

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.523 of 2018**

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Rita Devi W/o Suresh Prasad Yadav resident of Mohalla- Shyam Chak @
Sri Ram Chak, P.S.- Bhagwan Bazar, District- Saran.

... .. Petitioner/s

Versus

1. Surendra Bahelia @ Surendra Ram S/o Late Timal Bahelia @ Timal Ram resident of Mohalla- Shyam Chak, P.S.- Bhagwan Bazar, District- Saran.
2. Champa Kuer W/o Late Hira Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
3. Brajendra Bahelia S/o Late Hira Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
4. Brijesh Bahelia S/o Late Hira Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
5. Brajnandan Bahelia S/o Late Hira Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
6. Dhanraj Bahelia Minor son of Late Hira Bahelia under the guardianship of their mother namely Champa Kuer, resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
7. Raja Babu Kumar Minor son of late Hira Bahelia under the guardianship of their mother namely Champa Kuer, resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
8. Indu devi D/o Late Hira Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
9. Pooja Kumari Minor D/o Late Hira Bahelia under the guardianship of their mother namely Champa Kuer, resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
10. Mira Devi D/o Late Naresh Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
11. Arun Bahelia S/o Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
12. Anil Bahelia S/o Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.

13. Ravi Bahelia S/o Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
14. Shashi Kumar S/o Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
15. Shakuntala Devi D/o Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
16. Suman Kumari minor daughter of Rama Bahelia under the guardianships of father Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
17. Kushum Kumari minor daughter of Rama Bahelia under the guardianships of father Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
18. Prabhawati Devi D/o Ganesh Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
19. Chandrawati Devi D/o Late Ganesh Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
20. Ramloki Rai S/o Late Jhalku Rai resident of Jantola, P.S. Rivilganj, District- Saran.
21. Triloki Rai S/o Late Jhalku Rai resident of Jantola, P.S. Rivilganj, District- Saran.
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23. Bishwamohan Rai S/o Late Jhalku Rai resident of Jantola, P.S. Rivilganj, District- Saran.
24. Radha Mohan Rai S/o Late Jhalku Rai resident of Jantola, P.S. Rivilganj, District- Saran.
25. Panmata Devi W/o Late Jhalku Rai resident of Jantola, P.S. Rivilganj, District- Saran.
26. Rajmuni Devi D/o Late Jhalku Rai resident of Jantola, P.S. Rivilganj, District- Saran.
27. Mukra Devi D/o Late Jhalku Rai resident of Jantola, P.S. Rivilganj, District- Saran.
28. Babita Devi W/o Jitendra Prasad resident of Dharampura, P.S. Doriganj, District- Saran.

29. Mangal Rai S/o Late Jadu Rai @ Jai Rai resident of Tarwa, P.S. Kopa, District- Saran, at present- Masumganj, P.S. Bhagwan Bazar, District- Saran.
30. Rajkumari Devi W/o Rameshwar Mahto resident of Village- Masumganj, P.S. Bhagwan Bazar, District- Saran.
31. Sapna Kumari D/o Minor D/o Late Prahalad Bahelia under the guardianship of Prabhawati Devi (Fua) resident of Mohalla- Shyamchak, P.S. Bhagan Bazar, District- Saran.

... ... Respondent/s

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Acts/Sections/Rules:

CPC – Order 21 Rule 29; Rule 97; Rule 102

Petition – filed against order passed in Execution case by which the learned Sub. Judge rejected the petition filed under Order 21 Rule 29 of the Code of Civil Procedure, 1908.

Held – The only course open to Petitioner was to challenge the final decree and to put her objection to the same and in case, it was not considered by the court concerned, then to assail it before a Higher Court. The petitioner has not done any such thing and has not taken recourse to the proper course of law. (Para 7)

Since the petitioner is purchaser pendente lite from a co-sharer, she can lay her claim only against her vendor out of the share of her vendor. - Utmost, the petitioner could have done to make a prayer in the final decree proceeding to fetch the property purchased by her to be allotted to the share of her vendor. Evidently, the petitioner did not do so. (Para 9)

Merely filing a suit against respondent, the decree holder, would not make petitioner entitled to seek relief under Order 21, Rule 29 of the Code, for the obvious reasons that no decree has been passed against the petitioner and being purchaser pendente lite, she did not get any right to step into the shoes of her vendor. (Para 10)

Petition dismissed. (Para 11)

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- of father Rama Bahelia resident of Mohalla- Shyam Chak, P.S.- Bhagan Bazar, District- Saran.
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... .. Respondent/s

Appearance :
For the Petitioner/s : Mr. Ranjan Kumar Dubey, Advocate
Mr. Kumar Gaurav, Advocate
Mr. Ashish Anand, Advocate
For the Respondent/s : Mr. Arun Kumar Rai, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT
Date :19-01-2024

The instant petition has been filed against the order



dated 17.02.2018 passed by the learned Sub-Judge-IV, Chapra in Execution Case No. 03 of 2013 by which the learned Sub-Judge-IV, Chapra rejected the petition dated 02.01.2018 filed on behalf of the petitioner under Order 21 Rule 29 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code').

02. Briefly stated the case of the parties may be summarized as follows:-

The plaintiff/respondent no. 1, Surendra Baheliya, filed Title Suit No. 209 of 1994 against Ganesh Baheliya and his sons for partition of the suit property claiming 1/3rd share. The plaintiff/respondent no. 1 is the grandson of one Lalu Baheliya, who died leaving behind his three sons, namely, Ganesh Baheliya, Naresh Baheliya and Timal Baheliya. Ganesh Baheliya had two sons, namely, Hira Baheliya and Prahalad Baheliya and two daughters, namely, Prabhawati and Chandrawati. Hira Baheliya died leaving behind his widow, five sons and two daughters. Hira Baheliya sold part of the disputed land in favour of one Imdad Ali Khan during pendency of the partition suit and later on, Imdad Ali Khan also sold his purchased land in favour of the petitioner through registered sale deed dated 11.09.2007 and handed her over its possession. The petitioner got the land mutated in her name in revenue



records and started paying rent to the State of Bihar. She also constructed a residential house on her purchased land and started residing there with her family members. Title Suit No. 209 of 1994 was contested by the vendor of the petitioner, namely, Hira Baheliya and ultimately, the suit was dismissed vide Judgment and decree dated 31.05.2007. Being aggrieved and dissatisfied with the judgment and decree of the learned trial court, the plaintiff/respondent no. 1 filed Title Appeal No. 40 of 2007. During pendency of the said appeal, the vendor of the petitioner, namely, Hira Baheliya died, his heirs were substituted and a compromise petition was filed, which was affidavited by the wife of Hira Baheliya, namely, Champa Kuer. But, none had represented the minor sons and daughter of late Hira Baheliya. The said appeal was allowed in terms of compromise vide judgment and decree dated 19.06.2009 holding that the plaintiff was entitled to 1/3rd share in the suit land. The office was directed by the learned first appellate court to prepare the decree accordingly.

It is the further case of the petitioner that till today no decree has been prepared by the learned trial court as per direction of the learned first appellate court, but the plaintiff/respondent no. 1 filed an application for preparation of



final decree on the basis of judgment and decree passed on 31.05.2007. Accordingly, the Commissioner was appointed and after accepting the writ, he prepared his report. Further case of the petitioner is that she was not aware about the pendency of the suit and for the first time she came to know about the same at final decree stage and at the moment she came to know about the pendency of the final decree proceeding, she filed an application with a prayer to add her as a party but the same has been rejected. Even the objection raised on the report of Advocate Commissioner, has been rejected by the learned court below and the report of the Commissioner was affirmed. Thereafter, final decree was prepared vide judgment and decree dated 23.02.2013. But, on 31.05.2007 on the basis of judgment and preliminary decree dated 31.05.2007, the suit of the plaintiff/respondent no.1 had been dismissed so, there was no preliminary decree on 31.05.2007 and from perusal of final decree, it is evident that final decree was to be prepared on the basis of the preliminary decree passed by the learned Sub. Judge-VII, Saran at Chapra dated 31.05.2007. On the basis of aforesaid judgment and decree, the plaintiff/respondent no. 1 filed Execution Case No. 03 of 2013, in which, the name of the petitioner was added showing that decree was to be executed



against her as well as some other persons. The moment petitioner came to know about the same, she filed an application under Order 21 Rule 97 which was registered as Misc. Case No. 22 of 2013. In the said Misc. Case, opposite party filed objection on 08.09.2015 under Order 21 Rule 102. The learned executing court, after hearing the parties in detail and after going through the materials available on record, rejected the objection petition filed by the plaintiff/respondent no. 1 under Order 21 Rule 102 of the Code. The said order was challenged in C.W.J.C. No. 2022 of 2016 before this Court, which was allowed by a Co-ordinate Bench of this Court vide order dated 29.08.2016. The petitioner filed review petition against this order, which was disposed of with liberty to file separate suit. Prior to that, the petitioner filed Title Suit No. 174 of 2013.

03. It has been submitted by the learned counsel for the petitioner that the petitioner was not a party at any stage of the suit and when she tried to get herself impleaded as party at final stage of decree, the same has been opposed by the plaintiff/respondent no. 1. Further, preparation of final decree is based on judgment and decree dated 31.05.2007 passed in Title Suit No. 209 of 1994, which is not in accordance with law as vide said judgment and decree dated 31.05.2007, the said suit



has been dismissed. Learned counsel further submits that the final decree has been prepared against a dead person as Hira Baheliya died on 18.06.2008 and he has been substituted in the Title Appeal but in the final decree he has been made a party in place of his heirs, which itself shows that no opportunity was given to the legal heirs of the vendor of the petitioner by the learned Advocate Commissioner at the time of preparation of final decree and has allotted the land of the petitioner in favour of the plaintiff/respondent no. 1 on which this petitioner has been residing with her family members after constructing a residential house. Raising all these issues, the petitioner filed an application on 26.09.2016. Though the plaintiff/respondent no. 1 filed rejoinder but he did not give any reply to the objections as raised by the petitioner. Learned counsel further submitted that the learned executing court, after hearing both sides, finally rejected the petition dated 26.09.2016, without application of judicial mind and without assigning proper reasons and mainly on the ground that the petitioner has raised objection with respect to preliminary decree and not with respect to final decree and further on the ground that she suppressed this fact that her application for impleading her as party in the final decree has already been rejected. Learned executing court has



failed to give its finding with respect to specific objections regarding final decree, which had been prepared on the basis of preliminary decree dated 31.05.2007, by which the suit was not decreed, rather the same has been dismissed as such there was no determination of rights of the parties. The learned executing court did not record any finding regarding final decree which has been prepared against a dead person. Learned counsel further submitted that since the petitioner was not added as party in the suit filed by the plaintiff/respondent no.1, she herself filed an independent suit bearing Partition Suit No. 174 of 2013 with respect to purchased land. During pendency of the Partition Suit No. 174 of 2013, the petitioner filed an application under Order 21 Rule 29 of the Code on 02.01.2018 in Execution Case No. 03 of 2013 with a prayer to stay the further proceeding of execution case till disposal of Partition Suit No. 174 of 2013. However, the learned court below rejected the petition dated 02.01.2018. During pendency of the Partition Suit No. 174 of 2013, the decree holder filed an application under Order 7 Rule 11 of the Code with a prayer to reject the plaint stating it to be not maintainable. The learned court below rejected the petition filed by the decree holder vide order dated 27.02.2018. Learned counsel further submitted that both the cases are pending before



the same court and on one hand, the learned court below dismissed the petition filed by the decree holder under Order 7 Rule 11 of the Code holding that issues have been framed and evidence is going on, but, on the other hand, the same court rejected the petitioner's petition on the ground that her name did not find place in the decree under appeal. Learned counsel further submitted that there has been no settlement/compromise before the learned appellate court as after death of Hira Baheliya, his wife and children moved an application before the learned appellate court admitting the claim of 1/3rd share of the plaintiff/respondent no. 1. Even in final decree, the legal representatives of Hira Baheliya have not been made party. Learned counsel further submitted that if contentious issues are involved in writ proceedings, then normally stay should be granted. On this aspect, learned counsel for the petitioner relied on a decision of Hon'ble Apex Court in the case of ***Dinesh Prabhulal Barat v. Sai Palace Hotels (P) Ltd.***, reported in ***(2004) 13 SCC 667***. On this aspect, learned counsel also relied on the decision of Hon'ble Supreme Court in the case of ***Shaukat Hussain v. Bhuneshwari Devi*** reported in ***AIR 1973 SC 528 [Paragraphs 4, 5 & 6]***. Learned counsel further submitted that the learned trial court has observed that the



petitioner was not a party in decree, which was sought to be executed and the said decree was not issued against him, but the petitioner was subsequently made party in the execution proceeding. When the petitioner has been made party before the executing court, naturally, she has a right to appear before the learned executing court and to seek stay on the proceeding before it. Learned counsel further submitted that the same subject matter of suit proper is also the subject matter of Partition Suit No. 174 of 2013. The spirit of Order 21 Rule 29 of the Code is that the execution of a decree will be kept in abeyance if any suit regarding the same property is pending against the decree holder. Since, the petitioner has not been made party, she was compelled to file the partition suit and when she moved before the learned executing court to avail her right, she stepped into shoes of her vendor. The learned counsel further submitted that the legal representatives of original defendant-Hira Baheliya were not made party in the final decree proceeding, so, there was no occasion either for the petitioner or for the legal representatives of her vendor to put up their case before the learned Survey Knowing Pleader Commissioner, so that he could have taken care of the objections of the petitioner and could not have allotted her share to other co-sharer. Thus,



the learned counsel submitted that the impugned order is not sustainable and the same be set aside.

04. Learned counsel appearing on behalf of plaintiff/respondent no. 1 vehemently contended that there is no infirmity in the impugned order and the same ought to be sustained. Learned counsel further submitted that the learned trial court dismissed the Partition Suit No. 209 of 1994 filed by the plaintiff/respondent no. 1, but respondent no.1 preferred Title Appeal No. 40 of 2007 and the learned first appellate court allowed the appeal by its judgment dated 16.09.2009 and decree dated 24.09.2009. Some purchasers/defendants have filed second appeal before this Court against the aforesaid judgment and decree passed in Title Appeal No. 40 of 2007 vide Second Appeal No. 401 of 2009. This second appeal was dismissed at the stage of admission itself on 02.05.2012, as no substantial questions of law was found involved for consideration in the second appeal. Learned counsel further contended that the petitioner was never made party as judgment debtor in Execution Case No. 03 of 2013, which was based on final decree of Partition Suit No. 209 of 1994. Only the defendants were shown in the column of judgment debtors and purchasers of the land, which were allotted by final decree to the decree



holder/respondent no. 1, were made party in other column, who were in possession of the allotted share of respondent no. 1. Learned counsel further contended that showing the name of a dead defendant, namely, Hira Baheliya is mistake on part of the office. Learned counsel further submitted that the petitioner appeared before the Executing Court and filed their objection under Order 21 Rule 97 of the Code of Civil Procedure in Execution Case No. 03 of 2013 and the same was registered as Misc. Case No. 22 of 2013. The respondent no. 1 questioned the maintainability of the application of the petitioner and her application being barred under Order 21 Rule 102 of the Code. However, prayer of the respondent no. 1 was rejected by the learned trial court vide order dated 06.01.2016. Thereafter, the plaintiff/respondent no. 1 filed CWJC No. 2022 of 2016 against the order dated 06.01.2016 passed in Misc. Case No. 22 of 2023 arising out of Execution Case No. 03 of 2013 before the High Court. The High Court set aside the impugned order and dismissed the Misc. Case No. 22 of 2013 holding it to be not maintainable as barred under Order 21 Rule 102 of the Code vide order dated 29.08.2016. In partition Suit No. 174 of 2013 filed by the petitioner, she filed an injunction petition to restrain the respondent no. 1 from dispossessing her from the land. The



said petition was rejected by the learned court below. The petitioner approached this Court against the said order by filing Misc. Appeal vide M.A. No. 238 of 2014. In the said Misc. Appeal, the plaintiff/respondent no. 1 was directed not to dispossess the petitioner from the property in question otherwise than due course of law, during pendency of the Partition Suit No. 174 of 2013, vide judgment dated 22.11.2017. Learned counsel further submitted that the learned executing court has rightly rejected the petition dated 17.02.2018 filed on behalf of the petitioner under Order 21 Rule 29 of the Code on the ground that the petitioner is not a judgment debtor. She purchased the land during pendency of the Partition Suit No. 209 of 1994 and after death of her vendor, his legal heirs and judgment debtor lost the Partition Suit No. 209 of 1994 and for this reason provisions under Order 21 Rule 29 of the Code are not attracted. Learned counsel further pointed out that the petitioner has wrongly contended that she has constructed a house over the suit land as the plaintiff/respondent no. 1 specifically stated and mentioned in Schedule-I of the plaint that there is ancestral house of the respondent no. 1 on the suit plot no. 294, 295 and 296. If the vendor of the petitioner has lost the suit, the petitioner cannot demand stay on the execution proceeding, as



the same can only be asserted by the legal heirs of her vendor. Learned counsel further submitted that the present petition is devoid of merit and the contention raised here have been considered by this Court in Second Appeal and nothing new has been submitted before this Court. So, the instant petition is devoid of any merit and the same be dismissed.

05. I have given my thoughtful consideration to the facts of the case as well as rival submissions of the parties. Order 21, Rule 29 of the Code provides as under:-

“Where a suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court on 'the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided:

Provided that if the decree is one for payment of money, the Court shall, if it grants stay without requiring security, record its reasons for so doing.”

06. The plain reading of the provisions shows that it is applicable in such cases where the suit is pending on part of the person against whom the decree was passed. In the present case, decree has not been passed against the petitioner, who is a transferee *pendente lite* and for this simple reason, the learned trial court vide impugned order dismissed the petition filed by



the petitioner under Order 21 Rule 29 of the Code.

07. The case of the petitioner is very peculiar but not very uncommon. The petitioner is a purchaser *pendente lite* and on merits of the case, the petitioner could not have much say. The legal heirs of the vendor of the petitioner admitted 1/3rd share of the plaintiff/respondent no. 1 and the learned first appellate court disposed of the matter taking into consideration the statements made by the heirs of Hira Baheliya along with other martial facts. The order of the learned first appellate court was not disturbed by this Court in second appeal, which did not find any substantial question of law for consideration of the second appeal, which was dismissed. It has been submitted that this petitioner was not the appellant but the decision of this Court will be binding on all concerned parties. Further claim of the petitioner that she was not having knowledge and only came to know about the subject matter when she was made party before the executing court could not lessen her burden. The only course open to her was to challenge the final decree and to put her objection to the same and in case, it was not considered by the court concerned, then to assail it before a Higher Court. Obviously, the petitioner has not done any such thing and has not taken recourse to the proper course of law.



08. At the same time, I do not find any substance in the submission made on behalf of the petitioner about there being no preliminary decree or final decree being against a dead person. Once the decree of the learned trial court was reversed, it is the judgment and decree of the first appellate court, which become relevant for the purpose of preparation of final decree. It is admitted fact that the legal heirs of the deceased-defendant, Hira Baheliya, were substituted in his place before learned first appellate court and even if the final decree mentions the name of the deceased-defendant, i.e., Hira Baheliya, it is a clerical mistake and not much importance could be attached to it.

09. Another striking aspect of the matter is the partition suit of the petitioner. The petitioner has filed a suit for partition against respondent no. 1 and I am not able to understand the grievance of the petitioner against respondent no. 1. Admittedly, the respondent no. 1 got 1/3rd share from the joint family property and his position was upheld till this Court in second appeal. Since the petitioner is purchaser *pendente lite* from a co-sharer, she can lay her claim only against her vendor out of the share of her vendor. It is not the case of the petitioner that she purchased more than the share of her vendor or that even after allotment of 1/3rd share of the respondent no.1, the



share of the petitioner would remain intact or that the respondent no. 1 got more than his 1/3rd share in partition in terms of decision of the first appellate court. Utmost, the petitioner could have done to make a prayer in the final decree proceeding to fetch the property purchased by her to be allotted to the share of her vendor. Evidently, the petitioner did not do so.

10. In view of the discussion made herein above, the decisions cited by the learned counsel for the petitioner are distinguishable on the facts of the instant case and therefore, are not of any help to the case of the petitioner. Hence, I do not find that the petitioner has got any case in her favour, even her suit against the respondent no. 1 appears to be misconceived and merely filing a suit against respondent no.1, the decree holder, would not make her entitled to seek relief under Order 21, Rule 29 of the Code, for the obvious reasons that no decree has been passed against the petitioner and being purchaser *pendente lite*, she did not get any right to step into the shoes of her vendor. Therefore, I am of the considered opinion that there is no infirmity in the impugned order dated 17.02.2018 passed by the learned Sub-Judge-IV, Chapra in Execution Case No. 03 of 2013 and the same does not suffer from any jurisdictional error.



11. Accordingly, the present Civil Misc. Petition stands dismissed. However, the observations made here are only for the purpose of disposal of the present petition and will have no bearing on the case of the petitioner before the learned subordinate court.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	AFR
CAV DATE	03-01-2024
Uploading Date	19-01-2024
Transmission Date	N/A

