

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16854 of 2015

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Purnea Municipal Corporation Purnea

.... Petitioner/s

Versus

Vidya Sagar Prasad & Anr

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Bijendra Kumar Singh

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

4 31-08-2016

Interlocutory application being I.A. No. 6223 of 2016

has been filed by the son of respondent No.2 for being added as party on the ground that prior to filing of the writ application, respondent No.2 had died in the year 2007 itself.

2. The learned counsel for the petitioners has got no objection. Accordingly, the interlocutory application is allowed. Son of respondent No.2 is substituted in place of respondent No.2 after deleting the name of deceased-respondent No.2. He has already appeared by filing vakalatanama.

3. It appears that title suit No. 624 of 1993 was filed by the plaintiffs-respondents for declaration of title and for delivery of possession after removing encroachment and for further declaration that the suit land was never a public road and that the defendants have no title and possession over the suit property. In the suit, there were two defendats, one is Commisisoner of Purena



Municipal Corporation other is Executive Officer-cum- Special Officer, Purnea Municipal Corporation. The suit was decreed *ex parte*. Thereafter, Execution Case No. 02 of 2007 was filed by the plaintiffs-respondents to execute the *ex parte* decree. The Purnea Municipal Corporation, petitioner No.1, herein, when came to know about execution case and *ex parte* judgment, filed application under Order 9 Rule 13 C.P.C. being Miscellaneous Case No. 01 of 2015 praying for setting aside the *ex parte* decree. Since the Executing Court was proceeding to execute the *ex parte* decree, the petitioner filed application praying for stay of the execution case during the pendency of the Miscellaneous Case No. 01 of 2015. By the impugned order, the Executing Court disposed of the application observing that it would not be proper to stay the further proceeding of the instant execution case. Further no sufficient cause has been shown to the Court as discussed in the order.

4. Learned counsel for the petitioners submitted that in view of Order 27 read with Section 79 of the Code of Civil Procedure Code, Purnea Municipal Corporation was necessary party but the suit was filed without making Purnea Municipal Corporation as a party to the suit. Therefore, the suit itself was bad for non-joinder of necessary party. The plaintiffs added the



Commissioner and Executive Officer only as defendants. Since no notice was served and moreover when Purnea Municipal Corporation was not party, there was no question of service of notice but the courts below without considering these questions of law decreed the suit *ex parte* and also the Executing Court rejected the application filed by the Purnea Municipal Corporation. According to learned counsel, the petitioners have got excellent chance of success in the miscellaneous case. Therefore, if the further proceeding in execution case is not stayed, the petitioners shall suffer serious loss and it will cause great hardship to the petitioner, which is a 'Estate' within the meaning of Rule 12 of the Constitution of India and that will affect the rights of public at large. Learned counsel further submitted that till the disposal of miscellaneous case, further proceeding of the execution case be stayed. Even if Order 21 Rule 106 C.P.C. is not maintainable, then also the court has got inherent jurisdiction under Section 151 C.P.C. to stay the further proceeding of the execution case and stay the delivery of possession which is in fact a public road.

5. On the other hand, learned Senior counsel appearing for the respondents submitted that in fact, the then Purnea Municipality was represented by the Commissioner of the Municipality and Executive Officer of the Municipality.



Therefore, they were made party and notices have already been validly served. In such circumstances, technically because the Municipal Corporation has not been made party, the *ex-parte* judgment cannot be said to be contrary to law or that no notice was served on them. Therefore, on these grounds, the delivery of possession cannot be stayed and the learned court below has rightly not stayed the delivery of possession.

6. Learned Senior counsel further submitted that if at all the *ex parte* decree will be set aside and the plaintiff's suit will be dismissed then naturally the petitioners can avail the remedy under Section 144 C.P.C. i.e for restoration of the possession of the property.

7. Perused the impugned order. At the time of hearing of this writ application, copy of the plaint was placed before this Court by the learned Senior counsel for the respondents. Admittedly, the petitioner No.1 Purnea Municipal Corporation, then Purnea Municipality, is not party to the suit, the defendant No.1 is Commissioner, Purnea Municipality and defendant No.2 is Executive Officer, Purnea Municipality. The controversy between the Purnea Municipal Corporation and the plaintiffs-respondents is that according to the plaintiffs-respondents, the suit property is their purchased property, as such, they are the owner whereas



according to the petitioner No.1 Purnea Municipal Corporation, the municipal corporation is the owner of the property, which is a public road. Therefore, prima facie, it appears that now road has been constructed and being used by the public at large. The plaintiffs-respondents have prayed for delivery of possession after removal of encroachment or by the Purnea Municipal Corporation the then Purnia Municipality.

8. In view of the above admitted facts, now, even if the order 21 Rule 106 C.P.C. is not applicable then also the Court has the jurisdiction to stay the further proceeding of the execution case and/or stay the delivery of possession after removal of the encroachment. From perusal of the impugned order, it appears that the court below has not considered this aspect of the matter and the fact that if, at the stage, without hearing the petitioners in miscellaneous case, delivery of possession is effected then it will affect the public at large. In my opinion, therefore, executing court has refused to exercise the jurisdiction, which is vested in it by law.

9. In view of the facts and circumstances, as discussed above, the delivery of possession of the suit property after removing the encroachment is stayed in the execution case No. 02 of 2007 till the disposal of Miscellaneous Case No. 01 of 2015

filed by the petitioners pending in the court below. Thus, this writ application stands allowed and the impugned order granting further proceeding and issuance of D.P. in execution case is stayed.

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(Mungeshwar Sahoo, J)