

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1709 of 2019

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Satyasheel Kumar (wrongly named as Munna Kumar in Execution Case), S/o Suresh Chandra Singh @ Suresh Chandra Sinha, Resident of Village- Hasanpur, P.O.- Teghra, P.S.- Teghra, District- Begusarai, Pin- 851133.

... .. Petitioner/s

Versus

1. Navin Kumar Singh, S/o Shree Kapildeo Singh, Resident of Village- Hasanpur, Pergana Malki, P.S.- Teghra, District- Begusarai.
2. Smt. Renu Devi, W/o Naveen Kumar Singh, Resident of Village- Hasanpur, Pergana Malki, P.S.- Teghra, District- Begusarai.

... .. Respondent/s

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Constitution of India---Article 227--- Code of Civil Procedure, 1908--- Order 21 Rule 22--- Execution of decree---petition to set aside order passed by learned executing court whereby and whereunder challenge to the maintainability of the execution proceeding was rejected--- plea that learned executing court failed to appreciate that as the judgment and decree was passed against a dead person, the judgment and decree are nullity and cannot be executed through the process of law---further argument that learned executing court failed to consider that the suit property as mentioned in the plaint is non-existent and decree could not be executed due to vague description and ambiguity over the boundary---*Held:* the decree would not become nullity since the fact of death of one of the defendants was not brought before the court concerned which has no occasion to take into consideration the death and went on to pass the decree--- as right to sue survives against other defendants, the suit would not abate as a whole and hence the decree would not be a nullity---the decree may be irregular but not nullity---- suit property has been mentioned with well-defined boundaries and the executing court can proceed in the matter and execute the decree to the extent of suit land as mentioned in the plaint--- no ambiguity on identification of the suit land and there is no use saying there is residential house of the petitioner on the suit property---- no infirmity in the impugned order--- civil miscellaneous petition dismissed. **(Para 3, 14-17)**

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... .. Respondent/s

Appearance :
For the Petitioner/s : Mr. R.KP. Singh, Advocate
Mr.Bal Bhushan Choudhary, Advocate
Mrs. Nutan Kumari Sharma, Advocate
For the Respondent/s : Mr.Prashant Kashyap, Advocate
Mr. Amit Ranjan, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 16-05-2024

The present petition has been filed under Article 227 of the Constitution of India against the order dated 04.12.2018 passed by the learned Sub Judge-7, Begusarai in Execution Case No.1/2016 whereby and whereunder the petition dated 03.02.2018 filed on behalf of the judgment debtor has been rejected.

2. The respondents are decree-holders and they filed Title Suit No. 171 of 2007 against the grandfather, father and uncle of the petitioner in the court of learned Sub Judge, Begusarai. The suit was filed for declaration of title in respect of



Schedule-A property and for recovery of possession from defendants 1st and 2nd set by demolishing the construction made by them on the suit land as well as for mesne profit and injunction. The defendants appeared and filed their written statement controverting the claim of the plaintiffs. Title Suit No. 171 of 2007 was finally heard and decided vide judgment and decree dated 08.09.2016 on contest in favour of the plaintiffs. The defendants 1st set, who are members of joint family of the petitioner, preferred appeal before the learned District Judge, Begusarai vide Title Appeal No. 14/2016 and the said title appeal is still pending for final hearing. Meanwhile, the decree-holders filed Title Execution Case No. 01/2016 in the court of learned Sub Judge- 1st , Begusarai, which is pending before the court of learned Sub Judge-VI, Begusarai. In the execution case, the petitioner and other defendants appeared and challenged the maintainability of the execution proceeding by filing a petition on 03.02.2018. The decree-holders filed their objection on 17.02.2018 to the petition dated 03.02.2018 by way of a rejoinder. Both parties were heard and the learned executing court vide the impugned order dated 04.12.2018 rejected the petition filed by the petitioner.

3. The learned counsel appearing on behalf of the judgment-debtor no.2/petitioner submitted that the learned



executing court passed the order erroneously as it failed to appreciate that the execution proceeding could not be continued as the judgment and decree was passed against a dead person and for this reason, the judgment and decree are nullity and cannot be executed through the process of law. The learned counsel further submitted that the defendant no.7 (f), namely Sageeta Devi died on 13.03.2015 before the judgment and decree dated 08.09.2016, but without substituting her legal heirs/representatives in her place and without excluding her name from the plaint, the judgment and decree came to be passed against a dead person making the decree nullity and not executable. In support of his contention that the decree passed by the learned trial court against a dead person is nullity, the learned counsel placed reliance on the decision rendered in the case of ***Gurnam Singh (D) through L.Rs & Ors. Vs. Gurbachan Kaur (D) by L.Rs. & Ors.*** reported in ***2017 (2) PLJR 414 (SC)***. Further, the learned executing court failed to consider that the suit property as mentioned in the plaint is non-existent and decree could not be executed due to vague description and ambiguity over the boundary. The learned counsel further submitted that the land is non-existent and unidentifiable and the suit land has got no separate identity and the part area and plot number cannot be demarcated being part and



parcel of the residential house of the petitioner, but the learned executing court completely overlooked this important aspect of the matter. The learned counsel further submitted that the claim and defence of defendants 1st set is joint and inseparable, hence, on account of death of Sangeeta Devi and non-substitution of her heirs, the suit became incompetent and the judgment passed in the suit is illegal and bad in the eyes of law and the same cannot be executed. The learned counsel further submitted that the respondents did not answer the claim of the petitioner about nonexistence of disputed property and in the counter affidavit, there is no specific denial about the fact of Schedule-A property being non-existent which amounts to admission as evasive denial is no denial. Even the boundary of the property given in the counter affidavit does not tally with the boundary of disputed land mentioned in Schedule-A of the plaint which shows description of the said land as given in Schedule-A of the plaint is false and imaginary. The plaintiffs have not furnished any sketch map with the plaint and the learned trial court did not consider any map whatsoever. However, reliance placed on Annexure A of the counter affidavit which is a rough sketch map is misconceived. Moreover, it is not in consonance with the boundary mentioned in Schedule-A of the plaint. There is no separate block of suit land rather it has been amalgamated with



the house of the petitioner. Even the learned executing court has not referred the relevant paragraphs of the judgment in the impugned order with regard to finding about existence of suit property and, for this reason, the impugned order is not sustainable and fit to be set aside.

4. *Per contra*, it has been submitted on behalf of the respondents/plaintiffs/decreed-holders that there is no infirmity in the impugned order and the learned executing court passed the order after due consideration of the facts before it. The learned counsel further submitted that the petitioner claims that Sangeeta Devi died on 13.03.2015 and the same is corroborated from the certificate issued by the State of Bihar and obtained by the petitioner on 27.02.2018. However, in the memo of appeal filed in Title Appeal No.14/2017, the petitioner has mentioned that Sangeeta Devi died 10 years prior to the judgment and decree which cannot be true since the decree has been issued on 08.09.2016. If the judgment-debtors were well aware that Sangeeta Devi was dead and hence as defendants, they could have very well objected the trial proceeding against a dead person. The learned counsel further submitted that the instant petition has been filed on wrong submission about the death of Shyam Narayan Singh as well as Sangeeta Devi. A petition for substitution of defendant no. 7 was filed on 10.01.2012 and the



same was allowed on 03.02.2012 and, even at that time, no question was raised on behalf of the petitioner to wrong substitution of Sangeeta Devi as one of the heirs/legal representatives. The learned counsel further submitted that decree passed against a dead person is not nullity if the fact of the death is not brought to the notice of the court. In such circumstances, passing of decree against a dead person is only an irregularity and it would not be *void ab initio* and such decree is executable. When the court proceeds with the case in ignorance of the fact of death of a person and passes a decree, the decree cannot be treated as nullity. It may be a wrong decree, but then it would have to be set aside by taking appropriate proceeding like appeal or revision. The learned counsel further submitted that the petitioner/judgment-debtor has already preferred title appeal against the judgment and decree passed in Title Suit No. 171 of 2007 and they have all opportunity to raise all such points in the said appeal. The present petition is misuse of the process of law and the petitioner is trying his luck before different forum and if the present petition is allowed, the appeal of the petitioner would become infructuous. The learned counsel further submitted that the reliance placed by the petitioner on the judgment of Hon'ble Supreme Court in the case of **Gurnam Singh** (supra) is not applicable in the present facts and



circumstances of the case. The aforesaid judgment has been passed relying on the judgment of *Kiran Singh & Ors. vs. Chaman Paswan & Ors.*, reported in *AIR 1954 SC 340* wherein the Hon'ble Supreme Court held that a decree passed by a court without jurisdiction is a nullity and without jurisdiction has been explained with reference to defect of jurisdiction in pecuniary or territorial or in respect of subject matter of their action. These are three defects of jurisdiction which strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of parties. The learned counsel further submitted that the petitioner misinterpreted the ratio laid down by the Hon'ble Supreme Court and gave an impression that the suit has abated automatically in absence of any substitution and validity of the decree passed in absence of defendant Sangeeta Devi could not be questioned in the present execution proceeding. Moreover, the suit would not abate as a whole as other defendants were present representing the substantial interest of even deceased defendant. The learned counsel further submitted that it is the settled proposition of law that the executing court cannot travel either beyond the decree under execution or behind the decree under execution. For this reason, the petition filed by the petitioner before the learned executing court is wholly misconceived as the learned executing



court has absolutely no jurisdiction to entertain such type of petition and the same was rightly rejected. Assailing the order of rejection before this Court under Article 227 of the Constitution of India is an abuse of the process of law. The learned counsel further reiterated that validity and veracity of the execution can be considered by the learned appellate court and only that court can decide whether the decree in execution is executable or not.

5. The learned counsel for the respondents referred to paragraph 7 of the judgment of Hon'ble Calcutta High Court in the case of *Himangshu Bhusan Kar and Ors. Vs. Manindra Mohan Saha* reported in *AIR 1954 Cal 205* on the point that the decree passed in favour of a dead person is not a nullity.

6. The learned counsel further placed reliance on paragraph 5 of the judgment of the Hon'ble Bombay High Court in the case of *Raddulal bhurmal and Ors. Vs. Mahabirprasad Bisesar Kalwar and Ors.* reported in *AIR 1959 Bombay 384* to stress the point that if the Court proceeds with a case in ignorance of the fact of the death of a person and passes a decree, that decree cannot be treated as a nullity. It may be a wrong decree but it will have to be set aside by taking appropriate proceedings.

7. The learned counsel further placed reliance on paragraph 3 of the judgment of the Hon'ble Madras High Court



in the case of *Abdul Azeez Sahib vs. Dhana-bagiammal and Ors.* reported in *AIR 1983 Madras 5* to further stress the point that a decree passed in favour of a dead person is not a nullity and the fact of death not brought to the notice of the Court when it passed the decree is only an irregularity and it cannot have the effect of making the decree void ab initio and the decree is executable.

8. The learned counsel further submitted that there is no ambiguity with regard to the suit property. The claim of the petitioner that the suit property is non-existent is not sustainable. The petitioner dispossessed the defendants/respondents/decreed-holders and constructed the house on the whole land and now they are claiming that land is not identifiable. The suit land is 3 Katha 10 dhur of Plot No. 356. The judgment debtors forcibly dispossessed the plaintiffs/decreed-holders. It was the judgment debtors, who changed the attributes of suit land and amalgamated the same with their land. The learned counsel further submitted that from the Schedule-A of the plaint, there appears no ambiguity in the identification of the suit land as clear cut boundary has been given in the Schedule. Notwithstanding any claim of the petitioner on this account, the suit property is in existence and identifiable with certainty. The defendants have earlier filed Title Suit No. 129 of 2002 against



the defendants 3rd party and State of Bihar to set aside the deed of gift dated 12.06.2000 duly executed by defendant 3rd party in favour of Governor of Bihar relating to an area 1 katha 10 dhurs under Survey Plot No. 356 of Khata No. 4142 of the same Schedule-A property. In the plaint of the said title suit, the defendants admitted in paragraph 13 about existence of 2 katha 10 dhurs of land allotted in their share on which the defendant no.1 constructed a *Pucca* house and residing with their family members, for this reason, defendant 1st and 2nd party cannot claim their title and possession over any part of the land in Plot No.356 beyond western wall of defendant no. 1 and 2.

9. The learned counsel for the respondents referred to the decision of the Hon'ble Supreme Court in the case of ***Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Ors.*** reported in ***AIR 1970 SC 1475*** to stress the point that a Court executing a decree cannot go behind the decree and cannot entertain any objection that the decree was incorrect in law or on facts and referred to paragraph 6 which reads as under:

“A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was



incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is till binding between the parties”.

10. The learned counsel for the respondents further referred to the decision of the Hon’ble Supreme Court in the case of ***Bhawarlal Bhandari vs. M/s Universal Heavy Mechanical Lifting Enterprises***, reported in ***AIR 1999 SC 246*** again on the point whether executing court can go behind the decree which in turn referred to ***Vasudev Dhanjibhai Modi*** (supra).

11. The learned counsel for the respondents further submitted that it is the settled law that if a point of defence which has been willfully or deliberately abandoned by a party in a civil case at a crucial stage, it cannot be allowed to be taken up later at the sweet will of the party. In this regard, learned counsel referred to the decision of the Hon’ble Supreme Court in the case of ***N. Jayaram Reddy and another vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool*** reported in ***(1979) 3 SCC 578***.

12. Thus, learned counsel for the respondents submitted that there is no infirmity so as to interfere with the impugned order and the same needs to be affirmed by this



Court.

13. By way of reply, learned counsel for the petitioner submitted that if Sangeeta Devi died on 13.03.2015 and decree was passed on 08.09.2016, then obviously the decree was passed against a dead person and it becomes a nullity. The learned counsel further pointed out that objection could always be filed under Order 21 Rule 22 of the Code of Civil Procedure. The petitioner raised two objections; one with regard to decree being passed against a dead person and identification of the land not possible as per the claim of the plaintiffs. The learned trial court without assigning any reasons rejected the objection petition dated 03.02.2018 and started the proceeding in the matter which is completely against the provisions of law.

14. I have given my thoughtful consideration to the rival submission of the parties on the issue involved in the matter. The petitioner has assailed the order of the learned Sub Judge-7, Begusarai regarding non-executability of the decree on two grounds. The first ground taken is that the decree was passed against a dead person and the second ground is ambiguity over the suit property and there being no property in-existence so as to execute the decree. However, in my view, both the submissions, though look attractive, are specious. Much stress has been put on the issue that decree was passed



against a dead person. If such decree was passed when one of the defendants was dead, it was also the duty of the defendants to bring the fact to the notice of the court concerned. If the defendants did not bring to the notice of the court concerned about the death of one of the defendants and made different claims even about time and date of death of such defendant, how could the defendants expects the plaintiffs to apprise the court about the death of one of them? Then there is no contention that the plaintiffs/decreed holders, though having knowledge, did not bring the fact of death of defendant Sangeeta Devi to the notice of the court. Moreover when the court proceeded in the matter in ignorance of the fact of death of one of the defendants, obviously the decree would not become nullity. If the decree is not nullity, the executing court is required to execute such decree unless it has been set aside by a competent court in an appropriate proceeding. It further appears that in the present petition, the petitioner has claimed that Sangeeta Devi died on 13.03.2015, but certificate of death has been obtained by the petitioner on 27.02.2018. On the other hand, in Title Appeal No. 14 of 2017, the same petitioner has stated that Sangeeta Devi died 10 years prior to the judgment in Title Suit No. 171/2007. Both cannot be true. If defendants were knowing about the death of Sangeeta Devi, they did not raise



any alarm about the proceeding against a dead person. At the same time, nothing has come on record that the plaintiffs-decree holders deliberately did not substitute and allow the dead defendant to remain on record.

Moreover, the suit would abate only against the deceased Sangeeta Devi or her legal representatives and not against all the defendants. For this reason, the suit would not abate as a whole and the decree would not be nullity against other defendants as right to sue survived against such defendants.

15. Further, the fact is also to be taken note of that if the petitioner has abandoned his objection at the time of trial about the name of Sangeeta Devi not being expunged from the record or her legal heirs not substituted in her place, the same cannot be taken as per convenience of the petitioner especially at the time of execution of decree. On the other hand, as the petitioner is already before the first appellate court in Title Appeal No. 14 of 2016, he has all the opportunity to raise the issue of decree being against a dead person.

16. Considering all these facts, I am of the opinion that the decree would not become nullity since the fact of death of Sangeeta Devi was not brought before the court concerned which has no occasion to take into consideration the death of



Sangeeta Devi and went on to pass the decree. Further, as right to sue survives against other defendants, the suit would not abate as a whole and hence the decree would not be a nullity. For this reason, the decree may be irregular but not nullity as submitted by the learned counsel for the petitioner. Therefore, the authorities relied on by the learned counsel for the petitioner are no help to the case of the petitioner.

17. Another point of contention of learned counsel for the petitioner is about non-existence of the suit property for which decree has been issued. I fail to understand on what ground it has been claimed on behalf of the petitioner that description of the suit land in Schedule-A of the plaint is false and imaginary. The suit property has been mentioned with well defined boundaries and it is the case of the plaintiffs-decree holders that the defendants amalgamated the suit property with their land, naturally there would be change in the nature of suit property. So, identity of the land would be established with the help of the boundary as mentioned in Schedule-A of the plaint with regard to the suit property. The submission has been advanced on behalf of the respondents about Title Suit No. 129 of 2002 filed by the same defendants wherein there is admission about existence of 2 Katha 10 Dhur of land allotted in their share on Plot No. 356 on which they constructed a *Pucca* house.



The petitioner appears to have taking advantage of dispossession of the decree-holders from the suit land and amalgamation of the said land with the land of the petitioner. So, the executing court can proceed in the matter and execute the decree to the extent of suit land as mentioned in the plaint and I do not think there is any ambiguity on identification of the suit land and there is no use saying there is residential house of the petitioner on the suit property.

18. Therefore, in the light of discussion made hereinbefore, I do not find any infirmity in the impugned order dated 04.12.2018 passed by the learned Sub Judge-7, Begusarai in Execution Case No. 1/2016 and the same is affirmed finding no error of jurisdiction on part of learned trial court.

19. In the result, the instant petition stands dismissed.

(Arun Kumar Jha, J)

V.K.Pandey/-

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