

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.385 of 2018**

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1. Md. Mohiuddin @ Babu S/o Late Maulana Abdul Matin, Resident of Mohalla-Basarbiga, Town, Biharsharif, P.S.-Sohsara, District-Nalanda.
Presently residing at Plot No. 59, Moh.-Khanpura, Limbayat Udhana, Town-Surat, Near Madina Masjid, Gujrat, Pin Code-394210.

.....Defendant No.1, Judgment debtor-Petitioner /s
Versus

1. Md. Iliyas S/o Late Md. Ismaiel, Resident of Moh.-Banauliya, town-Biharsharif, P.S.-Bihar, District-Nalanda

-----Plaintiff-D.Holder-Respondent 1st set

2. Hafiz Md. Minhajuddin, S/o Late Maulana Abdul Matin, Resident of Moh.-Basarbiga, Town-Biharsharif, P.S.-Sohsara, District-Nalanda.

..... Def. No.2-J.Debtor-Respondent 2nd set

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Appearance :

For the Appellant/s : Mr. Ram Prasad Singh

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR
JHA
ORAL ORDER**

4 02-04-2018 Heard Mr. R.K.P.Singh for the petitioner on I.A.
No.2357 of 2018 in the present civil miscellaneous petition.

The petitioner has challenged the order dated 04.01.2018 but during the pendency of this writ petition, the petitioners filed I.A. No.2357 of 2018 for amendment in the prayer portion and seeks to set aside the order dated 11.07.2017 passed in Misc. Case No.32 of 2017.

The petitioner never challenged that order earlier and, therefore, I do not find any merit in this I.A.. Accordingly, I.A. No.2357 of 2018 is dismissed.

Heard Mr. R.K.P. Singh, learned counsel for the



petitioner and Mr. T.N.Maitin, learned senior counsel for the respondent No.1.

The petitioner has filed this civil miscellaneous petition against the order dated 04.01.2018 passed in Execution Case No.2 of 2010 by which the Executing Court directed the office to comply the earlier order for delivery of possession.

The facts which are requisite and relevant for deciding this case are that decree holder-respondent No.1 is the plaintiff. The petitioner is defendant No.1 and respondent No.2 is defendant No.2 in Title Suit No.1 of 1986. The plaintiff filed the suit for specific performance of contract. During the pendency of the suit, defendant No.1-petitioner transferred the suit land to defendant No.2 and handed over the possession of his 50% share in the suit land to his brother. The suit was decreed. The defendant No.2 preferred Title Appeal No.37 of 1993 and the same was dismissed. The judgment and decree passed in Title Suit No.1 of 1986 was affirmed upto the Apex Court. The judgment-debtor filed Execution Case No.2 of 2010 in which it appears that Court ordered for issuance of warrant of delivery of possession but thereafter the petitioner filed Misc. Case No.32 of 2017 for setting aside the judgment and decree passed ex parte against him on the ground that petitioner never received any summons and the



judgment and decree was obtained playing fraud upon him. The Misc. Case No.32 of 2017 was admitted. In the meantime, the petitioner also filed petition for stay of the Execution Case No.2 of 2010 but vide order dated 11.07.2017, the petition of the petitioner for stay of the Execution Case No.2 of 2010 was dismissed but the petitioner did not assail the aforesaid order rejecting the prayer of the petitioner for stay of the execution case. The petitioner filed petition to hear the Execution case No.2 of 2010 and Misc. Case No.32 of 2017 side by side and the Executing Court vide order dated 08.11.2017 ordered for hearing of both the cases side by side. On 04.01.2018, the Court directed that delivery of possession has already been issued on 02.08.2017. Thereafter, on 04.01.2018, office was directed to comply the order dated 02.08.2017. Being aggrieved by the aforesaid order, the petitioner filed this civil miscellaneous petition.

Mr. R.K.P.Singh, learned counsel for the petitioner submits that admittedly, the suit was decreed ex parte against the petitioner. The petitioner filed Misc. Case No.32 of 2017 for setting aside the ex parte decree on the ground of non-service of summons and notice to the petitioner as well as on the ground that the decree was obtained playing fraud upon the petitioner. It is further submitted that since Misc. Case No.32 of 2017 is pending,



if the same is allowed, the petitioner shall suffer irreparable loss to get the property restored in case the judgment and decree passed is set aside. It is further submitted that the suit land is a residential house and shop. On the similar facts, this Court in the case of Dinanath @ Dinanath Prasad v. Sukhdei Devi and others, II 1963 BLJR held that when a petition for setting aside the ex parte decree is pending rejection of the stay order of the execution case amounts to misdirection. Delivery of possession is stayed till the disposal of application under Order IX Rule 13.

Of course, it is generally and commonly if a petition under Order IX Rule 13 is pending for setting aside ex parte order the execution case for delivery of residential house should be stayed but in the present case, it appears that the petitioner earlier filed petition in the execution case for stay of the execution case on 05.07.2017 in Execution Case No.2 of 2010. The same petition was dismissed on 11.07.2017 but the petitioner accepted that order and did not move any higher court against the order refusing to stay the execution case. The petitioner chose to file petition in execution case to hear the execution case as well as Misc. Case No.32 of 2017 side by side. Vide order dated 08.11.2017, the court ordered for hearing both the cases i.e. Execution Case No.2 of 2010 and Misc. Case No.32 of 2017 side by side. By the order



impugned dated 04.01.2018, the court simply directed the office to take steps for compliance of the order dated 02.08.2017 but did not take any fresh steps. It further transpired that petitioner himself admitted in his petition in paragraph 4 that the petitioner during the pendency of the suit settled in Gujarat after selling his 50% share of the property to the defendant No.2 who happens to be his own brother. The defendant No.2 contested the suit upto the Apex Court and the judgment and decree passed in Title Suit No.1 of 1986 was confirmed. This facts shows that petitioner was neither in possession of the land nor he is at all interested rather it appears that the petitioner filed the petition for setting aside the judgment and decree at the instance of his brother, defendant No.2 who contested the suit throughout and the judgment and decree has been confirmed by the Supreme Court.

Therefore, I do not find any merit in this civil miscellaneous petition. Accordingly, the same is dismissed.

(Prabhat Kumar Jha, J)

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