

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.726 of 2023

1. S. Manauwer Hussain Son of Late S. Manjoor Hussain Resident of Mohalla Kashi Takiya, P.S.- Bihar Sharif, District Nalanda.
2. Most. Nausehaba Hassan @ Naushaba Hassan Wife of late Syed Aftab Husain Resident of Mohalla Kashi Takiya, P.S.- Bihar Sharif, District Nalanda.
3. S. Rasid Hussain @ Syed Rashid Hussain Son of late Syed. Aftab Husain Resident of Mohalla Kashi Takiya, P.S.- Bihar Sharif, District Nalanda. At present House No. 111, Near Rahmatganj Masjid, Rahmatganj, Pandar Pala (Bishunpur) P.S Bank More, District Dhanbad(Jharkhand).
4. Shajia Hassan @ Shazia Afrin D/o Late Syed Aftab Husain Resident of Mohalla Kashi Takiya, P.S.- Bihar Sharif, District Nalanda.
5. Neda Arfeen @ Nada Afreen D/o Late Syed Aftab Husain Resident of Mohalla Kashi Takiya, P.S.- Bihar Sharif, District Nalanda.

... .. Petitioner/s

Versus

1. S.M. Eqbal Mazhar Son of Syed Majhar Hussain Resident of Mohalla- Bari Road, P.S. Kotwali Town, District- Gaya.
2. Bibi Shakila Khatoon D/o Syed Majhar Husain, Resident of Mohalla- Bari Road, P.S. Kotwali Town, District- Gaya.
3. Bibi Shahnaz Khatoon D/o Syed Majhar Husain, Resident of Mohalla- Bari Road, P.S. Kotwali Town, District- Gaya.
4. Bibi Naushaba Khatoon D/o Syed Majhar Husain, Resident of Mohalla- Bari Road, P.S. Kotwali Town, District- Gaya.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Abul Kalam, Advocate
For the Respondent/s	:	Mr. Bishwa Nath Chaudhary, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT

Date : 20-03-2024

Heard learned counsel for the parties on the point of maintainability.

2. The learned counsel for the petitioners submits that the impugned order passed in Miscellaneous Appeal No. 42 of 1995 is an order without jurisdiction. The orders have been passed in miscellaneous appeal against Order 21 Rule 90 read with Section 151 of the Code of Civil Procedure (in short ‘the Code’)



on a petition filed under Order 43 Rule 1(J) of the Code. But Order 43 Rule 1(J) of the Code provides for an appeal only against an order under Rule 72 or Rule 92 of Order 21 of the Code. Hence the learned appellate Court was not having any jurisdiction when it passed the orders after entertaining the petition filed under Order 21 Rule 90 read with Section 151 of the Code.

3. Learned counsel for the respondent submits in fact the petition was filed under Rule 92 of Order 21 of the Code though not specifically mentioned. The learned counsel further submits that the learned appellate Court has got the jurisdiction and it passed an effective legal order since application to set aside sale on ground of irregularity or fraud could be filed under Rule 90 of Order 21 of the Code and it is Rule 92 of the Order 21 of the Code which provides what would happen when application under Rule 89 or Rule 90 or Rule 91, is filed or no such application is filed or where such application is filed and disallowed. Since consequences of making application under Rule 90 of Order 21 of the Code have been discussed in Rule 92 of Order 21 of the Code, naturally a petition challenging such order passed on a petition under Rule 90 of Order 21 of the Code could be challenged in the appellate jurisdiction under



Order 43 Rule 1(J) of the Code.

4. I find merit in the submissions of learned counsel for the respondent. Rule 90 of Order 21 reads as under :

“90. Application to set aside sale on ground of irregularity or fraud.-(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.”

5. This rule provides for the condition where any immovable property has been sold in execution of decree and a person affected by the sale might apply to the Court to set aside



the sale on the ground of a material irregularity or fraud in publishing or conducting it. Rule 92 of Order 21 of the Code reads as under :

“92. Sale when to become absolute or be set aside.- (1) *Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the court shall make an Order confirming the sale, and thereupon the sale shall become absolute: [Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the court shall not confirm such sale until the final disposal of such claim or objection.]*

(2) *Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within 1 [sixty days] from the date of sale, [or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the court, the court shall make an Order setting aside the sale:]*

Provided that no Order shall be made unless notice of the application has been given to all



persons affected thereby:

[Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.]

(3) No suit to set aside an Order made under this rule shall be brought by any person against whom such Order is made.

[(4) Where a third party challenges the judgment debtor title by filing a suit against the auction purchaser, the decree holder and the judgment debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the court shall direct the decree holder to refund the money to the auction purchaser, and where such an Order is passed the execution proceeding in which the sale had been held shall, unless the court otherwise directs, be revived at the stage at which the sale was ordered.]”

6. So it is apparent that consequences of filing/non-filing an application under Rule 90 of Order 21 of the Code have been described in Rule 92 of Order 21 of the Code and against



such consequences, the Code provides for an appeal under Order 43 which in turns provides a list for appealable orders. On this aspect of the matter, I do not find much merit in the submissions of learned counsel for the petitioners that the learned Additional District Judge, II, Gaya was not having jurisdiction when it entertained an appeal against the order dated 01.04.2023 passed in Misc Appeal No. 42 of 1995 filed by the petitioners.

7. Since the impugned order is a final order, the proper remedy against such order lies under Section 115 of the Code and not in a proceeding under Article 227 of the Constitution of India. However, learned counsel appearing for the petitioners has referred to a decision dated 13.10.2022 of the Hon'ble Apex Court in **Raj Shri Agrawal @ Ram Shri Agrawal & Anr vs. Sudheer Mohan & Ors** passed in **Civil Appeal No. 7266 of 2022** on the point that even if remedy is available under Section 115 of the Code, writ petition under Article 227 of the Constitution of India shall be maintainable. But reliance on the said case would not be of much help to the cause of the petitioners since the Hon'ble Supreme Court in Paragraph No. 3 has held as under :

“3) By the impugned judgment and



order, the High Court has dismissed the writ petition, under Article 227 of the Constitution of India, observing that the writ petition, under Article 227 of the Constitution of India, is not maintainable as remedy by way of revision under Section 115 CPC is available to the appellant/plaintiffs. As observed by this Court in catena of decisions and even in the decisions considered by the High Court, the view taken by this Court is that where there is availability of remedy under Section 115 CPC normally "the petition under Article 227 of the Constitution of India would not lie". That does not mean that writ petition, under Article 227 of the Constitution of India, shall not be maintainable at all. There is a difference and distinction between the entertainability and maintainability. The remedy under Article 227 of the Constitution of India available is a constitutional remedy under the Constitution of India which cannot be taken away. In a given case the Court may not exercise the power under Article 227 of the Constitution of India if the Court is of the opinion that the aggrieved party has another efficacious remedy available under the CPC. However, to say that the writ petition under Article 227 of the Constitution of India shall not be maintainable at all is not tenable."

8. Obviously, the Hon'ble Apex Court, while



differentiating between entertainability and maintainability, has held that the High Court may not exercise the power under Article 227 of the Constitution of India, if the Court is of the opinion that the aggrieved party has another efficacious remedy available under the Code. The Apex Court has differentiated between entertainability and maintainability and further in paragraph No. 4 has held as under.

“4) Even otherwise, it is required be noted that, to even according to the High Court, the remedy available to the original plaintiffs was under Section 115 of the CPC. In that view of the matter, the High Court ought to have converted the writ petition under Article 227 of the Constitution of India into revision petition under Section 115 CPC and ought to have considered the same in accordance with law and on its own merits, rather than permitting the writ petitioners to file a fresh revision application under Section 115 of the CPC. It would unnecessary increase the burden of the Court. To avoid further multiplicity, even the High Court ought to have converted the writ petition under Article 227 of the Constitution into revision under Section 115 of the CPC.”

9. It further transpire that in that case the matter was remanded to the High Court to consider the writ petition in



accordance with law on merits. While remanding, it was made clear that to avoid further multiplicity, even the High Court ought to have converted the writ petition under Article 227 of the Constitution into revision under Section 115 of the CPC.

10. Taking cue from the aforesaid cited decision, the learned counsel for the petitioners seeks permission of the Court to convert the present petition into a civil revision petition and accordingly permission is granted and the learned counsel is directed to convert the present petition into civil revision petition within four weeks. Office is directed to extend all help to the learned counsel for the parties.

(Arun Kumar Jha, J)

Prakash/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

