IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.102 of 2020

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Mahaveer Prasad Sah @ Mahavir Prasad, S/o Late Bhagwan Das, Resident of Mohalla-Naya Bazar, Dalpatti, P.S.-Lakhisarai, District-Lakhisarai.

... ... Petitioner/s

Versus

1. Om Prakash Sah Vidyalankar, S/o Late Bhagwan Das, Resident of Naya Bazar, Dalpatti, Lakhisarai, P.S.-Lakhisarai, District-Lakhisarai.
2. Ravi Kumar, S/o Om Prakash Sah Vidyalenkar, Resident of Naya Bazar, Dalpatti, Lakhisarai, P.S.-Lakhisarai, District-Lakhisarai.
3. Rashmi Kumari, D/o Om Prakash Sah, Resident of Naya Bazar, Dalpatti, Lakhisarai, P.S.-Lakhisarai, District-Lakhisarai.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Chandra Kant, Advocate Mr. Purushottam Kumar Jha, Advocate Mr. Navin Kumar, Advocate Mr. Ravi Bhushan Bharat, Advocate Mr. Lalan Pandey, Advocate
For the Respondent/s	:	Mr. Rajiv Ranjan Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA

CAV JUDGMENT

Date : 06-03-2024

The instant petition has been filed by the petitioner under Article 227 of the Constitution of India seeking following reliefs :-

> *"(I) Issuance of a Direction/ Order/ Writ including writ in the nature of a writ of Mandamus/certiorari to quash the order dt. 30.11.2019 passed by Sub Judge-I,*

Lakhisarai by which and whereunder he has rejected the application filed under order XXIII, Rule- 9 on dates mentioned in impugned order itself commission for local investigation for the reason that there are in erred in Decree regarding area of land as stated 2438 Sq. feet where as possession over the land under the Judgement debtor is 2696 Sq. feet in Khesra No.- 782 which does not tally & real suit land is of Khesra No.- 982, that has never modified according to law therefore to meet the principal of natural justice a verification is required to be done by the survey knowing pleader Commissioner and Petitioner- Judgement debtor is ready to bear the expenditure. Therefore a survey knowing pleader commissioner be appointed.

(II) Issuance of writ/ order in the nature of mandamus commanding that petitioner prays that a petition dt. 27.09.2019 was filed on his behalf under order 21 Rule 29 C.P.C. for staying the execution proceeding in Execution Case No.-2/2010 for the reason that a T. S. No.- 06/2016 was filed and copy was also served upon the concerning parties and matter was directed to be listed alongwith Execution Case No.- 2/2010 on 28.09.2019 but on the matter was directed to hear on 26.10.2019 said date the court was closed and in the mean time Nazir Shiv Shakti Singh reached at the place of disputed land to execute the order passed in

T. Eviction No.- 02/2004 alongwith C.O. Lakhisarai with police administration and they forcefully removed to load his domestic article on road which was protested by the Judgement debtor. The concerned authority granted one week time to vacate the premises. In mean while Judgement debtor got his land measured by the Survey knowing Amin and find that in Khata No.- 564 Khesra No.- 782 total area as per map is 19.75 decimal and total area is 8601 Sq. feet and in Khesra No.- 782 from the main road to middle side there is 31 feet where as by the appellate Court under Khata No.- 564, Khesra No.- 782 has passed order showing two storied house alongwith 106 feet length and 23 feet width land whose total area shown to home 2438. Sq. feet where as the Judgement debtor has got possession over 2696 Sq. feet land which does not tally with the delivery of possession land as in decree their is order to vacate two storied house along with rice meal where fact is that there is one storied building in land in question & no rice meal stablished on the Suit land. It is further to state here that the original Suit has been filed related to Khesra No.- 982 & entire evidences as well as many of the petitions, that was filed before the learned court below during the Trial as stated Khesra No.- 982 & even the Judgment & decree has been passed against Khesra No.- 982 but at the time of decision

of First Appeal said Khesra has been modified by the Court even there was neither any modification petition filed by any party related to the suit land of Khesra No.- 782 (Correct Khesra) nor any specific decision has been passed by the learned Court on appeal but learned Court has modified Khesra No.- 782 in the place of 982 whimsically that is against admitted principal & law of C.P.C.

(III) Issuance of a direction/ writ/ order to which the petitioner may be found entitled to in the facts and circumstances of the case."

2. Briefly stated, the facts of the case are that the petitioner and the respondents were members of joint Hindu family who owned and possessed the suit land appertaining to Khata No.782, area 9 ¼ decimals. After family partition, the petitioner got his share in the joint family property. The respondents filed Title Suit No.19/1996 before the court of learned Sub Judge, Lakhisarai for declaration of title with respect to Khata no.782, area 9 ¼ decimals and the suit was decreed in favour of the respondents. Thereafter, the respondents filed Eviction Suit No.2/2004 which was also decreed on 04.06.2010 in their favour and, thereafter, the respondents filed Execution Case No.02/2010 which is still pending. In the Execution Case No.02/2010, the respondents

filed an amendment petition for amendment of description of the house regarding which they have sought delivery of possession, but the said amendment petition was dismissed on 17.08.2015. The petitioner filed Misc. Case No.01/2016 under Section 47 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') on 28.01.2016 and on 21.04.2016 initial objection regarding maintainability was raised by the respondents and after hearing the parties, the learned court below vide order dated 21.04.2016 held the miscellaneous case to be maintainable. The petitioner contended that decree under execution had wrong entry regarding description of house in khesra number as well as area which have been wrongly mentioned with wrong boundary. It means identity of the suit property which is subject matter of the decree and execution proceeding is vague and suffering from ambiguity and hence, the decree became in-executable. Therefore, it was requested that an inquiry be made to ascertain whether decree under Execution Case No.02/2010 is executable or not. The petitioner further submitted before the learned court below that regarding the disputed area of the property over which the execution case was pending, the Commissioner should be appointed to measure the property under execution and submit a report. Subsequently, vide order dated 23.10.2016, the executing court passed an order

to stay the execution case till further orders. Thereafter, vide order dated 17.08.2017, the executing court passed another order for analogous hearing of miscellaneous case and execution case holding that the executing court has jurisdiction to determine all the questions and parallel miscellaneous proceeding was nothing but to misuse of the process of the court. During the pendency of the miscellaneous case, the petitioner filed four petitions on 25.10.2019 and 23.11.2019 for issuance of order of delivery of possession in accordance with the decree after cancellation of earlier issued delivery of possession order and also for appointment of survey knowing pleader commissioner. As all the petitions were of similar nature, the learned court below heard them together and rejected all the petitions by a common order dated 30.11.2019, which is under challenge before this Court.

3. The learned counsel for the petitioner submitted that the impugned order is erroneous and there is difference between the order passed by the learned appellate court and the factual status of the land in question. The learned appellate court in its decree specifically ordered to vacate two storied building along with 106 feet x 23 feet land having total area 2438 sq.ft., whereas factual position is that judgment debtor has one storied house along with 2696 sq.ft. The learned counsel further

submitted that Rule 459 of the Civil Courts Rules prescribes procedure for institution of miscellaneous case. When an objection is filed under Section 47 of the Code then the court has to follow Rule 459 of the Civil Courts Rules and also as per Section 141 of the Code, all the procedures which are applicable to the suit will be applicable to the miscellaneous proceeding as well. So, the miscellaneous case filed by the petitioner should be treated like suit and the court has to record evidence of the parties and, thereafter, the court has to decide the objection under Section 47 of the Code and, thereafter, it has to give finding as to whether the decree is executable or not. Reliance in this regard is placed on the decision in the case of ***Most. Sanjha Devi vs. Amar Yadav*** reported in ***2007 (4) PLJR 727***, ***Jugal Kishore Khetan vs. Mohan Lal Kheta*****n** reported in ***2009 (4) PLJR 651***.

4. The learned counsel for the petitioner further submitted that instead of deciding the objection under Section 47 of the Code, the executing court is bent upon executing the decree and unless Misc. Case No.01/2016 filed under Section 47 of the Code is decided, the executing court cannot proceed with the execution case. The learned executing court has been exercising its jurisdiction in a manner which may result in failure of justice and such exercise also tantamounts to

overstepping its jurisdiction. In these circumstances, the High Court must intervene to correct the wrong being committed by the learned executing court. Regarding power of the High Court in such cases, learned counsel relied on paragraph 23 of the judgment of the Hon'ble Supreme Court reported in the case of ***Radhey Shyam and Anr. Vs. Chhabi Nath and Ors.*** reported in ***(2015) 5 SCC 423,*** which reads as under :

> ***"23.*** *The Bench then referred to the history of writ of certiorari and its scope and concluded thus: (Surya Dev Rai case [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , SCC pp. 687-90, paras 18-19 & 24-25)*
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> *"18. Naresh Shridhar Mirajkar case [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] was cited before the Constitution Bench in Rupa Ashok Hurra case [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] and considered. It has been clearly held: (i) that it is a well-settled principle that the technicalities associated with the prerogative writs in English law have no role to play under our constitutional scheme; (ii) that a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by a superior court to an inferior court which certifies its records for examination; and (iii) that a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the High Court; much less can the writ jurisdiction of a High Court be*

invoked to seek issuance of a writ of certiorari to the Supreme Court. The High Courts are not constituted as inferior courts in our constitutional scheme.

19. Thus, there is no manner of doubt that the orders and proceedings of a judicial court subordinate to the High Court are amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.

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24. The difference between Articles 226 and 227 of the Constitution was well brought out in Umaji Keshao Meshram v. Radhikabai [Ganga Saran v. Civil Judge, Hapur, 1986 Supp SCC 401] . Proceedings under Article 226 are in exercise of the original jurisdiction of the High Court while proceedings under Article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 excepting that the power of superintendence has been extended by this article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction

which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.

25. Upon a review of decided cases and a survey of the occasions, wherein the High Courts have exercised jurisdiction to command a writ of certiorari or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the writ of certiorari is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate, revisional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the

> *impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, maybe, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well."*

5. The learned counsel for the petitioner further submitted that the appointment of Pleader Commissioner was refused by the learned court below on the ground that the executing court has to execute the decree and it will not check who is in possession of how much land, but this finding is an erroneous finding. The learned counsel further submitted that it is well settled law that the executing court can appoint a Commissioner for measurement and identification of the property. In this regard, the learned counsel placed reliance on the decisions in the cases of ***P.N.Kurian vs. Thulasidas*** reported in ***AIR 2003 Kerala 228*** & ***Smt. Lalmuni Devi and Ors. Vs. Shiv Shanker Tiwar***y, reported in ***AIR 1980 Patna 184***.

6. The learned counsel for the petitioner further submitted that the another prayer which the court has rejected is with respect to the petition dated 23.11.2019 filed by the petitioner, in which the petitioner has prayed for cancellation of delivery of possession and also for issuance of delivery of possession in accordance with the decree of the learned appellate court. The learned counsel further submitted that the court has not taken into consideration the fact that the decree holder had filed amendment petition to amend the suit property in the plaint and the said amendment petition was rejected vide order dated 17.08.2015 and as that order was not challenged before the superior court, hence, description of the property given in the plaint remains as it is. The report and warrant of possession both shows that Nazir has effected the delivery of possession residential house and godown and the same is not in accordance with law of the decree of the appellate court. From the facts and circumstances, it is clear that the learned court below has not acted as per the rule prescribed and the executing court must be directed to first decide Misc. Case No.01/2016 and, thereafter to decide the petitions filed by the petitioner. After disposal of the Misc. Case No.01/2016, the execution case can proceed and for this reason the order passed by the learned court below while rejecting the petition for appointment of

Commissioner is not in accordance with Order 26 Rule 9 of the Code. For this reason, the petition needs to be allowed and the impugned order is required to be set aside.

7. Per contra, learned counsel for the respondents vehemently contended that the order of the learned court below is correct and no interference is required. The learned counsel further submitted that the respondent no.1 filed Title Suit No.19/1996 before the learned Sub Judge, Lakhisarai for declaration of right, title and interest for the land in question which became subject matter of Execution Case No.02/2010. The decree was passed in favour of the respondent no.1. The judgment of the learned trial court was upheld by the learned appellate court vide judgment dated 26.11.2009 passed in Title Suit No.10/2006. The petitioner preferred Second Appeal No.68 of 2010 before this Court challenging the concurrent finding of the courts below, which was dismissed vide order dated 09.02.2012. The judgment and decree passed by this Court dated 09.02.2012 in S.A.No.68/2010 have not been challenged, hence, the same has attained finality. Thereafter, the respondent no.1 filed Title Eviction Suit No.02/2004 before the learned Subordinate Court which was decreed in favour of the respondent no.1 vide judgment and decree dated 31.05.2010 and the same was affirmed by judgment and decree dated

18.12.2012 and 07.01.2013, respectively whereby appeal was dismissed with some modification and judgment and decree of learned court below was affirmed. The second appeal filed by the affected party was dismissed vide order dated 18.09.2014 passed in S.A.No.65/2013 by this Court. The order of the High Court has not been challenged and the same has now attained finality. The Execution Case No.02/2010 arises out of Title Eviction Suit No.02/2004.

8. The learned counsel for the respondents further submitted that as per Section 47 (1) of the Code, all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to execution discharge or satisfaction of the decree shall be determined by the court executing the decree and not by separate suit. The petitioner, in order to delay the execution proceeding, has been filing petition after petition and this fact was duly noted by the learned executing court in its order dated 30.11.2019. The learned counsel further submitted that the petitioner filed an application dated 13.10.2019 before the Executive Magistrate, Lakhisarai for grant of some time to vacate the premises and, thereafter, he has been delaying the execution proceeding on one pretext or another. The learned counsel further submitted that there is absolutely no confusion to the identification of the suit

property. But the petitioner wants to delay the proceeding by any means. The learned counsel further submitted that the order dated 17.08.2017 passed in Misc. Case No.01/2016 was challenged before this Court in Civil Misc. No.2099/2017 and the same was dismissed vide order dated 18.07.2018. Thus, amalgamation of Execution Case No.02/2010 and Misc. Case No.01/2016 has been upheld. The petitioner has been re-agitating the same issue before this Court. The learned counsel relied on the decision of the Hon'ble Supreme Court in the case of ***Rahul S. Shah Vs. Jinendra Kumar Gandhi and Ors.*** reported in ***(2021) 6 SCC 418*** wherein in paragraph 42 certain directions were given for dealing with the execution proceeding to avoid delay in execution. The learned counsel further relied on the decision in the case of ***Pradip Mehra vs. Harijivan J. Jethwa & Ors.*** reported in ***2023 SCC OnLine SC 1395*** about the abuse of the process in execution proceeding to the peril of the helpless decree holder.

9. I have given my thoughtful consideration to the rival submission of the parties and the facts and circumstances of the case. So far as the claim of the petitioner about the identity of the suit property is concerned, I do not find much merit in such claim as its identity has made clear in the decree of the first appellate court and only the decreetal property

would be the subject matter of the proceeding before the learned executing court and in this manner the decree will be enforced by the learned executing court. The decree mentions the area with approximation and when the boundary is not in dispute, the matter cannot be agitated again and again when it has already been subject matter of first appeal and second appeal.

10. The law is well settled that executing court could not go beyond the decree and this observation has been made by Hon'ble Apex Court in a number of cases including the case of ***Topanmal Chhotamal Vs. Kundomal Gangaram & Ors.***, reported in ***AIR 1960 SC 388*** and ***J & K Bank Ltd. & Ors. Vs. Jagdish C. Gupta*** reported in ***(2004) 10 SCC 568***. But at the same time Hon'ble Supreme Court in the cases of ***Rajinder Kumar Vs. Kuldeep Singh & Ors., Mohinder Kumar Gupta vs. Kuldeep Singh & Ors. and S.K. Gupta (Dead) Through Legal Representatives & Ors. Vs. Kuldeedp Singh & Ors.*** reported in ***(2014) 15 SCC 529***, has held that if there is any ambiguity in the decree, it is for the executing court to construe the decree if necessary after referring to the judgment. If sufficient guidance is not available even from the judgment, the court is even free to refer to the pleadings so as to construe the true import of the decree. It further held that the court cannot go behind the decree or beyond the decree but while executing a

decree for specific performance, the court, in case of any ambiguity, has to necessarily construe the decree so as to give effect to the intention of the parties. Similar to the effect is the decision of the Hon'ble Supreme Court in the case of ***Meenakshi Sexena & Anr. Vs. ECGC Limited & Anr***., reported in ***(2018) 7 SCC 479***.

11. So far as the submission regarding disposal of objections prior to the execution proceeding is concerned, the learned executing court vide order dated 17.08.2017, amalgamated the proceeding of Misc. Case No.01/2016 with Execution Case No.02/2010 holding that running a separate miscellaneous proceeding under Section 47 of the Code was a misuse of the process of the court as the questions raised by the miscellaneous petitioner can be raised and adjudicated in the execution case itself. In these circumstances, it was incumbent upon the executing court to first decide the questions and objections raised in the miscellaneous petition before moving towards delivery of possession. On this limited point, I find merit in the submission of learned counsel for the petitioner and hence, the impugned order dated 30.11.2019 is set aside to the aforesaid extent only and the learned trial court is directed to dispose of the objections/questions raised by the petitioner in Misc. Case No.01/2016 within three months from the date of

receipt/production of a copy of this judgment.

12. Accordingly, the instant petition stands allowed in part.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	08.02.2024
Uploading Date	07.03.2024
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