

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.322 of 2022

Manoj Kumar Jaiswal Son of Late Rajendra Prasad Choudhary, resident of
Village- Shahpur Patori, Hasanpur Surat, P.S.- Patori, Distt- Samastipur.

... .. Petitioner/s

Versus

1. Dinesh Kumar Choudhary S/o Late Mahendra Choudhary, resident of
Village- Govind Pur Chakosan, P.S.- Bidupur, Distt- Vaishali.
2. Dolly Jaisawal wife of Manoj Kumar Jaisawal, resident of Village- Shahpur
Patori, Hasanpur Murat, P.S.- Patori, Distt- Samastipur.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Waliur Rahman, Adv.
Mr.Kumar Praveen

For the Respondent/s : Mr.Uma Shankar Singh

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
ORAL ORDER

2 29-08-2022 Heard Mr. Waliur Rahman, learned counsel for the
petitioner and Mr. Uma Shankar Singh, learned counsel for the
respondents.

The petitioner has challenged the order dated
03.03.2022 by which the learned lower appellate court has
rejected the application filed under Order 41 Rule V of the
C.P.C. on the ground that unless the Miscellaneous Appeal No.
04 / 2007 is restored and restoration application bearing Misc.
Case No. 06 of 2017 filed by the defendant is allowed, no stay
can be granted.

The petitioner is the defendant / tenant. The



respondent-plaintiff filed a suit for eviction seeking eviction of the petitioner from the tenanted premises bearing Eviction Suit No. 03 of 2004 which was decreed ex-parte *vide* judgment and decree dated 21.06.2005. The petitioner challenged the ex-parte decree under Order 9 Rule 13 of the C.P.C. in Misc. Case No. 10 of 2005 which also got dismissed on its own merit on 20.01.2007. Aggrieved by the same the petitioner preferred appeal bearing Misc. Appeal No. 4 of 2007 which got dismissed for default on 09.12.2016. A restoration application bearing Misc. Case No. 06 of 2017 was filed by the petitioner in which the petitioner filed a petition under Order 41 Rule 5 of the C.P.C. for stay of further proceeding in Execution Case No. 01 of 2005.

Learned counsel for the petitioner submits that it is correct that provision under Order 41 Rule 5 of the C.P.C. is not applicable in restoration application but the court ought to have exercised its discretionary power under Section 151 of the C.P.C. and ought to have granted stay.

On the other hand, learned counsel for the respondent-plaintiff submits that the petitioner in abuse of the process of court is adopting various measures to stall the execution of the eviction decree inasmuch as earlier Title Suit No. 207 / 2002



was filed by the wife of the petitioner / defendant claiming therein that the respondent -plaintiff has entered into an agreement for sale with the petitioner for the sale of the tenanted premises. That suit filed by the wife of the petitioner got dismissed on 07.08.2013 on merit and the Title Appeal No. 756 / 2013 / 748 / 2014 also got dismissed in default on 20.01.2018.

Learned counsel for the petitioner submits that restoration application for restoration of that Appeal has already been filed.

Having heard learned counsel for the parties and taking into consideration the facts and materials on record it appears that the petitioner has suffered decree for eviction and miscellaneous case filed for setting aside the ex-parte decree has also been dismissed. Learned lower appellate court has correctly come to the conclusion that no regular case is pending and as such stay cannot be granted in restoration application unless the miscellaneous appeal is restored to its original file. The power under Section 151 of the C.P.C. may not be exercised if there is express provision in law for stay of the execution proceedings under Order 41 Rule V of the C.P.C. In my considered opinion gathered from the facts of this case that petitioner / judgment



debtor is trying to linger the proceeding in execution case which was filed about 17 years ago for execution of eviction decree.

Accordingly I do not find any merit in this application as such this application stands rejected.

(Anil Kumar Sinha, J)

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