the learned counsel, the father of the petitioner had purchased the suit property by registered sale deed which is annexed with this application but the plaintiff respondent giving false address of the petitioner and his mother obtained the decree ex.-parte without service of the notice on the petitioner and if the decree is allowed to stand, then it will not only cause irreparable loss or injury but shall greatly prejudice the petitioner and it will occasion failure of justice.

7. Admittedly, eviction suit was filed by the plaintiff respondent and ex.-parte judgment and decree has been passed by the trial Court.

8. The Hon'ble Supreme Court in the case of ***Bhanu Kumar Jain Vs. Archana Kumar AIR 2005 SC 626*** has held that 'when an ex.-parte decree is passed, the defendant apart from filing a review petition and a suit for setting aside the ex.-parte decree on the ground of fraud has two clear options (i) to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 CPC.' Here the petitioner neither filed a review application nor has filed appeal nor has filed an application under Order 9 Rule 13 CPC, his mother has filed an application under Order 9 Rule 13 CPC, the question is whether



notice was validly served on the petitioner or on his mother and whether they had got knowledge of the proceeding, i.e., eviction suit is a pure question of fact and that can be examined in proceeding under Order 9 Rule 13 CPC. So far the point raised by the petitioner that fraud has been played upon by the plaintiff respondent on the Court is also a pure question of fact. This can be examined in a suit but suit has also not been filed by the petitioner. Nor the petitioner had filed appeal on merit against the impugned ex.-parte judgment and decree.'

9. So far Article 227 of the Constitution of India is concerned, the Hon'ble Supreme Court in the case of *Shalini Shyam Shetty vs. Rajendra Shankar Patil 2010 (8) SCC 329* has held that 'Article 226 and 227 stands on substantially different footing and operate in different fields. A writ under Article 226 is a proceeding under the original jurisdiction of the High Courts. The jurisdiction under Article 227 on the other hand is not original nor is it appellate. This jurisdiction of superintendence under Article 227 is for both administrative and judicial superintendence. A proceeding under Article 227 can never be governed under the Original Side Rules of the High Court. In certain cases where there is infringement of Fundamental Right, the relief under Article 226 of the Constitution can be claimed ex debito justitiae



or as a matter of right. But in case where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right.’ In the said decision, the Hon’ble Supreme Court has held that ‘off late there is a growing trend among several High Courts to entertain writ petition in cases of pure property dispute like partition suit, execution of a decree, landlord tenant dispute and also in a case of monetary. In some cases, the High Courts in a routine manner entertained petitions under Article 227 over such dispute and such petitions are treated as writ petition. As a result of frequent interference by the High Courts, the cases of the civil and criminal Courts get impaded.’

10. We have seen that the petitioners against whom ex.-parte judgment and decree has been passed has got the remedy according to the law laid down by the Hon’ble Supreme Court reported in *AIR 2005 SC 626* referred to above. Therefore, the correctness or otherwise and legality or otherwise of the ex.-parte Judgment and decree cannot be examined in an application under Article 227 of the Constitution of India.

11. So far the order rejecting an application under Section 47 of the Code of Civil Procedure is concerned, the objection is to



the effect that the Judgment is a nullity because it is obtained by playing fraud, therefore it is unexecutable. Again, it will not be out of place to mention here that this question as to whether the Judgment and Decree has been obtained by playing fraud is pure question of fact depending on the evidence.

12. The Hon'ble Supreme Court in the case of *Dhurandhar Prasad Singh Vs. Jai Prakash University AIR 2001 SC 2552* has held that '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 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing Court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and nullity, apart from the ground that decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing.'

13. In the present case, the petitioner is challenging the executability of the decree on the ground that it is a nullity because same has been obtained by playing fraud. The executing



Court, therefore, for deciding as to whether the decree is a nullity cannot investigate the question of fraud, which is dependant on the evidences that may be brought by the parties. The inexcusability of the decree should be evident from the order itself.

14. So far the point of the petitioner is that the fraud visits the judgment and decree is concerned, it may be mentioned that there is no dispute about this legal position but certainly the said principle is not applicable in the present case. The fraud has to be found out by a competent Court. Unless it is recorded that the Judgment and Decree is obtained by fraud as such is nullity, it can never be said that judgment and decree is a nullity and is not capable of executable by the executing Court.

15. The Hon'ble Supreme Court in the case of ***Inderjit Singh Grewal Vs. State of Punjab 2012 (1) B.L.J. 42 SC*** has held that 'it is settled legal position that where a person gets an order / office by making misrepresentation playing fraud upon the competent authority, such order cannot be sustained in the eyes of law as fraud unravels everything. Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law'. It is a trite that "Fraud and justice never dwell together (*fraus ed jus nunquam cohabitant*). Fraud is an act of



deliberate deception with a design to secure something, which is otherwise not due. Fraud and deception are synonymous. Fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine". An act of fraud on Court is always viewed seriously.'

16. Further the question which arise as to whether it is permissible for a party to treat the Judgment and decree is nullity without getting it set aside from the competent Court. The Hon'ble Supreme Court in aforesaid decision relied upon various decisions and held that there cannot be any doubt that even if an order is void or voidable the same requires to be set aside by the competent authority. It is also held that even if the decree is void ab initio, declaration to that effect has to be obtained by the person aggrieved by the competent Court. More so such a declaration cannot be obtained in colateral proceeding. In the present case at our hand, the petitioner in a proceeding under Article 227 of the Constitution of India is trying to show that the Judgment and Decree obtained by the plaintiff respondent is tainted with fraud. The High Court in exercise of jurisdiction under Article 227 of the Constitution of India cannot record finding of fraud which is



depending on the evidences.

17. Recently The Hon'ble Supreme Court in the case of *Radhey Shyam Vs. Chabbi Nath (2015)5 SCC 423* has held that 'all the Courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Control of working of the subordinate Courts in dealing with their judicial orders is exercised by way of appellate or revisional powers, or power of superintendence under Article 227. While appellate or revisional jurisdiction is regulated by the statutes, powers of superintendence under Article 227 is constitutional. Despite the curtailment of revisional jurisdiction under Section 115 CPC, the jurisdiction of the High Court under Article 227 remains unaffected, and has not resulted in expanding the High Court's power of superintendence.'

18. In view of this decision of the Hon'ble Supreme Court, it becomes now clear that when the order is neither revisable nor appealable it can be examined in Article 227 of the Constitution of India. So far the judgment and decree are concerned, the petitioner has got remedy under the Code of Civil Procedure and, therefore, the petitioner is required to move in the way prescribed in the Code of Civil Procedure. He has got no right to claim



equitable supervisory jurisdiction under Article 227 of the Constitution of India by ignoring the procedure prescribed under the Code.

19. In view of my above discussion, I find no reason to interfere with the impugned Judgment and Decree and the order dated 12.08.2016 and accordingly, the execution proceeding cannot be set aside in an application under Article 227 of the Constitution of India.

20. In the result, this Civil Misc. application is dismissed.

(Mungeshwar Sahoo, J)

Sanjeev/- A.F.R..

U		T	
---	--	---	--

