

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.456 of 2024

Sanjay Kumar Yadav Son of late Rambilash Yadav @ Ramvilash Yadav
Resident of Ward no.- 13, Dhoi, Navtoli, Dhoi Lakshmisagar, P.S- and
District- Darbhanga.

... .. Petitioner/s

Versus

1. Kaushal Kumar Mishra S/o late Kedar Nath Mishra Resident of Mohalla Mishra Tola, P.O.- Lal Bagh P.S.- Town District Darbhanga.
2. Kanak Lata Mishra, D/o Late Kedar Nath Mishra and W/o Balram Mishra Resident of Khagaul Road Danapur, Satya Kunj Apartment near Rim Break District Patna.
3. Kumud Mishra D/o late Kedar Nath Mishra and W/o Ram Kumar Mishra Resident of village and Post Kantaul Ward No.- 11 District Darbhanga.
4. Manish Kumar Mishra, S/o Lakshmi Nath Mishra Resident of Mohalla Mishra Tola, P.O.- Lal Bagh P.S.- Town District Darbhanga.
5. Prabha Mishra, D/o late Keshavnath Mishra and W/o Manoj Kumar Shukla Teacher of DAV Public School, Bihar State Electricity Board Colony Patna.
6. Jyoti Kumari, D/o late Keshavnath Mishra W/o Pradeep Kumar Resident of Mohalla Urdu Bazar, Neem Chowk, Darbhanga.
7. Rashmi Pandey, Daughter of late Keshavnath Mishra and wife of Vineet Kumar Pandey Resident of Lalu Chak Bhagalpur, P.O. and P.S. Sadar Dist.- Bhagalpur.
8. Ritu Priya, Daughter of Keshavnath Mishra wife of Amresh Kumar Mishra Resident of Mohalla New Area Bishar Talab, Gaya, P.O. and P.S. Sadar, District- Gaya.
9. Smt. Phulo Devi, W/o Late Ramvilas Yadav Resident of Ward no.- 13, Dhoi, Navtoli, Dhoi Lakshmisagar, Keotiranway Darbhanga P.S.- and District- Darbhanga.
10. Vivekananda Yadav, Son of Late Ramvilas Yadav Resident of Ward no.- 13, Dhoi, Navtoli, Dhoi Lakshmisagar, Keotiranway Darbhanga P.S.- and District- Darbhanga.
11. Usha Devi, Daughter of Late Ramvilas Yadav, Wife of Ramashish Yadav Resident of Ward no.- 13, Dhoi, Navtoli, Dhoi Lakshmisagar, Keotiranway Darbhanga P.S.- and District- Darbhanga.
12. Most. Ramrati Devi, W/o Rajgir Sah Resident of village Kalyana, P.S.- Sadar District Darbhanga.
13. Lakshman Sah, S/o Late Rajgir Sah Resident of village Kalyana, P.S.- Sadar District Darbhanga.
14. Raju Sah (Minor), Under the guardianship of his mother namely Most. Ramrati Devi Resident of village Kalyana, P.S.- Sadar District Darbhanga.



... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Bhubneshwar Prasad, Advocate
For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT

Date : 14-05-2024

The matter has been listed on mentioning being made on behalf of the petitioner.

2. Heard learned counsel for the petitioner and I intend to dispose of the petition at the stage of admission itself.

3. The instant petition has been filed under Article 227 of the Constitution of India for setting aside the order dated 25.11.2023 passed in Eviction Execution Case No. 17 of 1982 by learned Munsif 1st, Darbhanga, whereby and whereunder the petition dated 28.02.2019 filed by judgment-debtor nos. 2 and 4 for dropping the execution proceeding was rejected.

4. Learned counsel for the petitioner submits that Kedarnath Mishra and others had filed Title Suit No. 98 of 1976 before learned Munsif 1st, Darbhanga against the father of the petitioner and another for declaration of title and recovery of possession of suit land as described in Schedule I of the plaint. The suit was decreed in favour of plaintiff and defendant no. 2 was directed to vacate the premises within two months vide judgment and decree dated 26.02.1982 and 15.03.1982,



respectively. Thereafter, plaintiff filed Title Execution Case No. 17 of 1982 before learned Munsif 1st, Darbhanga to execute the judgment and decree passed by learned Munsif 1st, Darbhanga. Learned counsel further submits that after passing of the aforesaid judgment and decree, the decree-holder no. 2 namely, Lakshmi Nath Mishra came in possession and sold the land in favour of the petitioner by registered sale deed dated 08.07.2003. So the petitioner came in possession of his purchased land and thereafter, his name was mutated and he started paying rent to the State of Bihar which issued him rent receipts. On 28.02.2019, a petition was filed on behalf of judgment-debtor nos. 2 to 4 for dropping the proceeding in the court of learned Munsif 1st, Darbhanga in Execution Case No. 17 of 1982 on the ground that decree-holder no. 2 has already sold the land through a registered sale deed in favour of the petitioner and decree has not remain executable. The decree-holder filed rejoinder on 24.04.2019, wherein he has stated that decree-holder had also filed Partition Suit No. 133 of 2008 before the court of learned Sub-Judge 1st, Darbhanga in which the judgment-debtor had also been made party. Vide order dated 25.11.2023 the learned Munsif 1st, Darbhanga rejected the petition dated 28.02.2019 filed by the judgment-debtor nos. 2 to



4 holding that it was not lawful to drop execution proceeding.

5. Learned counsel for the petitioner argues that the learned executing court did not consider that decree was not executable in view of the fact that judgment-debtor has already purchased the land in question from one of the decree-holders and as such there was no necessity to continue the execution proceeding in the eye of law. The learned executing court further committed error in appreciation of the legal principle that if a co-sharer has sold some of the land out of the land in dispute, it shall be carved out in favour of the defendant purchaser out of the share of the co-sharer. Learned counsel further submits that the learned executing court has failed to appreciate the fact that some of the lands in possession of contesting defendant were acquired by his father under the provisions of Bihar Privileged Persons Homestead Tenancy Act (hereinafter the 'BPPHT Act'). Hence, such land was out of the purview of the plaintiffs-decree holders stand and consequently the execution could not have been initiated to the extent of that portion of land in dispute which was coming in possession of the petitioner without having shown that the order was got set aside by the plaintiffs in a proceeding under BPPHT Act. Learned counsel further submits that in this regard the



averments has also been made by the defendants in the written statement. Learned counsel further submits that Section 16 of the BPPHT Act bars any execution proceeding against such land covered by the Act. Learned counsel further submits that the learned executing court has also lost sight of the fact that Title Suit No. 98 of 1978 was filed by three brothers against the father of the present petitioner for 5 katha 10 dhurs of land appertaining to Khata No. 812 Khesra No. 1119/3078 whereas this petitioner also claimed and has filed an objection in respect of 5 katha 10 dhurs of land having purchased from one of the decree-holders, namely Lakshmi Nath Mishra through a registered sale deed. Hence, the decree is not executable in view of the fact that the judgment-debtor has already purchased the land from the decree-holder. Learned counsel further submits that the learned executing court has not considered the fact about filing of Partition Suit No. 133 of 2008 by one of the brothers of vendor of this petitioner who also impleaded the petitioner as one of the parties and sought relief of 1/5 share whereas in earlier Title Suit No. 98 of 1978 he had sought relief of restoration of physical possession after removing whatsoever structure over it. Learned counsel submits that the learned executing court committed further error when it rejected the



objection petition of the petitioner filed under Order 21 Rule 97 of the Code of Civil Procedure (in short 'the Code') is summary manner as the petition of the petitioner was dismissed without adjudication of the *lis* between the parties regarding right, title and interest of the parties. Learned counsel has relied on a decision of this Court in the case of ***Most. Sanjha Devi Vs. Amar Yadav & Ors***, reported in ***2007 (4) PLJR 727***, wherein learned Single Judge hold that if there is no adjudication then it is not an order in terms of Rule 103 of Order 21 of the Code. Learned counsel further referred to a decision of the Hon'ble Supreme Court in the case of ***Sameer Singh & Anr. Vs. Abdul Rab & Ors***, reported in ***(2015) 1 SCC 379*** on the point that where executing court does not adjudicate upon *lis* between the parties under Order 21 Rule 97 of the Code on the ground that it became functus officio and thereby lacked jurisdiction, order passed by executing court cannot be deemed to be a decree and also on the ground that subsequent to application filed under Order 21 Rule 97 executing court has power to adjudicate upon all questions relating to rights, title and interest in property arising between the parties including those of the stranger. Thus, learned counsel submits that the impugned order is not sustainable and the same may be dismissed.



6. I have given my thoughtful consideration on the various aspect of the matter. Admittedly the petitioner is one of the judgment-debtors. Though, of late it has been contended by the petitioner that after purchasing the property from one of the decree-holders, his status has changed and he has not remained the judgment-debtor. His position is similar to a third party who is in possession of the suit property against which decree is being executed. Provision regarding execution by joint decree-holder under Order 21 Rule 15 of the Code reads as under:-

“15. Application for execution by joint decree-holders.- (1) Where a decree has been passed jointly in favour of more persons than one, any one or more or such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.”

Obviously where there are more than one decree-



holder any one or more of such persons can seek execution of the decree. Now coming back to the facts of the case, admittedly the decree has been issued for 5 katha 10 dhurs of land and was in favour of three decree-holders. The claim of the petitioner that he purchased the total decretal land from one of the decree-holders would not change his status from that of judgment-debtor to a decree-holder or like a third party/stranger in possession of the suit property against which the execution is being sought. The petitioner has all along being knowing about the execution proceeding which was being prosecuted by the three decree holders and even then, the petitioner purchased the property from one of the decree-holders hoping to trump the claim of the decree-holders, I think that would be wishful thinking on the part of the petitioner. His status would remain as a judgment-debtor and no right accrues to him for filing objection under Order 21 Rule 97-101 of the Code.

7. The Hon'ble Supreme Court in the case of ***Jagdish Dutt Vs. Dharam Pal*** reported in ***(1999) 3 SCC 644*** observed that where a joint decree for actual possession of immovable property is passed and one of the coparceners assigns or transfers his interest in the subject matter of the decree in favour of the judgment-debtor, the decree gets



extinguished to the extent of the interest so assigned and execution could lie only to the extent of remaining part of the decree. The Hon'ble Supreme Court further held that purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained he cannot be deprived of the possession thereof for a joint decree-holder can seek for execution of a decree in the whole and not in part of the property. The Hon'ble Supreme Court further held that a joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the shares of the decree-holders are defined or those shares can be predicted or the share is not in dispute. But when the judgment-debtor claims the assignment of whole of the property, no question arises for determination of the share of the coparcener and there would be no requirement for ascertaining rights of the party so far execution of decree is concerned since it has been observed that a joint decree can be executed as a whole since it is not divisible and it can be executed in part only when the shares of the decree-holders are defined which is again not the case before us.



Moreover, Order 21 Rule 15 of the Code also provides for execution of the whole decree. Unless the share of the vendor of the petitioner is ascertained, the petitioner cannot resist the execution of the decree.

8. In the case of ***Smt. Ved Kumari (Dead through her legal representative) Dr. Vijay Agarwal Versus Municipal Corporation of Delhi through its Commissioner*** reported in ***2023 Livelaw (SC) 712*** the Hon'ble Supreme Court reiterated that it is the duty of the executing court to issue warrant of possession for effecting physical delivery of the suit land to the decree-holder in terms of Schedule of the suit property and if any resistance is offered by any stranger/encroacher to the decree, the same be dealt with in accordance with Rules 97 to 101 of Order 21 of the Code. But as already held, the status of the petitioner is not like a stranger. Further, the Hon'ble Supreme Court ordained that the executing court cannot dismiss the execution petition only on the ground that the possession was passed to a third party/encroacher and held that if the same is allowed to have happen every judgment-debtor shall hand over possession to a third party to defeat the decree-holder's right and entitlement to enjoy the fruits of litigation and this may continue indefinitely and no decree for immovable property



can be executed. The petitioner cannot be allowed to defeat the mandate of judgment and decree passed in favour of the plaintiffs on the ground that since he purchased the suit property from one of the decree-holders he cannot be dispossessed till the time the suit land is partitioned *inter se* parties by metes and bounds as claimed by the learned counsel for the petitioner raising the issue that the decree-holders have already instituted a partition suit in which the petitioner is also a party. Allahabad High Court in the case of ***Smt. Lalita Devi Vs. Smt. Kamla Devi*** reported in ***AIR 1995 Allahabad 21*** has held that in case of a joint decree where the shares of the parties are distinct or separable and even though some of the decree-holders have transferred their shares to the judgment-debtors, the decree does not become in-executable as a whole but can be executed by one of the decree-holders under Order 21 Rule 15 of the Code at least the extent of the share of the decree-holder. But in the present case the shares are undefined and the petitioner has not purchased the share of one of the decree-holders rather he claims to have purchased the total property through one of the decree-holders and when the share is undefined and has not been determined, the decree would be required to be executed as a whole. Again taking note of the fact that in the decree the



share of the plaintiffs/deed-holders have not been specified and it is joint deed passed in favour of the deed-holders, such deed could be executed as a whole, by one or more of the joint deed-holders especially when the petitioner does not claim certain share of his vendor in the suit property which is under execution for deed.

9. In the light of discussion made so far, I arrive at the conclusion that the application filed by the petitioner under Order 21 Rule 97 was not maintainable and for this reason, the reliance placed by learned counsel for the petitioner in the case of *Most. Sanjha Devi Vs. Amar Yadav & Ors* (supra) and in the case of *Sameer Singh & Anr. Vs. Abdul Rab & Ors.* (supra) are not of any help. Moreover, there is no dispute over the jurisdiction of the executing court under Order 21 Rule 97 -101, to dispose of an application like a suit if a person raises objection against his dispossession in an execution proceeding and thus adjudicating the right, interest and title of the parties.

10. The petitioner could have claimed certain rights, if he would have confined his claim to the extent of share of his vendor and in that case he could have protected his possession to the extent of interest of his transferor. But the same is not the case here. As already held petitioner is one of the judgment-



debtor and for this reason could not be considered to be a stranger/third party in possession resisting the delivery of possession and for this reason his objection could not be decided by following the procedure prescribed under Order 21 Rule 97 – 101 of the Code.

11. So far as the submission of learned counsel for the petitioner regarding the land of the petitioner falling under the provisions of BPPHT Act is concerned, the same is not relevant for the purpose of execution as the executing court cannot go behind the decree and the issue should have been taken up by the defendant at the time of trial or even at the stage of appeal and he is not permitted to rake up this issue at the time of execution.

12. In the light of discussion made hereinbefore, I do not find any infirmity in the impugned order and same is affirmed.

13. Accordingly, the present petition stands dismissed.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	18.05.2024
Transmission Date	NA

