

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.624 of 2018

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Oshiyar Singh S/o Late Nagina Singh, Resident of Village- Supauli, Paragana Bara, P.S. Pacharukhi, District Siwan.

... .. Petitioner/s

Versus

1. Krishna Singh and Ors S/o Late Ram Chandra Singh, Resident of Village- Supauli, at present r/o Itawa, P.S. Pacharukhi, District- Siwan.
2. Kanti Devi, W/o Gopal Singh.
3. Kusum Kumari Devi, W/o Gorakh Singh.
4. Chandra Devi, W/o Lala Babau Singh.
5. Bachan Devi, W/o Harihar Singh.
6. Girija Devi, W/o Atha Singh.
7. Arjun Singh, S/o Late Nagina Singh.
8. Indu Devi, D/o Late Nagina Singh, All are Resident of Village- Supauli, Paragana Bara, P.S. Pacharukhi, District- Siwan.
9. Bacha Singh, S/o Late Nagina Singh, Resident of Village- Supauli, Paragana Bara, P.S. Pacharukhi, District Siwan.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr.Chandra Kant, Adv.
For the Respondent/s : Mr. Md. Waliur Rahman, Adv.

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
ORAL ORDER

7 26-07-2022 Heard Mr. Chandra Kant, learned counsel for the petitioner and Mr. Md. Waliur Rahman, learned counsel for the respondents.

The petitioner is aggrieved by the order dated 30.01.2018 passed in Execution Case No. 5 / 2017 whereby the learned Executing Court has allowed the petition filed by the respondents under Order 21 Rule 97 of the CPC and has directed the decree holder to delete the plots from the Execution



Case No. 5 of 2017 upon which delivery of possession has already been taken place in another suit filed by the respondents bearing Partition Suit No. 394 of 2005.

A preliminary objection has been raised by learned counsel appearing for the respondents that this civil miscellaneous application is not maintainable inasmuch as per Order 21 Rule 103 of the CPC the order passed by the Executing Court in exercise of its jurisdiction under Order 21 Rule 97 & 99 of the CPC is a deemed decree and as such appeal will lie. Learned counsel in support of his argument has relied upon Full Bench judgment of the Andhra Pradesh High Court reported in **AIR 2005 AP 95 Gurram Seetharam Reddy Versus Smt. Gunti Yashoda & Anr.** in which the Hon'ble Court has held that the order passed under Order 21 Rule 97 & 99 are appealable.

On the other hand, learned counsel for the petitioner submits that the judgment passed by the Andhra Pradesh High Court is not applicable in the facts of the case and he has relied upon the judgment of the Patna High Court reported in **2007 (4) PLJR 727 Most. Sanjha Devi vs. Amar Yadav & Ors.** and submits that in an objection filed under Order 21 Rule 97 of the CPC the paraphernalia of suit will follow and the parties should



be given a chance to substantiate their case by evidence and the order passed under Order 21 Rule 103 of the CPC must be preceded by an adjudication. The learned court below has failed to exercise its jurisdiction properly under Order 21 Rule 97 of the CPC and without adjudicating the matter as if the court is deciding suit has merely directed the decree holder to delete some of the plots from the execution case bearing Execution Case No. 5 / 2027. Therefore appeal is not the correct remedy and civil miscellaneous application has rightly been filed.

The background of the case is that a title partition suit bearing Partition Suit No. 419 of 2002 was filed by the petitioner for partition of the joint family property which was decreed on 19-08-2006. The final decree was passed in the aforesaid suit on 30-06-2017 in which the respondents filed an application under Order 1 Rule 10 (2) of the CPC for impleadment which was rejected and after final decree Execution Case No. 5 of 2017 was filed by the petitioner on 04-06-2017. On the other hand, respondents filed a partition suit bearing Title Partition Suit No. 394 / 2005 on 20-01-2008 in which final decree was passed on 29/05/2012 and thereafter an Execution Case No. 2 / 2012 was filed by the respondents in which delivery of possession was made on 17/03/2012. It is



noted that the petitioner was also one of the defendants in the suit filed by respondent and a First Appeal bearing F.A. No. 30 of 2008 has been filed before this court challenging the preliminary decree and First Appeal No. 101 of 2012 has been filed challenging the final decree by the petitioner which are pending before this court. On 20.09.2017 the respondent filed a petition under Order 21 Rule 97 CPC taking an objection that land / plots which are the subject matter of the suit and the decree passed thereon in Partition Suit No. 419 of 2002 is also subject matter of Partition Suit No. 394 of 2005 in which the delivery of possession has already taken place and as such those plots should be deleted from the decree passed in Title Partition Suit No. 419 of 2002.

I have heard learned counsel for the parties and have gone through the impugned order. It appears that both the parties have filed separate suit and the claim of one of the parties is that Partition Suit No. 419 of 2002 was filed by the petitioner on the basis of incorrect genealogical table and the petitioner has obtained collusive decree by impleading his own brother and the other co-sharers were not made party in the said suit. It also appears that a separate suit was filed by the respondent in which decree has already been passed and



delivery of possession has been made. The scope of the petition filed under Order 21 Rule 97 of the CPC and the procedure prescribed under Order 98 & 100 of the CPC are well established and if any objection under Order 21 Rule 97 CPC is filed by a person who is not a party in the suit, the same shall be decided as if the suit is being decided by the concerned Executing Court. From the impugned order it appears that the learned Executing Court without framing the issues and without taking any evidence of the parties merely on the basis of a separate suit filed therein by the respondent the decree of which is under challenge in the First Appeal has directed for deletion of the plots from the decree passed in Partition Suit No. 419 / 2002 and allowed the objection filed by the respondent herein. It is now settled that after the amendment in the Order 21 Rule 97 CPC in 1976 and 1977 the legislator has introduced the concept of adjudication and the courts have taken consistent view that adjudication would make it similar to a suit. By the impugned order the Executing Court has not decided the objection under Order 21 Rule 97 CPC in the manner a suit is decided and merely on an application filed by the respondents has directed for deletion of the plots from the decree.

In the aforesaid background facts and law, in my view



the learned Executing Court has not exercised its jurisdiction in the manner provided under the law and as such I hold that this civil miscellaneous application is maintainable.

On the basis of the aforesaid discussions, I hereby set aside the impugned order dated 30.01.2018 and remit the matter back before the Executing Court to decide the objection under Order 21 Rule 97 of the CPC filed by the respondents in the manner as provided under law.

Accordingly, this civil miscellaneous application stands disposed of.

It is expected that the learned court below will decide the objection under Order 21 Rule 97 of the CPC within a reasonable time frame.

(Anil Kumar Sinha, J)

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