

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.661 of 2023**

Subhash Chandra Yadav @ Subhash Prasad Yadav S/o Late Mahadev Yadav,
R/o Village - Nandgram, Dhamdaha, P.S.- Dhamdaha, Distt. Purnea.

... .. Petitioner/s

Versus

1. Ashok Kumar Mandal @ Ashok Prasad Yadav S/o Late Hanuman Mandal @ Hanuman Pd Yadav, R/o Village - Belonkalan, Ward no. 2, Narhi Tola P.O. Murho, P.S. and Distt. - Madhepura, 852114, Bihar.
2. Nand Kumar Mandal, S/o Late Hanuman Mandal @ Hanuman Pd. Yadav, R/o Village - Belonkalan, Ward no. 2, Narhi Tola, P.O. Murho, P.S. and Distt. Madhepura, 852114, Bihar.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr.Rajesh Kumar, Advocate
For the Respondent/s	:	Mr. Jitendra Prasad Singh, Advocate
		Mr. Nazir Alam, Advocate

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

Date : 13-09-2024

The present petition has been filed under Article 227 of the Constitution of India seeking issuance of writ of certiorari for ad interim order of stay and quashing of the impugned order dated 11.05.2023 passed by learned Sub Judge, Dhamdaha, Purnea in Title Execution Case No. 04 of 2009, whereby and whereunder the learned Sub Judge declined to extend and grant stay of the execution proceeding.

2. Briefly stated the facts of the case as it appears from the record are that one Title Suit No. 50 of 1994 was decreed ex-parte. It was a suit for partition and three persons were plaintiffs and 181 persons were defendants. In the Title



Suit No. 50 of 1994 preliminary decree was prepared on 09.08.1999 vide an ex-parte order of learned Sub Judge-VI, Purnea in favour of plaintiffs/decreed holders. The defendant No. 8 Tara Devi, defendant No. 32 Binda Devi and defendant No. 33 Gita Devi filed Misc. Petition bearing Misc. Case No. 10 of 1999 under Order 9 Rule 13 of the Code of Civil Procedure (in short 'the Code') for setting aside the ex-parte decree. The petitioners of Misc. Case No. 10 of 1999 demanded setting aside of the ex-parte decree on the ground that their wrong addresses have been given and for this reason no notice/summons had been served upon them. Apart from other defence like minors were not properly represented and major amendment had been made in the plaint and after amendments no fresh notice had been served as required under Order 5 Rule 2 of the Code. Misc. Case No. 10 of 1999 was dismissed on 18.07.2003 as there has been non-compliance of the order for substitution of defendant no. 19 by his legal heirs. To restore Misc. Case No. 10 of 1999, another Misc. Petition vide Misc. Case No. 11 of 2003 had been filed on 06.08.2003 and vide order dated 28.01.2022, the learned Sub Judge, Dhamdaha, Purnea restored Misc. Case No. 10 of 1999 to its original file. While the proceedings for restoration of Misc. Case No. 10 of 1999 have been under way



and Misc. Case No. 11 of 2003 has been pending, the decree-holders/respondents filed Execution Case No. 04 of 2009 against the judgment-debtors/defendants. In Title Execution Case No. 04 of 2009 the learned Sub Judge, Dhamdaha, Purnea vide order dated 08.03.2022 stayed the proceeding of the execution case for six months and the decree-holders filed Civil Miscellaneous Case No. 359 of 2022 against the said order which is still pending before this Court. Thereafter, the judgment-debtors filed a petition under Order 21 Rule 29 of the Code for stay of execution proceeding till final orders in the Misc. Case. The said petition was rejected by learned executing court which refused to extend the stay of the execution proceeding and the said order has been challenged before this Court in the present proceeding.

3. Learned counsel for the petitioner submitted that the learned trial court has passed the orders dated 29.05.2023, 01.06.2023 and 02.06.2023 without consideration of the facts. Learned counsel further submitted that the learned executing court recorded in its order dated 29.05.2023 that Nazir submitted his report, after getting the writ, that there were more than 150 parties and time was required for issuance of notice to them and the said report of Nazir was accepted and the Office



Clerk was directed to seek report from Nazir about service of notice. Thereafter, on the next date, i.e., on 31.05.2023, the Presiding Officer was on leave. Further, on 01.06.2023, Nazir, Civil Court, Dhamdaha sought permission for taking delivery of possession seeking leave for the same on 02.06.2023 which was allowed. Again, on 02.06.2023 a similar application seeking leave on 04.06.2023 for delivery of possession by Nazir was allowed after dismissing his application dated 02.06.2023. Learned counsel further submitted that on 29.05.2023, time was sought by Nazir for serving notice upon more than 150 judgment-debtors, but in undue haste, the learned executing court allowed the application of Nazir for proceeding with the delivery of possession. Learned Sub Judge did not take into consideration the fact that no notice was issued to 150 judgment-debtors and they were not provided with any opportunity to submit their case before the learned executing court. Learned counsel further submitted that the proceeding before the learned executing court is wholly irregular as notices on judgment-debtors have not been served. Thus, the proceeding is being run in illegal manner. Therefore, the orders dated 11.05.2023, 29.05.2023, 01.06.2023 and 02.06.2023 need to be quashed.



4. Learned counsel appearing on behalf of the respondents submitted that there is no infirmity in the impugned orders and the orders are just and proper and do not require interference by this Court under its supervisory jurisdiction. Learned counsel for the respondents further submitted that the father of the respondents late Hanuman Mandal and others were plaintiff in Title Suit No. 50 of 1994 in which the petitioner and others were defendants. Title Suit No. 50 of 1994 was decreed ex-parte by passing a preliminary decree dated 09.08.1999. The defendants did not appear despite valid service of notice. Subsequently, some of the defendants filed Misc. Case No. 10 of 1999 under Order 9 Rule 13 of the Code for setting aside the ex-parte decree which was dismissed in default on 18.07.2003. After dismissal of Misc. Case No. 10 of 1999, the defendants filed Misc. Case No. 11 of 2003 although remedy for defendants was to file an appeal against the order dated 18.07.2003 as provided under Order 43 Rule 1(d) of the Code. Learned counsel further submitted that Misc. Case No. 11 of 2003 was allowed vider order dated 28.01.2022 and Misc. Case No. 10 of 1999 was restored. Meanwhile, the plaintiffs applied for preparation of final decree and accordingly, final decree was prepared on 04.07.2009 and the report of the Survey Knowing



Pleader Commissioner allotting share to the parties has been confirmed by the learned trial court. After passing of the final decree, plaintiffs/respondents filed Execution Case No. 04 of 2009 which has been pending for execution of the final decree and after about 13 years, the defendants filed a petition under Order 21 Rule 29 of the Code for stay of execution and the same was allowed and the learned executing court granted time of six months vide order dated 08.02.2022 to the defendants. The plaintiffs/respondents being aggrieved by the order dated 08.03.2022 filed Civil Misc. No. 359 of 2022 before this Court in which notices have been issued to the contesting respondents and matter is pending for adjudication. Learned counsel further submitted that the judgment-debtors/petitioner again filed petition on 08.10.2023 under Order 21 Rule 29 of the Code for stay of the execution case which has been rejected by the learned trial court vide impugned order dated 11.05.2023. Learned counsel further submitted that mere perusal of provisions of Order 21 Rule 29 of the Code makes it clear that when a suit is pending in any court against the holder of decree of such court, the court may stay execution of the decree until the pending suit has been decided but no such suit is pending against the decree-holder filed by the judgment-debtors. The



judgment-debtors/petitioner could have sought stay of execution under Order 21 Rule 26 of the Code to stay execution for a reasonable time but the same has already been granted by the learned executing court vide order dated 08.03.2022 to enable the petitioners to proceed with the miscellaneous case filed for setting aside the ex-parte decree. The learned trial court has observed that there is serious laches on part of the petitioners of Misc. Case No. 10 of 1999 and they are not prosecuting their case and are not ready to get Misc. Case No. 10 of 1999 disposed of. Further, the learned executing court, after considering the legal and factual aspects of the matter, has rightly refused to extend the period of execution proceeding which has been pending since 2009 and grant stay against it and for this reason, the order could not be said to be irregular or illegal. Learned counsel further submitted that the orders dated 01.06.2023 and 02.06.2023 have been passed on the application of the Nazir and it is the matter between the court and its officer and from these orders it does not appear that the judgment-debtors have not been served. Thus, learned counsel submitted that there is no infirmity in the impugned order and the same needs to be sustained.

5. I have considered the submission made on behalf



of the parties and perused the record. It is pertinent to take note of the fact that Civil Misc. No. 135 of 2022 has been disposed of by this court prior to the disposal of the present petition. In the judgment of Civil Misc. No. 135 of 2022, the order dated 28.01.2022 passed in Misc. Case No. 11 of 2003 has been set aside. Resultantly, there is no proceeding before the learned trial court against the ex-parte decree dated 09.08.1999 passed in Title Suit No. 50 of 1994. In this background, the submission of the parties are to be considered apart from the other facts and circumstances of the case.

6. Since there is no proceeding pending against the ex-parte decree of Title Suit No. 50 of 1994, any objection of the petitioner to execution proceeding could not be sustained. There can be no challenge to the execution proceeding on any substantive grounds.

7. Main thrust of argument of learned counsel for the petitioner is directed against the some irregularities committed by the learned trial court while taking decision towards delivery of possession. The petitioner is aggrieved by the fact that the learned executing court vide order dated 29.05.2023 accepted the prayer of Nazir and granted him time for issuance of notice as there were more than 150 judgment/debtors. Nazir again



moved before the learned executing court on 01.06.2023 seeking leave for delivery of possession. Thereafter, another application dated 02.06.2023 has been moved by the Nazir, Civil Court, Dhamdaha seeking leave for delivery of possession on 04.06.2023. Whatever may be the case, the petitioner could not have any claim so as to intervene in the execution proceeding in the light of fact that the order dated 06.08.2003 passed in Misc. Case No. 10 of 1999 has been set aside and there is no miscellaneous case. It is also a fact that mere irregularity of the executing court could not be the matter of challenge before this Court under Article 227 of the Constitution of India. Even the orders dated 29.05.2023, 01.06.2023 and 02.06.2023 could not be considered irregular as would be clear from further discussion. Though Nazir sought time for serving notice upon the judgment-debtors and report was accepted, however, considering the fact that the report about service of notice is dated 17.02.2023 and thereafter, on lapse of more than three months, order dated 29.05.2023 has been passed and the same could be considered as *post facto* approval of the report and nothing more. Moreover, when the writ is issued to Nazir for delivery of possession, the process of service of notice is completed on the judgment-debtors prior to issuance of the writ



and seeking time for service of notices upon judgment-debtors by the Nazir is more in the form of intimation to the judgment-debtors about impending action and has no other purpose. If the petitioner has already been put to notice he could not take a U-turn and say that the proceeding before the learned executing court is being conducted against the provisions of law. Apart from the aforesaid facts, the learned executing court has taken into consideration the fact that the petitioner of Misc. Case No. 10 of 1999 has failed to proceed with the case and the learned trial court even observed that conduct of the petitioner of miscellaneous case shows that the petitioners of the Misc. Case No. 10 of 1999 were not willing to get this case disposed of. At the same time, it is also a fact that execution case is pending since 2009 and if there has been no appeal, it is not reasonable to grant any stay on the proceeding in absence of cogent reasons to stay the proceeding, more so when even the miscellaneous case of the petitioner stands effaced from the record in the light of order passed in Civil Misc. No. 135 of 2022.

8. It is also appropriate to take note of the decision of the Hon'ble Supreme Court in the case of ***Rahul S. Shah Vs. Jinendra Kumar Gandhi and Others***, reported in ***(2021) 6 SCC 418***, has issued certain guidelines for executing court to adhere



to and has also directed that the executing proceeding must be concluded within six months.

9. In the light of the discussion made so far, I am of the considered opinion that the impugned order does not suffer from any infirmity and hence, the impugned order dated 11.05.2023 is affirmed. The learned executing court is directed to proceed in the mater and dispose of the same in terms of guidelines as mentioned in the case of **Rahul S. Shah** (*supra*).

10. In the result, the present petition stands dismissed.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	NAFR
CAV DATE	29.07.2024
Uploading Date	13.09.2024
Transmission Date	NA

