

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1080 of 2024**

Mahaveer Prasad Sah @ Mahavir Prasad S/o- Late Bhagwan Das, Resident of
Mohalla- Naya Bazar, Dalpatti, P.S.- Lakhisarai, District- Lakhisarai.

... .. Petitioner/s

Versus

1. Om Prakash Sah Vidyalkar, S/o- Late Bhagwan Das, Resident of Naya Bazar, Dalpatti, Lakhisarai, P.S.- Lakhisarai, District- Lakhisarai.
2. Ravi Kumar, S/o- Om Prakash Sah Vidyalkar, Resident of Naya Bazar, Dalpatti, Lakhisarai, P.S.- Lakhisarai, District- Lakhisarai.
3. Rashmi Kumari, D/o Om Prakash Sah, Resident of Naya Bazar, Dalpatti, Lakhisarai, P.S.- Lakhisarai, District- Lakhisarai.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Chandra Kant, Advocate
For the Respondent/s : Mr.

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

Date : 18-10-2024

The matter has been taken up on mentioning being
made on behalf of the petitioner.

2. Heard learned counsel for the petitioner and I
intend to disposal of the petition at the stage of admission itself.

3. The petitioner is aggrieved by the order dated
02.09.2024 passed in Misc. Case No. 01 of 2016 by learned Sub
Judge 2nd, Lakhisarai, whereby and whereunder the learned trial
court has rejected the petition filed by the petitioner for
appointment of Survey Knowing Pleader Commissioner.

4. Learned counsel for the petitioner submits that the
impugned order is not sustainable since the reasons given for



rejection of the petition filed for appointment of Survey Knowing Pleader Commissioner amounts to finally deciding the miscellaneous case. Moreover, the observations made by the learned subordinate court is the matter within the domain of the court executing the decree and the learned subordinate court in seisin of the matter of miscellaneous case could not have recorded the said reasons while disposing of the petition for appointment of Survey Knowing Pleader Commissioner. Learned counsel further submits that the miscellaneous case was taken up for disposal after passing of the order by this Court in Civil Miscellaneous Jurisdiction No. 102 of 2020, wherein the learned subordinate court was directed to first decide the objections raised by the petitioner in miscellaneous case and thereafter, to take steps for delivery of possession in the matter. Learned counsel further submits that the property against which execution has been sought is not identifiable with certainty and there is doubt over the identity of the property. The property on which decree has been passed and the property on which execution case is pending are different. Further, the petition filed by the decree holder to amend the execution petition to correct the description of the property in execution was rejected by the executing court. The said order was not challenged and it



he has become final. There is no such property over which execution can be ordered by the court and hence to ascertain these facts the appointment of Survey Knowing Pleader Commissioner is essential.

5. Learned counsel has referred to a decision of Kerala High Court in the case of *P.N. Kurian Vs. Thulasidas* reported in *AIR 2003 (Ker) 288*, wherein the learned Single Judge directed for appointment of Survey Knowing Pleader Commissioner during execution proceeding while relying on a decision of the Patna High Court in the case of *Smt. Lalmuni Devi v. Shiv Shankar Tiwary* reported in *AIR 1980 Patna 184*, wherein the Hon'ble Division Bench held that the executing court is certainly entitled in law to take such steps to effect delivery of possession in terms of the decree under execution. The Hon'ble Division Bench further held that the such steps would not amount to taking any additional evidence in the matter but would amount simply ascertain and fix up identity of the property in terms of the decree itself. Thus, learned counsel submits that establishing the identity of the property is essential and it could be made clear by the report of the Survey Knowing Pleader Commissioner and hence rejection of petition filed under Order 26 Rule 9 of the Code of Civil Procedure is bad and



the impugned order is not sustainable and the same needs to be set aside.

6. Perused the records.

7. From perusal of the record and especially the impugned order, it is evident that the learned trial court has considered the requirement of the appointment of Survey Knowing Pleader Commissioner and rejected the prayer of the petitioner. The learned trial court has taken into consideration the contention of the petitioner about doubt over identity of the decretal property and it recorded its finding that the contentions raised by the petitioner were earlier also raised before the first appellate court with regard to identity of the suit property. The first appellate court corrected the number of suit property from 982 to 782 and the claim of the petitioner over identity of the suit property was rejected by this Court in Civil Miscellaneous Jurisdiction No. 102 of 2020. While deciding the objections raised by the petitioner/judgment debtor in miscellaneous case, if the learned subordinate court did not consider it proper to appoint Survey Knowing Pleader Commissioner holding it to be an exercise on part of the petitioner to gather evidence in his favour or to delay the proceeding, the said finding could not be faulted. It has rightly held that the decree would be executed as



it is. If during execution any issue arises, the executing court could take such steps for delivery of possession in terms of decree under execution to ascertain and fix up the identity of the property in terms of decree itself. But at this stage, the learned subordinate court is not supposed to do the bidding of the petitioner. Moreover, the ground taken for appointment of Survey Knowing Pleader Commissioner has already been taken up at different fora and if the same has also been raised in objection in miscellaneous case, it is for the petitioner to establish the same and he cannot ask the court to gather evidence for him. Hence, the learned subordinate court rightly refused to entertain the petition for appointment of the Survey Knowing Pleader Commissioner.

8. The authorities cited by the learned counsel for the petitioner are not of much help to the cause of the petitioner as facts are not similar and there is no dispute over the proposition of law about powers of the executing court to take such steps to effect delivery of possession in terms of the decree under execution.

9. In the light of discussion made herein before, I do not find any infirmity in the impugned order dated 02.09.2024 and hence, the same is affirmed.



10. As a result, I do not find any merit in the present petition and hence, the same is dismissed at the stage of admission itself.

11. However, it is made clear that the court has not made any comments on the merits of the case of the respective parties and the learned subordinate court is directed to proceed in the matter and dispose of the miscellaneous case at the earliest uninfluenced by any observation made in this order.

(Arun Kumar Jha, J)

DKS/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	21.10.2024
Transmission Date	NA

