

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16381 of 2013

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Sanjay Kumar Gupta S/O Shiv Nath Gupta Resident of Mohalla- Chowk
Bazar, Deorhi Bazar, P.S- Kotwali, District-Munger.

... .. Petitioner

Versus

Ashok Kumar Gupta S/O Late Bishwanath Prasad Gupta Resident Of
Mohalla- Chowk Bazar Deorhi Bazar, P.S- Kotwali, District- Munger.

... .. Respondent

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Appearance :

For the Petitioner	:	Ms. Sushmita Mishra, Advocate
For the Respondent	:	Mr. Kumar Laliteshwar Pd. Singh, Advocate Mr. Bipin Bihari Prasad, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT

Date : 04-01-2024

The present application has been filed for quashing the order dated 10.06.2013 passed by the Sub-Judge-I, Munger in Eviction Execution Case No. 08 of 2010, by which the petition dated 22.03.2013 filed by the petitioner under Order XXI Rule 29 of the Civil Procedure Code for staying the proceeding of execution case has been dismissed.

2. The facts of this case are that the respondent had filed Eviction Suit No.03 of 1995 against the present petitioner for a decree of eviction from the suit premises mentioned in Schedule-II of the plaint and also to hand-over the possession of the said suit premises to the respondent. In the plaint, the plaintiff stated that he is the owner of the suit premises and the defendant is the tenant in the suit premises on



monthly rent of Rs. 300/- on a fixed term. The aforesaid suit was decreed on contest in favour of the respondent-plaintiff vide judgment dated 15.06.2006 and decree dated 22.06.2006 with a direction to the defendant to vacate the suit premises within a month failing which the plaintiff shall be at liberty to get the premises vacated and delivery of possession over the same through the process of the Court. The defendant was also directed to give compensation for damages to the plaintiff at the rate of Rs. 300/- per month as well as arrears of rent. Against the aforesaid judgment and decree, the petitioner-original defendant filed an appeal viz. S.E.A. No.01 of 2006. During the pendency of the aforesaid appeal, the respondent/decreed holder filed Eviction Execution Case No.08 of 2010 under Order XXI Rule 15 of the Code for execution of the judgment and decree passed in Eviction Suit No. 03 of 1995. In the said execution case, the petitioner filed a rejoinder dated 27.09.2011. By an order dated 08.09.2011, the SEA No. 01 of 2006 was dismissed for default. Thereafter, the petitioner filed Misc. Case No.03 of 2011 for re-admission of the aforesaid appeal which was admitted vide order dated 23.09.2011.

3. It is the case of the petitioner that Title Suit No.38 of 1998 is pending before the Sub Judge-I, Munger i.e.



same Court in which the land in the execution case is also included. The petitioner filed a petition dated 22.03.2013 in Eviction Execution Case No.08 of 2010 for staying the proceeding of the execution case till the disposal of the Title Suit No.38 of 1998, which has been rejected by the learned Sub-Judge-I, Munger by the impugned order dated 10.06.2013. Hence, this writ petition.

4. Learned counsel for the petitioner submits that the Court below has committed an error in dismissing the petition filed by the petitioner for staying the proceeding of the Execution Case No. 08 of 2010 on technical ground. The Court below has failed to appreciate the fact that the Title Suit No.38 of 1998 is still pending regarding the suit property and unless and until it is decided, the execution of judgment and decree for evicting the petitioners from the suit property cannot be done.

5. Learned counsel for the petitioner further submits that the Court below has rejected the petition of the petitioner only on the ground that in the eviction appeal preferred by him, a petition for stay under order XLI Rule 5 was rejected. He further submits that the parties claimed title over the land in question through a common ancestor and the petitioner is the co-sharer of the suit property as being member



of joint family.

6. The sole respondent has appeared and filed his counter affidavit and has opposed the application by relying on the judgment of *Krishna Singh vs. Mathura Ahir & Ors* reported in *AIR 1982 SC 686* and has submitted that executing Court has got no jurisdiction to go beyond the decree and if a decree is executed and ultimately the petitioner succeeds in the partition suit then he can get recovery of possession but the decree holder cannot be debarred from executing the judgment and decree. He has also relied upon a decision of this Court in the case of *Khurdeni Mistri vs. Satendra Prasad & Anr.* reported in *1999 (2) PLJR, Page-12*.

7. Learned counsel for the respondent has submitted that against the judgment and decree passed in the Eviction suit, the petitioner filed an appeal bearing S.E.A. No. 01 2006, which stood dismissed for default and for re-admission of the same, Misc. Case No.03 of 2011 was preferred by the petitioner, which too stood dismissed vide order dated 18.03.2016. He has supported the impugned order by contending that there is no infirmity in the impugned order.

8. I have considered the submissions of the parties and also perused the materials on record.



9. It is an admitted fact that the petitioner has lost in Eviction Suit and the Court below has directed him to vacate the suit premises with a month, failing which the respondent was given liberty to get the premises vacated through the process of the Court. Against the judgment and decree passed in the Eviction Suit, the petitioner preferred an appeal, which stood dismissed for default and the restoration application has also been dismissed. Therefore, the judgment and decree passed in the Eviction Suit has become final. It is also an admitted fact that the suit between the parties with regard to partition is pending for evidence which goes to show that the petitioner is not interested in disposal of the partition suit and he wants to use it as a tool for lingering the execution proceeding.

10. The Hon'ble Supreme Court in the case of ***Krishna Singh vs. Mathura Ahir (Supra)*** has held that the scope and ambit of Order XXI Rule 29 has to be exercised with very great care and caution only in special cases. It will be relevant to quote paragraph nos.16, 18, 20 and 25 which read as under:-

16. We are rather amazed to find that the totally unwarranted plea taken by Sri Krishna Singh seems to have found



favour with the Civil Judge who readily accepted the prayer of Sri Krishna Singh of staying the execution of the decree without realising the scope and ambit of O. XXI, R. 29. Under this provision, jurisdiction has to be exercised with very great care and only under special cases. The Civil Judge also prima facie held that Harshankaranand was not a legal representative of late Mahant when this question was only left open and had to be decided by the Civil Judge. This shows the casual and perfunctory approach which was made by the Civil Judge. It is rather unfortunate that even the District Judge in revision affirmed the order of the Civil Judge.

18. It was contended by Mr. Asthana that O. XXI, R. 29 was amended by Section 72 of Act 104/1976 which introduced the following words:

"or of a decree which is being executed by such Court."

The amendment is of no avail to Sri Krishna Singh because the words "such Court" appear in the amendment also. Furthermore, the execution in the instant case was first filed before the City Munsiff who alone had the jurisdiction to proceed under O. XXI, R. 29. As the execution case was transferred to the Civil Judge, he ceased to have any



jurisdiction in the matter. Thus, on this ground also the order of the Civil Judge and as affirmed by the District Judge in revision is a ity. Moreover, the judgment of the Civil Judge in view of the circumstances detailed above appeared to us to be an order passed in defiance of and in disobedience to the clear directions given by us and the decree passed by us in C.A. 1802/1971 and therefore would be non est and absolutely without jurisdiction and violative of Art. 141 of the Constitution of India.

20. *It was also contended that the decree-holder has filed a writ petition in the High Court. That, however, is of no consequence because in view of our finding, the writ petition would become infructuous. Thus, taking an overall picture of the situation, we are constrained to observe that despite the clear directions contained in the decree of the High Court as also of this Court, the Civil Judge made no attempt to comply with the decree passed by this Court but used his discretion to perpetuate injustice so as to continue and legalise an unlawful and wrongful possession of a person who had been held to be a rank trespasser by the High Court as also by this Court. The execution was stayed at the instance of a*



person who had exhibited an adverse interest to the Math properties and was not at all concerned with the preservation of the Math properties. As a defacto manager Harshankaranand could recover the property for the benefit of the Math from the possession of the trespassers and there was no occasion for the Civil Judge to have resorted to the extraordinary discretion under O. XXI, R. 29, C.P.C. even if it was applicable.

25. *We also direct the Civil Judge to send an explanation as to why despite our clear orders, he did not proceed to deliver possession of the property to Harshankaranand from Sri Krishna Singh as also the circumstances under which he passed the extraordinary and palpably wrong order under O. XXI, R. 29, C.P.C. We further direct the Civil Judge to deliver possession of the property from Sri Krishna Singh and others to the decree-holder Harshankaranand and report compliance within a week from the receipt of this order. If necessary, the Civil Judge can take the aid of police. Let a copy of this order be sent to the Civil Judge so as to enable him to give his explanation.”*

11. In ***Khurdeni Mistri vs. Satendra Prasad & Anr. (Supra)*** the Hon’ble Supreme Court has held that a decree



holder in an eviction suit cannot be debarred in execution of decree. It will be relevant to quote paragraph no.3, which reads as under:-

“(3.) The defendant-petitioner by filing written statement denied the allegation made in plaint including tracing of title of the plaintiffs regarding auction sale etc. They also denied the settlement in favour of Gayaddin Sah and the rest of the documents by which the plaintiffs became the owner are being challenged as forged and fabricated documents. According to the defendants, on 31.12.1988 by a Mahadanama Raghav Sharma, son of the defendant, agreed to purchase the land from Nagendra Singh, grand-son of the recorded tenant Kamal Rai and ultimately on 28.12.1989 Nagendra Singh executed the sale deed in favour of Raghav Sharma and it was totally denied that there was any relationship of landlord and tenant between the plaintiffs and defendant. According to the defendant, to grab the land the petitioner have filed the suit in the garb of eviction. The suit was ultimately decreed in favour of the plaintiffs and against that decree the defendant came up before this Court in Civil Revision No. 439 of 1994. By order dated 17.12.1996 a Bench of this Court held that the findings arrived at by



the Court below are passed upon correct appraisal of the evidence on record and as such there was no scope of interference in the civil revision application and as such the revision petition was dismissed but in course of discussion it was observed in the following manner.

“However, the defendant, if so advised, may file a Title Suit for declaration of his title and recovery of possession with respect to the suit property which shall be considered and decided strictly in accordance with the law not being influenced either by the findings arrived at by the Court below or by the revisional Court in the question of title in the eviction suit.”

Being enthusiastic with such observation of this Court the defendant filed a suit for declaration of title as per the written statement filed in the eviction suit being Title Suit No.59 of 1997 and also prayed for confirmation of possession. Against the eviction decree when the revision petition failed the defendant filed the above mentioned execution case being Execution Case No.13 of 1994 for recovery of possession from the plaintiffs.



In the execution case the petitioner being the judgment-debtor filed the petition under Order XXI Rule 29 C.P.C. for stay of the execution proceeding pending disposal of his suit. According to the petitioner, he purchased 51/2 dhoors whereupon the shop house is situated and he is not concerned with the rest of the land of 11 dhoors as claimed by the plaintiff-decree holder and that the same shop house being the only source of livelihood and when the plaintiffs could not be able to prove his title in the eviction suit by producing auction sale documents etc. then prima facie the judgment-debtor is having a good case for being declared of title in the title suit itself and hence if the present execution proceeding is not stayed at least in respect of 51/2 dhoors of land wherefrom the suit house is situated, highly injustice would be caused to the judgment-debtor and such stay is definitely necessary for ends of justice even on the observation being made by a Bench of this Court in the earlier revision filed against the eviction decree. In respect of his contention learned Counsel has referred to 1968 PLJR 136. In that case an ex parte decree was obtained against the defendant and then the defendant challenged that ex parte decree by filling



a fresh suit and then it was observed that it was a fit case where the executing Court can exercise its jurisdiction under Order XXI, Rule 29 of the Code of Civil Procedure. But the facts in that case are not at all similar to the present case. It was held by the revisional Court that the opposite parties got the eviction suit legally and the evidence and documents supported the case of the opposite parties and there was nothing to interfere with the eviction decree by way of revision under Sec. 115 of the Code of Civil Procedure. That the decree was obtained long back but up till now the decree-holder could not be able to get the fruit of the decree. There was observation by this Court while disposing of the revision that the petitioner would be at liberty to file a suit for declaration of his title and for recovery of possession meaning thereby that on the eviction decree if the decree-holder gets possession by execution of the decree the defendant would not be debarred in filing fresh suit and for getting recovery of possession but taking advantage of such observation the judgment-debtor by filing a suit is now trying to stay the proceeding of execution of the eviction decree. The decree passed in the eviction suit has not been challenged in the suit in which the



plaintiffs want declaration of title in respect of 51/2 dhoors which is included in the eviction decree with regard to 11 dhoors. During the course of argument learned Counsel for the petitioner submitted that he has no objection if the decree-holder takes possession of his decreetal land besides 51/2 dhoors for which the title suit is pending. The executing Court has got no scope to go beyond the decree or divide the decree into part. If he is to execute the decree he should execute as a whole and not by part. Even if on the eviction decree the petitioner is dispossessed then also if his Suit which was filed at a very belated stage i.e. in the year 1997 he could be able to get recovery of possession in respect of the land for which decree might be obtained by him in the title suit. But a decree-holder in an eviction suit cannot be debarred in execution of the decree. Already by filing various petitions the judgment-debtor could delay the execution proceeding for long five years. Learned Counsel appearing for and on behalf of the opposite parties contended that as per observation made by the revisional Court the petitioner have not prayed for recovery of possession but prayed for confirmation of possession which is against the



direction/observation given by this Court.”

12. Considering the facts of this case and also considering the law laid down by the Hon'ble Supreme Court in the case of ***Krishna Singh v/s Mathura Ahir (Supra)*** and ***Khurdeni Mistri vs. Satendra Prasad & Anr. (Supra)***, I am of the view that the judgment and decree obtained by the sole respondent in Eviction Suit cannot be denied on the ground of pendency of the partition suit, which is not pursued by the petitioner. The Eviction Suit was decreed in the year 2006 and the execution proceeding has been stalled by the petitioner on the ground of pendency of the partition suit till today. The partition suit is pending since 1998 and the petitioner has not taken steps for disposal of the partition suit which shows that the sole intention of the petitioner is to delay the execution proceeding and nothing else.

13. In view of the aforesaid discussions, I am of the considered view that there is no illegality and infirmity in the impugned order dated 10.06.2016 by which the petition filed by the petitioner for staying the execution case has been rejected.

14. Accordingly, this writ petition stands dismissed. The Sub-Judge concerned is directed to execute the judgment and decree passed in the title eviction no. 3 of 1995 within a



period of two weeks from the date of receipt/production of copy
of this order and thereafter he will file a compliance report
before this Court forthwith.

(Sandeep Kumar, J)

N.K/-

AFR/NAFR	A.F.R.
CAV DATE	N/A.
Uploading Date	09.02.2024
Transmission Date	N.A.

