

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.320 of 2021**

1. Basant Kumar @ Basant Kumar Sah, Son of Late Jhabulal Singh @ Jhabbu Lal Sah, Resident of Village - Didhwa Tola, Khajuhatti, P.O. - Khajuhatti, P.S. - Baikhundpur, District - Gopalganj.
2. Archana Verma, Wife of Asimkant Verma, Resident of Village - Didhwa Tola, Khajuhatti, P.O. - Khajuhatti, P.S. - Baikhundpur, District - Gopalganj.

... .. Petitioner/s

Versus

Harendra Manjhi, Son of Late Jagrup Manjhi, resident of Village - Didhwa Tola, P.O.- Khajuhatti, P.S. - Baikhundpur, District - Gopalganj.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Pankaj Kumar Dubey, Advocate
For the Respondent/s : Mr. Akshay Ashish, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT**

Date : 06-03-2024

Heard learned counsels for the parties on the point of admission and I intend to dispose of the instant petition at the stage of admission itself.

2. The instant petition has been filed by the petitioners under Article 227 of the Constitution of India for setting aside the order dated 13.04.2021 passed by learned Sub Judge-10th, Gopalganj in Execution Case No. 42 of 2017 whereby and whereunder the application dated 10.03.2021 filed by the petitioners under Order XXI Rule 26 and 29 along with Section 151 of the Code of Civil Procedure (hereinafter 'the Code') has been rejected.

3. Briefly stated, the facts of the case are that the



respondent is the plaintiff before the learned trial court and filed Title Suit No. 300 of 2015 in which the petitioners were made defendants and the plaintiff sought declaration of title, ownership and interest over the suit property along with other reliefs. Title Suit No. 300 of 2015 was decreed *ex-parte* on 31.10.2017 directing the defendants/petitioners to vacate the suit land and give its possession to the plaintiff/respondent. Thereafter, the plaintiff/respondent moved before the learned Sub Judge, Gopalganj and filed Execution Case No. 42 of 2017 for execution of the decree dated 31.10.2017 passed in Title Suit No. 300 of 2015. However, the defendants/petitioners filed an application under Order IX Rule 13 for setting aside the *ex-parte* decree against the defendants vide Misc. Case No.51 of 2018 dated 13.03.2018 and the said miscellaneous case is still pending before the learned subordinate court. The petitioners on receiving summons appeared in Execution Case No. 42 of 2017 and filed their show cause dated 16.01.2019 mentioning the fact about filing of application under Order IX Rule 13 of the Code and prayed that till the disposal of Misc. Case No. 51 of 2018, the proceedings of Execution Case No. 42 of 2017 might be stayed. Both the cases are pending before the court of learned Sub Judge, Gopalganj but the learned Sub Judge did not pass



any order in Misc. Case No. 51 of 2018 and rather it rejected the application filed under Order XXI Rule 26 and 29 by the petitioners in Execution Case No. 42 of 2017 vide the impugned order dated 13.04.2021. The said order is under challenge before this Court.

4. The learned counsel appearing on behalf of the petitioners submits that the continuation of Execution Case No. 42 of 2017 without passing any order in Misc. Case No. 51 of 2018 is illegal and without jurisdiction. Learned subordinate court failed to consider that the decree and the order passed in Title Suit No. 300 of 2015 were *ex-parte* and the petitioners have filed an application for setting aside the *ex-parte* decree and order and without hearing the said application, further proceeding in the execution case filed by the respondent is highly objectionable. Learned counsel further submits that the learned subordinate court ought not to have proceeded with the execution case of the respondent without deciding the miscellaneous case of the petitioners and it shows complete lack of application on part of the learned Subordinate Judge. When the decree and order of the title suit have been passed *ex-parte*, the petitioners have every right to challenge it according to the provisions of the Code but the said fact escaped from the mind



of the learned trial court. Learned counsel further submits that the learned executing court did not take into consideration the fact that sufficient cause was shown by the petitioners to stay the execution. Learned executing court has also not considered the fact that Misc. Case No. 51 of 2018 was pending before it which was filed against the respondent/decree holder by the petitioners/judgment debtors and during pendency of such case, it was incumbent upon the learned executing court to stay the execution proceedings.

5. On the other hand, learned counsel appearing on behalf of the respondent submits that there is no infirmity attached with the impugned order and the same is quite sustainable. Learned counsel further submits that the petitioners want to delay the proceedings and further want to deny the fruits of the decree to the respondent. The petitioners deliberately did not join the proceedings in the suit despite proper service of notice and have filed the miscellaneous case under Order IX Rule 13 of the Code on flimsy grounds and are not pursuing the said case. The petitioners want to stay the proceedings for indefinite period which could not be permitted. The petitioners have failed to point out any infirmity in the decree and hence it should be executed as such.



6. I have given my thoughtful consideration to the facts of the case as well as the rival contentions of the parties. The petitioners moved an application under Order XXI Rule 26 and 29 of the Code which read as under:-

“26. When Court may stay execution.—(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Power to require security from, or impose conditions upon, judgment-debtor.—Before making an order to stay execution, or for the restitution of property or the discharge of the judgment-debtor, [the Court shall require]



such security from, or impose such condition upon, the judgment-debtor as it thinks fit.

29. Stay of execution pending suit between decree-holder and judgment-debtors.—Where a suit is pending in any Court against the holder of a decree of such Court 2[or of a decree which is being executed by such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided:

2[Provided that if the decree is one for payment of money, the Court shall, if it grants stay without requiring security, record its reasons for so doing.]”

7. The provision of Order XXI Rule 26 of the Code confers power to the executing court to stay the execution of decree for a reasonable time on sufficient cause being shown to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of decree or the execution thereof, for an order to stay execution. Obviously the executing court cannot grant stay for indefinite period and could have granted stay only to enable the judgment debtor to approach the court of competent jurisdiction seeking relief against the decree which is being executed.

8. Since the petitioners have already filed a



miscellaneous case under Order IX Rule 13 of the Code for setting aside the *ex-parte* decree, there could be no application of Order XXI Rule 26 of the Code in the facts of the present case.

9. Similarly, Order XXI Rule 29 of the Code provides that when any suit is pending against the decree holder on the part of the person against whom the decree was passed, the executing court may stay execution of the decree until pending suit has been decided. Again in the present case no suit is pending between the parties though a miscellaneous case is pending for setting aside the *ex-parte* decree. Moreover, even in a petition under Order XXI Rule 29 of the Code, the petitioner must show sufficient cause to get the benefit. Unless sufficient cause is shown to stay the execution case, the relief under Order XXI Rule 29 of the Code cannot be granted. In this regard, decision of a Co-ordinate Bench of this Court in the case of ***Mukti Nath Prasad Vs. Sushma Devi & Ors.***, passed in ***CWJC No. 20623 of 2013*** may be referred wherein grant of stay of execution proceeding for indefinite period was deprecated in similar circumstances.

10. Thus, in view of the aforesaid facts and circumstances and discussion made so far, I am of the



considered opinion that the petition filed by the petitioners under Order XXI Rule 26 and 29 read with Section 151 of the Code in Execution Case No. 42 of 2017 was simply not maintainable and the petitioners should have moved their application in Misc. Case No. 51 of 2018 filed under Order IX Rule 13 of the Code for setting aside *ex-parte* decree and order of the title suit.

11. For the aforesaid reason, I do not find any infirmity in the impugned order dated 13.04.2021 passed by learned Sub Judge-10th, Gopalganj in Execution Case No. 42 of 2017 and the same is affirmed.

12. Accordingly, the instant petition stands dismissed.

13. However, this Court has not made any comments on the merits of the case and the learned trial court is directed to dispose of the miscellaneous petition filed by the petitioners within a period of six months from the date of receipt/production of a copy of this order.

(Arun Kumar Jha, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	11.03.2024
Transmission Date	NA

