

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.61 of 2014

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1. Laxman Singh
 2. Bharat Singh Both S/o Late Brij Nandan Singh
 Both resident of Village Masarh, P.S. Udwant Nagar, District Bhojpur.
 3. Ranjit Singh
 4. Chandra Bhushan Singh Both S/o Late Jai Nandan Singh
 5. Raj Devi w/o Late Jai Nandan Singh
 All resident of Village Masarh, P.S. Udwant Nagar, District Bhojpur.

.... Petitioner/s

Versus

1. Basistha Pathak S/o Late Baleshwar Pathak Resident of Village Masarh, P.S. Udwant Nagar, District Bhojpur.
 2. Sona Devi D/o Late Basistha Pathak and W/o Nageshwar Mishra Resident of Village Dhowahi, P.S. Warasganj, District Mirzapur (U.P.).
 3. Baidyanath Pathak S/o Late Jagdish Pathak
 4. Vimal Kumar Pathak @ Nirmal Kumar Pathak Both resident of Village Masarh, P.S. Udwant Nagar, District Bhojpur.

.... Respondent/s

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Appearance:

For the Petitioner/s	:	Mr. Kumar Uday Singh Mr. Sudhir Kumar Singh
For Opposite party 1	:	Mr. Anish Chandra Sinha Mr. Sangha Mitra Ghosh

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
CAV JUDGMENT

Date: 02 -05-2017

1. This revision petition has been preferred against the order dated 05.03.2014 passed by learned Execution Munsif, Ara in Miscellaneous Case no. 11/1999 by which he dismissed the aforesaid Miscellaneous Case no. 11/1999.

2. The brief fact of the present case is that one Mostt. Jota Kuwer filed Title suit no. 126/1991 against Jagdish Pathak and two others for declaration that she was legally wedded wife of Baleshwar Pathak and on the basis of the Will executed by the said Baleshwar Pathak in her favour, she got her right and title on the disputed



properties. Furthermore, she sought relief for cancellation of two sale deeds dated 25.01.1966 and 13.11.1966, out of which one sale deed is said to be executed by Jagdish Pathak in favour of Brijnandan Singh and Jainandan Singh and another is said to be jointly executed by Jagdish Pathak and the said Mostt. Jota Kuwer in favour of Brijnandan Singh and Jainandan Singh. She also sought relief for confirmation of possession over the disputed properties as well as recovery of possession, if she was found dispossessed from the disputed properties.

3. The above stated Brijnandan Singh and Jainandan Singh were defendant nos. 2 and 3 in the aforesaid Title suit no. 126/1991. It is pertinent to note here that petitioner nos. 1 and 2 are sons of the aforesaid Brijnandan Singh whereas petitioner nos. 3 and 4 are sons and petitioner no. 5 is wife of above stated Jainandan Singh.

4. Summons were sent to the defendants of Title suit no. 126/1991 but they could appear in the aforesaid Title suit no. 126/1991 only after substituted service. However, even after appearance in the aforesaid suit, defendants of Title suit no. 126/1991 did not file any written statement and accordingly, the aforesaid suit was heard ex parte and ex parte decree was passed by the concerned court on 15.05.1997. It is also pertinent to mention here that during the pendency of the aforesaid title suit, original plaintiff, namely, Mostt. Jota Kuwer died and in her place, her son Basistha Pathak and married daughter Sona Devi were substituted in her place and have been made opposite party nos. 1 and 2 respectively to this petition whereas sons of late Jagdish Pathak, namely, Baidyanath Pathak and



Vimal Kumar Pathak alias Nirmal Kumar Pathak have been made opposite party nos.3 and 4 to this petition. After pronouncement of judgment and decree in Title suit no. 126/1991, Execution case no. 26/1997 was filed for execution of the aforesaid judgment and decree. In the aforesaid execution proceeding, petitioners appeared and filed a petition for dismissal of Execution case on the ground that defendant no. 1 of Title suit no. 126/1991 had died in the year 1992 but during the pendency of Title suit no. 126/1991, his legal heirs were not brought on record and, therefore, judgment and decree dated 15.05.1997 passed in Title suit no. 126/1991 was a nullity and Execution case no. 26/1997 can not proceed. The aforesaid petition of the petitioners was rejected by the Execution court vide order dated 04.03.2003 which was challenged before this court in Civil Revision no. 785/2003 which was disposed of by this court vide order dated 16.4.2004 directing the court below to make enquiry regarding actual date of death of defendant no. 1 and pass a fresh order. After that learned Execution Munsif, Ara took the evidence of the parties and passed the order dated 05.03.2014 holding that defendant no. 1 of Title suit no. 126/1991 had died in the year 1992 but the judgment and decree passed in Title suit no. 126/1991 was not a nullity and dismissed Miscellaneous Case no. 11/1999 against which the present petition has been filed.

5. Learned counsel appearing for the petitioners would submit that admittedly, in Title suit no. 126/1991 judgment and decree was pronounced ex parte on 15.05.1997 and the execution court found that defendant no. 1 of the aforesaid Title suit no. 126/1991 died in the



year 1992. He would further submit that admittedly, legal heirs of defendant no. 1, namely, Jagdish Pathak were not brought on the record of Title suit no. 126/1991 and judgment and decree in the aforesaid Title suit no. 126/1991 was pronounced against a dead person which was nullity. He would further submit that in Title suit no. 126/1991, original plaintiff had sought principal relief against original defendant no. 1, namely, Jagdish Pathak. He would further submit that sale deeds in question were executed by the aforesaid Jagdish Pathak individually as well as jointly with original plaintiff of Title suit no. 126/1991 and, therefore, aforesaid Jagdish Pathak was a necessary party to the aforesaid suit but his legal heirs did not get any opportunity to contest the suit. He would further submit that it is obvious from the aforesaid facts that the suit filed by the plaintiff Mostt. Jota Kuwer was abated against defendant no. 1, namely, Jagdish Pathak in the year 1992 and, therefore, judgment and decree passed in Title suit no. 126/1991 was not executable but the learned court below did not pay any heed towards the aforesaid fact and having relied upon a decision reported in 2003 (3) PLJR page 675 (wrongly mentioned in impugned order as BBCJ 2001 Volume I page 670) rejected the petition filed on behalf of the petitioners. He would further submit that the decision reported in **2003 (3) PLJR page 675 (Md. S. Imam vs. Rai Bharat Kumar & ors)** is not applicable in the present case because in that case, petition under Order XXII Rule 4 (4) of the CPC was filed but the same was rejected. He would further submit that in the present case, admittedly, no step was taken on behalf of the plaintiff of Title suit no. 126/1991 to bring legal heirs of



deceased nor any petition for exemption was filed and, therefore, the above stated decision is not applicable in the present case.

6. Learned counsel relied upon a decision reported in **(2009) 14 SCC page 294 (T. Gnanavel Vs. T.S.Kanagaraj and another)** in which their lordships held that under Order XXII Rule 4 (4) of the CPC clearly states that exemption could be taken only by the court before the judgment is pronounced and not thereafter, and furthermore, their lordships held that failure to bring the legal heirs of a deceased would be a nullity and no judgment and decree can be passed against a dead person. He also relied upon a decision reported in **AIR 1962 SC page 89 (State of Punjab vs Nathu Ram)** in which at para 4, their lordships held that *if the court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent it has to proceed with the appeal and decide. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal.* Learned counsel would further submit that it is an admitted position that prior to filing of Title suit no. 126/1991, opposite party no.1 brought Title suit no. 66/1970 against Jagdish Pathak and others for declaration of right, title and recovery of possession of same property and the aforesaid title suit was dismissed by learned Execution Munsif, Ara vide judgment dated 19.8.1975 and in that judgment, learned Execution Munsif, Ara held that sale deeds executed by Jagdish Pathak as well as original plaintiff of Title suit no. 126/1991 were genuine and legal and, therefore, original plaintiff of Title suit no. 126/1991 had no right to raise the



aforesaid issue again. He would further submit that learned court below has committed error in passing the impugned order and, therefore, the impugned order is liable to be set aside.

7. On the other hand, learned counsel appearing for opposite party nos. 1 and 2 would submit that original defendant no. 1, Jagdish Pathak as well as Brijnandan Singh and Jainandan Singh, the ancestors of the petitioners, had appeared in Title suit no. 126/1991 but they did not file any written statement nor contested the aforesaid suit and, therefore, the decision rendered by Hon'ble Division Bench of this court in case of Md. S. Imam (Supra) is applicable in the present case. He would further submit that neither the petitioners nor their ancestors challenged the judgment and decree dated 15.5.1997 passed in Title suit no. 126/1991 and likewise, legal heirs of Jagdish Pathak also not challenged the judgment passed in Title suit no. 126/1991 and admittedly, the aforesaid judgment and decree passed in Title suit no. 126/1991 has already attained its finality. He would further submit that legal heirs of Jagdish Pathak were brought on record in Execution case no. 26/1997 but they never challenged execution of the decree passed in Title suit no. 126/1991 rather only the petitioners challenged execution proceeding when they lost Title suit no. 126/1991. He would further submit that Jagdish Pathak was not a necessary party of Title suit no. 126/1991 and, therefore, even if Jagdish Pathak died during the pendency of Title suit no. 126/1991 and his legal heirs were not brought on record, then also, the aforesaid suit was not abated. He cited the decision of **Tej Narain Singh alias Bhukloo Raut vs. Dr. Krishna Kant Singh and others reported in**



1986 PLJR page 658.

8. Certain facts are admitted in this case. It is an admitted position that original plaintiff, namely, Mostt. Jota Kuwer filed Title suit no. 126/1991 against three persons, namely, Jagdish Pathak, Brijnandan Singh and Jainandan Singh for declaration that she was legally wedded wife of Baleshwar Pathak who happened to be uncle of Jagdish Pathak and for declaration of her right and title over disputed plots on the basis of Will executed by Baleshwar Pathak in her favour and also for cancellation of sale deeds dated 25.01.1966 and 13.11.1966 said to be executed by Jagdish Pathak individually as well as jointly with original plaintiff Mostt. Jota Kuwer in favour of Brijnandan Singh and Jainandan Singh. It is also an admitted position that after substituted service, original defendants of Title suit no. 126/1991 appeared in the aforesaid title suit but they did not file any written statement nor contested the aforesaid suit resulting ex parte judgment and decree in the aforesaid suit. It is also an admitted position that after pronouncement of judgment and decree, Execution case no. 26/1997 was filed but the execution proceeding was opposed by the petitioners on the ground of death of Jagdish Pathak during the pendency of the aforesaid Title suit no. 126/1991. It is also an admitted position that learned Execution Munsif, Ara enquired the date of death of Jagdish Pathak and came to the conclusion that Jagdish Pathak died in the year 1992 and the judgment and decree in Title suit no. 126/1991 was pronounced ex parte on 15.05.1997 i.e. after death of Jagdish Pathak.

9. I would like to refer Order XXII Rule 4 (4) of the



CPC which says that *in case of death of one of several defendants or of sole defendant- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survive, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*

(2) -----

(3) *Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.*

(4) *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 had been pronounced before death took place.*

10. From bare perusal of the aforesaid provisions, it is obvious that if a defendant dies and the right to sue does not survive against remaining defendants, the court shall cause the legal representatives of the deceased defendant to be made party on an application made in that behalf and furthermore, the aforesaid provision makes it clear that if the sole defendant dies and a right to sue survives, then also, the court shall cause legal representatives of the deceased defendant to be made party on an application filed for bringing legal representatives of deceased defendant and in both the circumstances, the court, having brought legal representatives of the deceased defendant on record, shall proceed with the suit.



Furthermore, Order XXII Rule 4 (3) of the CPC goes to show that if no application is made under sub-rule (1) of the CPC within the time, the suit shall abate as against the deceased respondent. However, Order XXII Rule 4 (4) of the CPC was inserted in the Code of Civil Procedure (Amendment Act) on 01.02.1977 and Order XXII Rule 4 (4) of the CPC gives a discretion to the court to 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 had been pronounced before death took place. Therefore, it is apparent from Order XXII Rule 4 (4) of the CPC that if a defendant fails to file written statement or fails to contest the suit, the judgment may be pronounced against him even though such defendant dies during the pendency of the suit and the judgment shall have the same force and effect as it has been pronounced before his death.

11. In the present case, admittedly, deceased Jagdish Pathak appeared in Title suit no. 126/1991 but neither filed any written statement nor contested the aforesaid title suit. It is also an admitted position that the remaining original defendants, the ancestors of petitioners, of Title suit no. 126/1991 had also appeared in the aforesaid title suit but they, too, neither filed any written statement nor contested the aforesaid title suit. It is also an admitted position that no petition was filed on behalf of the plaintiff of the aforesaid title suit



under Order XXII Rule 4 (4) of the CPC and admittedly, court proceeded with the aforesaid title suit and pronounced the judgment and decree after death of original defendant Jagdish Pathak.

12. It is also an admitted position that original plaintiff Mostt. Jota Kuwer had brought Title suit no. 126/1991 for cancellation of sale deeds in question and for declaration of her legal status as wife of Baleshwar Pathak. It is admitted case of the parties that sale deeds in question were executed much prior to filing of Title suit no. 126/1991 and according to the case of the petitioners itself, at the time of filing of Title suit no. 126/1991 Jagdish Pathak had already transferred his right, title and interest of disputed properties to the ancestors of the petitioners. It is important to note here that Mostt. Jota Kuwer sought relief for declaration of her right and title over the disputed properties on the ground of execution of Will deed by Baleshwar Pathak in her favour. It is not in dispute that the aforesaid Will was probated in probate case which was subsequently, converted into title suit and in that title suit, it was incidentally held that Mostt. Jota Kuwer was legally wedded wife of Baleshwar Pathak and, therefore, when original defendant no. 1, Jagdish Pathak had already transferred disputed lands to ancestors of the petitioners, in my view, he was not necessary party to the aforesaid suit.

13. Moreover, it is an admitted position that not only aforesaid Jagdish Pathak but ancestors of the petitioners also appeared in the aforesaid Title suit no. 126/1991 but they did not choose to file written statement or to contest the aforesaid Title suit no. 126/1991. In the aforesaid circumstances, in my view, even if Jagdish Pathak,



original defendant no. 1 in Title suit no. 126/1991, died during the pendency of the aforesaid suit, then also, the right to sue was survived against remaining defendants of the aforesaid Title suit no. 126/1991 and the aforesaid suit was not abated due to death of deceased Jagdish Pathak.

14. It is an admitted position that legal heirs of deceased Jagdish Pathak have not raised any objection in Execution case no. 26/1997, though it would appear from the impugned order that son of deceased Jagdish Pathak was examined in Miscellaneous Case no. 11/1999 as witness on behalf of the petitioners at the time of enquiry of actual date of death of the deceased Jagdish Pathak. It is also an admitted position that ancestors of the petitioners lost Title suit no. 126/1991 and after that when Execution case no. 26/1997 was filed, petitioners raised question of abatement, particularly, in the circumstance, when their ancestors had already lost the aforesaid Title suit no. 126/1991. Execution case no. 26/1997 had been filed for recovery of possession of the disputed properties and it is an admitted case of the petitioners that after execution of the sale deeds, their ancestors came in possession and, therefore, aforesaid Execution case no. 26/1997 had been filed for execution of the decree against the petitioners and not against legal representative of deceased Jagdish Pathak and moreover, legal heirs of deceased Jagdish Pathak have not challenged the execution of the decree which is voidable only against them and, therefore, in my view, petitioners have no right to say that in Title suit no. 126/1991, decree was passed against a dead person.

15. So far as judgment of Title suit no. 66/1970 is



concerned, in my view, petitioners can not raise the aforesaid point either before this court or before execution court and they ought to have raised the aforesaid point in Title suit no. 126/1991 but ancestors of the petitioners failed to do so and, therefore, even if in Title suit no. 66/1970 any finding was given in respect of sale deeds in question, the said finding would not help the petitioners in this revision petition.

16. On the basis of the aforesaid discussions, I am of the opinion that there is no illegality, irregularity, impropriety into the impugned order and accordingly, this civil revision petition stands dismissed and the impugned order dated 05.03.2014 passed in Miscellaneous Case no. 11/1999 is, hereby, confirmed.

shahid

(Hemant Kumar Srivastava, J)

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