

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.138 of 2018

1. Anil Kumar Roy
2. Navin Kumar Roy, Both sons of Late Harbans Roy,
3. Most. Sunaina Devi, W/o Late Harbans Roy, All residents of Village- Chainpur Mubarakhpur, P.O.- Chainpur, P.S.- Siswan, District- Siwan.
4. Dipika Kumari, D/o Late Harbans Roy, W/o Shri Amlesh Mishra, R/o Mohalla- Alka Colony, P.O.- Bahadurpur, P.S.- Bahadurpur, District- Patna.

... .. Petitioner/s

Versus

2. Kamlesh Singh
3. Prakash Singh @ Laltu Singh, Both sons of Janak Singh,
4. Pratibha Devi
5. Puranjana Devi
6. Priti Devi, All daughters of Janak Singh, All residents of Village- Chainpur Mubarakhpur, Hal- Chainpur, P.S.- Siswan, District- Siwan.
7. Most. Raj Kishori Devi, W/o Late Paramhans Roy
8. Surendra Ray, S/o Late Paramhans Roy, Both residents of Mauza- Chainpur Mubarakhpur, P.S.- Siswan, Hal- Chainpur, District- Siwan.
9. Umrawati Devi, W/o Dharmendra Singh, R/o Village- Amlauri, P.O.- Amlauri, P.S.- Siwan Mufassil, District- Siwan.
10. Vijanti Devi, W/o Ram Udar Pandey, R/o Village- Pachua, P.S.- Ekma, District- Saran.
11. Sijanti Devi, W/o Jai Kumar Singh, R/o Village- Newari, P.O.- Newari, P.S.- Raghunathpur, District- Siwan.
12. Prabhawati Devi, W/o Narendra Roy, R/o Village- Husena Bangra, P.O.- Chainpur, P.S.- Siswan, District- Siwan. All daughters of Late Paramhans Roy.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Vinod Kumar Singh, Advocate Mrs. Vagisha Pragya Vacaknavi, Advocate
For the Respondent/s	:	Mr. Shailendra Kumar Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 25-09-2025

The instant civil miscellaneous petition has been filed
by the petitioners for quashing the order dated 18.12.2017
passed by the learned Sub Judge-VII, Siwan in Execution Case



No. 01 of 1999 whereby and whereunder the aforesaid execution case was closed and the petitioners were given an option to file fresh execution case. Further prayer has been made to restore the aforesaid execution case to its original position.

2. Briefly stated, the facts of the case, as flowing from the record, are that the plaintiffs and respondent 2nd set are decree holders and respondent 1st set are judgment debtors. The original plaintiffs, namely Harbans Roy and Paramhans Roy, instituted Title Suit No. 348 of 1985/7 of 1992 for declaration of their title and recovery of possession in respect of suit land comprised in Khata No. 284, Plot No. 3283 measuring 1 *bigha* 6 *katha* 2 *dhur* situated in Mauza Chainpur, Baharakhpur, P.S. & District-Siwan. The aforesaid title suit was dismissed by the learned Sub Judge-VII, Siwan vide judgment dated 09.12.1992 and decree dated 21.12.1992. Thereafter, original plaintiffs preferred Title Appeal No. 1 of 1993 against the judgment and decree of the learned trial court. The Title Appeal No. 1 of 1993 was allowed by learned Additional District Judge-II, Siwan vide judgment dated 27.11.1998 and the judgment and decree of the learned trial court passed in Title Suit No. 348 of 1985/7 of 1992 were set aside. It further transpires that the defendants of



Title Suit No. 348 of 1985 and respondents of Title Appeal No. 1 of 1993 preferred Second Appeal No. 20 of 1999 which was dismissed on 12.01.2000 under Order 41 Rule 11 of the Code of Civil Procedure (for short 'the Code') but with modification of the judgment of the first appellate court that the right, title and interest over the suit land should be declared in favour of the plaintiffs subject to the mortgages encumbered on the suit land in favour of the defendant no.4 and the father of the defendant no.1, namely Raj Narayan. It was also held that the plaintiffs shall be entitled to redeem those mortgages in due course of law and get recovery of possession on the basis of title. After execution case being filed on behalf of the decree holders, an objection petition dated 09.10.2014 was filed by the judgment debtors in the aforesaid execution case for dismissal of the execution proceeding. The said application was heard and rejected on 18.04.2016. The rejection was challenged by the judgment debtor by filing Civil Misc. No. 568 of 2016 which was also dismissed by this Court on 07.09.2016. Prior to that, judgment debtors filed a Misc. Case No. 7 of 2001 against the decree holders for dismissal of Execution Case No. 1 of 1999. But the said miscellaneous case was dismissed. Thereafter, it appears the judgment debtors filed another application dated



08.03.2017 under Section 151 of the Code. A rejoinder dated 21.03.2017 was filed by the decree holders. The application dated 08.03.2017 filed by the judgment debtors was allowed by the learned executing court vide order dated 18.12.2017 which is under challenge before this Court.

3. Learned counsel for the petitioners submitted that the impugned order is not sustainable as the learned executing court has acted illegally and without jurisdiction while passing the impugned order. Learned counsel further submitted that for better appreciation of the issue involved in the case it was necessary to look into the facts of the case. The father of the petitioner nos. 1, 2 and 4, namely Harbans Roy (since deceased) purchased through registered sale deed dated 09.01.1974 the aforementioned suit land having area of 1 *bigha* 6 *katha* 2 *dhur* for a consideration amount of Rs. 5,000/- from one Shiv Kumar Giri. Rs. 3,000/- was mortgage money which was kept in reserve in the aforesaid registered sale deed to be paid to mortgagee Jaggu Tiwari of registered mortgage dated 29.06.1967 in respect of aforesaid land executed by Shiv Kumar Giri in favour of Jaggu Tiwari. From the redemption note dated 31.10.1971 on the back side of the first sheet of registered mortgage deed, it would appear that Jaggu Tiwari received Rs.



3,000/- and he handed it to one Raj Narayan Rai. Again Mahant Shiv Kumar Giri executed another mortgage deed dated 27.10.1991 in respect of four plots including the entire area of the purchased plot of Rai Narayan Rai for mortgage money of Rs. 7,000/- having total area 4 *bigha* 8 *katha* 16 *dhur* situated at the same place where the purchased land is also situated and therein it has been mentioned that Rs. 3,000/- of mortgage money is payable to Jaggu Tiwari. But the said Jaggu Tiwari has already received Rs. 3,000/- from Raj Narain Rai in respect of purchased land of 1 *bigha* 6 *katha* 2 *dhur*. Thus, the decree holders were liable only to pay mortgage amount of Rs. 3,000/- as per the sale deed dated 09.01.1974 but in order to avoid further litigation, the vendee agreed to pay the mortgage amount of Rs. 7,000/- and also filed application to that effect on 08.06.2016 with a prayer to permit him to deposit the mortgage amount of Rs. 7,000/- in the court which relates to mortgage deed dated 27.10.1971 pursuant to the order dated 08.04.2016 passed by the learned 3rd Sub Judge, Siwan in Execution Case No. 01 of 1999. This prayer was opposed by the judgment debtor Janak Singh by filing his rejoinder. In a similar matter, judgment debtor Janak Singh and others moved the High Court against the order dated 18.04.2016 on the objection petition of



the judgment debtors in Civil Misc. No. 568 of 2016 but this Court dismissed the same vide its order dated 07.09.2016. Thereafter, Kamlesh Singh, son of judgment debtor Janak Singh, filed an application dated 08.03.2017 without mentioning any provision of law, for dismissal of the execution case and also for direction to get the decree executed passed by the High Court in Second Appeal No. 20 of 1999. Learned counsel referring to the decision of this Court in Second Appeal No. 20 of 1999 pointed out that in terms of the orders of this Court in the second appeal, the petitioners are only entitled to redeem the mortgage made in respect of the suit land and not in respect of other land but in spite of that the petitioners were ready and filed petition for grant of permission to deposit an amount of Rs. 7,000/- which includes the amount of mortgage for other land as well, in order to avoid further delay. Learned counsel further submitted that mortgage money of the mortgage deed dated 29.06.1967 has already been deposited by the petitioners. Furthermore, the petitioners have always been ready to deposit Rs. 7,000/- and they moved an application on 08.06.2016 before the learned executing court for granting permission to deposit the aforesaid amount in compliance of order dated 09.10.2014 but instead of granting permission to deposit the aforesaid



amount, the execution case was dismissed vide order dated 08.12.2017 which is in complete violation of the law.

4. Learned counsel further submitted that the original judgment debtors made an application under Section 47 read with Section 151 of the Code which was registered as Misc. Case No. 7 of 2001. On 23.12.2010, the objection of the judgment debtors made in Misc. Case No. 7 of 2001 was dismissed for want of prosecution. Earlier, an application was filed for dismissing the Execution Case No. 1 of 1999 and such application was itself dismissed for non-prosecution and Misc. Case No. 5 of 2009 was filed to restore it. But the judgment debtors did not show any interest in Misc. Case No. 7 of 2001 and accordingly, recording its opinion that keeping the case pending was not in the interest of justice, the learned executing court, vide order dated 23.12.2010 dismissed the matter for want of prosecution. This dismissal was not challenged and has attained finality. Learned counsel next submitted that the learned executing court failed to consider that judgment debtors had been adopting dilatory tactics to delay the execution by filing frivolous petitions. Learned counsel further submitted that dismissal of the execution case is on a frivolous petition which was the second petition filed with similar facts and for this



reason the amount of Rs. 7,000/- could not be deposited. Learned counsel stressed that there was no liability of the petitioners to pay that amount because the order of this Court relates only to the suit land and no other lands. Mortgage money of Rs. 7,000/- is also for other lands including the suit lands which is evident from the mortgage deed dated 27.10.1971. Learned counsel further submitted that the learned executing court has completely failed to take into consideration the fact that the objection raised by the judgment debtors/respondent 1st set were already decided by the same court on 18.04.2016. If the question of dismissal of execution case was already decided by the competent court, the judgment debtors were not permitted to raise the same question between the same party in the same proceeding. Therefore, the learned executing court failed to appreciate that application of the judgment debtors was barred by *res judicata* since *res judicata* applies even at subsequent stages of same proceeding. Learned counsel further submitted that this fact was not considered by the learned executing court though it was specifically raised by the petitioners in their rejoinder. Therefore, the learned executing court committed jurisdictional error in ignorance of legal principles and acted with illegality and material irregularity.



Learned counsel reiterated that it is well settled law that principles of *res judicata* applies in same proceeding in subsequent stages. In the present case, the parties are same, subject matter is same and real controversy, regarding continuance of execution proceeding after orders passed by the High Court in Second Appeal No. 20 of 1999 dismissing the said appeal under Order 41 Rule 11 of the Code, has also been decided by the court of competent jurisdiction twice earlier; firstly in Misc. Case No. 7 of 2001 and secondly on objection petition dated 09.10.2014. Therefore, the learned executing court has exercised the jurisdiction which was not vested in it while passing the impugned order. Learned counsel further submitted that the order dated 18.04.2016 has been upheld by this Court vide order dated 07.09.2016 passed in Civil Misc. No. 568 of 2016. Learned counsel relied on the decision of the Hon'ble Supreme Court in the case of ***Y.B. Patil And Ors. vs. Y.L. Patil*** reported in ***(1976) 4 SCC 66***, in the case of ***Ashok Kumar Srivastav vs. National Insurance Company, Limited & Ors.***, reported in ***(1998) 4 SCC 361*** and in the case of ***Ishwar Dutt vs. Land Acquisition Collector And Anr.***, reported in ***(2005) 7 SCC 190*** on the proposition that the principle of Section 11 of the Code will apply at subsequent stages of the



same proceedings in respect of orders already rendered in those proceedings. But even this fact was also not taken into consideration by the learned executing court and, hence, the impugned order is perverse and the same needs to be set aside.

5. On the other hand, learned counsel appearing on behalf of the judgment debtors/respondents vehemently contended that there is no infirmity in the impugned order and the same does not need any interference by this Court. Learned counsel, at the outset, referred to the decision of this Court in Second Appeal No. 20 of 1999 wherein it has been recorded as under:-

“I find that the decree passed by the appellate court requires some modification with regard to the relief of recovery of possession. The decree passed by the appellate court is modified to the extent that the right, title and interest over the suit land should be declared in favour of the plaintiffs subject to the mortgages encumbered of the suit land in favour of the defendant no.4 and late Raj Narayan/defendant No.1. The plaintiffs shall be entitled to redeem those mortgages in due course of law and get recovery of possession on the basis of title.”

6. Learned counsel further submitted that statute provides for redemption of mortgage and the petitioners did not



comply the orders of this Court and pursued the Execution Case No. 1 of 1999 which was based on the decree of the first appellate court. Mortgage was not redeemed in accordance with law though the petitioners have to get the suit land redeemed by due process of law as directed by this Court while dismissing the appeal under Order 41 Rule 11 of the Code. Procedure for redemption of mortgage of immovable property is prescribed under Order 34 of the Code which was not resorted to by the petitioners. For this reason, any amount deposited by the petitioners in the court below does not entitle them to redeem the mortgage in violation of prescribed procedure. Learned counsel clarified that the petition dated 09.10.2014 filed earlier for dismissal of execution case, was not held maintainable on the ground that mortgage deed dated 29.06.1967 has not been redeemed and the learned trial court directed the decree holder to comply the directions of the High Court and the objection petition was accordingly disposed of. Learned counsel further submitted that the decree holder had been pursuing Execution Case No. 1 of 1999 on the basis of decree of first appellate court. But the first appellate court's decree was modified in Second Appeal No. 20 of 1999 vide order dated 12.01.2000. Hence, considering the rival submission of the parties, the



learned executing court passed the impugned order holding that the execution case was being pursued by the decree holders on the basis of the decree of the first appellate court which was modified by the High Court in second appeal and so the present execution was ordered to be closed with liberty to the decree holders to file fresh execution case on the basis of modified decree of the High Court. Learned counsel further submitted that application under Section 47 read with Section 151 of the Code filed before the learned executing court and registered as Misc. Case No. 7 of 2001 was filed on the ground that mortgagee Jaggu Tiwari who was not made party in execution case from whom the delivery of possession is being sought and in absence of Jaggu Tiwari execution case cannot proceed. Therefore, the objection petition and miscellaneous case filed by the judgment debtors were on different grounds and their disposal would not affect the merits of the application dated 08.03.2017 filed by the judgment debtors. Learned counsel referred to a decision of the Hon'ble Supreme Court in the case of ***Jamila Begum (Dead) Thr. Lrs. vs. Shami Mohd. (D) Thr. Lrs. & Anr.***, reported in ***AIR 2019 SC 72*** wherein in paragraph no. 33, the Hon'ble Supreme Court held that Order 34 Rule 7 of the Code stipulates that in a suit for redemption of mortgage, the



court shall prepare the preliminary decree in accordance with Order 34 Rule 7 of the Code. The High Court has passed a decree for redemption of mortgage simpliciter. The High Court could not have passed the decree for redemption without following the procedure laid down in Order 34 Rule 7 and 8 of the Code which, in turn, lays down a detailed procedure for passing a preliminary decree and final decree in the suit for redemption. Therefore, the learned trial court rightly allowed the objection petition of the judgment debtors/respondents 1st set. Learned counsel further submitted that after dismissal of petition dated 19.10.2014 by the learned Sub Judge vide order dated 18.04.2016, the judgment debtors preferred Civil Misc. No. 568 of 2016 which came to be dismissed on 07.09.2016 by a learned Single Judge of this Court who held that after deposit of the amount of mortgage with permission of the court in the year 2001, the modification made by the High Court in second appeal has been complied with but such finding is against the settled principles of law and, therefore, order dated 07.09.2016 passed in Civil Misc. No. 568 of 2016 is *per incuriam* since it has not considered the settled proposition of law that unless mortgage is redeemed in accordance with the procedure established by law, merely depositing the money would not



suffice. Therefore, the execution case could not proceed. Thus, the learned counsel submitted that unless the mortgage is redeemed in accordance with procedure established by law, merely deposit of money by decree holders would not satisfy the rigours of law and on this ground, the decree holders cannot say that the mortgage has been redeemed and now they should be handed over the possession. Moreover, no orders for recovery of possession has been passed. Therefore, there is no infirmity in the impugned order and the same is proper and valid.

7. In reply, learned counsel for the petitioners referred to the decision of the Hon'ble Supreme Court in the Case of **Gorie Gouri Naidu (Minor) & Anr. vs. Thandrothu Bodemma & Ors.**, reported in **(1997) 2 SCC 552** wherein it has been held that even an erroneous decision is binding if it has not been challenged and therefore, the decision dated 07.09.2016 is binding on the parties since it has not been challenged. If the decision dated 07.09.2016 is binding, subsequent application dated 08.03.2017 is hit by the principles of *res judicata* and the learned executing court could not have ventured into the matter and ought to have dismissed the application before it challenging the maintainability of the execution case.

8. I have given my thoughtful consideration to the



rival submission of the parties. The issue before this Court lies in narrow compass and it is whether the learned executing court was justified in allowing the application dated 08.03.2017 filed on behalf of the judgment debtors/respondents 1st set for dismissal of execution case. Challenge to the order dated 18.12.2017 is two folds. It has been firstly contended by the learned counsel for the petitioners that dismissal of earlier application dated 09.10.2014 and Misc. Case No. 7 of 2001 would act as *res judicata* in the present matter and, therefore, the learned trial court erred in not considering this fact. The second objection is on the ground that the petitioners have already deposited the mortgage amount in the court and there was no hindrance in redemption of mortgage in favour of the petitioners.

9. On the other hand, it is the contention of the judgment debtors/respondents that the decree holders were required to get the mortgage redeemed in due course of law and the decree holders were required to file a suit for redemption of the mortgage which was not done by them within the limitation period of 30 years and, hence, continuation of execution proceeding for recovery of possession was based on illegality. It has also been feebly contended on behalf of the judgment



debtors that issues involved in application dated 09.10.2014 and Misc. Case No. 7 of 2001 were different and not on the same aspect but the perusal of record shows in the objection petition dated 09.10.2014, the objection was taken by the petitioners on same ground for dismissal of the Execution Case No. 1 of 1999.

10. So far as challenge to the impugned order on the ground of *res judicata* is concerned, I find merit in the submission of learned counsel for the petitioners. Earlier in their petition dated 09.10.2014, the judgment debtors took the same objection about continuation of the execution case and the said application was heard and dismissed vide order dated 18.04.2016 by the learned executing court and the said order attained finality as the same was sustained by this Court in its order dated 07.09.2016 passed in Civil Misc. No. 568 of 2016. Order passed on 07.09.2016 in Civil Misc. No. 568 of 2016 has not been further challenged. Therefore, the impugned order is hit by the principles of *res judicata*.

11. So far as the second objection to the impugned order about deposit of mortgage money in the court below is concerned, this contention is not of much significance. It has been vehemently contended on behalf of the judgment debtors that the sustainability of this contention in Civil Misc. No. 568



of 2016 is against the settled principles of law that mortgage could be redeemed only in accordance with procedure established by law and not by depositing the amount of mortgage in terms of modification made in the decree of the first appellate court by the orders of this Court in second appeal. But as already observed, the arguments made for and against with regard to the contention of the petitioners is a non-issue which would become clear by discussion made hereinafter.

12. Admittedly, the mortgage was executed on 29.06.1967. Thereafter, Bihar Money Lenders Act, 1974 came into force from 22.07.1975. Section 12 of the Bihar Money Lenders Act, 1974 reads as under:-

“12. Usufructuary mortgage and their redemption.

Notwithstanding anything to the contrary, contained in any law or anything having the force of law or in any agreement, the principal amount and all dues in respect of an usufructuary mortgages relating to any agricultural land, whether executed before or after the commencement of this Act, shall be deemed to have been fully satisfied and the mortgage shall be deemed to have been wholly redeemed on expiry of a period of seven years from the date of the execution of the mortgage bond in respect



of such land and the mortgagor shall be entitled to recover possession of the mortgaged land in the manner prescribed under the Rules:

Provided that if the mortgage bond had been executed before the commencement of this Act nothing in this section shall entitle the mortgagor to claim any accounts or profits from the mortgagee by the reason of the benefit of redemption of the mortgage under this provisions.”

13. The aforesaid provision makes it clear that on expiry of a period of 7 years from the date of execution of mortgage bond, the mortgage shall be deemed to have been redeemed. This condition applies to the mortgage executed prior to the commencement of the Bihar Money Lenders Act, 1974 or after its commencement. Applying this law to the facts of the present case, as the mortgage was executed on 29.06.1967, after expiry of 7 years, automatic redemption would have taken place and, hence, under Section 12 of the Bihar Money Lenders Act, 1974, the said mortgage stood redeemed by the operation of law. There remains no requirement for filing any suit for redemption after coming into force of Section 12 of the Bihar Money Lenders Act, 1974. Therefore, the decree holders were not even required to make payment of any money or to file any suit for



redemption to redeem the mortgage so as to claim the rights over the suit property.

14. Therefore, I am of the considered opinion that the learned executing court committed an error of jurisdiction in allowing the application dated 08.03.2017 filed by the judgment debtors vide its order dated 18.12.2017 as the same was barred by principles of *res judicata*. Further any challenge to the execution proceeding on the ground that suit for redemption of mortgage was not filed by the decree holders following the due procedure is a fallacious argument since the mortgage came to be redeemed by operation of law under the deeming provisions of Section 12 of the Bihar Money Lenders Act, 1974. Hence, in the light of aforesaid discussion, I have no hesitation in holding that the impugned order suffers from illegality and therefore, the impugned order dated 18.12.2017 passed by learned Sub Judge-VII, Siwan in Execution Case No. 01 of 1999 is set aside.

15. Accordingly, the present petition stands allowed.

(Arun Kumar Jha, J)

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AFR/NAFR	AFR
CAV DATE	08.08.2025
Uploading Date	25.09.2025
Transmission Date	NA

