

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1374 of 2017**

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S. M. Izhar Anwar, Son of Md. Wali Alam, Resident of Mohalla-Kashmiri
Kothi, Patna City, Police Station-Khajekalan, District-Patna

.... Petitioner

Versus

S. S. Rajaur Rahman, Son of Late S.S.Rayajur Rahman, Resident of
Mohalla-Kashmiri Kothi, Patna City, Police Station-Khajekalan, District-
Patna

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Manoj Kumar

For the Respondent/s : Mr.

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

ORAL ORDER

2 28-03-2018 Heard Mr. J.S.Arora, learned senior counsel for the

petitioner and Mr. S. Arshad Alam, learned counsel for the

respondent.

The petitioner filed this civil miscellaneous petition
against the order dated 01.07.2017 passed in Execution Case No.6
of 2015 by which the petition dated 01.04.2017 of the petitioner
for stay of execution case has been dismissed.

The petitioner is the judgment debtor. The plaintiff
filed suit for eviction on the ground of personal necessity. The suit
was decreed ex parte. The petitioner earlier filed petition under
Order IX Rule 13 C.P.C. for setting aside the ex parte decree but
the same was dismissed vide order dated 31.08.2016 passed in
Misc. Case No.4 of 2016. The petitioner preferred Civil Misc.



No.1433 of 2016 in this Court and this Court allowed the petitioner to withdraw the aforesaid civil miscellaneous and gave liberty to file petition under Section 151 C.P.C. for setting aside the ex parte judgment and decree in view of the fact and the finding of the lower court that petition under Order IX Rule 13 C.P.C. is not maintainable. Immediately thereafter, the petitioner filed petition under Section 151 C.P.C. which was admitted after hearing both the parties and numbered as Misc. Case No.8 of 2017 and thereafter petitioner filed the petition for stay of the execution case which has been dismissed by the order impugned.

Mr. J.S.Arora, learned senior counsel for the petitioner submits that if the execution case is not stayed till the disposal of Misc. Case No.8 of 2017 for setting aside ex parte judgment and decree, the miscellaneous case shall become infructuous. The petitioner has got no objection if miscellaneous case is directed to be disposed of within 2 ½ months.

Mr. S.Arshad Alam, learned counsel for the respondent-decree holder ardently submitted that the judgment and decree is not an ex parte order rather the defendant received notice but did not appear. Consequently, the suit was decided in absence of the defendant. The land holder filed the suit for eviction on the ground of personal necessity. The judgment debtor on one pretext



or other wants to delay the execution case. The judgment debtor has also filed a suit for specific performance of contract on assertions that the landlord had agreed to sell the suit property to him on payment of consideration of Rs.22 lacs but the suit was dismissed, therefore, this petition has got no merit. The learned counsel for the respondent further pointed out that petitioner has already concluded his evidence.

Having considered the submission of both sides, I find that admittedly the eviction suit was decided ex parte on account of non-appearance of the defendant. The defendant-judgment debtor filed petition under Order IX Rule 13 C.P.C. for setting aside that ex parte judgment and decree but the learned Munsif held that petition under Order IX Rule 13 is not maintainable against the aforesaid order. The petitioner filed civil Misc. No.1433 of 2016. This Court vide order dated 13.12.2016 passed in Civil Misc. No.1433 of 2016 allowed the petitioner to withdraw the aforesaid case in view of the law laid down in AIR 1993 Patna 30(Santosh Singh and others v. Ram Chandra Sah and others) enabling him to file petition under Section 151 C.P.C. for setting aside the ex parte judgment and decree. Subsequently, the petitioner filed petition under Section 151 C.P.C. which is numbered as Misc. Case No.8 of 2017 and the same is pending



which has been filed for setting aside the ex parte judgment and decree. I find that if the execution case is not stayed during the pendency of the miscellaneous case, the miscellaneous case shall become infructuous and that will occasion injustice to the judgment debtor.

In this view of the fact, I find that the learned Munsif has committed jurisdictional error by not allowing the petition of the petitioner for stay of the execution case during the pendency of the miscellaneous case. Accordingly, the order dated 01.07.2017 is set aside. This civil miscellaneous petition is allowed with a direction to the learned Munsif, Patna City to dispose of Misc. Case No.8 of 2017 within two months from the date of receipt of this order. Till the disposal of miscellaneous case, the Execution Case No.6 of 2015 shall remain stayed.

(Prabhat Kumar Jha, J)

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