

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.558 of 2019**

Vikash Yadav @ Vikash Kumar, male, aged about 30 years, son of Late Ramadhar Prasad Yadav, resident of Village- House No.15 Arar Mor, P.S. Gopalganj, District- Gopalganj.

... .. Petitioner (son of Judgment Debtor)
Versus

1. Kailash Chandra Sinha, son of Late Dev Nandan Prasad resident of Village- Manikpur, presently residing at Gopalganj, P.S. Gopalganj, District- Gopalganj.
.....Decree Holder/ Petitioner/ Respondent 1st Set.
2. Asharfi Sah (Dead), resident of Village- Majhwalia, P.S. Manjagarh, District- Gopalganj.
3. Smt. Isheesh Saha (Dead), wife of Asharfi Sah, resident of Village- Majhwalia, P.S. Manjagarh, District- Gopalganj.
.....Judgment Debtor/ Respondents 2nd Set

... .. Judgment Debtor/ Respondents 2nd Set

Appearance :

For the Petitioner : Mr. Jagannath Singh-Advocate
For the Respondents : Mr.

**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT**

26-09-2019

Heard Mr. Jagannath Singh, learned counsel for the petitioner.

2. This application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 19.09.2018 passed by the learned Munsif, Gopalganj in Execution Case No.02/ 2002, whereby the objection raised by the son of the judgment-debtor, Late Ramadhar Prasad Yadav, in the execution proceeding, has been rejected.

3. Learned counsel appearing for the petitioner



submitted that the learned Munsif grossly erred in law in rejecting the application dated 18.08.2018 filed by the petitioner wherein it was pleaded by the petitioner that the execution proceeding should be dismissed due to the death of the judgment-debtor. According to him, an execution proceeding cannot run against a dead person. Since all the three judgment-debtors had died and their legal representatives were not brought on record by the decree-holder, the learned Munsif ought to have dismissed the execution proceeding. He argued that the order impugned is illegal, unjust and perverse. Hence, the same is liable to be set aside.

4. The facts of the case, in brief, are that the decree-holder (Respondent 2nd Set) had filed an execution case for execution of a decree dated 23.11.1986 passed in Title Suit No.119 of 1972 for delivery of possession by appointing a pleader knowing Survey Commissioner against Khata No.221, Plot No.1028, against the father of the petitioner, namely, Ramadhar Prasad Yadav and two other judgment-debtors, namely, Asharfi Sah and Smt. Ishee Sana (Respondents 2nd Set).

5. The petitioner being the son of judgment-debtor Ramadhar Prasad Yadav after coming to know about the pendency of Execution Case No.02 of 2002 filed a petition in



the Court of Munsif, Gopalganj on 18.08.2018 stating therein that he is the son of judgment-debtor namely, Ramadhar Prasad Yadav, who had died on 06.07.2012. The judgment-debtor no.2 Asharfi Sah died in 2015 and his wife, the judgment-debtor no.3, namely, Smt. Ishee Sana also died in the Year 2013, but the legal representatives have not been brought on record either by filing fresh execution case or impleading them in the pending execution proceeding.

6. On the aforesaid grounds, a prayer was made to dismiss the ongoing execution proceeding against the deceased judgment-debtors.

7. Having heard the parties, the learned Munsif, vide impugned order dated 19.09.2018, dismissed the petition filed by the petitioner dated 18.08.2018.

8. Being aggrieved by the impugned order dated 19.09.2018, the instant application under Article 227 of the Constitution of India has been filed by the petitioner before this Court.

9. The only question involved in the present application is whether a decree-holder can proceed with the execution case in spite of death of the judgment-debtor without impleading the legal representatives of the judgment-debtor.



10. Section-50 (1) of the Code of Civil Procedure

(for short 'C.P.C.') provides that "Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."

11. Section-50 (2) of the C.P.C. provides that

"Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit."

12. Section-2 (11) of the C.P.C. defines the term

"legal representative" to mean a person, who in law represents the estate of a deceased person, and includes any person, who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued."

13. Order-22 of the C.P.C. deals death, marriage and insolvency of parties.

14. Rule-3 of Order-22 of the C.P.C. deals with



Procedure in case of death of one of several plaintiffs or of sole plaintiff.- It provides that “Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.”

15. **Rule-3(2) of Order-22 of the C.P.C.** provides that “Where within the time limited by law no application is made under sub-rule(1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.”

16. **Rule-4 of Order-22 of the C.P.C.** provides for substitution the legal representatives of the deceased defendant.

The said rule is set out herein above:-

“4. Procedure in case of death of one of several defendants or of sole defendant-

(1) Where one of two or more defendants dies and the right to sue does not survive against the



surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

[(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where



(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.]

17. Rule-4-A of Order-22 of the C.P.C. provides that the plaintiff should not suffer where the deceased-defendant had no legal representative or legal representative is not traceable. It enables the representation of the estate of the deceased, the defendant in the suit, so that the plaintiff may proceed with the suit.

18. **Order-22, Rule-12 of the C.P.C.** provides that



“Nothing in rules-3, 4 and 8 shall apply to proceedings in execution of a decree or order.”

19. From a reading of the aforementioned rules, it would be manifest that the normal principle in a suit before the decree is passed is that the legal representatives are to be brought on record within the time limited by the rules and in case, the legal representatives are not brought on record within the time stipulated in the rules under Order-22, the suit would abate, however, the same principle is not applicable in case of death of the decree-holder or judgment debtor in execution proceeding, in view of the specific provision prescribed under Order-22, Rule-12 of the C.P.C.

20. In *V. Uthirapathi, Petitioner vs. Ashrab Ali and others, Respondents since reported in AIR 1998 SC 1168*, the Supreme Court had occasion to examine the consequence of death of the decree-holder or the judgment debtor and his legal representatives having not been brought on record. Paras 13 to 15 of the said judgment read as under:-

"13. In Venkatachalam vs. Ramaswami, [1932 ILR 55 Mad. 352 : AIR 1932 Mad. 73 (FB)], a Full Bench of the Madras High Court has held that this rule enacts that the penalty of abatement shall not attach to execution proceedings. Mulla's



Commentary on CPC (Vol.3) p. 2085 (15th Ed., 1997) refers to a large number of judgments of the High Court:

"Rule 12 engrafts an exemption which provides that where a party to an execution proceedings dies during its pendency, provisions as to abatement do not apply. The rule is, therefore, for the benefit of the decree holder, for his heirs need not take steps for substitution under Rule 2 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding or they may file a fresh execution application."

14. In our opinion, the above statement of law in Mulla's Commentary on the CPC, correctly represents the legal position relating to the procedure to be adopted by the parties in execution proceedings and as to the powers of the Civil Court.

15. It is clear, therefore, that if after the filing of an execution petition in time, the decree holder dies and his legal representatives do not come on record - or the judgment debtor dies and his legal representatives are not brought on record, then there is no abatement of the execution petition. If there is no abatement, the position in the eye of law is that the execution petition remains pending on the file of



*the execution Court. If it remains pending and if no time limit is prescribed to bring the legal representatives on record in execution proceedings, it is open in case of death of the decree holder, for his legal representative to come on record at any time. The execution application cannot even be dismissed for default behind the back of the decree holder's legal representatives. **In case of death of the judgment debtor, the decree holder could file an application to bring the legal representatives of the judgment debtor on record, at any time. Of course, in case of death of judgment-debtor, the Court can fix a reasonable time for the said purpose and if the decree holder does not file an application for the aforesaid purpose, the Court can dismiss the execution petition for default. But in any event the execution petition cannot be dismissed as abated.** Alternatively, it is also open to the decree holder's legal representatives, to file a fresh execution petition in case of death of the decree holder; OR, in case of death of the judgment debtor, the decree holder can file a fresh execution petition impleading the legal representatives of the judgment debtor; such a fresh execution petition, if filed, is, in law, only a continuation of the pending execution petition- the one which was filed in time*



by the decree holder initially. This is the position under the Code or Civil Procedure.”

(emphasis added)

21. In view of the aforesaid authoritative pronouncement made by the Supreme Court in *V. Uthirapathi (supra)*, it can safely be said that the learned Munsif committed no illegality in dismissing the application filed by the petitioner. In any event, on account of death of judgment-debtor, the execution petition could not have been dismissed as abated.

22. However, on the facts and in the circumstances of the case, the learned Munsif ought to have fixed a reasonable time to bring the legal representatives of the judgment-debtor on record and if the decree-holder would not have filed an application for the aforesaid purpose, he could dismiss the execution petition for default.

23. With the aforesaid observations, keeping in mind the ratio laid down by the Supreme Court in *V. Uthirapathi (Supra)*, the application is dismissed.

(Ashwani Kumar Singh, J)

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AFR/NAFR	NAFR
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