

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1025 of 2016**

=====

Shyam Kumar Purbey

.... Appellant/s

Versus

Hari Narain Purbey

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Shailendra Kumar

For the Respondent/s : Mr.

=====

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

2 29-09-2016

Heard the learned counsel, Mr. Bhupendra Narain Singh

for the petitioner and the learned counsel, Mr. Manoj Kumar for
the respondent.

It appears that in partition suit injunction order was
passed restraining the parties from transferring the suit property. It
further appears that some properties were sold by one of the
defendants and, therefore, an application under Order 39 Rule 2A
C.P.C. was filed by the respondent which was registered as Misc.
Case No.9 of 2004. Evidences were adduced by the plaintiff-
respondent who is the petitioner in the miscellaneous case.
Thereafter, amendment application was filed on 16.08.2016
alleging that this petitioner Shyam Kumar Purbey has sold on
23.05.2002 in spite of the injunction order. By the impugned
order, this amendment application has been allowed. As a result of
which, the miscellaneous case i.e. the proceeding under Order 39

Rule 2A C.P.C. will now continue against the present petitioner also.

The learned counsel for the petitioner submitted that firstly order 6 Rule 17 C.P.C. is not maintainable. Secondly, he submitted that if it is maintainable, then because of proviso to Order 6 Rule 17 C.P.C., the amendment could not have been allowed by the Court below after commencement of trial as the proviso to Order 6 Rule 17 is mandatory. Further, the sale deed said to have been executed by the petitioner is of the year 2002 and now after such a long period the petitioner is now trying to prosecute the petitioner after 14 years.

On the other hand, the learned counsel for the respondent submitted that when he came to know about the violation of the injunction order, he has filed the amendment application. The proceeding under Order 39 Rule 2A is filed informing the Court about the violation of the injunction order. The petitioner has sold the property in violation of the injunction order. Therefore, on technical ground, the application could not have been rejected by the Court below.

Admittedly, the miscellaneous case is an application filed under Order 39 Rule 2A C.P.C. The provision as contained in Order 6 Rule 1 C.P.C. provides that “pleading shall mean plaint or



written statement.” Therefore, the application filed by the respondent under Order 39 Rule 2A is not a plaint nor is a written statement. It is only a mere application. Now, therefore, by filing supplementary affidavit to the application, this fact about the violation of the injunction order by the petitioner could have been brought by the respondent herein. Merely because the application has been leveled under Order 6 Rule 17 C.P.C., the Court should not reject outrightly.

The question is whether the petitioner has violated the injunction order or not. How this fact is brought to the notice of the Court is immaterial whether by filing supplementary affidavit or by filing application under Order 6 Rule 17 C.P.C. Moreover, even if Order 6 Rule 17 C.P.C. application is maintainable then also in the facts and circumstances of the case the evidence of the petitioner has not yet started.

Now the controversy between the parties is the petitioner has violated the order. Merely on technical ground i.e. proviso to Order 6 Rule 17 C.P.C. is considered and the application is rejected then this dispute between the parties will remain pending. In my opinion, therefore, this amendment sought for is necessary for just decision of the controversies between the parties. Now let us consider in other way. When the evidence of the petitioner has

not yet started, there is no question of prejudice to him arises. He has got the opportunity to put forth his case.

The Hon'ble Supreme Court in the case of **Rajkumar Gurawara vs. S.K.Sarawagi and company private limited and another, (2008) 14 Supreme Court Cases 364** has held that "in the case of amendments after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such an event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso to Order 6 Rule 17 C.P.C." In the present case, there is no question of completion of evidence of the petitioner arises because evidence has not yet been started.

In view of the above factual and legal position, in my opinion, this is not a case for interference in exercise of supervisory jurisdiction. Thus, this Civil Miscellaneous application is dismissed.

(Mungeshwar Sahoo, J)

Saurabh/-

U			
---	--	--	--