

(2002) 09 PAT CK 0022
In the Patna High Court
Case No : Civil Revision No. 753 of 2002

Abhinandan Jha @ Abhed Jha and Others	APPELLANT
Vs	
Anant Mishra and Others	RESPONDENT

Date of Decision : 19-09-2002

Acts Referred:

Citation : (2002) 09 PAT CK 0022

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—This civil revision application is directed against the order dated 3.6.2002 passed by the Addl. District Judge II, Madhubanj in Title Appeal No. 4 of 2002 rejecting the petition filed by the Petitioners under Order XXI Rule 29 of the CPC (hereinafter referred to as the Code) for staying the execution case being Execution Case No. 7 of 1999.

2. The facts leading to the filing of the present application are that the Defendants/opposite parties No. 1 to 3 filed a title Suit being Title Suit No. 31 of 1999 against the Petitioners in the Court of Munalf 1st, Madhubani for declaration of title and possession over the property described in Schedule of the plaint and for eviction and permanent injunction with regard to property described in Schedule II of the plaint. The said suit was decreed ex parte on 14.10.1999 against the Petitioners. The Petitioners filed a Miscellaneous case under Order IX Rule 13 of the Code for setting aside the ex parte decree. The said Misc. Case was dismissed on 15.5.2000. They preferred an appeal before the appellate Court and the same was also dismissed. Thereafter the Defendants/opposite parties" No. 1 to 3 levied an execution case being Execution Case No. 7 of 1999 in the Court of Munsif 1st, Madhubani against the judgment debtor/Petitioners. The Petitioners thereafter filed a Title Suit being T.S. No. 39 of 2001 out of which the present matter arises against the Defendants/opposite parties No. 1 to 3 for declaration of their title and confirmation of possession lover the same very land which was subject matter of earlier suit and for setting aside the exparte decree dated 14.10.1999 as fraudulent and not binding on them. The decree holder-

Defendants/ opposite parties No. 1 to 3 raised an objection as to the maintainability of the suit on the ground that the same is barred by principles of res judicata. The Munsif 1st, Madhubani by order dated 25.1.2002 held that the suit is barred by principles of res judicata. Thereafter the Petitioners filed Civil Revision No. 235 of 2002 before this Court and this Court by order dated 22.4.2002 held that the civil revision application is not maintainable and the appeal is appropriate remedy against the aforesaid judgment and order and accordingly, the Petitioners preferred Title Appeal No. 4 of 2002. During the pendency of the aforesaid appeal, they have filed the aforesaid petition for staying the execution case which has been rejected as stated above.

3. The learned Counsel appearing for the Petitioners submitted that the Court below has committed jurisdictional error in refusing the prayer of the Petitioners to stay the execution case. In this connection, he submitted that the assertion of the Petitioners is that the decree was obtained by fraud which vitiates even solemn proceeding of the Court and as such it was a fit case where the execution case should have been stayed. In support of the fact that the suit to challenge the decree on the ground of fraud can be filed, he has relied upon certain decisions which in my view are not relevant at all to decide the point involved in this case.

4. The learned Counsel for the Defendants/opposite parties No. 1 to 3 on the other hand submitted that the application under Order XXI Rule 29 of the Code was not maintainable at all before the appellate Court as the application can be filed only in the Court which passed the decree earlier and where the subsequent suit is pending. Alternatively, he submitted that even if the application is treated to be filed u/s 151 of the Code, the appellate Court has considered and rejected the prayer of the Petitioners and as such this Court in Civil Revision will not interfere with the order as the case is not covered by any of the clauses of Section 115 of Code.

5. Order XXI Rule 29 of the Code reads as follows:

Stay of execution pending suit between decree holder and judgment debtor:- Where a suit is pending in any Court against the holder of a decree of such Court (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:

[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.]

6. According to the said section, the Court which is empowered to exercise the power under Order XXI Rule 29 of the Code is the Court where both, the suits and execution proceedings are pending and no other Court can entertain the application under the aforesaid provision. In that view of the matter, the application under Order XXI Rule 29 of the Code was not maintainable before the

appellate Court. This apart, Order XXI Rule 29 of the Code vests discretion in the Court to grant stay and stay cannot be granted as a matter of right.

7. The Apex Court in the case of Sri Krishna Singh Vs. Mathura Ahir and Others, held that the jurisdiction has to be exercised with a very great care and only in special cases. Thus, there is force in the submissions raised on behalf opposite parties that the application under Order XXI Rule 29 was not maintainable.

8. Even if it is assumed that the application was maintainable u/s 151 of the Code which was also one of the sections mentioned in the application, the Court below having considered the matter and having taken note of the fact that the decree holder has obtained a decree and the application under Order IX Rule 13 of the Code has been rejected, held that this was not a fit case to stay the execution case specially when on success, the Petitioners' possession can be restored by taking recourse to Section 144 of the Code. In such a situation, this Court in exercise of revisional jurisdiction will not interfere with the order.

9. Accordingly, the civil revision application is dismissed.