

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Revision No.2010 of 2006

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Arun Kumar

.... Petitioner/s

Versus

Smt.Shyampati Kuer & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Shaishav Kumar
Mr. Anil Kr.Singh

For the Respondent/s : Mr. Rakesh Kumar Srivastava
Mr. Jaswir Singh Arora
Mr. Ajay Kumar
Mr. Ravi Bhatia

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Dated : 28th day of March, 2017

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV O R D E R

43 28-03-2017 **1.** I have already heard the learned counsel Mr. Jitendra Kishore Verma, for the petitioner and the learned senior counsel, Mr. J. S. Arora, for the Opposite party.

2. This Civil Revision application was admitted for hearing on 01.09.2015. However, at the time of hearing of this Civil Revision application, the learned counsel, Mr. J. S. Arora, for the Opposite party raised objection regarding maintainability of this Civil Revision. According to the learned senior counsel,



since by the impugned order dated 16.09.2006 passed by Sub Judge VI, Patna in Execution Case No.1 of 2005, the objection petition filed by the petitioner under Section 47 CPC has been disposed of revision under Section 115 CPC will not be maintainable. The petitioner may, therefore, be directed to convert this Civil Revision application to an application under Article 227 of the Constitution of India.

3. On the other hand, the learned counsel, Mr. Verma, for the petitioner submitted that prior to admission in the year 2015 this objection was not raised by the other side. This Civil Revision is of the year 2006. Therefore, at the stage of hearing if the petitioner will convert this Civil Revision to a Civil Misc. application then it will only delay the disposal of the matter. Moreover, this Court has the jurisdiction to hear this Civil Revision application treating the Civil Revision as an application under Article 227 of the Constitution of India. The learned counsel submitted that directing the petitioner to convert to Civil Misc. application and then hearing in admission matter are all technical matter. Even if it is converted then also the High Court will hear the matter. Mere leveling the application will not matter anything. However, the learned counsel submitted that against the impugned order revision will not be maintainable which has



finally been held by Division Bench of this Court in the case of ***Durga Devi 2010 (2) PLJR 954.***

4. Heard the parties on merit also.

5. It appears that the decree holder respondents and others filed Title Suit No.260 of 1986 praying for declaration that the plaintiffs have got absolute and exclusive title to the land in suit described in Schedule II of the plaint and defendant 2nd party have no title to any portion of the same. The plaintiffs also prayed for declaration that the possession of defendant Ist party over Schedule IV land and the possession, if any, of defendant 2nd party over any portion of the land in the suit is that of trespassers and they are liable to be evicted from Schedule IV of the plaint. The petitioner, Arun Kumar, was one of the defendant 2nd party along with his brother Arvind Sharma.

6. The suit was contested by brother of the petitioner who was defendant 2nd party No.7 and defendant No.1, i.e., defendant Ist set. Ultimately, the suit was decreed in toto on contest against defendant No.1 and 7 and ex.-parte against others.

7. The decree-holder respondent then filed Execution Case No.1 of 2005 for recovery of possession of Schedule I property. After delivery of possession affected by Nazir, report was



submitted. At this stage, the objection was filed by the present petitioner who was numbered as judgment debtor No.2 in the execution application. By the impugned order, the learned executing Court has rejected the objection application.

8. The learned counsel, Mr. Verma, submitted that an intervention application was filed by Chandra Kumar Pandey in the execution case. The executing Court heard the parties and by terms of order dated 09.09.2006 (Annexure-12), the executing Court fixed the date for 16.09.2006 for order on the said application but on 16.09.2006, the executing Court disposed of the objection petition filed by the petitioner without hearing the petitioner. Therefore, the impugned order violates the principle of natural justice. No opportunity was granted by the Court to place his grievance / objection and the executing Court relying on the report of Nazir, accepted it as gospel truth and rejected the objection. On this score alone, the impugned order is liable to be set aside.

9. Secondly, the learned counsel submitted that in paragraph 18A of the plaint which was added by way of amendment, the plaintiff decree holder categorically admitted that the petitioner dispossessed the plaintiff and came in possession of



Schedule III Property. The plaintiff never prayed for delivery of possession with respect to Schedule III property but the Nazir in the garb of giving possession of Schedule IV property, delivered possession of Schedule III Property also. According to the learned counsel, the plaintiff only prayed for declaration of title with respect to Schedule II property and the case of the plaintiff with respect to Schedule III is that tenants were in occupation of Schedule III property. However, the Nazir affected delivery over more than 4434 sq. feet land. This is the objection of the petitioner, therefore, this would have been decided by the executing Court after appointment of pleader commissioner to verify that whether delivery of possession has been given to the plaintiff over more than 4434 sq. feet area because the plaintiffs only prayed for recovery of possession with respect to Schedule IV property measuring 4434 sq. feet. The Court below also wrongly held that the boundary tally with the boundary described in the writ of delivery of possession comparing it with the boundary of Schedule I land which is not the subject matter of suit. The learned counsel, therefore, submitted that the executing Court has no jurisdiction to travel beyond the decree and writ issued by the Court for affecting D.P. over Schedule IV land. This would have been examined on the basis of evidence but the Court



below neither heard the petitioner nor appointed pleader commissioner and rejected the objection petition. The learned counsel relied upon various decisions on this points which I will consider one after other later on.

10. On the other hand, the learned senior counsel, Mr. Arora, submitted that the dispute is with regard to plot No.1479 and 1480 and this is the Schedule II property. Out of this Schedule II property in one portion, the tenants of plaintiffs were in occupation and this portion is described in Schedule III and the rest portion was encroached by the defendant 2nd party in collusion with defendant Ist party which is described in Schedule IV of the plaint. Therefore, Schedule II includes entire Schedule III and Schedule IV. There is no written statement filed by the petitioner. In fact no case was ever made out that beyond Schedule IV, the defendant 2nd party were in possession. The plaintiff's suit have been decreed in toto, i.e., with respect to Schedule II property which consists of two plots, 1479 and 1480 measuring 5 katha 6 dhur. Since the plaintiffs were in possession of Schedule III and prayer was made for recovery of Schedule IV land only. The Nazir had affected the delivery of possession over Schedule IV land. The brother of the petitioner had contested the suit but he also never claimed possession over any party of Schedule III land.



In fact the case of the plaintiff regarding Schedule III land is uncontroverted.

11. The learned senior counsel further submitted that now in the objection under Section 47, the petitioner is raising the question that plot No.1479 and 1480 consisted of a house measuring 8713 sq. feet approximately which is in excess of the warrant issued. While delivering possession, the house of judgment debtor had been demolished and, therefore, the property of the petitioner be re-delivered in their favour after granting compensation. This question is a new question and is dependent on facts. There was no pleading at all in the suit and, therefore, in view of the principle of implied res judicata, the judgment debtor petitioner is debarred from raising this fact regarding existence of his house on his land which could have been raised during trial. If his objection is allowed, then there will be de novo trial of the suit again to find out whether in which portion, the petitioner herein was in possession and in which portion, his house was there. This is not permissible in an execution case and will not come under purview of section 47 of the Code of Civil Procedure. The decree can be set aside or modified or altered by the appellate Court only and for that the petitioner has filed appeal against the judgment and decree. In such circumstances, what can be given to the



petitioner if the appeal will be allowed that cannot be given by executing Court in the garb of Section 47 CPC.

12. The learned senoir counsel further submitted that no doubt the date was fixed for passing order but then on the date, parties were heard on the objection and then the order was passed which would be evident from the impugned order itself. And moreover, what could have been done by the executing Court can be done by the High Court in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. According to the learned senior counsel in view of the description of the suit properties, the petitioner has raised entirely foreign question which are not permissible and improbable facts without there being any basis and, therefore, the petitioner is not entitled to invoke supervisory jurisdiction under Article 227 of the Constitution of India.

13. On these grounds, the learned counsel submitted that the Civil Revision be dismissed.

14. So far the maintainability matter is concerned, it is admitted by the learned counsels for the parties that in view of the amendment of Section 115 CPC in the year 2002, Civil Revision under Section 115 is not maintainable. Now, therefore, when the



legal position is that Civil Revision is not maintainable then whether the only course open is to direct the petitioner to convert this Civil Revision to Civil Misc. application. In my opinion, this is only a technical matter. Even if Civil Revision is converted to Civil Misc. application under Article 227 of the Constitution of India then also the High Court will exercise power under Article 227. The High Court can also hear the Civil Revision application treating it as an application under Article 227 of the Constitution of India. So far the Division Bench decision in the case of ***Durga Devi (Supra)*** is concerned, it may be mentioned here that the matter had not been finally settled prior to the Division Bench decision regarding as to whether against an order passed on objection under Section 47 CPC, revision will lie or not. In that case, the Division Bench has only stated that the Civil Revision may be converted to Civil Misc. application but no strata jacket formula has been framed in the Division Bench decision that even if Civil Revision application is admitted then also the High Court will hear the petitioner only after it is converted to Civil Misc. application. Nowhere it is held that the High Court had no jurisdiction to treat the Civil Revision application as an application under Article 227 and hear the parties.

15. In the present facts of this case, it will not be out of



place to mention that this Civil Revision is of the year 2006. Now, if the petitioner will be directed to convert this Civil Revision to Civil Misc. application then the result will be only change of nomenclature and provision of law but the jurisdiction will be exercised by the High Court may it be under Article 227. Further, if petitioner is directed to convert then it will delay the matter. If it is heard treating as an application under Article 227, no prejudice will be caused to the respondent. In this case, the petitioner has also deposited the required Court fee and submitted that the Civil Revision be heard treating as an application under Article 227 of the Constitution of India.

16. In view of the above position, I do not find any mandatory procedural law that the Civil Revision application must be converted to an application under Article 227 of the Constitution of India, if Civil Revision is not maintainable then only the petitioner will be heard. The High Court has the power to exercise jurisdiction under Article 227 suo motu also.

17. I, therefore, instead of directing the petitioner to convert this Civil Revision application to Civil Misc. application under Article 227 of the Constitution of India according to Patna High Court Rules proceeded to decide on merit treating this Civil



Revision application as an application under Article 227 of the Constitution of India.

18. Plaintiff has been annexed as Annexure '1' to this application. The plaintiff prayed for declaration of title with respect to Schedule II property comprised within plot No.1479 and 1480. The area is mentioned as 5 katha 6 dhurs and the boundary shows that this disputed land is bounded by road in three sides, i.e., South, East and West and in the North side boundary of plot No.1481 and 1482 on which house of Suresh Aggrawal is there. This would be evident from the statement made in paragraph 12 read with the boundary mentioned in Schedule II. Out of this suit land, according to the plaintiff, the defendants 2nd party encroached Schedule IV land and Schedule III land were in possession of tenants of the plaintiffs. Therefore, it becomes clear that Schedule III + Schedule IV = Schedule II land. The defendant No.1 and defendant No.7 contested the suit. Defendant No.7 is the brother of the petitioner. The suit had been decreed in toto, i.e., plaintiff's title has been declared over Schedule II property. This Schedule II includes Schedule III and Schedule IV. According to the plaintiff during pendency of the suit, the defendant 2nd party drove out the tenants from Schedule III Property and, therefore, amendment was made vide paragraph 18A of the plaint. Now,



therefore, according to the plaintiff, although Schedule III property was earlier in possession of tenant, the tenants have been driven out by the encroachers. It is not the case of the petitioner that the defendant 2nd party or the petitioner ever came in possession of Schedule III property. There was no pleading at all.

19. The learned counsel, Mr. Verma, for the petitioner submitted that in paragraph 18A, the plaintiff admitted the fact that the defendant 2nd party drove out the tenants which means that the defendant 2nd party came in possession thereof. So far this submission is concerned, the Court of law cannot presume this fact. This fact has to be pleaded and proved but in the present case neither there was pleading nor there was any evidence on behalf of the defendant 2nd party including the present petitioner. Further, if one person has a tenant in his house or land then can it be presumed that if the tenant will fled always because of fear of third person then the third person came in possession over the suit premises? The answer will be 'No.'. This is a disputed question of fact which could have been raised during trial.

20. The objection petition has been annexed as 'Annexure '4'. From perusal of the same, it appears that the only objection is that the delivery of possession was being executed on the property



of petitioner and house of petitioner was demolished. Except this, there is nothing to show that which was the land of the petitioner or on which plot, the house was there. Supplementary affidavit is Annexure '5'. At paragraph '3', the petitioner admitted that the delivery of possession was affected on plot No.1479 and 1480. This plot No.1479 and 1480 is the disputed land described in Schedule II of the plaint. According to the petitioner on these plots, house of the petitioner was there which has been demolished. This is a defence to the plaintiff's case. According to the plaintiff's pleading, there was no house that too over 8713 sq. feet as claimed by the petitioner. When the disputed land is only 5 katha 6 dhur which is less than 8000 sq. feet, it appears to be improbable that the petitioner had the house over such a big area, i.e., in excess of the disputed land. Moreover, if in fact there was house beyond the disputed land Schedule II then it is outside the disputed land.

21. Now, if this case of the petitioner is allowed to be investigated then it will amount to de novo trial. The executing Court will investigate to see whether there was any house of the petitioner on plot No.1479 and 1480 which has been demolished and whether the land comprised within plot No.1479 and 1480 described in Schedule II belonged to the petitioner or not. It will



amount to decide the correctness of the judgment and decree passed ex.-parte against this petitioner and, therefore, it is not permissible under Section 47 of the CPC. The correctness or otherwise of the Judgment and decree can very well be tested before the appellate Court. Admittedly, the petitioner has filed First Appeal.

22. So far the submission that the decree has been executed over excess area of land is concerned, it may be mentioned that the description of Schedule II stated above is very clear. The disputed land is bounded by roads in three sides and in one side bounded by boundary of plot No.1481 and 1482 whereon house of Suresh Aggrawal is there. In the supplementary affidavit, the petitioner also admitted this fact. If it is so, then where from the excess land came. It is not the case that any flanks of the roads in three sides has been delivered in possession to the plaintiff nor it is the case that land of Suresh Aggrawal has been delivered to the plaintiff and moreover Suresh Aggrawal is not coming into the Court. So far Schedule II property is concerned, the boundary is specific and is admitted. Now, the petitioner is making a case that Schedule II land is his land and that his house was on the land. This cannot be allowed to be raised in objection under Section 47 CPC. This cannot be investigated in the garb of objection, particularly when



the decree has been passed in favour of the plaintiff and his title has been declared over Schedule II land. Now, in the garb of objection under Section 47 CPC, the Executing Court cannot be allowed to find out if petitioner was in possession of schedule IV land or Schedule III land or outside of Schedule III and Schedule IV land or any where else.

23. So far granting opportunity to the petitioner is concerned, from perusal of the impugned order, it appears that the Court below has dealt with the application, i.e., objection of the petitioner and the rejoinder filed by the decree holder and then has stated that heard the parties and then perused the record. In such circumstances, this Court cannot presume that the petitioner was not heard at all.

24. Emphasis has been given by the petitioner on order dated 09.09.2006 Annexure '12' and it was submitted that 16.09.2006 was the date fixed for order on intervention application. From perusal of Annexure '12', I find that the learned counsel for the petitioner is correct but it will not be out of place to mention here that there is no bar that on the date fixed for passing order on an application, the Court cannot hear other application and pass order. Therefore, it can very safely be said



that although the date was fixed for passing order on 16.09.2006 on the intervention application, the executing Court heard the parties on objection also and passed the impugned order. Moreover, this Court has the jurisdiction under Article 227 to pass the order which would have been passed by the lower Court after hearing the parties. What more argument could have been advanced by the petitioner before the executing Court or what more will be argued before the executing Court if the matter will be remanded to the executing Court for passing a fresh order after hearing the petitioner. After all, from the objection and arguments advanced, it appears that the facts are evident from the record and, therefore, only law has to be applied. In my opinion, no case for remanding the matter on the ground of natural justice is made out. On the other hand, on this technical ground if the matter is remanded then again complicity will arise and it will delay the matter and an opportunity will be available to the petitioner to begin second inning in this matter. It will only delay the matter and will also prejudice the other side and will amount to granting permission to the petitioner to abuse the process of Court by killing the public time on this frivolous ground.

25. The learned counsel for the petitioner relied upon :- (i) *AIR 1967 SC 1193* (ii) *AIR 1980 Patna 184* (iii) *AIR 1961 SC*



272 (iv) AIR 1987 SC 71. So far these decision are concerned, there is no dispute about the settled proposition of law laid down in the decision in the facts and circumstances of those cases. The facts of the present case is entirely different. Only because objection has been filed, it must be tried as regular suit, it is not the proposition of law. In my opinion, therefore, these decisions are not applicable and the petitioner is not benefited by these decisions in any way.

26. The Hon'ble Supreme Court in **AIR 2001 SC 2552 Dhurandhar Prasad Singh Vs. Jai Prakash University** 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 inito 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.’

27. In view of my above discussion, I find no merit in this Civil Misc. application (Civil revision treated as Civil Misc. application) and thus this Civil Misc. application is dismissed.

(Mungeshwar Sahoo, J)

Sanjeev/-

AFR/NAFR	NAFR
CAV Date	17.03.2017
Uploading date	
Transmission date	

