

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CIVIL REVISION No.15 of 2018**

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Kushum Devi w/o Pashupati Yadav resident of Village - Bochha Tola,  
Gangachak Malakana, P.O. and P.S. Masaurhi, District - Patna.

... .. Petitioner/s

Versus

1. Shrimati Sumitra Devi w/o Shambhu Sharan Singh resident of village -  
Gangachak Alikana, P.O. and P.S. Masaurhi, District - Patna presently  
residing at village - Maganibigha, P.O. - Bhaiswan, P.S. - Masaurhi, District  
- Patna.
2. Sri Sanjay Yadav s/o Late Jagdish Prasad resident of village - Mahadeo  
Bigha Posanda, P.S. - Dhanarua, District - Patna.
3. Naresh Rai s/o Late Hari Yadav
4. Suresh Rai s/o Late Hari Yadav
5. Smt. Sumitra Devi d/o Late Hari Yadav All are residents of village Chapaur,  
Tola Malachak, P.O. and P.S. Masaurhi, District - Patna.
6. Brij Nandan Yadav s/o Late Hari Yadav resident of village - Chapaur, Tola  
Malachak, P.O. and P.S. - Masaurhi, District - Patna.

... .. Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. Ranjan Kumar Dubey, Advocate  
For the Respondent/s : None

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**CORAM: HONOURABLE MR. JUSTICE KHATIM REZA**  
**ORAL ORDER**

13    15-12-2022                      Heard learned counsel for the petitioner.

After repeated calls, no one appears on behalf of the  
opposite parties, although a counter affidavit has been filed on  
behalf of the opposite party no. 1 on 17.07.2019.

This Civil Revision application has been filed against  
the order dated 15.11.2017 passed by the learned Munsif,  
Masaurhi in Miscellaneous Case No. 08/2017 in Execution Case  
No. 04 of 1991, whereby the learned lower court has dismissed  
the aforesaid Miscellaneous case on the ground of pendency of



another Title Suit No. 158 of 2004.

The plaintiff/decreed holder filed Title Suit No. 06 of 1989 for specific performance of contract on the basis of an agreement to sale dated 13.06.1987 which was decreed *ex parte* on 05.12.1990 against the defendant vendor from whom the petitioner purchased the said land in the year 1988 and 1992, total measuring 1 *Katha* 4 *Dhur*, land over which the petitioner has already constructed her house after investing a considerable amount. It is submitted that the plaintiff filed Execution Case No. 04 of 1991 for execution of *ex parte* decree dated 05.12.1990.

Learned counsel for the petitioner submits that the petitioner came to know about the said case when notice was issued to the heirs of original judgment debtor, namely, Shiv Baran Yadav in Execution Case No. 04 of 1991. Soon after, the petitioner filed an application under 21, Rule 97, 101 read with Section 151 of the Code of Civil Procedure and on the basis of aforesaid application, a Miscellaneous Case No. 8 of 2017 has been instituted, after admission notices were issued to the opposite parties who appeared and filed their respective rejoinders. It is stated that after completion of pleadings trial of the said miscellaneous case has been started and both parties



started to adduce their oral as well as documentary evidences. It is apparent from the order sheet dated 17.04.2017, opposite party has produced his witness and on that day, he has been cross-examined partly by the petitioner. It is further stated that the opposite party challenged the maintainability of the aforesaid miscellaneous case for the first time on 29.05.2017, an application has been filed in which objection has been raised that since the another suit is pending with respect to the same piece of land, the present proceedings is not maintainable.

Learned execution court entertained the application filed by the opposite party for deciding the question on the point of maintainability of the said miscellaneous case on a preliminary issue, and after hearing the parties, the executing court decided the Miscellaneous Case No. 08 of 2017 filed under Order 21 Rule 97, 101 read with 151 of the Code of Civil Procedure by the petitioner and held that the miscellaneous case is not maintainable in view of the pendency of Title Suit No. 158 of 2004.

Learned counsel for the petitioner submits that Miscellaneous Case No. 08 of 2017 is independent petition which has to be decided by the executing court. The principles laid down in the decisions such as *1995 (1) S.C.C. 242*



*(Noorduddin Vs. Dr. K.L. Anand)*, executing court is enjoined with the power of deciding the objection first. Learned counsel for the petitioner has relied on ***AIR 2002 SC 251 Paragraph 15*** also.

The Hon'ble Supreme Court in, ***AIR 2002 SC 251 Paragraph 15*** has held that:-

*“All questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court Shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. On a fair reading of the rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree holder or any other*



*person in possession of the immovable property under execution and has vested the power in the executing Court to deal with all questions arising in the matter irrespective of whether the Court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the Courts seized of an execution proceeding. The Court cannot shirk its responsibility by skirting the relevant issues arising in the case.”*

It is well-settled in earlier decision also by the Hon'ble Apex Court in case of **Noorduddin v. K.L. Anand** reported in **1995 Vol. 1 SCC 242**, in which it has been held that-

*“The execution Court is enjoined to adjudicate the claim or the objection or the claim to resistance as same rule 97 enables such a person to make an application which must be independent of the judgment-debtor or a person having derivate right from the judgment-debtor. It has also been held that the applicant in his own right must be in possession of the property.”*



It is apparent from the execution case and case of the decree-holder that he is not in possession of the property, that's why the execution proceeding has been initiated. Moreover, the purchaser-petitioner purchased the suit property from vendor, namely, Shiv Baran Yadav who came in possession through registered gift deed dated 25.1.1988 before filing of T.S. No. 06 of 1989.

Considering the facts and circumstances and aforesaid citation, I am of the view that firstly the executing court has to decide the application filed under Order 22 Rule 97 like a suit without going into the merits of the case, the order dated 15.11.2017 is set aside and executing court is directed to decide the application bearing Miscellaneous Case No. 08 of 2017, which has been filed before him.

Accordingly, this Civil Revision application is allowed.

**(Khatim Reza, J)**

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