

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.936 of 2017

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Ram Babu Rai, Son of Late Jai Narain Rai, Resident of Village- Govind Fandah,
Post- Riga, P.S.+ District- Sitamarhi.

.... Defendant-Petitioner

Versus

1. Nachari Mishra,
2. Shatrughan Mishra,
3. Bharat Mishra,
4. Sushil Mishra,
5. Anil Mishra,

All Sons of Late Mahendra Mishra, Residents of Village- Panchhor, P.O.+ P.S.-
Riga, District- Sitamarhi.

6. Kunti Devi, Daughter of Late Mahendra Mishra, Wife of Dhrub Narain Jha,
Resident of Village+ Post- Sahbajpur, P.S.- Riga, District- Sitamarhi.

7. Munni Devi, Daughter of Late Mahendra Mishra, Wife of Chandra Mohan
Mishra, Resident of Village- Majhoulia, P.S.- Bathnaha, District- Sitamarhi.

.... Plaintiffs-Respondent 1st set

8. Chandradeo Mishra, Son of Late Aklu Mishra, Resident of Village- Panchhor,
P.O.+ P.S.- Riga, District- Sitamarhi.

.... Defendant-Respondent 2nd set

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Appearance :

For the Petitioner : Mr. Yogendra Mishra, Sr. Adv.
Mr. Arvind Kumar Jha, Adv.

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT & ORDER



Date: 15-11-2017

Following are the reliefs sought in the present application filed under Article 227 of the Constitution of India:-

“(i) An appropriate writ, order or direction declaring the order dated 20.04.2017 as illegal and void, be issued.

(ii) An appropriate writ, order or direction declaring the Execution Case No. 31/2015/CIS No.68/2015 as not maintainable, be issued.

(iii) Further, prays for issuance of any other appropriate writ/writs, order/orders, direction/directions and/or relief/reliefs which the petitioner is entitled to in the facts and circumstances of the case.”

2. The said impugned order, dated 20.04.2017, has been passed in Execution Case No. 31 of 2015 (CIS No. 68 of 2015) by the executing Court on an application filed by the petitioner, who was defendant in Title Suit No. 125 of 1998. In the said application, he had questioned the very maintainability of the



execution case, on the ground that the decree of the appellate Court, sought to be executed, was a nullity and, therefore, inexecutable.

3. Before I take note of the submissions made by Mr. Yogendra Mishra, learned Senior Counsel, appearing on behalf of the petitioner, certain brief facts are to be taken note of first.

4. Respondent 1st set had filed Title Suit No. 125 of 1998, seeking following relief/s, *inter alia*, as indicated in paragraph 4 of the present application:-

“4. x x x x

(a) That on adjudication of the facts and circumstances stated above the court be pleased to declare that the two sale deeds dated 18.08.1981 purported to executed by defendant second set Chandradeo Mishra in the name of the defendant first set Ram Babu Rai with respect to the Schedule 1 land of the plaint are forged, fabricated, fraudulent, without consideration and void documents and not binding on the plaintiffs.

(b) That on adjudication of relief no. (a) the court be pleased to declare that title and confirm the



possession of the plaintiff over Schedule 1 land of the plaint and in case the plaintiff is dispossessed from Schedule 1 land of the plaint during the pendency of this suit or the plaintiff is deemed to be dispossessed by the court in that circumstances, a decree for recovery of possession over the Schedule 1 land be granted in favour of the plaintiff and against the defendant first set and the plaintiff be put in possession over the Schedule 1 land of the plaint through the process of the court.

(c) That the court be pleased to issue temporary injunction restraining the defendant first set from dispossessing the plaintiff from Schedule 1 land of the plaint during the pendency of the suit.”

X X X X X
X X X X X

5. The petitioner was defendant No. 1 in the title suit.

The suit was dismissed. It is the case of the petitioner that the suit



property was transferred to him, through registered sale-deed, by the defendant 2nd set. He, being the purchaser, was impleaded as defendant 1st set in the said title suit.

6. The plaintiffs-respondent 1st set filed Title Appeal No. 11 of 2001, which came to be allowed by learned Additional District Judge, F.T.C. No.1, Sitamarhi, by the judgment and decree dated, 21.03.2005. The Court, accordingly, held that the plaintiffs were entitled to get a decree for declaration of title and confirmation of possession. Against the said judgment and decree of the appellate Court, a second appeal was filed before this Court, registered as S.A. No. 181 of 2005, which stood dismissed for non-compliance of the peremptory order, dated 05.04.2010.

7. The plaintiffs-respondent 1st set, thereafter, instituted the execution case, giving rise to Execution Case No. 31 of 2015, for execution of the decree passed by the appellate Court, dated 21.03.2005. In the said execution case, the petitioner resisted the execution on the ground that there was no finding recorded by the appellate court of dispossession of the petitioner during the pendency of the suit and, therefore, there could not have been any decree for recovery of possession.

8. This is the background in which Mr. Yogendra



Mishra, learned Senior Counsel, appearing on behalf of the petitioner, has drawn my attention to the relief(s) sought by the plaintiffs before the trial Court and has submitted that the plaintiff had sought for declaration of title and confirmation of possession. According to him, there was no plea taken, in course of the trial, that the plaintiff was ever dispossessed from the suit land. There is no finding recorded by the appellate Court of his dispossession during the trial. In that circumstance, there could not have been any decree for recovery of possession. He has, accordingly, submitted that the decree to the said extent is nullity in the eye of law and, therefore, not executable.

9. Mr. Mishra, learned Senior Counsel, has placed reliance on Supreme Court's decision in case of ***Kiran Singh & Ors. Vs. Chaman Paswan & Ors., reported in A.I.R. 1954 SC 340***, with special reference to paragraph 6. He has also placed reliance on another Supreme Court's decision in case of ***Sunder Dass Vs. Ram Parkash***, reported in ***A.I.R. 1977 SC 1201***, in order to buttress his contention that it is the duty of the executing Court to deny execution of such decrees which are nullity. He has emphasized that in the absence of any finding recorded by the court below of dispossession of the plaintiff, during the pendency of the suit, the



decree of recovery of possession is a nullity.

10. I have perused the impugned order as also the judgment and decree of the appellate Court below. It is clearly evincible that upon appreciation of evidence on record, the appellate Court recorded that the defendant 1st set appeared to be in permissive possession over the suit land and held the plaintiffs' title over the suit land. Correctness of the findings recorded by the appellate Court below was assailed in the second appeal, being S.A. No. 181 of 2005, as has been noted above, which was allowed to be dismissed for non-compliance of the peremptory order.

11. In my view, a decree can be said to be null and void, if it is passed by a Court lacking the very jurisdiction to pass the decree. A decree cannot be said to be a nullity on the ground of the same having been passed erroneously or there is error while passing the decree. A decree can be said to nullity if it is *ultra vires* the powers of the Court passing the decree and not mere voidable decree. The Supreme Court in case of ***Hiralal Moolchand Doshi Vs. Barot Raman Lal Ranchhoddas (Dead) By LRS.***, reported in ***(1993) 2 SCC 458***, held in paragraph 8 as follows:-

“8. It may be noticed that we are dealing with the question of



nullity of a decree because the executing court is bound to execute the decree and cannot go behind the same unless the decree passed by it is a nullity. It appears, there is a lot of confusion as to what is meant by “decree being null and void”. In the context which we are dealing, a decree is said to be a nullity if it is passed by a court having no inherent jurisdiction. Merely because a court erroneously passes a decree or there is an error while passing the decree, the decree cannot be called a nullity. The decree to be called a nullity is to be understood in the sense that it is ultra vires the powers of the court passing the decree and not merely voidable decree.”

12. In a subsequent decision in case of *Rafique Bibi (Dead) By LRS.Vs. Sayed Waliuddin (Dead) By LRS. & Ors.*, reported in (2004) 1 SCC 287, the Supreme Court has discussed, when a decree can be said to be a nullity and has held that a decree



can be said to be without jurisdiction and hence nullity, if the Court passing the decree usurped the jurisdiction which it did not have.

13. I do not feel convinced with the submissions of Mr. Mishra, learned Senior Counsel, since there is clear distinction between a decree passed by a Court without jurisdiction and resultantly a nullity and, therefore, not executable, and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid by law. Noticing this distinction the Supreme Court, in case of *Rafique Bibi (supra)*, clearly laid down that a decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing Court and remedy of a person aggrieved by such a decree is to have it set aside in duly constituted legal proceeding or by a superior Court. (*Para 8*)

14. The Supreme Court has held in case of *Rafique Bibi (supra)* in paragraph 6 as follows:-

“6. What is “void” has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a



nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.”

15. Noticing the decision in case of *Rafique Bibi* (*supra*), the Supreme Court in a subsequent decision in case of *Balvant N. Viswamitra & Ors. Vs. Yadav Sadashiv Mule (Dead) through LRS. & Ors.*, reported in (2004) 8 SCC 706, has held that where a Court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction, *non est* and *void ab initio*, validity of which can be challenged at any stage, even in execution proceeding or collateral proceedings. The Court, however, held that all irregular or wrong decrees are not necessarily null and void and an erroneous or illegal decision, which is not void, cannot be objected in execution or collateral proceedings.

16. I must take note of another Supreme Court decision in case of *Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul*



Rehman & Ors., reported in ***(1970) 1 SCC 670***, emphasizing that an executing Court cannot go behind the decree and cannot entertain any objection that the decree was incorrect in law or on facts. A decree, even if erroneous, is still binding between the parties until it is set aside in an appropriate proceeding. The Court laid down the law in paragraph 6 as follows:-

“6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

17. The decree, passed by the appellate Court below cannot be said to be beyond jurisdiction or a nullity and inexecutable, in my view, in the light of aforementioned reasons.

18. The Supreme Court's decisions, which have been relied on by Mr. Yogendra Mishra, learned Senior Counsel,



appearing on behalf of the petitioner, have no application in the facts and circumstances of the present case. In case of **Kiran Singh** (*supra*), the Supreme Court found the District Court of Monghyr to be *coram non judice* and, accordingly, held that the judgment and decree passed by the said Court was a nullity. Paragraph 6 of the said decision can be appositely reproduced hereinbelow:-

“(6) The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of section 11 of the Suits Valuation Act is on that position. It is fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, & that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority



of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was ‘Coram non judice’, and that its judgment and decree would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position.”

(emphasis supplied)

Similarly, in case of *Sunder Dass* (*supra*), the Supreme Court was considering a situation, where the Court had held that the executing Court can entertain an objection that the decree is a nullity and can refuse to execute the decree. Mr. Mishra, learned Senior Counsel, has submitted that in the absence of any finding of dispossession, the decree of recovery of possession is a nullity.

19. I do not think that this submission finds support from the Supreme Court’s decision, in case of *Sunder Dass*



(*supra*). The said principle will apply if the Court, passing the decree, does not have the inherent jurisdiction to pass such decree and the decree is passed beyond jurisdiction.

20. Situated thus, I have no hesitation in holding that in the absence of any legal challenge to the decree in question, the petitioner cannot resist the execution of the decree on the grounds taken on his behalf as discussed above.

21. I do not find any merit in this application. This application is, accordingly, dismissed.

(Chakradhari Sharan Singh, J)

Praveen-II/-

AFR/NAFR	NAFR
CAV DATE	N/A
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