
(2013) 03 PAT CK 0059
In the Patna High Court
Case No : Civil Revision No. 156 of 2011

Arun Kumar Sah

APPELLANT

Vs

Gita Devi and Others

RESPONDENT

Date of Decision : 01-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2, Order 14 Rule 1(5), Order 17 Rule 2, Order 17 Rule 3, Order 17 Rule 3(a)

Citation : (2013) 2 PLJR 221

Hon'ble Judges : Jyoti Saran, J

Bench : Single Bench

Advocate : Madhuresh Prasad, for the Appellant; Harshwardhan Sahay, for the Respondent

Final Decision : Allowed

Judgement

Jyoti Saran, J.—This Civil Revision application is directed against the order dated 08.12.2010 passed by learned Sub Judge-1st, Munger in a case arising from Miscellaneous Case No. 26 of 2009, whereby application filed by the opposite parties under Order 9 Rule 13 of the CPC (hereinafter referred to as the "Code") together with petition for condonation of delay, has been allowed upon payment of cost of Rs. 5,000/- and the judgment and decree dated 14.09.2009 passed in Title Suit No. 24 of 2008 has been set aside and the suit has been restored to its original position. The facts of the matter as stated by the petitioner who is the plaintiff in the court below is that the opposite parties in urgent need of money, entered into an agreement to sell a semi constructed house standing on plot bearing khata no. 55, plot no. 120, tauzi no. 459, thana no. 210 admeasuring 9.38 decimals in mauza Ram Nagar, Circle, Jamalpur in the district of Munger for a consideration of Rs. 3,00,000/- in favour of the petitioner on 5.8.2006 after receiving an advance of Rs. 2,50,000/-. The agreement to sell was registered on 7.8.2006 with the District Sub Registrar, Munger. Upon failure of the opposite parties to execute a formal sale deed after receiving the balance consideration of Rs. 50,000/-, despite request being made by the petitioner and notice issued

under registered post on 15.01.2007 and 7.4.2009, the suit in question was filed giving rise to Title Suit No. 24 of 2008. The suit was decreed on contest by a judgment and decree passed on 14.9.2009 directing the plaintiff-petitioner to deposit the balance amount of Rs. 50,000/- within two months and which was deposited by the petitioner vide chalan, copy whereof is placed at Annexure-2. An execution case was levied under Order 21 Rule 11 of the Code giving rise to Execution Case No. 8 of 2009 for execution of the sale deed through the process of the court. It is at this stage that the application in question was filed by the petitioner under Order 9 Rule 13 of the Code giving rise to Miscellaneous Case No. 26 of 2009 and which has been allowed by the order impugned, hence the present application.

2. Mr. Madhuresh Prasad, learned counsel has appeared on behalf of the petitioner and Mr. Harshwardhan Sahay, learned counsel has appeared for the defendant-opposite parties. Mr. Madhuresh Prasad has submitted that the suit being decreed on contest, no remedy lay for the opposite parties under Order 9 Rule 13 of the Code. It is submitted that the learned trial court has misdirected itself in allowing the said application which was not maintainable. With reference to the provisions of Order 9 Rule 13 of the Code, it is submitted that there are only two circumstances in which a defendant can take recourse to the remedy, namely; (a) non-service of summons and (b) availability of sufficient cause for not being able to contest the matter during trial. It is submitted that the case of the opposite parties did not fall in either of the categories. With reference to the statement made in paragraph-1 of the miscellaneous application, copy whereof is placed at Annexure-3 of the application, it is stated that the opposite parties have admitted to the service of notice and thus the condition of service of summons stands satisfied. It is submitted that even the other ground is not available to the opposite parties, since it is a contest decree. It is submitted that plea of lack of communication by the advocate hardly constitutes a sufficient cause for maintaining such application. It is submitted that the order sheet of the trial court manifests that arguments had been advanced on behalf of the defendants and thus even this plea is not available to them and they cannot plead that they were prevented by sufficient cause in appearing before the trial court. With reference to the operative portion of the judgment passed in the Title Suit, copy whereof is placed at Annexure-1, it is submitted that the suit having been decreed on contest by the trial court, the forum of Order 9 Rule 13 was no more available to the defendants-opposite parties. It is further submitted that the petitioner having fulfilled his part of obligation under the contest decree and having deposited the balance consideration amount, the defendant-opposite parties are now trying to wriggle out of their obligation under the decree. It is submitted that in view of the finding of the trial court recorded at page 13 of the impugned order wherein the learned trial court has noted that the hearing of the suit was adjourned for evidence of the defendants but no evidence was produced by them and that on 5.9.2009 there was attendance of both the parties and the argument of both the parties was heard, there is no circumstance warranting the

exercise of power vested in the trial court under Order 9 Rule 13 of the Code. It is thus submitted that the order of the court below suffering from serious legal infirmity cannot be upheld and is fit to be set aside. It is submitted that the judgment and decree in the suit has been passed under the provisions of Order 17 Rule 3(a) of the Code and to which the provision of Order 9 Rule 13 do not apply. Learned counsel in support of his submissions has relied upon a Bench decision of this Court reported in Krishna Kumar Vs. Raghubir Prasad Yadav and Another, , a judgment of the Supreme Court reported in Prakash Chander Manchanda and Another Vs. Janki Manchanda, and a judgment of the Supreme Court reported in Parimal Vs. Veena @ Bharti, . It is submitted that once the defendants had entered appearance, filed written statement and had contested the matter by advancing arguments, the remedy of the Miscellaneous Case was not available for them. Concluding his arguments, Mr. Prasad submitted that mere shifting of the burden on the counsel, by the defendant-opposite parties did not constitute sufficient cause.

3. The arguments advanced by Mr. Prasad has been contested by Mr. Sahay appearing for the defendant-opposite parties. It is submitted that the powers vested in the trial court under Order 9 Rule 13 is discretionary and the trial court having exercised the same in the light of the evidence on record, the finding arrived at may not be disturbed in the Revisional jurisdiction for there is neither any error of jurisdiction by the trial court nor is there any material irregularity in the same. It is stated that as the defendants were not informed about the hearing of the suit hence they did not lead evidence after filing written statement and that their lawyer misled them in the matter. It is further submitted that when the defendants were not getting information about the progress in the suit from their counsel, they got the records inspected through another counsel, that it came within their information that the suit had been decreed and which was sealed and signed on 18.9.2009. It is submitted that it is on account of failure of the counsel of the defendants to inform them about the hearing, that they were unable to lead evidence and thus the defendants may not be penalized for the acts of their counsel. It is submitted that the learned court below after considering the matter threadbare recorded satisfaction that the defendants were not able to actively participate in the suit and for the laches and negligent attitude of the counsel, the defendants cannot be put to injustice. It is submitted that in view of the categorical finding of the court below as to the reasons which prevented the petitioner from participating in the trial, the opinion formed by the court below did not warrant interference.

4. Learned counsel in support of his submission has relied upon the following judgments:

(i) 1980 BLJ 389 (Ram Swaroop Prasad vs. Central Bank of India)

(ii) Prakash Chander Manchanda and Another Vs. Janki Manchanda, Prakash Chander Manchanda and Another Vs. Janki Manchanda,

(iii) OCL India Ltd. Vs. State of Orissa and Others, B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and Others, .

5. I have heard learned counsel for the parties and have perused the materials available on record. There is no dispute on the facts leading to the suit. The only dispute is whether the appearance/non appearance by the counsel for the defendants would make out a case covered under the provisions of Order 17 Rule 2 or it is a case covered under Order 17 Rule 3(a). It is not in contest that if the case of the defendant-opposite parties was covered under the provisions of Order 17 Rule 3(a), the provisions of Order 9 would not be applicable. The provisions of Order 10 Rule 2 and Order 14 Rule 1(5) manifests that hearing in a suit begins with framing of issues and leading of evidence by the parties. It is after the hearing has begun in the light of the provisions aforementioned that the provisions of Order 17 comes into play regulating the hearing of the suit. Order 17 deals with adjournment and the power of the court to impose cost on unwarranted adjournments. The provision relevant for the case in hand are Rule 2 and Rule 3 of Order 17. Order 17 Rules 2 and 3 enable the trial court to proceed in the matter where a party has failed to produce his evidence despite time being granted. The circumstances for exercise of such power also has been engrafted in the provision together with an explanation. The parties are not at issues that the provisions of Order 9 are available only to such ex parte decrees as covered under the provisions of Order 17 Rule 2 and are not applicable to cases covered under Order 17 Rule 3(a). The provisions of Rule 2 enables the court concerned to dispose of the suit in one of the modes as found under Order 9 or to make such other order as it deems fit. Rule 3(b) further enables the court to proceed under Rule 2 in cases where a party to the suit to whom time has been granted, fails to produce evidence or to perform such other acts for which time was allowed. The explanation under Rule 2 vests discretion in the court to proceed against the party found absent but such course can be adopted only if the party concerned has led evidence or at least a substantial portion thereof, failing which the court would have no other option but to proceed in terms of Rule 2. The scope of such exercise has been aptly discussed in the judgment of B. Janakiramaiah Chetty (supra) and paragraph-10 and 11 of the judgment would be relevant for the issue:

10. In Rule 2, the expression used is "make such order as it deems fit", as an alternative to adopting one of the modes directed in that behalf by Order IX. Under Order XVII, Rule 3(b), only course open to the Court is to proceed under Rule 2. When a party is absent, explanation there to gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule.

While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two Rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

11. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.

6. The judgments relied by both the parties are on the settled principles of law on the issue. There is no gainsaying that even after a party has appeared and filed his pleadings but has failed to lead evidence or participate in the hearing, the court would have to proceed in terms of Order 17 Rule 2 and in case the party concerned has participated and also led evidence, then the discretion vests in the court to proceed in the manner as it deems fit depending on the nature of evidence led by the party concerned. But the situation would be different where a party neither leads evidence nor seeks leave for such purpose rather proceeds to participate at the argument stage without a murmur. In my opinion such a circumstance would fall under Order 17 Rule 3(a). It is now to be seen whether the case of the defendant-opposite parties would be covered by Rule 2/Rule 3(b) or Rule 3(a). The order sheet has been placed at Annexure-5 of the proceedings and a perusal whereof shows that since after filing appearance and written statement, initially the defendant was participating in the suit but subsequently started absenting therefrom. On 6.8.2009 the plaintiff witness was examined but there was no representation on behalf of the defendants and the witnesses were discharged. On the next date i.e. 18.08.2009 the attendance was filed on behalf of the defendants and the matter was posted on 21.8.2009 (incorrectly mentioned as 21.08.2008 in the order sheet) for defendants evidence. On 21.8.2009 the defendants failed to lead evidence even after marking attendance and the matter again was posted for defendants evidence on 25.8.2009. Again on 25.8.2009 though attendance was filed but no evidence was

led by the defendants and matter was adjourned to 2.9.2009. As the defendants again failed to lead evidence, the trial court closed the defendants evidence vide order passed on 2.9.2009 and the matter was posted for arguments on 4.9.2009. None appeared on behalf of the defendants on 4.9.2009 and the matter was posted for arguments on 5.9.2009. On 5.9.2009 the learned trial court after hearing the arguments of both sides posted the matter for judgment on 14.9.2009. The judgment was delivered on 14.9.2009 and decree was passed on contest.

7. Had the defendants not participated in the arguments held on 5.9.2009 their case stood covered under the provisions of Order 17 Rule 2 but the defendants have participated in the arguments. There is nothing on record to show that any leave was sought from the trial court for leading evidence or any application was filed for recall of the order posting the matter for arguments, resulting in a contest decree. The order sheet shows that the defendants have participated in the argument. This said single factor of the defendants participation in the arguments held on 5.9.2009 is self sufficient to take out the case of the petitioner from Rule 2 and to bring it within the ambit of Rule 3(a) of Order 17. It is rather surprising that the trial court having noticed this relevant aspect and having noted that the plaintiff evidence stood closed on 18.8.2009 and that the suit was adjourned to 21.8.2009 for the evidence of the defendants who failed to produce any evidence and as a consequence the matter was posted for argument on 5.9.2009 on which date there was attendance of both the parties and the argument on behalf of both the parties was advanced, yet has proceeded to record satisfaction on the cause shown by the defendants of being prevented from participating in the suit by shifting the burden on their counsel. The learned trial court appears to have got swayed in the wave of sympathy for the defendants and has held that the laches and negligent attitude of the defendants counsel constituted sufficient cause for non-participation of the defendants. These grounds assigned are foreign to the exercise of power under Order 9 Rule 13 of the Code especially where the counsel for the defendants has participated in the trial and has led his arguments. His failure to cross-examine the witnesses of the plaintiff and to lead evidence, cannot render the decree ex parte. The judgment passed in the suit is present at Annexure-1 and the learned trial court having decreed the suit on contest against the defendants, could under no circumstance set aside a contest decree in exercise of power under Order 9 Rule 13 of the Code. The learned trial court in passing the order impugned, has not only acted with material irregularity but has exercised such powers which is not vested in him in law.

8. For the reasons aforementioned, the order impugned dated 8.12.2010 passed in Miscellaneous Case No. 26 of 2009 by learned Sub Judge-1, Munger is set aside. In consequence, the defendant shall be entitled to the refund of the cost of Rs. 5,000/-, if deposited by him pursuant to the order dated 8.12.2010 passed in the Misc. Case No. 26 of 2009. This application is allowed but without any order as to costs. This order, however, would not preclude the defendants from

taking recourse to such remedies as may be available to them in law.