

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.400 of 2018**

=====

1. Zulfikar Haidar Son of Haji Mustafa Ahmad Resident of Momin House, Kalami Mohalla, Post Office +Police Station+District-Aurangabad.
2. Hafiz Mansoor Alam Son of Late Abdul Wadood
3. Md. Naushad Alam Son of Hafiz Mansoor Alam All Residents of Village +Post Office + Police Station- Sigori, District- Patna.
4. Md. Rizwan Alam Son of Washi Ahmad Resident of Mohalla- Karbala Naya Tola , Police Station- Phulwarisharif, District- Patna.
5. Md. Mumtaz Arfi Son of Md. Mustafa Resident of Isha Nagar, Naya Tola, Phulwarisharif, Police Station- Phulwarisharif, District- Patna.

.... Petitioner/s

Versus

1. Sajila Khatoon, Wife of Md. Munna Resident of Mohalla- Alamganj, Police Station- Alamganj, District- Patna.
2. Rukshana Khatoon Wife of Akhtar Mohammad Mustaqueem Resident of Shahjahan Lane, Maulabagh, Naya Tola, Phulwarisharif, Police Station- Phulwarisharif, District- Patna.

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. J.S.Arora, Sr. Advocate
Mr. Gaurav Pratap, Advocate
Mr. Manoj Kumar, Advocate
For the Respondent/s : Mr. Navin Kumar, Advocate
Mr. Deepak Kumar Sinha, Advocate

=====

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

5 04-10-2018 Heard learned counsel for the petitioners and learned counsel for the respondent Nos.1 and 2.

The petitioners filed this civil miscellaneous petition under Article 227 of the Constitution of India against the order dated 11.12.2017 passed in Misc. Case No.51 of 2017 arising out of Execution Case No.3 of 2008 by which learned Sub Judge II, Patna dismissed the petition of the petitioners filed under Order XXI Rule 97 C.P.C.



One and only question arises for consideration is “whether the learned Court below is legally justified in dismissing the petition filed under Order XXI Rule 97 C.P.C. without hearing the petition after its admission under Order XXI Rule 105 C.P.C.?”

The facts, relevant for the disposal of this case, may be summarised as follows:

The petitioners filed petition under Order XXI Rule 97 read with Section 151 C.P.C. in Execution Case No.3 of 2008. The Execution Case No.3 of 2008 was filed by the decree holder for execution of the judgment and decree passed in Title Suit No.161 of 2002. The petitioners objected the delivery of possession on the ground that the petitioners have got title and possession over the land but after admission of the Misc. Case No.51 of 2017, the respondents filed petition that the miscellaneous case is not maintainable and the same does not relate with the land on which judgment and decree was passed in Title Suit No.161 of 2002. On such objection, learned Sub Judge by the impugned order dismissed the miscellaneous case registered on the petition filed under Order XXI Rule 97 C.P.C.

Mr. J.S. Arora, learned senior counsel for the petitioners submits that once the petition under Order XXI Rule 97 C.P.C. is



registered and admitted, the petitioners have got every right to resist the delivery of possession and without hearing in accordance with the procedure laid down under Rule 105 of Order XXI C.P.C., the miscellaneous case cannot be dismissed and, therefore, the order is illegal and the learned Sub Judge has committed jurisdictional error.

Contending the submissions of the learned counsel for the petitioners, learned counsels for the respondent Nos.1 and 2 made all efforts to persuade the Court that the petitioners have got no merit in the case. Petitioners themselves assured the Court to vacate the suit premises and the petitioners are only in possession of a deed of dakhli baibyana. On the basis of dakhli baibyana, the resistance of delivery of possession cannot be made and the petition filed under Order XXI Rule 97 C.P.C. is devoid of merit, accordingly, the same was rightly dismissed on the objection of opposite parties-respondents.

Having considered the submissions of both sides and on perusal of the records, it would be very appropriate to reproduce Rule 105 of Order XXI of the C.P.C. in order to appreciate the contention of both sides and decide the question whether petition filed under Order XXI Rule 97 & 99 can be disposed of at preliminary objection of the opposite party, which reads as



follows:

“Hearing of application: (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.”

This provides procedure for disposal of the application filed under Order XXI Rule 97. It provides that the miscellaneous petition shall be disposed of according to the procedure adopted for disposal of the miscellaneous cases. The Court has to record the evidence of both sides and only after hearing both sides, the miscellaneous case shall be disposed of but it appears that learned Sub Judge has, on the objection of the opposite parties-respondents, dismissed the miscellaneous case without hearing the petitioners and allowing him to adduce evidence. Thus, I find that learned Sub Judge has committed jurisdictional error and the order is not sustainable.

In this view of the fact, the order dated 11.12.2017 passed in Misc. Case No.51 of 2017 is set aside. This civil



miscellaneous petition is allowed with a direction to the Sub Judge
to decide miscellaneous case in accordance with law within four
months from the date of receipt of this order.

(Prabhat Kumar Jha, J)

Saurabh/-

U			
---	--	--	--

