

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.649 of 2016**

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Jaynarayan Tiwari & Ors

.... Appellant/s

Versus

Prabhu Rai & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Chandra Kant

For the Respondent/s : Mr.

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

2 22-09-2016

Heard the learned senior counsel, Mr. S.S.Dvivedi for the plaintiffs-petitioners and the learned counsel, Mr. Bashishtha Narayan Mishra for the respondents.

Perused the impugned order dated 04.06.2016 passed by District Judge, West Champaran in Misc. Appeal No.2 of 2016 whereby the learned lower appellate court has allowed the miscellaneous appeal after setting aside the trial court order and has rejected the injunction application.

The learned senior counsel, Mr. Dvivedi for the petitioner shortly submitted that the plaintiff has filed the suit for declaration of title and confirmation of possession over 28 decimals of land comprised within Plot No.303 which is a big plot. The defendant is making construction on the basis of the purchase made by him in the year 2014 from one Sushila Devi. Sushila Devi had in turn purchased the same from Pratima Devi in the year 1959. The

purchased land is also comprised within Plot No.303.

The learned senior counsel, Mr. Dvivedi submitted that except this 28 decimals land for which the suit has been filed the respondent may construct anywhere his house if respondent has purchased the same because the plaintiff-petitioner has got no concern with the land claimed by the respondent. Likewise, the learned counsel, Mr. Mishra for the respondent submitted that the respondent has also got no concern with the land of the plaintiff regarding 28 decimals for which the suit has been filed and that he is constructing his house within 4 kathas of land sold by Pratima Devi to Sushila Devi from whom the respondent has purchased the same.

In view of the aforesaid submissions of the learned counsel for the parties, it becomes admitted fact that the plaintiff has got no objection if any construction is made outside the land measuring 28 decimals for which the suit has been filed. The learned counsel for the respondent also submitted that he has got no concern with the aforesaid land.

In view of the aforesaid controversy between the parties, I find that none of the courts below has considered this aspect of the matter. According to the petitioner, if construction is made beyond his 28 decimals on land then he has got no objection and

according to the respondent, he will not construct over 28 decimals for which the suit has been filed. In such circumstances, in my opinion, for determining the real controversy between the parties, the Court should appoint a Survey Knowing Pleader Commissioner under Order 39 Rule 7 of the Code of Civil Procedure, who shall submit the report after measuring the suit property.

Accordingly, this Civil Miscellaneous application is allowed. The order passed by the trial court as well as by the lower appellate court are hereby set aside. The matter is remanded back to the trial court for a fresh consideration and passing a fresh order on the basis of the report of the Pleader Commissioner and after hearing the parties.

(Mungeshwar Sahoo, J)

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