

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.744 of 2023

Jaideo Narayan Mishra @ Jai Narain Mishra Son of Late Shiv Nandan Mishra, Resident of village- Rampur Khajuria, P.S.- Dumariya Ghat, District- East Champaran.

... .. Petitioner/s

Versus

1. Bharat Mishra Son of Late Hari Shankar Mishra, Resident of village- Rampur Khajuria, P.S.- Dumariya Ghat, District- East Champaran.
2. Raj Naraynan Mishra Son of Late Shiv Nandan Mishra, Resident of village- Rampur Khajuria, P.S.- Dumariya Ghat, District- East Champaran.
3. Madhusudan Mishra Son of Raj Narayan Mishra, Resident of village- Rampur Khajuria, P.S.- Dumariya Ghat, District- East Champaran.
4. Mostt. Saraswati Kuer Widow of Late Chandra Bhushan Mishra, Resident of village- Rampur Khajuria, P.S.- Dumariya Ghat, District- East Champaran.
5. Sanjay Mishra Son of Late Chandra Bhushan Mishra, Resident of village- Rampur Khajuria, P.S.- Dumariya Ghat, District- East Champaran.
6. Sonu Mishra Resident of village- Rampur Khajuria, P.S.- Dumariya Ghat, District- East Champaran.
7. Mamta Devi Wife of Pankaj Pathak, Daughter of Late Tarkeshwar Mishra, Resident of village- Sonarapur, P.O.- Sonarapur Jusariya, P.S.- Keshariya, District- East Champaran.
8. Pinki Devi Wife of Vijay Pandey, Daughter of Late Tarkeshwar Mishra, Resident of Village- Mohammadpur Teknawas, P.S.- Mohammadpur, District- Gopalganj.
9. Switi Devi Wife of Shrikant Pandey alias Ravi Pandey alias Pappu Pandey, Daughter of Late Tarkeshwar Mishra, Resident of village- Rewatit, P.O.- Rewatit, P.S.- Baikunthpur, District- Gopalganj.
10. Brij Kishore Mishra Son of Late Lalan Mishra, Resident of village- and P.O- Rampur Khajuriya, Via- Hussaini, P.S.- Dumariyaghat, District- East Champaran.
11. Nawal Kishore Mishra Son of Late Shiv Nandan Mishra, Resident of village- and P.O- Rampur Khajuriya, Via- Hussaini, P.S.- Dumariyaghat, District- East Champaran.
12. Kusum Devi Wife of Shri Prakash Pandey, Daughter of Hari Shankar Mishra, Resident of village- and P.O- Mohammadpur, P.S.- Mohammadpur, District- Gopalganj.
13. Sangeeta Kunwar Wife of Late Tarkeshwar Mishra, Resident of village- Sareya Baduraha, at present village- Rampur Khajuriya, P.S.- Dumariyaghat, District- East Champaran.

... .. Respondent/s



Appearance :

For the Petitioner/s : Mr. Binay Kant Mani Tripathi, Advocate
For the Respondent/s : Mr. Madhurendra Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL ORDER

3 11-11-2024 Heard learned counsel for the petitioner as well as
learned counsel for the respondents.

2. The petitioner is aggrieved by the order dated 20.04.2023 passed by learned 21st Additional District Judge, Motihari, East Champaran in Title Appeal No. 40 of 2020 whereby and whereunder the learned first appellate court stayed the proceeding of Execution Case No. 2 of 2021 till disposal of Title Appeal No. 40 of 2020.

3. Learned counsel for the petitioner submits that the impugned order is not sustainable as it has been passed without consideration of facts and law. Order 41 Rule 5 of the Code of Civil Procedure (for short 'the Code') provides that unless there was any order of delivery of possession, stay should not be granted under Order 41 Rule 5 of the Code. Learned counsel further submits that the learned first appellate has passed an erroneous order when it stayed the whole proceeding in the Execution Case No. 2 of 2021. Learned counsel further submits that without hearing the other respondents in the title appeal, the impugned order has been passed and the said order is against the principle of natural justice. Hence, the impugned order is not



sustainable and the same needs to be set aside.

4. Learned counsel appearing on behalf of the respondents 1st set submits that the petitioner is the plaintiff and decree holder and he is the contesting respondent. After appearance of the plaintiff/respondent, petition under Order 41 Rule 5 of the Code was filed on 04.07.2022 and rejoinder was filed by the plaintiff/petitioner on 28.07.2022 and thereafter impugned order was passed. Learned counsel further submits that the learned first appellate court has discussed the facts of the case in detail and has substantiated its order by giving reasons and showing sufficient cause and, therefore, there is no infirmity in the impugned order.

5. I have given my thoughtful consideration to the rival submission of the parties and also the facts of the case and perused the record. Order 41 Rule 5 of the Code reads as under:-

“41 (5). Stay by Appellate Court.- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Stay by Court which passed the decree.— Where an application is made for stay of



execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) [Subject to the provision of sub-rule (3),] the Court may make an ex parte order for stay of execution pending the hearing of the application.

[(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.]”

6. Bare perusal of the aforesaid provision show it does not talk about stay of execution proceeding only at the stage of delivery of possession. Perusal of impugned order shows the learned first appellate court has supplanted its reasoning for passing the order granting stay in the execution proceeding and I



do not find any infirmity or illegality in the impugned order dated 20.04.2023 passed by 21st Additional District Judge, Motihari, East Champaran in Title Appeal No. 40 of 2020 and, hence, the same is affirmed.

7. Accordingly, the present petition stands dismissed being devoid of any merit.

(Arun Kumar Jha, J)

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