

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CIVIL MISCELLANEOUS JURISDICTION No.446 of 2016**

=====

Ashok Kumar Singh & Anr

.... .... Appellant/s

Versus

Birendra Singh @ Ramakant Singh & Ors

.... .... Respondent/s

=====

**Appearance :**

For the Appellant/s : Mr. J.K. Verma, Adv.

For the Respondent/s : Mr. J.S. Arora, Sr. Adv.

=====

**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR  
SAHOO  
ORAL ORDER**

9      29-11-2016                      Heard learned counsel, Mr. Jitendra Kishor Verma,  
  
appearing for the petitioners and learned Senior counsel, Mr. J.S.  
  
Arora, appearing for the respondents.

2.                      Perused the order dated 27.06.2016 passed by the  
  
learned Sub-Judge-VI, Patna in Execution Case No. 04 of 2013,  
  
whereby the application for stay of the Execution Case No. 04 of  
  
2013 filed by the petitioners has been rejected.

3.                      It appears that the suit for specific performance of  
  
contract was filed by the plaintiffs-respondents, who are the  
  
decree holder. Prior to the filing of this suit for specific  
  
performance of contract, the sale deed had already been executed  
  
by the defendants of the suit for specific performance of contract  
  
in favour of the present petitioners on 27.03.2012. The suit for  
  
specific performance was decreed ex-parte because the vendor of  
  
the petitioners did not contest the suit. After decree of the suit for



specific performance of contract, Execution Case No. 04 of 2013 was filed by the plaintiffs-decree holder-respondents for execution of the decree passed ex-parte in the suit.

4. The present petitioners, who are the objector filed an application under Order 21 Rule 97, 99 and 101 C.P.C. praying for declaration of their title alleging that prior to the suit for specific performance of contract filed by the plaintiffs, they have already purchased the property on 27.03.2012, as such, on the date of filing the suit for specific performance contract, they were the rightful owner of the property. The decree passed against the vendor of the petitioners is not binding on him. The suit premises was in occupation of tenant, therefore, the vendor of the petitioners filed eviction suit against tenant and in the eviction suit, delivery of possession was effected in favour of the vendor and thereafter the petitioners are coming in possession of the property. This application under Order 21 Rule 97, 99 and 101 C.P.C, has been registered as Miscellaneous Case No. 05 of 2016 and it has been admitted for hearing. The petitioners filed application praying for stay of the delivery of possession in the execution case till the disposal of the Miscellaneous Case No. 05 of 2016. The court below by the impugned order has rejected the prayer for stay recording finding that objector has no actual



possession over the disputed property.

5. Learned counsel, Mr. J.K. Verma, appearing for the petitioners relying on the decision of the Supreme Court rendered in the case of ***Babulal Versus Raj Kumar & Ors.*** reported in ***Air 1996 SC 2050*** submitted that till the disposal of the application under Order 21 Rule 97 C.P.C., the objectors cannot be dispossessed from the suit premises. According to learned counsel, in the case before the Supreme Court also, the objector was the prior purchaser of the suit property and after purchase, the suit for specific performance was filed and thereafter, it was decreed. Learned counsel in support of his contention further relied on the decision of the Supreme Court rendered in the case of ***Brahmdeo Chaoudhary Versus Rishikesh Prasad Jaiswal*** reported in ***AIR 1997 SC 856***. According to learned counsel, the decree passed in a suit for specific performance of contract cannot be executed in favour of the petitioners, who are the owner of the property and were not made party in the suit for specific performance of contract.

6. On the other hand, learned Senior counsel, Mr. J.S. Arora, appearing for the respondents submitted that in the sale deed itself, there is mention that delivery of possession was effected in favour of the purchasers i.e. objectors but, in fact, it



was in possession of the tenant, who was evicted by eviction decree in eviction suit filed by the vendor of the objectors, which clearly indicate that the sale deed is showy and sham transaction. This Eviction Suit No. 85 of 2012 was filed by the vendor of the petitioners after the sale deed executed in favour of the present petitioners, the objectors of the execution case. The delivery of possession in eviction suit was also effected in favour of the vendor of the present petitioners. According to learned counsel, the respondents were not aware of the sale deed in favour of the petitioners. The court below considering all these facts has held that the objectors are not in possession of the property and, accordingly, rightly rejected the prayer for stay. Moreover, if the delivery of possession will be effected, it will be always subject to the result of the miscellaneous case filed by the petitioners.

7. It is the pleading of the petitioners in the application under Order 21 Rule 97, 99 and 101 C.P.C. that after delivery of possession in eviction suit, the petitioners are coming in possession of the suit property. The miscellaneous case has been admitted for adjudication.

8. The Hon'ble Supreme Court in the case of ***Babulal*** (supra) has held that it would, therefore, be clear that an adjudication is required to be conducted under Order 21, Rule 98



before removal of the obstruction caused by the objector or the appellant and a finding is required to be recorded in that behalf. The order is treated as a decree under Order 21, Rule 103 and it shall be subject to an appeal. The determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under Order 21, Rule 98 which is an order and is a decree under Order 21, Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it were a decree. Thus, the procedure prescribed is a complete code in itself. Therefore, the executing Court is required to determine the question, when the appellants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance.

9. It is also admitted fact that the petitioners are the purchasers of the suit property by a registered sale deed dated 27.03.2012. This sale deed is never challenged by the plaintiffs-respondents. After this sale deed, it appears that the suit for specific performance of contract was filed by the plaintiffs-respondents without making the real owner of the property as party to the suit for specific performance of contract. The vendor of the petitioners did not contest the suit as he has already parted with his interest in favour of the petitioners. Obviously, therefore,



the suit for specific performance was decreed *ex-parte* and the plaintiffs-respondents are trying to execute the said decree in favour of the real owner of the property without making him party in the suit for specific performance and without challenging the sale deed, which is prior to the institution of the suit for specific performance of contract, on the ground that the purchasers are not in possession of the property. This is the main question to be decided in the application under Order 21 Rule 97 C.P.C. filed by the petitioners. The court below while deciding whether stay should be granted or not has decided the main issue of the miscellaneous case.

10. In view of the above facts and circumstances of the case, in my opinion, the court below has acted in the manner not permitted by law and refused to exercise the jurisdiction vested in it by law and, thereby, occasioned failure of justice. If the impugned order is not set aside then it will cause prejudice to the petitioners.

11. In the result, this miscellaneous application is allowed. The impugned order dated 27.06.2016 passed by the Sub-Judge-VI in Execution Case No. 04 of 2013 is hereby, set aside. The further proceeding in Execution Case No. 04 of 2013 pending



before Sub-Judge-VI, Patna shall remain stayed till the disposal of the Miscellaneous Case No. 05 of 2016 filed by the petitioners under Order 21 Rule 97, 99 and 101 C.P.C. However, it is made clear that any observation on merit or otherwise made by the trial court in the impugned order and by this Court in this order shall not prejudice any of the parties in the trial of the miscellaneous case.

Brajesh/-

|   |  |  |  |
|---|--|--|--|
| U |  |  |  |
|---|--|--|--|

**(Mungeshwar Sahoo, J)**

