

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.2023 of 2008

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Smt. Girja Devi @ Manorma Devi, Wife of Sri Onkar Nath Singh, Resident of Village-Betaura, P.S.-Phulwari and at present Mohalla-Salempur Dumra, P.S.-Gardanibagh (Sastri Nagar) P.O.-B.V. College, District-Patna..

.... Plaintiff/Decree Holder/Petitioner.
Versus

1. Chameliya Devi@Photu Devi ,D/o Late Fudena Singh and Wife of Late Bangali Singh, Resident of Village-Nargada, P.S.-Danapur, P.O.-Nargada, District-Patna.
 2. Arvind Kumar Son of Late Rajendra Singh.
 3. Ajay Kumar Singh Son of Late Rajendra Singh.
- Both Resident of Village-Betaura, P.O.-Beur, P.S.-Phulwari Sharif, District-Patna.

.... Opposite Parties.

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Appearance :

For the Petitioner/s :	Mr. R.K.P.SINGH Mr. Shashi Bhushan Singh Mr. Manish Kishore
For the Respondent/s :	Mr. Sandeep Kumar Mr. Ajit Kumar

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 01-08-2017

Heard the learned counsel for the parties.

This revision application has been filed against the order dated 07.11.2008 passed in Execution Case No.01/2003 by which the learned executing court below has dismissed the execution case holding the decree to be a nullity.

The facts are not in dispute that the partition suit filed by the petitioners was decreed on 26.06.1999. Accordingly, the



preliminary decree was passed on 12.07.1999. The Advocate Commissioner was appointed for carving out the share of the parties in the suit property for the purpose of preparation of final decree. The report was submitted by the Advocate Commissioner on 20.10.2001 and the same was confirmed on 17.08.2002. The final decree, accordingly, was sealed and signed on 23.09.2002. The Execution Case No.01/2003 was filed by the decree holder-petitioner for execution of the final decree. During the course of execution proceeding, a petition was filed by the judgment debtor nos.6 and 17 on 01.10.2005 and 21.11.2005 questioning the legal enforceability of the decree asserting that the same has been passed against the defendant no.2, Rajendra Singh after his death and therefore, is a nullity and not executable. It was the case of the said judgment debtors that the final decree was passed on 23.09.2002 but prior to that the defendant no.2 Rajendra Singh died on 05.02.2001 leaving behind his widow and two sons as his legal heirs who were not substituted in his place and the decree was prepared in the name of the dead person. The prayer was thus made for dismissal of the execution case.

The decree holder-petitioner contested the assertions of the judgment debtor-opposite parties by filing a rejoinder asserting that after the death of defendant no.2 Rajendra Singh on



05.02.2001, a petition was filed on 05.05.2001 in T.S.No.79/71/33/75 under Order 22 Rule 4 C.P.C. praying for substitution of his heirs and heirs in his place. It was also stated in the said petition (Annexure-6) that one of the sons of the deceased defendant no.2-Rajendra Singh was already on record as defendant no.13.

The learned court below by the impugned order has sustained the objection as raised by the judgment debtor(opposite party) nos.6 and 17 and has dismissed the execution case holding the decree under the execution to be nullity.

After considering the submissions on behalf of the parties and the materials on record, it is limpid that there is no dispute about the date of death of the defendant no.2-Rajendra Singh being on 05.02.2001 after the preliminary decree was passed. The final decree proceeding was started and the Advocate Commissioner was appointed as envisaged under Order 26 Rule 14 C.P.C. for the purpose of preparation of final decree and after submission of the report by the Advocate Commissioner and its confirmation, the final decree was sealed and signed on 23.09.2002. It also stands admitted that the defendant no. 2 Rajendra Singh participated in the proceeding before the Advocate Commissioner at some stages. It is also admitted fact that his one son Ajay Kumar Singh was already on record as judgment debtor-defendant no.13 and the final decree was passed in his



presence. It is also an admitted fact that a petition for substitution of the remaining heirs and legal representatives was filed by the decree-holder petitioner in the suit on 05.05.2001 (Annexure-6) but no order could be passed by the court on the said petition.

In the petition filed by the judgment-debtor-defendant nos. 6 and 17 (Annexure-3) on 01.10.2005 in the execution case praying for dismissal of the execution case on the ground that the decree under execution has been passed against the dead person (defendant no. 2 Rajendra Singh), it is not their case that estate of the deceased defendant no. 2 Rajendra Singh could not have been represented by his son defendant no. 13. There is also no averment in the said petition that the left out heirs of the said deceased defendant no. 2 Rajendra Singh had a special case or defence in the proceeding other than that of the defendant no.13.

Though the principle of law is well settled that a decree passed for or against a dead person is a nullity but it is not attracted in the case at present when the estate of the deceased party in the proceeding could be deemed to have been represented by one of his heirs already on record. It would be fruitful here to notice the dictum laid down by the Full Bench of this Court in **Jagannath Singh Vs. Srimati Singhashan, 1984 PLJR 217** as follows:-

“17.....From the discussions of the



several Supreme Court decisions made above, it emerges that when one or more heirs of the deceased defendant or respondent are on record, then the estate is fully represented in the suit or the appeal, as the case may be, and the suit or the appeal will not abate for not bringing on record the other left out heirs.

This will also include a case where some of the heirs at their own initiative are brought on the record of the case. Such heirs, who applied for bringing on record, would represent the entire estate.....

.....
It is further held that where one or more of the heirs of deceased defendant or respondent are on record or they are already before the court in another capacity, but the left out heirs were not brought on the record, and no formal application was made showing them as heirs and legal representatives of the deceased, still the estate of the deceased would be represented by the heirs on record and the decision will bind not only the heirs on record, but the entire estate including those not brought on record unless the case comes under any of the



exceptions mentioned above. However, it will be open to the heirs on record to point out that they do not represent the interest of other heirs and in that case it becomes the duty of the plaintiff or the appellant, as the case may be to make diligent and bonafide enquiry of bringing other heirs on record in accordance with law. But if no such objection is taken, then after the decision it will be deemed that there has been abandonment of technical plea of abatement.....”

(emphasis supplied)

Testing the rival submissions of the parties in the backdrop of the admitted facts and on the anvil of the principles as laid down in **Jagannath Singh** (supra), the conclusion is inevitable that the estate of the deceased defendant no. 2 was fully represented in the final decree proceeding by his son who was already on record as defendant no.13 in the proceeding. As the defendant no.13 raised no objection at any stage before passing of the final decree or even in his petition dated 01.10.2005 (Annexure-3), praying for dismissal of the execution case, pointing out that he did not represent the interest of the other heirs, he would be deemed to have abandoned the technical plea of abatement or the decree being a nullity as having been passed against the dead person.



Examining the contentions on behalf of the parties from another angle, it is manifest from the provision of Order 22 Rule 4 (3) C.P.C. that once the petition for substitution of the deceased defendant is filed by the plaintiff within the time, there would be no abatement. In the present case, admittedly such petition for substitution has been filed by the plaintiff in the suit on 05.05.2001 within the prescribed period of limitation. In such a circumstance, there was no scope for holding that the suit (at the stage of final decree proceeding) could have abated. It is a fact that no order could be passed on the said petition which had remained pending but even in that case also, the consequence of abatement of the suit was completely excluded.

It is, though, well settled that the provisions of Order 22 Rule 3 and 4 C.P.C. have no application in a suit after the stage of preliminary decree but the authoritative pronouncements holding a final decree to be a nullity for want of substitution of the heirs of the party to the suit have proceeded to lay down the said principle only on the base that the estate of the said deceased party was not represented in the proceeding. This aspect of the matter is lucid from the full bench decision of this Court in the case of **Jungli Lall Vs. Laddu Ram A.I.R. 1919 Pat. 430** where it has been opined as follows:-



“
..... In the case before us it cannot be said that Raghu Lall was never a party to the suit in the proper sense of the term. It is common ground that he was till his death a proper party to the suit in the full sense of the term. The point here however is that when he died, so far as his interests were concerned, there was no party to the suit left, against whom a decree of any sort of kind could be passed 14 months later without proceedings under O. 22, R. 4, being first taken.....

.....
In cases like the one before us that which purports to be a decree was really passed only against a name on the record, the person behind that name having passed beyond the jurisdiction of all Courts. There remained on the record at the time of the decree, so far as Raghu Lall's property was concerned, no person who could be rendered amenable to the mandate of the Court in what purported to be its decree.....”

(emphasis supplied)

The view expressed by this Court in **Ramsewak Mishra Vs. Mt. Deorati Kuer A.I.R. 1962 Pat. 178** is also on



similar line when it has been observed as follows:-

“
While considering the question of law whether in the case of a death of a party after the preliminary decree in a mortgage suit the substitution of his heirs and legal representatives would be governed by Rules 3 and 4 of Order XXII or Rule 10 of that Order, their Lordships observed that the rule is that on the one hand, no final decree can be passed without the representative of the deceased party being brought on the record; but on the other hand, that Rule 10, and not Rules 3 and 4 of Order XXII of the Code of Civil Procedure are to be regarded as governing the procedure for making the necessary substitution..... ”

(emphasis supplied)

In the present case, the fact is apparent that the defendant no.13 was admittedly the son of deceased defendant no. 2 Rajendra Singh and was already on record of the suit. In view of the law as laid down in **Jagannath Singh** (supra), there is no legal impediment in holding that the estate of the deceased defendant no. 2 Rajendra Singh was not left unrepresented. The learned court below has committed error of jurisdiction and illegality in holding that the decree under execution is nullity for want of substitution of the



remaining heirs and legal representative of the deceased defendant no.
2 Rajendra Singh.

This revision application is, accordingly, allowed
and the impugned judgment and decree is set aside. In the facts and
circumstances of the case, there shall be no order as to costs.

(V. Nath, J)

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