

(1960) 10 PAT CK 0014
In the Patna High Court
Case No : Civil Revision No. 1082 of 1959

Smt. Kalabati and Another	Vs	APPELLANT
Chandranarain Mandal and Others		RESPONDENT

Date of Decision : 10-10-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1962 Patna 55

Hon'ble Judges : N.L. Untwalia, J

Bench : Single Bench

Advocate : S.N. Dutta and Mani Lall, for the Appellant; J.C. Sinha, for the Respondent

Final Decision : Allowed

Judgement

N.L. Untwalia, J.—This application in revision by the , two petitioners has arisen in these circumstances—In 1943, Deonarain Mandal since deceased, husband of the two Petitioners brought a suit for specific performance of contract against opposite party Nos. 2 to 7. Opposite party Nos. 2 to 8 had agreed to sell the property to him. Opposite party Nos. 4 to 7 were subsequent purchasers with notice of the contract for sale in favour of Deonarain Mandal. The suit was decreed by the trial court. The appeal of opposite party Nos. 4 to 7 before the lower appellate Court was also dismissed. They preferred Second Appeal No. 842 of 1950 in this Court and during the pendency of this appeal Deonarain Mandal died. The two Petitioners, his two widows, were substituted in the second appeal on the 1st February, 1956, and ultimately the second appeal was dismissed on the 31st July, 1956. Thereafter, Title Execution Case No. 176 of 1959 has been filed in the court of the Munsif at Madhipura by the two widows for execution of the decree for specific performance and another execution case, being Title Execution case, No. 178 of 1959, has been filed in the same court by Chandranarain Mandal opposite party No. 1, wherein he has impleaded the two widows also as parties On the ground that they are not ready to joint in the

execution case with him. Both the execution cases, it appears are; pending in the same court.

2. The order sheet of Execution case No. 176 of 1939 which is before me, shows that, after the office checked the application in Execution, it was directed by order dated 1-8-59 to put it up on 3-8-59 in presence of decree holder's lawyer. On the latter date the order reads

"Heard lawyers. Put up on 6-8-59 for further hearing."

On 6-8-59 the order is :-

"Dhr files hajri. Heard lawyers to 14-8-59 for order,"

It is not clear what matters were heard on 3-8-59 and 6-8-59 and who was the lawyer heard. The order dated 14-8-59 shows, however, that the matter, which was heard on these dates, was as to whether Chandranarain Mandal could execute the decree in question. I could not exactly follow how both the execution petitions were heard together. There does not seem to be any Order to that effect. Be that as it may, so far as the order passed in Execution case No. 176 of 1959 is concerned, the court below held by the order dated 14-8-59 that the executory of this decree should be the two widows of Deonarain Mandal and also Chandranarain Mandal. The parties were given chance to join hands in executing the decree. Thereafter, On 28-8-59 Chandranarain Mandal filed a verified petition along with the power praying to be made a decree holder in Execution Case No. 176 of 1959. This prayer was allowed by the order of that date. The Petitioners therefore, have come up in revision to this Court against the said order.

3. Mr. S. N. Datta, appearing in support of this application has urged two points (i) that, on the face of the decree, the two Petitioners only were the decree holders and Chandranarain Mandal cannot be heard in the execution case filed by them that he has also a right to execute the decree and as such cannot be added as a party to it, and (ii) that in any event the question inter se between the alleged heirs of the decree holder cannot be decided in an execution case u/s 47 of the Code of Civil Procedure, it has got to be decided by a separate suit.

4. Mr. J. C. Sinha, appearing for Chandranarain Mandal, opposite party No. 1, has not seriously contested the second point urged by Mr. Datta but has submitted that, on the facts and in the circumstances of this case the executing court can go into the question and decide that Chandranarain is one of the persons entitled to execute this decree. He has further raised a point of res judicata by pointing out that no appeal or revision has been preferred in Title Execution Case No. 178 of 1959 and the order dated 14-8-39 in effect holds that Chandranarain has got a right to proceed with that execution inasmuch as he has got a right to execute the decree along with the two widows. He, therefore, contended that the present application is barred on the principles of res judicata.

5. I do not think that the point of res judicata raised by Mr. J. C. Sinha has got any substance. The order dated 14-8-59 on the face of it has been passed in

Execution Case No. 176 of 1959. The order sheet of Title Execution Case No. 178 of 1959 has not been filed before me by opposite party No. 1. I do not know what orders have been passed in that execution case. There is nothing to indicate as to why and what matters in the two execution cases were heard together. Although in one sense, the point involved if raised in the two execution cases, could be said to be the same, the points are not exactly the same; and so far as Execution Case No. 176 of 1959 is concerned, I am called upon to see as to whether addition of Chandranarain as a party decree holder in this execution case is justified in law and has been so directed to be made with jurisdiction.

This leads me to the consideration of the two points raised on behalf of the Petitioners.

6. It is to be noticed that the second appeal was tiled in the year 1950 and on the death of Deonarain Mandal only 2 widows were substituted in his place on the 1st of February, 1956. The second appeal was disposed of 5 months later and at no point of time Chandranarain came and filed any application in the second appeal to be added or substituted as a party respondent along with the widows in place of deceased Deonarain. The trial Court decree ultimately merged in the High Court decree passed in the second appeal and, on the face of the decree, it (decree) stands in favour of the two widows only. The Executing court, therefore is not called upon to go into this question in the execution case as it has got to execute the decree as it stands. It may well be that Chandranarain, if he has got an interest in the decree, can establish it in a separate suit and may not be bound by the order of substitution passed on 1st of February, 1956. But that is no ground for adding him as a party decree holder in Execution Case No. 176 of 1959.

7. I find that second contention of Mr. S. N. Dutta is supported by decisions of this Court in *Munshi Rai Vs. Rup Narain and Others*, ; *Md. Abdul Matin and Others Vs. Mt. Bibi Hamidan*, , *Mt. Amiran and Another Vs. Mt. Kaniz Aisha and Others*, and *Mt. Bibi Kaniz Ayesha and Another Vs. Mojibul Hassan Khan and Others*, . As against this, Mr. Sinha submitted that, if the point would have been raised by the Judgment-debtors (although in the instant case I cannot see how the point could be raised on their behalf), the question as to who are the heirs of the decree-holder can be decided u/s 47 of the Code. To this extent, his submission, is correct and finds support from another Bench decision of this Court in *Kailash Kinkar Narain Singh and Others Vs. Dasrath Singh and Others*, . But the clear distinction which has been pointed out in several decisions is that, if the point is raised between two parties who had adverse or divergent interest in the suit, it can be decided in a proceeding u/s 47 of the Code, but, if it is raised inter se between the parties who or whose predecessors-in-interest had no divergent claims, it cannot be decided in that proceeding.

Here it is obvious that Deonarain was the sole plaintiff in the original suit and a question which falls to be decided between, his alleged heirs is not a question which should be decided between them in a proceeding u/s 47 at the instance of

one or more of them. The judgment-debtors in this case are not raising any objection in regard to the rights of the widows to execute the decree. In that view of the matter, in my Opinion, the view taken by the learned Munsif in his order dated 14-8-1959 is unwarranted and uncalled for in this proceeding and his order dated 28-8-1959 is one which is not only bad in law but has been passed without jurisdiction. I may make it clear, however, that I am not concerned in this revision application with what would and should be the fate of Title Execution Case No. 178 of 11959 filed by Chandranarain Mandal.

8. In the result, I allow this application, set aside the order dated 28-8-1959 and direct that Execution Case No. 176 of 1959 shall proceed to disposal according to law at the instance of the petitioners only. I make no order as to costs.