

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.135 of 2016

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1. Ram Lal Pal Son of late Kedari Pal Resident of Keohri, P.S. Kudra , District Kaimur, Presently resident of Durgawati Bazar, P.S. Durgawati Bazar, District Kaimur at Bhabhua.

.... Petitioners

Versus

1. Butai Pal Son of late Kedari Rai resident of Village- Sonedihra, P.S. Bhabua, District Kaimur at Kaimur.
2. Ramashish Pal Son of Butai Pal Resident of Keohri, P.S. Kudra , District Kaimur, Presently resident of Durgawati Bazar, P.S. Durgawati Bazar, District Kaimur at Bhabhua.

.... Respondents

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Appearance :

For the Appellant/s : Mr. Ranjan Kumar Dubey
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA
ORAL JUDGMENT

Date: 05-03-2018

The petitioner filed this civil Miscellaneous petition for quashing the order dated 03.02.2016 passed by Munsif, Kaimur at Bhabhua and to quash the entire order proceedings in Execution Case No.08 of 2009 by which the petition filed by the petitioner under Order XXI Rule 89 of the C.P.C. has been rejected even without registering miscellaneous case.

The facts in brief, giving rise the filing of this civil miscellaneous is that Kedari Pal had three sons, namely, Butai Pal (respondent no.1), Ram Lal Pal (Petitioner) and Hariji Prasad and three daughters. In the lifetime of Kedari Pal, there was mutual partition between him and his three sons. Some portions were allotted



to Kedari Pal and his wife and the remaining properties were partitioned between three sons. On the death of Kedari Pal, his daughter filed a Partition Suit No.19 of 1990 in the court of Sub Judge, Bhabhua. The suit was decreed on 22.06.1994 against which the plaintiffs filed First Appeal No. 564 of 1994 in the High Court, which is pending.

Butai Pal and his sons, the respondents filed Eviction Suit No.160/1989 in the Court of Munsif, Bhabhua for decree of eviction as well as realization of arrears of rent with the contention that the suit premises was exclusively acquired by them and the same was let out by them to the petitioner. The petitioner appeared and denied the contention of the plaintiffs about self acquisition of the property but the suit was decreed vide judgment and decree dated 28.05.1999. The petitioner filed T.A. No. 01 of 1999 and the same was dismissed vide judgment and decree dated 06.02.2008. The petitioner preferred Second Appeal No. 2/2008 but on account of certain defects, the Second Appeal was also dismissed.

The respondents filed Execution Case being Execution Case no. 03 of 2008 in the court of Munsif, Bhabhua on 22.10.2008 for realization of arrears of rent of Rs. 300/- from September, 1989 till the date of filing of execution case and for delivery of possession over the disputed property. Two decimals of land with house over Plot



No.812, Khata No.92, situated at village Durgawati Bazar, District-Rohtas. The petitioner after receiving notice, appeared before the Executing Court. The decree holder did not press at any point of time for taking steps for recovery of the arrears of rent. The petitioner handed over the possession to the decree holder and even thereafter, the execution case remained pending but the decree holder filed another Execution Case No.8/2009 before the same court for realization of Rs. 35,100/-, the decretal amount but without issuance of notice through registered post, service report was submitted in collusion with Office Peon and two acres of lands of the petitioner was put on auction sale. Consequently the sale was confirmed. Even the sale proclamation was not done in accordance with law. The petitioner came to know and filed petition for setting aside the sale certificate issued in favour of decree holder under Order XXI Rule 89 of the C.P.C. on 27.07.2013 but the Munsif held the petition of the petitioner not maintainable, on the ground that the decree holder has also entered into the stage of obtaining the possession of the auction property and accordingly dismissed the petition.

Heard Mr. S.S. Dwivedi, learned Senior Counsel appearing on behalf of the petitioner and Mr. Amarendra Kumar Sinha, learned Counsel for the respondents.

Mr. S.S. Dwivedi, learned Senior Counsel for the



petitioner submits that the judgment debtor, respondents firstly filed Execution Case No.03/2008 for realization of arrears of rent and for delivery of possession passed in Eviction Suit No.160/1989. The petitioner appeared in the aforesaid execution case. The delivery of possession was handed over to the decree holder and the Execution Case No.3/2008 remained pending for realization of rent. The decree holder never pressed or moved any petition for realization of arrears of rent from the judgment debtor. The judgment debtor, the petitioner continued to attend the proceedings of Execution Case No.3/2008 but the decree holder fraudulently filed another Execution Case No.8/2009 in the same court for execution of the part of decree i.e. for realization of Rs. 35,100/-, the decretal amount. It is submitted that in the judgment and decree, there was no order with regard to payment of interest or cost. The decree holder straightway prayed for realisation of decretal amount by way of putting the property i.e. two acres of lands of the petitioner on auction sale. It is submitted that from perusal of the entire order sheets of Execution Case No.8/2009, it would appear that no notice was ever issued to the petitioner through registered post. The notice was issued through ordinary process and the serving Peon, in collusion of the decree holder reported that the notice was not received by judgment debtor but there was no compliance of the order 5 Rule 19 of the C.P.C., which is



mandatory in nature. If the serving Peon reported the service of denial, Order 5 Rule 19 requires the mode of accepting such service after statement of facts by serving Officer on oath and no procedure was followed but the service was found to be valid. No notice under Order XXI Rule 41 C.P.C to the decree holder was ever issued nor the Court ever determined the valuation of the properties to be auction sold at any time and the proclamation of sale was never served in accordance with law and the auction sale was also not done in accordance with law. The entire two acres of lands of the petitioner was sold to decree holder on a paltry sum of Rs. 35,100/-, it was deemed by the Court that the decreetal amount is equal to the auction sale amount. It is further submitted that no order of confirmation of sale was ever passed by the court in accordance with law and a sale certificate was hurriedly issued. It is further submitted that the court below acceded the every request and every demand of the decree holder without visualizing the real facts that the decree holder committed fraud upon court by instituting another execution case no.8/2009, although Execution Case No.03/2008 for execution of the same judgment and decree is pending before the Civil Court, even the executing court did not think it proper, for the reasons best known to him to register the miscellaneous case on the petition filed by the petitioner under Order XXI Rule 89 of the CPC and dismissed the



petition illegally.

Controverting the submission advanced on behalf of the learned counsel for the petitioner, learned counsel for the respondents, the decree holder, submits that of course, the requirement of order VI Rule 19 is not fulfilled but the judgment debtor had knowledge about the pendency of the execution case and he did not appear. The order does not suffer from any illegality.

Having heard the submissions of both sides, I find that the sole question arises whether the order of Munsif suffers from any jurisdictional error or illegality and the properties of the petitioner was put on auction sale without following the procedures of law and service of notice was illegally deemed to be validly served.

It is admitted from the facts of the case that the respondents filed Eviction Suit No.160/1989 for eviction of the suit premises, on the ground that the land was self acquired property of the decree holder. The plaintiffs let out property to judgment debtor on monthly rent of Rs. 300/-. The suit was decreed and directed the judgment debtor, defendants petitioner to give vacant possession of the land and pay arrears of rent at the rate of Rs 300/- per month from the month of September, 1989 to May, 1999. The decree holder filed Execution Case No.3/2008. The petitioner, judgment debtor, appeared but it appears from the perusal of the order sheet of Execution Case



No.3/2008 that the decree holder never moved any petition for realization of arrears of rent, even then the decree holder filed another Execution Case No.8/2009 for realization of part decree and judgment passed in Eviction Suit No.160/1989 i.e. for realization of arrears of rent. Admittedly, the Execution Case No.3/2008 remained pending even then delivery of possession was given to the judgment debtor. In Execution Case No.8/2009, notices were issued through ordinary process. The Serving Peon reported that the judgment debtor refused to receive the notice and on such, the court accepted the report of the serving peon and considered the service of notice on judgment debtor to be valid.

In view of the provision, as contained under Rule 19 of Order 5 C.P.C.-

it is mandatory on the part of the court that “*where a summons is returned under Rule 17, the court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.*” But it appears that the court did not follow the mandatory provision as contained in Order 5



Rule 19 of the C.P.C. and accepted the report of the serving peon, who never examined, even on affidavit as valid service of notice. Moreover, it is evident that judgment debtor had been appearing all along in the arrear execution case being Execution Case No. 3/2008 filed by the judgment debtor. The decree holder may have, or may have liberty to notice of judgment debtor in the same court by giving notice to the judgment debtor for filing of another Execution case No.8/2009 for realization of arrears of rent but no such step was taken nor the court followed the mandatory provisions before accepting the report of serving officer about notice given to the judgment debtor. This fact shows that the decree holder played fraud by filing another Execution Case in getting the property of the judgment debtor without following any procedure, meant for execution of a decree payment of money. The property proposed to be auctioned sale was never attached nor any notice was given to the judgment debtor, as required under Rule 41 of Order 21 of the C.P.C. It further transpires that the court put the two acres of lands of the petitioner on auction sale and only decree holder was allowed to purchase and without following the procedure of law, sale certificate was issued. Therefore, I find that the decree holder had fraudulently got the order by concealing the facts about previous execution case bearing Execution Case No.3/2008, pending in the same court and the Munsif has committed



jurisdictional error as well as illegality.

Thus, I find that the order dated 03.02.2016 passed by Munsif, Kaimur at Bhabhua as well as entire proceedings in Execution Case No.08 of 2009 are not sustainable, and accordingly, set aside. Consequently, the auction sale is also set aside. The petitioner is directed to deposit decretal amount of Rs. 69,225/- in the court below within three months and the decree holder may withdraw the amount.

The Civil Miscellaneous petition is accordingly allowed.

(Prabhat Kumar Jha, J)

Amit/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	06.04.2018
Transmission Date	NA

