

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12137 of 2012

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1. Smt. Kamla Lal, W/O Sri Someshwar Lal R/O 613 B Lotus Apartment,
 Roadno. 1/F, Near Patliputra Colony, Patna-13

.... Petitioner/s

Versus

1. Ambika Singh, S/O Late Thakur Prasad Singh R/O Khajpura Tola,
 Garbhuchak, P.S.- Gardanibagh, Town And District- Patna
 2. Alakh Chouhan, S/O Late Govind Singh Azad R/O Khajpura Tola,
 Garbhuchak, P.S.- Gardanibagh, Town And District- Patna
 3. M/s Kislay Grih Nirman Swawlambi Sahkari Samittee Limited through
 Its Present Chief Executive Smt. Kamla Lal W/O Sri Someshwar Lal R/O
 613 B Lotus Apartment, Road No. 1/F, Near Patliputra Colony, Patna-13,
 Registered Office At 309/B, Adharshila Complex, Near Reserve Bank Of
 India, P.S.- Gandhi Maidan, District And Town - Patna

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Radha Mohan Pandey--Advocate

For the Respondent/s : Mr. Onkar Nath--Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

13 08-12-2015 A supplementary counter-affidavit as well as
 supplementary affidavit has been filed on behalf of respective
 parties, taken on record.

2. Heard learned counsel for the petitioner as well as
 learned counsel for the respondents.

3. At an earlier occasion, two petitions were
 surviving, one the present one and the another C.W.J.C. No.12149
 of 2012 filed by Dilip Kumar, which had already been disposed of
 vide order dated 04.12.2015, considering the submission made on
 behalf of learned counsel for the respondents while reserving his

objection so far petitioner is concerned. As such, instant petition has been heard independently.

4. The tug of war is going on amongst the landholder as well as Builder having named and styled as M/s Kislay Grih Nirman Swawlambi Sahkari Samittee Limited which is an institution created by the petitioner and her family members and further, at an earlier occasion, petitioner's son was Chief Executive and subsequently thereof, petitioner has shown herself to be Chief Executive.

5. In course thereof, the matter come up before this Court times without number under different heading, lastly have a pause after having nomination of arbitrator who had filed an award whereupon litigation again revived as against aforesaid award, petitioner had some sort of grievances, however, failed to sack the aforesaid award even up to the Hon'ble Apex Court. Consequent thereupon, the award has been made rule of the Court. Now, as is evident as per the terms of the award regarding payment to be at the end of the builder as laid down under Paragraph-34(II) of the award failed to be honoured, an execution proceeding has been drawn up bearing Execution Case No.01 of 2008 and during course thereof, the flat bearing No.6F including other have been attached. Regarding Flat No.6F, there happens to be plea at the end of the



petitioner to be her personal property whereupon filed a petition under Order-21, Rule-58 of the C.P.C. independently bearing Misc. Case No.17 of 2011, which is still pending. At the other end, the learned lower Court proceeded with the execution proceeding, hence arose a cause for filing instant petition.

6. It has been submitted on behalf of petitioner that Arbitrator, during course of preparing award, had perceived fault at the end of both the parties that means to say, the builder as well as the owner and on account thereof, gave a sumon to the builder in likewise manner, also directed the owner not to put hindrance in having the building constructed in terms of plan, so sanctioned by the authorities concerned. It has further been submitted that builder is accountable for the same and not an independent individual be it a partner or Chief Executive of the aforesaid institution that means to say, the individual status of the petitioner has to be bifurcated, separated, segregated from the affairs of the institution and on that very score, the interest of the petitioner is to be protected and for that, the learned lower Court should have gone through the petition filed by the petitioner under Order-21, Rule-58 registered under a separate Miscellaneous Case before proceeding ahead with the execution proceeding. It has also been submitted that aforesaid plea of the petitioner is found duly

supported with the principle enunciated by the **Hon'ble Apex Court reported in (2000)10 SCC 405** as well as **1998(1) P.L.J.R. Page-157**. As such, it has been prayed that the order impugned is fit to be set aside.

7. Per contra, it has been submitted on behalf of O.P. Nos.1 and 2, the owners that inter se relationship is not disputed. It has also been submitted that creation of respondent no.3, the society M/s Kislay Grih Nirman Swawlambi Sahkari Samittee Limited is at the behest of family members of the petitioner including petitioner in order to avoid so many legal complications while performing their motto to construct an apartment and sell it giving due share to the landholders in terms of agreement, so arrived, amongst them and retain thereunder. Therefore, it happens to be a business firm organized, patronized managed by the family members and for the illegal activities, they all are responsible as by their joint action such incident has visualized.

8. Furthermore, it has been submitted that it is an admitted fact that dispute arose amongst both of them and on account thereof, series of litigation cropped up wherein ultimately so many request cases were filed on behalf of landholders for appointment of arbitrator whereupon arbitrator was appointed, who submitted his award which, now remains the rule of the



Court. As per Clause-34, apart from allotment of flats in favour of different landholders, the builder was also required to pay the amount as detailed to the landholders. As the builder failed to pay the amount, though the flats have already been allotted, therefore, needs institution of execution case wherein, for satisfaction of the award, the flats have been attached including that of Flat No.6F which, happens to be the property of M/s Kislay Grih Nirman Swawlambi Sahkari Samittee Limited and not the individual acquisition of the petitioner as, from the document itself which is of the year 2002, it cast doubt over genuineness. So, submitted that if the petitioner is ready for payment of the aforesaid amount, then in that event, there will be no need to proceed with the execution case.

9. At the present moment, it has been submitted on behalf of petitioner that she is ready to pay amount, however, as she is being tortured and harassed by the builders out of whom, one, Binod Kumar Singh, brother of this petitioner has instituted Title Suit No.600 of 2012 for cancellation of the agreement having in between, hence she is not in a position to pay. It has also been submitted that the illegal activities by which builder has been forbidden to proceed with its construction work has also been perceived by the arbitrator and on that very score, the owners have

also been directed not to put hindrance in between, so that smooth sailing of construction work be allowed to continue, but never paid heed to it.

10. Gone through the relevant citation referred by learned counsel for the petitioner which relates with Order-21, Rule-97 to 101 of C.P.C. and not with regard to Order-21, Rule-58 of C.P.C. Both have got distinct feature and further, the requirements are not the same. Order-21, Rule-97 is always available when there happens to be obstruction during course of possession, while Order-21, Rule-58 is applicable when there happens to be attachment. Under Order-21, Rule-58, the Court is to adjudicate upon the claim or objection so raised on behalf of objector over attachment of property in execution of decree having an exception, as follows:-

“Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed”.

11. The subsequent provision, so incorporated under Rule-58, commands the procedure to be followed on filing, the

petition and those are prescribed under Sub-section-2 to Sub-section-5 for better appreciation, the same is quoted below:-

“(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,-

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) Continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if

it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive”.

Order-21, Rule-59 takes care of subsequent event after having a petition in terms of Order-21, Rule-58, whereunder Court has been directed to shrink its subsequent activity till the matter is adjudicated upon.

12. However, on plain reading of Order-21, Rule-58, it is evident that before proceeding ahead to adjudicate upon the point, it is evident that the aforesaid procedure is duly clutched by two eventualities, the first one the property had already been sold before filing of the objection and secondly, when the Court considers that the claim or objection was filed with mala fide intention just to defeat the execution.

13. From the petition impugned, it is evident that it has been filed in year 2012 wherein, the first order so alleged is the order dated 11.06.2008 whereby and whereunder the flat has



been directed to be attached when none turned up to defend even on due notice. The second order is dated 17.05.2012/ 18.05.2012 and both have been conjointly challenged without any explanation, that too while the petitioner, though claimed as Chief Executive, was contesting the award (Annexure-B) vide C.W.J.C. No.506 of 2011 which was disposed of on 25.06.2012. Thus, from the conduct of petitioner, it is apparent that she was well aware with the event and is adamant to put hurdle at each and every step. However, as the miscellaneous petition filed on behalf of petitioner is still alive, and instead of proceeding with the aforesaid petition, in order to delay the execution, has raised an objection at the present moment challenging the order impugned, which has been passed in the background of rejection of prayer on 24.01.2009 on a petition dated 12.09.2008 filed on their behalf. A further question is found unbonated relating to maintainability of petition under Order-21, Rule-58 in the background of presence of Section 47 of the C.P.C. considering status of the petitioner.

14. Apart from this, the incidence of execution proceeding as well as an objection purported to be under Order-21, Rule-58 deals with two different atmosphere, and the prayer, so made on behalf of petitioner to set aside the order impugned is found misconceived, as the prayer is found quite redressable in

terms of Rule-59, which has applicability having the proceeding under Order-21, Rule-58 and consequent thereupon, the instant petition lacks merit and is accordingly, rejected.

(Aditya Kumar Trivedi, J)

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