

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.176 of 2013

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Nandlal Paswan & Ors.

.... Petitioner/s

Versus

Himanshu Nayak & Ors.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ranjan Kumar Dubey

For the Respondent/s : Ms.Rina Sinha

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
CAV JUDGMENT

Date: 31 -10-2017

1. This civil revision petition filed under section 115 of the Code of Civil Procedure is against the order dated 18.2.2012 passed by the Addl. District Judge I, Samastipur in Misc. Appeal no. 01/2011 by which and where under the Addl. Sessions Judge set aside the order dated 10.12.2010 passed by Munsif, Dalsingsarai in Eviction Execution case no. 04/1990.

2. The brief fact which lies to file this revision petition is that Eviction Suit no. 08/1988 was filed by Late Hari Prasad Nayak, father of opposite party nos.1, 2,3,5 and 6 against opposite party no.4 seeking a decree for eviction on the ground of default as well as arrears of rent over ward no. 3 holding no. 27(old) 819(new) Tauzi no. 753 area approximately 6 1/ 2 kathas detailed in



Schedule I of the plaint, copy of the plaint of Eviction Suit no. 08/1988 has been annexed as annexure 3 to the petition. The claim of plaintiff of Eviction Suit no. 08/1988 was that the property in dispute was let over to the opposite party no.4 on monthly rent of Rs 225/- through a deed of Kirayanama dated 28.1.1983 for the period of five years but during the tenancy period, opposite party no.4 made default in payment of rent and in spite of issuance of legal notices, opposite party no.4 refused to vacate the suit premises even after expiry of tenancy period.

3. The aforesaid suit was decreed and against the above stated decree, appeal was filed by opposite party no.4 which was numbered as Eviction Appeal no. 05/1990. During the pendency of the aforesaid appeal, petitioners came to know about pendency of the said appeal and they filed intervention petition with a prayer to add them as party to the suit but the aforesaid prayer was rejected vide order dated 14.2.2006 and thereafter, petitioners preferred C.R. no. 536/2006 before this court but the said C.R. no. 536/2006 was, too, dismissed on the ground that no stranger can be permitted to be added as a



party to eviction suit. The above stated Appeal no. 05/1990 was also dismissed and against the aforesaid dismissal, second appeal was preferred by opposite party no.4 but the said second appeal was, too, dismissed vide order dated 5.2.2010. However, in the meantime, original plaintiff, namely, Hari Prasad Nayak died and opposite party nos.1, 2,3,5 and 6, being legal representatives of original plaintiff, filed Eviction Execution case no. 04/1990. In the aforesaid execution case, order of delivery of possession was passed and the concerned Nazir went on the spot to effect delivery of possession upon which petitioners resisted the delivery of possession by filing an application before the concerned Nazir and on their protest, delivery of possession could not be affected. Petitioners immediately, on 30.8.2010 filed an objection before the executing court to set up the claim and title. The learned Executing court, having taken the evidence of both parties, allowed the objection of the petitioners vide order dated 10.12.2010 and accordingly, dismissed execution proceeding holding that the aforesaid execution proceeding was not maintainable because execution has been sought over the lands other than lands



mentioned in the deed of tenancy. Copy of order of execution court has been annexed as annexure 2 to this revision petition. However, order dated 10.12.2010 passed in Eviction Execution case no. 04/1990 was challenged by opposite party nos.1, 2, 3, 5 and 6 before the District Judge, Samastipur by filing Misc. Appeal no. 01/2011 which was admitted by learned District Judge, Samastipur and subsequently, learned District Judge, Samastipur transferred the said Misc. appeal to the court of the learned Addl. District Judge I, Samastipur for disposal. Learned Addl. District Judge I, Samastipur vide order dated 18.2.2012 allowed the aforesaid Misc. Appeal no. 01/2011 setting aside the order dated 10.12.2010 passed by learned executing court (Munsif), Dalsingsarai in Eviction Execution case no. 04/1990 and also directed executing court to proceed for delivery of possession. Against the order dated 18.2.2012, petitioners initially, preferred CWJC no. 9955/2012 under Article 227 of the Constitution of India but subsequently, with the permission of this court, they converted said CWJC into revision petition.

4. Admittedly, petitioners resisted delivery of



possession on the ground that CS plot nos. 90, 92, 93, 94, 95 and 97 having a total area of 29 decimals equivalent to 6 kathas 14 dhurs were recorded in the name of Bihari Paswan and Jetu Paswan, who happened to be ancestors of the petitioners. Subsequently, RS plot nos. 287 and 288 were carved out from the above stated CS Plots. Petitioners claimed that since the time of Bihari Paswan and Jetu Paswan family of the petitioners had been coming in possession of the lands and over a portion of disputed lands, they got constructed their houses whereas remaining vacant portion was taken by Mehi Thakur orally in 1965 on rental of Rs. 30/- per month from father of the petitioners but after death of Mehi Thakur brother-in-law of Mehi Thakur, Mahendra Sharma started looking after business of Mehi Thakur as son of Mehi Thakur, namely, Raj Kumar Sharma (opposite party no.4) was minor at that time. The aforesaid Mahendra Sharma used to pay rent to the petitioners regularly but subsequently, he went in collusion with Hari Prasad Nayak, original plaintiff of Eviction Suit no. 08/1988 and got prepared forged kirayanama and subsequently, on the basis of the aforesaid forged document, original plaintiff, namely,



Hari Prasad Nayak filed Eviction Suit no. 08/1988. The aforesaid forged kiryanama was prepared in respect of plot no. 594 and two different holdings were given in the aforesaid kiryanama. Furthermore, petitioners claimed that opposite party no.4 namely, Raj Kumar Sharma had lodged Misc. case no. 10/2008 under section 47 of the CPC and in the said Misc. case no. 10/2008, copy of compromise petition in Partition suit no. 01/1976 was filed. The aforesaid compromise is said to have taken place in the family of original plaintiff, namely, Hari Prasad Nayak but in the aforesaid compromise petition, neither plot no. 594 nor disputed plots were mentioned.

5. On the objection raised by the petitioners before executing court, opposite party nos.1, 2,3,5 and 6 took a stand that the above stated CS plots were, no doubt, recorded in the name of Bihari Paswan and Jetu Paswan but Bihari Paswan had sold 10 kathas 11 dhurs of lands including disputed lands to Ramphal Poddar vide registered sale deed. Subsequently, property of Ramphal Poddar auctioned in some money decree which was auctioned purchased by Shanti Lal Nayak, grand father of the petitioners and accordingly, grand father of the



petitioners came in possession of disputed lands. In the aforesaid money decree, auction purchase was fought between the petitioners' ancestors and said Ramphal Poddar up to Privy Council.

6. Learned Munsif, Dalsingsarai (executing court) vide order dated 10.12.2010 came to the conclusion that ancestor of opposite party nos.1, 2,3,5 and 6 never came in possession of CS Plot nos. 90 to 98 and the aforesaid plots remained in possession of family of the petitioners as the survey purcha of RS plot no. 287 had been prepared in the name of the of the petitioners. However, learned appellate court came to the conclusion that mere preparation of survey parcha is not sufficient until revision khatian is finally published and furthermore, appellate court came to the conclusion that the petitioners failed to establish their right, title and possession over the disputed plots.

7. Learned counsel appearing for the petitioners challenged the impugned order passed by the appellate court arguing that learned Addl. District Judge I, Samastipur had no jurisdiction to entertain miscellaneous appeal against the order passed under Order 21 rule 98 of



the CPC because Order 21 rule 103 of the CPC clearly says that order passed under Order 21 rule 98 of the CPC shall have effect of decree and, therefore, Miscellaneous appeal against order of executing court was not at all maintainable and, therefore, order of learned Addl. District Judge I, Samastipur in Misc. Appeal no. 01/2011 is nullity and non-est in the eye of law. He, further, submitted that, no doubt, petitioners had filed petition under Order 1 rule 10 of the CPC praying therein to add themselves to party in Eviction Suit no. 08/1988 but their prayer was rejected up to this court but admittedly, the aforesaid Eviction Suit no. 08/1988 was between original plaintiff, namely, Hari Prasad Nayak and opposite party no.4 and the petitioners were treated as strangers to the aforesaid eviction suit and, therefore, finding given in Eviction Suit no. 08/1988 was not at all binding upon the petitioners but the learned appellate court failed to take note of the aforesaid fact as well as legal position and wrongly, held that since petitioners had already lost up to this court in CR no. 536/2006, they had no right to raise any resistance in execution of delivery of possession of the decree passed in Eviction Suit no. 08/1988. He,



further, submitted that neither original plaintiff, namely, Hari Prasad Nayak nor opposite party nos.1, 2,3,5 and 6 had ever challenged the entry of cadastral survey khatiyan as well as RS purcha and, therefore, appellate court was bound to presume correctness of entry of CS khatiyan as well as RS parcha. Moreover, there was nothing before the appellate court to show that family members of opposite party nos.1, 2,3,5 and 6 ever got actual possession over suit property.

8. On the other hand, learned counsel appearing for opposite party nos.1, 2,3,5 and 6 submitted that the petitioners filed objection in Eviction Execution case no. 04/1990 but their objection was premature as according to their case, they filed objection before executing court for delivery of possession and, therefore, the aforesaid objection of the petitioners was not maintainable. Moreover, learned executing court entertained objection of the petitioners in Eviction Execution case no. 04/1990 and no separate miscellaneous jurisdiction case was registered by learned executing court on the objection of the petitioners and that was the reason when the executing court passed the



order dated 10.12.2010, opposite party nos.1, 2,3,5 and 6 challenged the aforesaid order dated 10.12.2010 passed in Eviction Execution case no. 04/1990 before District Judge, Samastipur by filing Misc. Appeal no. 01/2011 and District Judge rightly admitted the aforesaid appeal. He, further, submitted that even if it assumed that there was any irregularity in admitting and deciding the aforesaid miscellaneous appeal, then also, it does not make any difference because the learned appellate court discussed all pros and cons of the matter and passed the detailed order and came to the conclusion that neither petitioners nor their ancestors had any right to raise any objection in execution of the decree passed in Eviction Suit no.08 of 1988.

9. Having heard rival contentions of both parties, I have gone through the record. It is admitted case of the petitioners that when Nazir went to execute delivery of possession, they filed objection in Eviction Execution case no. 04/1990 claiming their right, title and possession over the disputed plots. The learned executing court while dealing with this question as to whether objection filed on behalf of the petitioners before him is premature or not,



referred the decision of **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal reported in AIR 1997 SCC 856** and came to the conclusion that even the petitioners were not dispossessed from the disputed lands, they had every right to file objection under Order 21 rule 97 of the CPC. Order 21 rules 97 to 105 of the CPC have been brought on Statute book with object to determine all questions including the question relating to right, title and interest in the property arising out between the parties in execution proceeding itself and not left to be decided by way of separate suit. The aforesaid rule visualizes two scenarios. The first scenario is when at the time of delivery of possession, the execution of the decree is resisted by any person, the holder of the decree can make an application to the court claiming of such resistance or obstruction. Second scenario is when any person other than the judgment debtor is dispossessed of immovable property by the holder of the decree for possession of such property, the dispossessed person may make an application to the court complaining of such dispossession. Therefore, it is obvious from the aforesaid provision that Order 21 rule 97 of the CPC deals with



situation when dispossession has not been affected whereas Order 21 rule 99 of the CPC deals with the situation when dispossession has been affected.

10. No doubt, in Order 21 rule 97 of the CPC, it has been stated that it is the decree holder who can make complain of resistance or obstruction raised by a person but it does not mean that the aforesaid provision is only restricted up to the decree holder. The aforesaid provision, nowhere, forbids stranger to the suit to make complain before the executing court about his illegal dispossession. Therefore, in my view, even if the petitioners had not been dispossessed before filing objection, they had every right to file objection under Order 21 rule 97 of the CPC before the executing court but what irregularity has been committed by the executing court is that the executing court ought to have registered miscellaneous judicial case on the objection filed on behalf of the petitioners and to proceed with the aforesaid miscellaneous judicial case independently but the executing court did not register miscellaneous judicial case on the basis of objection filed on behalf of the petitioners rather the executing court entertained



objection with Eviction Execution case no. 04/1990 and proceeded with the aforesaid Eviction Execution case no. 04/1990.

11. It is not in dispute that if a stranger raises his interest, title and possession over the disputed property in respect of which decree has been passed and is going to be executed, all questions shall be decided by the executing court under Order 21 rules 97 to 105 of the CPC and, therefore, if the petitioners being strangers to Eviction Suit no. 08/1988 had resisted any objection in execution of the decree passed in Eviction Suit no. 08/1988 it was bounded duty of the executing court to decide all the questions in accordance with law. In support of my aforesaid view, decision of **N.S. S.Narayana Sarma and others vs. Gold Stone Exports (P) Limited and others reported in (2002) 1 SCC 662** is relevant and moreover, the aforesaid issue has already been set at rest in several decisions of the Hon'ble Apex Court and there is no need to refer other decisions.

12. Admittedly, petitioners were not party to Eviction Suit no. 08/1988 and their objection filed under Order 1 rule 10 of the CPC had already been rejected by



this court but I do agree with the submissions of learned counsel for the petitioners that finding given in Eviction Suit no. 08/1988 shall not effect the right given to the petitioners under Order 21 rule 97 of the CPC.

13. Admittedly, petitioners filed objection before the executing court under Order 21 rule 97 of the CPC and their objection was allowed vide order dated 10.12.2010 passed in Eviction Execution case no. 04/1990 and against the order of the executing court, opposite party nos.1, 2,3,5 and 6 preferred Misc. Appeal no. 01/2011 which was admitted by the District Judge, Samastipur and subsequently, disposed of by learned Addl. District Judge I, Samastipur passing the impugned order but, in my view, learned counsel for the petitioners rightly submitted that the aforesaid Misc. Appeal no. 01/2011 was not maintainable because Order 21 rule 103 of the CPC clearly says that where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have same force and subject to same conditions as to an appeal or otherwise as it were a decree. Therefore, the aforesaid provision clearly says that the order passed under Order 21 rule 98 or under



Order 21 rule 100 of the CPC shall be treated as decree and against the said order, regular appeal shall lie. Order 43 rule 1 of the CPC describes the orders which are appealable and the order passed under Order 21 rule 97 of the CPC is not in the list given in Order 43 rule 1 of the CPC and, therefore, learned counsel for the petitioners rightly submitted that miscellaneous appeal was not maintainable against the order dated 10.12.2010 passed in Eviction Execution case no. 04/1990. However, Order 43 rule 2 of the CPC says that rules of Order 41 shall apply so far as it may be to appeals from the orders. Therefore, it is obvious that the procedure to admit and to hear miscellaneous appeal is almost similar to the procedure given for admission and hearing of regular appeal. Section 96 of the CPC says that appeal shall lie from any decree passed by any court exercising original jurisdiction to the court authorized to hear appeal from the decisions of such court and section 100 of the CPC says that an appeal shall lie to the High court from every decree passed in appeal by any court subordinate to the High court, if the High court is satisfied that the case involves a substantial question of law. Section 2(2)



defines word 'decree' and says that the decree means the formal expression of an adjudication which, so far as regards the court expressing it conclusively, determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, shall not include

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

14. Perusal of section 2(2) (a) of the CPC goes to show that adjudication in appeal from an order shall not come within the definition of decree and, therefore, if any appeal is preferred under Order 43 rule 1 of the CPC and judgment /order is passed in the aforesaid appeal, said judgment /order shall not come under the definition of the decree and the aforesaid judgment /order shall not be treated as decree. Therefore, it is also obvious from the aforesaid fact that judgment /order passed in Miscellaneous appeal can not be challenged in second appeal. As I have already stated that the order passed under Order 21 rule 98 of the CPC is treated as decree in



view of mandate given in Order 21 rule 103 of the CPC and, therefore, against the order passed under Order 21 rule 98 of the CPC, regular appeal is maintainable.

15. No doubt, procedure of admission and hearing of miscellaneous appeal as well as regular appeal is almost similar but there is distinction between both of them because judgment /order passed in regular appeal can be challenged in second appeal but judgment /order passed in miscellaneous appeal can not be challenged in second appeal.

16. In the present case, as I have already stated that opposite party nos.1, 2,3,5 and 6 ought to have filed regular appeal against the order dated 10.12.2010 passed in Eviction Execution case no. 04/1990 because the aforesaid order was passed under Order 21 rule 98 of the CPC but they chose to file miscellaneous appeal and learned District Judge, Samastipur wrongly admitted the aforesaid miscellaneous appeal and transferred the same to the court of learned Addl. District Judge I, Samastipur for disposal and thereafter, learned Addl. District Judge I, Samastipur passed the impugned order which is not in accordance with law.



17. No doubt, learned Addl. District Judge I, Samastipur discussed the issues involved in the present matter but, in my view, the irregularity committed by the learned District Judge, Samastipur as well as learned Addl. District Judge I, Samastipur is not ignorable because miscellaneous appeal was not at all maintainable before the District Judge and, therefore, in the aforesaid circumstances, I have no option except to set aside the order dated 10.12.2010 passed in Misc. Appeal no. 01/2011 and to remand the matter to the District Judge, Samastipur with direction to him to give opportunity to opposite party nos.1, 2,3,5 and 6 to convert the aforesaid Misc. Appeal no. 01/2011 into regular title appeal and to file petition under section 5 of the Limitation Act and if they do so, the District Judge, Samastipur shall pass appropriate order on the point of limitation and admission and thereafter shall dispose of regular title appeal in accordance with law within a period of three months from the date of conversion and admission of title appeal.

18. With the aforesaid observations/findings, this revision is allowed and accordingly, the impugned order dated 18.2.2012 passed in Misc. Appeal no. 01/2011



stands set aside. It is made clear that any observation given on the merit of the case shall not cause any prejudice to the concerned court at the time of passing final judgment in regular title appeal.

Shahid

(Hemant Kumar Srivastava, J)

AFR/NAFR	AFR
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