

(1958) 08 PAT CK 0005

In the Patna High Court

Case No : A.F.O.O. No's. 227 of 1955 and 167 of 1956

Dineshwar Prasad Singh and Others

APPELLANT

Vs

Deoniti Prasad Singh and Others

RESPONDENT

Date of Decision : 25-08-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 17, 48

Citation : AIR 1959 Patna 199 : (1958) 6 BLJR 706

Hon'ble Judges : V. Ramaswami, C.J;Kanhaiya Singh, J

Bench : Division Bench

**Advocate : Lalnarain Sinha and Indu Sekhar Prasad Sinha, for the Appellant;
Rama Kant Varma, for the Respondent**

Judgement

1. Miscellaneous Appeal No. 227 of 1955 is brought on behalf of the judgment debtor appellants against an order of the subordinate Judge of Begusarai dated 13-5-1955, by which he allowed an application for amendment of the execution petition made on behalf of the decree holder respondents. It appears that the decree in this case was granted on 3-10-1939, and it provided for the payment of the decretal amount in certain annual instalments commencing from 30th Baisakh, 1347 Fasli corresponding to 21-5-1940

The present execution petition was filed on 18-12-1948, and the properties mentioned in the execution petition for being proceeded against were certain milkiat interest in village Akaha and Tulsichak, and also an elephant. On 29-3-1955, the decree-holders filed two applications, one for amending the properties which were sought to be proceeded against, and the other for correcting the name and description of the judgment-debtors. Both the applications were allowed by the executing court.

By the first amendment the decree-holders sought to proceed against the Milkiat properties in three more villages, namely, Bahorachak, Bairwa and Shaharpura. By the other amendment, the names of the judgment-debtors were sought to be described with a fuller description. In the present appeal, we are concerned with

the application for amendment made with regard to the addition of the milkfat properties. Learned counsel on behalf of the appellants did not contest the order of the learned subordinate judge dated 13-5-1955, allowing the amendment with regard to the names of the judgment-debtors.

With regard to the amendment of the properties to be proceeded against, the learned Government Advocate submitted that the execution petition was barred by limitation u/s 48 of the Code of Civil Procedure, and the amendment petition made on 29-3-1955, should be treated as a fresh execution petition within the meaning of Section 48 of the Code of Civil Procedure. In support of this proposition, the learned Government Advocate referred to a decision of this High Court in *Gajanand Sha and Others Vs. Dayanand Thakur*, which is a judgment of Fazl Ali and Chatterji, JJ.

It appears that in that case the decree-holder wished, by means of a subsequent application, to substitute a new property which was quite different from the property against which he wished to proceed in the first instance. It was held by the learned Judges that this application for amendment must be treated as a fresh application for execution, and Rule 17 of Order 21 of the CPC did not apply in such a case. It was further pointed out in that case that Order 21, Rule 17 was intended to deal only with formal amendments but for which the application for execution or attachment will not be regarded as complete.

For example, under Rule 11 the judgment-debtor is required to state such details as the number of the suit, names of the parties etc. and if on a scrutiny of the application it appears that any of these details is missing in that application, the court may give an opportunity to the decree-holder to remedy the defect. Similarly, what Order 21, Rule 13 contemplates is that the property which is sought to be attached should be described in such a way in the application for attachment as to show that the property is identifiable.

If, therefore, there are found wanting in the description such details as are necessary for the proper identification of the property, the executing court has full power to allow the decree-holder to remove the defect by supplying such details. But Rule 17 was never intended to enable the decree-holder to ask the court to delete from his application a property which is fully described and to substitute in place thereof another property with totally different description. In our opinion, the ratio of this case applies fully to the present case and it must be held that so far as instalments up to May, 1942, are concerned, the execution is barred by limitation u/s 48, Civil Procedure Code.

The learned Government Advocate conceded with usual fairness that the execution will not be barred by limitation with regard to instalments after May, 1942. Reliance was placed on behalf of the respondents on the decision of this Court in *Sheogobind Ram Vs. Mt. Kishunbansi Kuer*, . That case was cited before the learned Judges of the Division Bench who decided the case in *Gajanand Sha and Others Vs. Dayanand Thakur*, , and it was distinguished on the ground that

in Sheogobind Ram Vs. Mt. Kishunbansi Kuer, the amendment 311 question had been made under Order 21, Rule 17, Civil Procedure Code, and the interpretation of Section 48 of the CPC was not involved.

In Sheogobind Ram Vs. Mt. Kishunbansi Kuer, , an application for execution was filed against a deceased judgment-debtor in the first instance and subsequently leave was granted by the court to substitute on the record her heir. It was pointed out by the learned judges who decided that case that as soon as the defect was brought to the notice of the court, it fixed the time to correct the mistake and, therefore the case in substance was covered by Order 21, Rule 17, Civil Procedure Code.

In present case, for reasons mentioned in AIR 1943 Patna 127 we hold that the amendment which the decree-holders sought to make in the execution petition is not an amendment contemplated by Order 21 Rule 17 of the Code of Civil Procedure. A view similar to that taken in AIR 1943 Patna 127 has also been expressed in Maharaja Bahadur Ram Ranbijaya Prasad Singh Vs. Kesho Prasad Singh and Another, and the decision reported in AIR 1929 209 (Privy Council) .

On behalf of the respondents reference was made to decisions of other High Courts where a contrary view appears to have been taken, for example, a decision of the Calcutta High Court in Shekendarali Meah Vs. Abdul Gafur Choudhury and Others, , of the Bombay High Court in Vallabhdas Narandas Vs. Kantilal G. Parekh, , of the Madras High Court in Srila Sri Subramania Desika Gnanasambanda Pandara Sannadhi (deceased) and Another Srila Sri Shanmuga Desika Gnana Pandarasannadhi, Legal Representative Vs. Rangaswami Chettiar, and of the Mysore High Court in Marulusiddappa v. Lakshmipathi AIR 1950 Mys 64.

We, however, prefer to base our decision on the view expressed in Gajanand Sha and Others Vs. Dayanand Thakur, , and the series of Patna decisions followed in that case, namely, Chaurasi Mahasarick and Another Vs. Bhagan Sahu and Others, and Maharaja Bahadur Ram Ranbijaya Prasad Singh Vs. Kesho Prasad Singh and Another, . We see no reason to differ from the view expressed by this current of decisions. In our view, the present case is covered by the decision in Gajanand Sha and Others Vs. Dayanand Thakur, and it follows, therefore, that the appeal must be allowed and it must be held that the decree-holder respondents cannot prosecute the decree so far as the instalments before 1943 are concerned.

It must be held that the decree is barred by limitation u/s 48 of the CPC so far as these instalments are concerned and the decree-holders are not entitled to proceed with respect to these instalments. We accordingly allow Miscellaneous appeal No. 227 of 1955 to the extent indicated above. There will be no order for costs of the hearing of this appeal.

Miscellaneous Appeal No. 167 of 1956.

2. Miscellaneous Appeal No. 167 of 1956 is presented on behalf of one of the judgment-debtors against an order of the Subordinate Judge of Begusarai dated the 15th March, 1956, fixing the valuation of certain properties u/s 13 of the Bihar Money Lenders Act.

3. On behalf of the appellant a submission was made that after the order under appeal was made, there has been a change in the topography of the land. It was pointed out that the learned: executing court has proceeded upon the assumption that the lands which are sought to be sold were subject to periodical floods. But an affidavit has been sworn on behalf of the appellant that during the pendency of the appeal protective bunds-have been constructed on the sites of the river Gandak and Bagmati, and on account of this construction villages in which the disputed lands are situated are free from flood and so the valuation of the lands requires to be allowed.

An application has been made on behalf of the appellant, therefore, for producing additional evidence under the provisions of Order 41, Rule 27 of the Code of Civil Procedure. We consider that in the circumstances of this case the appellant should be permitted to adduce additional evidence under Order 41, Rule 27 of the CPC and the case is remanded to the executing court for this purpose.

4. For these reasons, we allow this appeal, set aside the order of the learned Subordinate Judge of Begusarai dated the 15th March, 1956, valuing the lands in dispute, and send the case back on remand to the learned Subordinate Judge for rehearing the question of valuation afresh after giving the parties an opportunity to adduce additional evidence with regard to the construction of the protective bunds on the sites of river Gandak and Bagmati as stated in the application of the appellant.

5. The appeal is accordingly allowed, but there will be no order as to costs.