

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17935 of 2015

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Munna Prasad & Ors

.... Petitioner/s

Versus

Sri Kailash Dubey & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Vinay Kirti Singh

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

3 20-09-2016 Heard the learned counsel, Mr. Vinay Kirti Singh for the

petitioners and the learned senior counsel, Mr. S.S.Dvivedi for the

respondent No.1.

Perused the impugned order dated 23.07.2015 passed by
Sub Judge III, Siwan in Execution Case No.4 of 2013 whereby the
Court below rejected the application filed by the judgment debtor-
petitioner for stay of the execution case during the pendency of the
Title Appeal No.60 of 2013.

It appears that the plaintiffs-respondents filed the suit for
specific performance of contract. The suit has been decreed.
Against the said judgment and decree, the defendants-petitioners
have filed aforesaid title appeal which is pending before the lower
appellate court.

According to the learned counsel for the petitioner, stay
application has been filed before the lower appellate court but the



lower appellate court said that he will hear the appeal itself and, therefore, it was necessary for the petitioner to file an application before the executing court for stay of further proceeding but the learned court below without considering this aspect has rejected the application for stay.

On the other hand, the learned senior counsel, Mr. Dvivedi submitted that no such stay application has been filed before the lower appellate court and in fact, the application filed before the Executing Court itself is not maintainable and, therefore, the Executing Court has rightly rejected the application filed by the petitioners. Moreover, the Executing Court is proceeding to get the sale deed executed and there is no question of delivery of possession at this stage arises. The learned counsel further submitted that the Executing Court cannot stay the execution proceeding on the ground that title appeal is pending. It is the appellate court who has the jurisdiction to stay the execution case.

From perusal of the impugned order, it appears that the learned Court below has held that there is no stay order passed by any higher courts. Admittedly, title appeal has been filed before the lower appellate court. Whether application has been filed under Order 41 Rule 5 C.P.C. or not, it is a question of fact but in

view of Order 41 Rule 5 C.P.C. merely because an appeal is filed, it shall not operate as a stay of the proceeding under a decree. According to this provision, the proceeding cannot be stayed except the order of the appellate court.

In my opinion, therefore, the learned Court below has rightly rejected the application filed by the petitioners as such, in my opinion, this is not a case for interference in supervisory jurisdiction under Article 227 of the Constitution of India.

Accordingly, this writ application is dismissed.

(Mungeshwar Sahoo, J)

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