

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVIEW No.171 of 2018

In
Civil Writ Jurisdiction Case No.16584 of 2014

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Bhim Prasad Sah @ Bhim Prasad S/o Late Gudari Sah, resident of Mohalla - Naya Tola, Prakash Nagar, Narkatiyaganj, P.S. Shikarpur, Distt. - West Champaran.

... .. Petitioner/s

Versus

1. Raghuwar Sharan, S/o Late Ramayan Sharan Srivastava, Resident of Mohalla - Pokhara Chawk, at and P.O. Narkatiyaganj, P.S. Shikarpur, Distt. West Champaran.
2. Panna Lal Sah, S/o Late Gudari Sah, resident of Mohalla - Naya Tola, Prakash Nagar, Narkatiyaganj, P.S. Shikarpur, Distt. - West Champaran.

... .. Respondents/Opposite Partys

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Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Sumit Kumar Jha, Advocate Ms. Riya Giri, Advocate Mr. Bivutosh Kumar, Advocate
For the Respondent No.1:		Mr. Ashok Kumar Sinha, Sr. Advocate Mr. Santosh Kumar Singh, Advocate Mr. Divyam Verma, Advocate
For the Respondent No.2:		Mr. Pranav Kumar, Advocate Ms. Shrishti Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT

Date : 28-08-2023

Heard learned senior counsel for the parties.

2. This application has been filed seeking review of the judgment dated 24.04.2018 passed in CWJC No.16584 of 2014 (Raghuwar Sharan Vs. Bhim Prasad Sah & another). By the judgment under review, this Court has been pleased to set aside the order dated 18.07.2014 passed by learned Sub-Judge, IV, Bettiah, West Champaran in Misc. Case No.21 of 2012 and remitted the matter to the court below to dispose of the



Miscellaneous Case in accordance with law.

3. It appears from the narration of facts available on the record that the petitioner in the writ petition had filed Title Eviction Suit No.191/2002 in the court of learned Sub-Judge-1st at Bettiah against his tenant Panna Lal Sah (respondent no.2) on the ground of default in payment of rent. The said Eviction Suit was decreed on contest vide judgment and decree dated 30.08.2009 passed by learned Sub Judge-IV, West Champaran.

4. The respondent no.2 preferred first appeal bearing F.A. No.55 of 2011 in the court of learned District Judge, Bettiah which was also dismissed by the lower appellate court and then the Second Appeal No.5 of 2012 brought before this Court was dismissed vide order dated 24.07.2013.

5. The decree holder in Title Eviction Suit No.191/2002 filed Execution Case. During pendency of the second appeal, the brother-in-law of the judgment debtor filed Misc. Case No.24 of 2011 in Execution Case No.01 of 2010 which was dismissed by the learned Executing Court on 22.06.2012.

6. It appears that the full brother of respondent no.2 (judgment debtor) filed Misc. Case No.21 of 2012 under Order XXI Rule 97 on the ground that the land bearing Khata No.8,



Survey Plot No.1457, Area 0.77 decimal at village Narkatiyaganj originally belonged to Bettiah Raj. He claimed that his ancestor named Dhup Sah took settlement of the plot in question measuring 8 khata 5 dhur. The Jamabandi of the plot was opened in the name of his ancestor Dhup Sah and the same continued to run in the sirista of Bettiah Raj. The objector in Misc. Case No.21 of 2012 has claimed that his ancestor Dhup Sah died leaving behind his four sons namely Gudar Sah, Ram Ratan Sah, Paras Sah and Baijnath Sah. In due course there was a partition between all the sons of the deceased Dhup Sah and the entire area of plot no.1457 fell in the share of Gudari Sah in lieu of other lands. The said Gudari Sah, it is claimed, died in the year 1993 in the state of jointness leaving behind his widow Devla Devi and his three sons namely Haridwar Sah, Bhim Prasad Sah (respondent no.1) and Panna Lal Sah (respondent no.2, judgment debtor in execution case no.01/2010). Since other details as claimed by the objector in the miscellaneous case are not relevant for the present adjudication, this Court is not going into much detail.

7. The bone of contention in the writ is the order dated 18.07.2014 passed by learned Sub Judge-IV in the Misc.Case No.21 of 2012. It is submitted that the petitioner (decree holder)



had filed a Misc. Case No.37 of 2014 in the court of learned District Judge for transfer of Misc. Case No.21 of 2012 from the court of learned Sub-Judge-IV, Sri H.N. Pandey to any other court for disposal of the case. The learned District Judge vide his order dated 11.06.2014 called for a report from the learned Sub-Judge. Thereafter, the learned Sub-Judge submitted his report denying the allegations against him but gave his consent to transfer the case to any other court. This was, however, nullified by the learned Sub-Judge-IV by his own conduct inasmuch as he proceeded to partly decide the Misc. Case No.21 of 2012 whereunder he confirmed the possession of respondent no.1 and fixed a date for deciding the issue of title.

8. Learned counsel for the petitioner (decree holder) contended before this Court that the learned Sub-Judge-IV proceeded to decide the application partly when the transfer case was pending before the learned District Judge and a report had been called for from the learned Sub-Judge. It was his further submission that the respondent no.2 who is the full brother of respondent no.1 though appeared in Misc. Case No.21 of 2012 but he did not prefer to file any rejoinder either supporting or denying the allegation of respondent no.1.

9. It was his further submission that the learned Sub-



Judge-IV was bound under law to adjudicate all questions of right, title and possession in the property claimed by the objector under Order XXI, Rule 97 but the piecemeal determination of one issue of possession is bad in law.

10. It appears that the order dated 18.07.2014 of the learned Sub-Judge-IV was challenged before this Court under Article 227 of the Constitution of India and as per the then procedure and practice in this Court it was registered as Civil Writ (now it is being registered as Civil Miscellaneous). The notice was issued to the respondents, the respondents appeared through vakalatnama but thereafter did not appear in this case when the case was posted for final adjudication on 23.04.2018 and 24.04.2018. The respondents did not file any counter affidavit in the civil writ for about three years after appearance in the matter and before the final order was passed on 24.04.2018. The judgment under review has been passed in the aforementioned facts and circumstances. This Court has held that the learned court below passed order in piecemeal without ascertaining the right and title and the observations of the learned court below in declaring the possession of respondent no.1 who is full brother of respondent no.2 (judgment debtor) is against the materials on record.



Submissions in the review application.

11. By filing the present review application, the respondent no. 2 in the civil writ has contended that there is an error apparent on the face of the record in the judgment of this Court in the civil writ. Mr. Y.V. Giri, learned senior counsel representing the present petitioner (respondent no. 2 in the writ) submits that the impugned order of the learned court below is a “decree” within the meaning of Order XXI Rule 103 of the Code of Civil Procedure, therefore, a proper first appeal under Section 96 read with Order XLI CPC would lie against the impugned order.

12. Learned senior counsel for the petitioner submits that the judicial orders of the civil court are not amenable to the writ proceeding. Reliance in this regard has been placed on the judgment of the Hon’ble Supreme Court in the case of **Radhey Shyam and Another versus Chhabi Nath and Others** reported in **(2015) 5 SCC 423**. It is his submission that the civil writ brought before this Court was not maintainable.

13. Learned senior counsel has further relied upon the judgment of this Court in the case of **Most. Sanjha Devi versus Amar Yadav & Ors.** reported in **2007 (4) PLJR 727** to submit a proceeding under Order XXI Rule 97 is like an original suit;



therefore adjudication on any issue is a “decree” under Section 2(2) of the Code of Civil Procedure, **Najbun Nisa @ Najmul Nisa versus Masrool Alam** reported in **2008 (2) PLJR 308** to buttress his point that if an adjudication has been done on any of the issues then, only a first appeal would lie. To strengthen his submission, Mr. Y.V. Giri, learned senior counsel has further relied upon **Sameer Singh and Another versus Abdul Rab and Others** reported in **(2015) 1 SCC 379** and **Rishabh Chand Jain and Another versus Ginesh Chandra Jain** reported in **(2016) 6 SCC 675**.

14. On the other hand, Mr. Ashok Kumar Sinha, learned senior counsel submits that there is no error apparent on the face of the record in the judgment of this Court of which review has been sought. It is submitted that the respondent no. 2 appeared in the civil writ which would be evident from the office note recorded on 27.02.2015. The respondent no. 2-petitioner did not file any counter affidavit and at no point of time, any objection as to maintainability of the application under Article 227 of the Constitution of India was raised.

15. It is further submitted that the present petitioner in the review was not even supported by his full brother who is the judgment debtor, however, the petitioner has been able to delay



the execution of the decree by filing frivolous application.

16. Learned senior counsel submits with reference to the provisions contained under Order XXI Rule 97 and Rule 101 that by the impugned order, there was no final adjudication of the application under Rule 97. According to him, it was an interim order, so neither revisable nor appealable. It is submitted that prior to coming into force of 1976 Amendment, the Executing Court was only required to take issue of possession in a summary proceeding and earlier a suit would have lied for this purpose, however now the executing court is competent to decide all the issues. Learned senior counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Ghasi Ram and Others versus Chait Ram Saini and Others** reported in (1988) 6 SCC 200.

Consideration

17. Having heard learned senior counsel for the parties and on perusal of the records, this Court would, at first instance, take note of the relevant provisions i.e. Order XXI Rule 97 to Rule 103 CPC. It is worth mentioning at this stage that Sub-Rule (2) of Rule 97 was substituted by the Act 104 of 1976 w.e.f. 01.02.1977.

**“97. Resistance or obstruction to possession of
immovable property-**



(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

⁴²[(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]

⁴³[**98. Orders after adjudication.** - (1) Upon the determination of the questions referred to in rule 101, the court shall, in accordance with such determination and subject to the provisions of sub-rule (2), -

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or



on his behalf, to be detained in the civil prison for a term which may extend to thirty days].

⁴⁴[**99. Dispossession by decree-holder or purchaser.** - (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]

⁴⁵[**100. Order to be passed upon application complaining of dispossession.** - Upon determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,-

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.]

⁴⁶[**101. Question to be determined.** - All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court



shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.]

⁴⁷[**102. Rules not application to transferee pendente lite.** -Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Explanation. - In this rule, “transfer” includes a transfer by operation of law.]

⁴⁸[**103. Orders to be treated as decrees.** - Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.]”

18. The contention of Mr. Giri, learned senior counsel is that in this case, the learned court below has made an adjudication as to the question of possession, however this Court has noticed that the order of the learned court below would show that the Court has erred in passing the order in piecemeal with ascertaining right and title. There is no final adjudication on all the issues as per mandate of Rule 101 of Order XXI CPC. The provision is very clear and according to



this, all questions including questions relating to right, title and interest in the property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit.

19. Mr. Sinha, learned senior counsel representing the writ petitioner-respondent no. 2 in the present case has placed before this Court a judgment of the Hon'ble Apex Court in the case of **Ghasi Ram** (supra) wherein the distinction regarding the possession prior to 1976 Amendment and the present one have been dealt with in paragraph '7' which reads as under:-

“7. A perusal of the aforesaid provisions would show that the scheme commencing under Rule 97 and onwards before the enactment of the Amendment Act, 1976 was that where a decree-holder or the purchaser at the court sale of property was obstructed in obtaining possession of such property by any person, he was entitled to apply to the court complaining of such resistance or obstruction. On such an application, the executing court was required to make a summary inquiry in regard to the question of possession. In such an inquiry, it was not permissible to the parties to lead evidence and insist upon an elaborate hearing. After inquiry, if the court was satisfied that the obstruction was occasioned without any just cause by the judgment-debtor or



by any other person, the court was empowered to put the party in possession over the property. But if the obstruction was offered by a person other than the judgment-debtor, claiming possession over the property in good faith, the court was entitled to dismiss such application. If an order was passed under Rule 98 allowing the application under Rule 97 CPC, such an order was conclusive between the parties except that a party other than the judgment-debtor against whom the order was passed was entitled to file a fresh suit under Rule 103 to establish his right to the possession. It is with reference to these provisions that Article 11-A of Scheduled I of the Act provided the period of one year to be computed from the date of the order passed under Order 21 Rule 98 CPC. However, the position has changed after amendment of the Code of Civil Procedure by the Amendment Act of 1976. Now, under the amended provisions, all questions, including right, title, interests in the property arising between the parties to the proceedings under Rule 97, have to be adjudicated by the executing court itself and not left to be decided by way of a fresh suit.”

20. The contention of Mr. Y.V. Giri, learned senior counsel that the order passed by learned Executing Court is in the nature of adjudication on the issue of possession and, therefore, it is a decree which would be appealable, has no merit to stand. No error apparent on the face of the record is found in the judgment of which review has been sought. In the case of



Most. Sanjha Devi (supra) and Najbun Nisa (supra), in fact the Hon'ble Court was dealing with a case in which there was no adjudication on any issue, hence, it was held that no appeal would lie.

21. The contention of Mr. Giri, learned senior counsel based on the judgment of the Hon'ble Apex Court in the case of **Radhe Shyam** (supra) seems to be misplaced, inasmuch as it appears from the records that the present application was filed actually under Article 227 of the Constitution of India but at the relevant time, the nomenclature which was provided for such application read 'civil writ.'

22. In the opinion of this Court, the nomenclature being civil writ would not matter on the face of the record as it was filed under Article 227 of the Constitution of India invoking the power of superintendence of this Court.

23. This Court finds that it is not one of those cases in which the judicial order of the civil court has been interfered with in the writ jurisdiction under Article 226 of the Constitution of India. In paragraph 29.2 of the judgment in the case of **Radhe Shyam** (supra), the Hon'ble Supreme Court has categorically held that "Jurisdiction under Article 227 is distinct from the jurisdiction under Article 226."



24. This Court also finds that by the judgment under review, this Court has not issued any writ in the nature of Mandamus under Article 226 of the Constitution of India. This Court has only set aside the impugned order and remitted the matter to the court below.

25. So far as other judgments cited by Mr. Y.V. Giri, learned senior counsel are concerned, since this Court has taken a view that the impugned order of the learned court below cannot come within the purview of a decree, those are clearly distinguishable in the facts of the present case.

26. This civil review application is dismissed.

(Rajeev Ranjan Prasad, J)

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AFR/NAFR	AFR
CAV DATE	16.08.2023
Uploading Date	28.08.2023
Transmission Date	

