

(1919) 08 PAT CK 0001
In the Patna High Court

Brindaban Chander Choubey

APPELLANT

Vs

Babu Gour Chandra Ray and Others

RESPONDENT

Date of Decision : 16-08-1919

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Government of India Act, 1935 — Section 107

Citation : 56 Ind. Cas. 155

Hon'ble Judges : Atkinson, J;Adami, J

Bench : Division Bench

Judgement

1. The petitioner applied to the Subordinate Judge of Purnea under Order IX, rule 13, to set aside an ex parte decree obtained against him in Suit No. 219 of 1917. The ex parte decree is dated the 11th June 1917,

2. The suit was instituted for the recovery of possession of a certain holding of which the defendant No. 1 was in possession. The defendant No. 1 acquired the interest of the defendant No. 2, who was the original tenant of this holding, by purchase; but it is alleged by the plaintiff, that the holding was a non-transferable holding and consequently the defendant No. 1 acquired no title by reason of his purchase from the defendant No. 2, that in effect the holding had been abandoned by the original tenant, and that the defendant was no better than a trespasser, and that the plaintiff was consequently entitled to recover possession of the property in suit.

3. In addition to the claim for recovery of possession of the aforesaid holding, the plaintiff also claimed to recover mesne profits in respect of the years in suit, and the mesne profits estimated in the prayer to the plaint were stated to be Rs. 5,195 odd. The learned Subordinate Judge disposed of the suit in the absence of the defendant No. 1, who failed to appear, and granted the plaintiff a decree for recovery of possession of the property in suit, and also awarded the plaintiff a decree for mesne profits measured at the sum of Rs. 1,200. The learned Subordinate Judge discarded the evidence adduced by the plaintiff with reference

to the claim for mesne profits claimed by him; and as I gather from the observations of the learned Subordinate Judge, he was satisfied that the claim for mesne profits put forward by the plaintiff in his plaint was extravagantly absurd, and of a most suspicious character. The learned Subordinate Judge, however, having discarded the evidence of the plaintiff as to mesne profits, on his own responsibility and apparently without any principle as a guide and without any evidence, assessed the value of the mesne profits per annum at the valuation of the holding. The holding was valued at Rs. 400; consequently the learned Judge assessed the mesne profits for the three years in suit at Rs. 400 per annum, arriving at a conclusive figure of Rs. 1,200 in respect of the entire claim for mesne profits.

4. This is the history of the ex parte decree which was sought to be set aside under the provisions of Order IX, rule 13. The onus was no doubt on the plaintiff to establish in the first instance that the plaint or summons was duly served on the defendant. In support of that onus the plaintiff called the peon who served the summons, and the identifier who accompanied the peon; and upon their evidence we are satisfied that the plaintiff has discharged the onus primarily imposed upon him by law in proving due service of the plaint and summons on the defendant No 1. Once such evidence was adduced on behalf of the plaintiff, the onus was immediately shifted on to the defendant to establish that no notice of the plaint or summons was served upon him and that service of the plaint and summons had been fraudulently suppressed.

5. The main evidence adduced by the defendant in discharge of the onus which was cast upon him is the evidence of himself. Contrasting the evidence of defendant No. 1 with the evidence of the peon and the identifier whose reports appear endorsed upon the back of the summons, little doubt is left in our minds that the evidence of the peon as given before the Court, and as embodied in his report endorsed upon the back of the summons, is reliable. The peon tells what seems to me a very natural story, and the learned Judge who saw this witness was satisfied that he was a witness of credit and of truth, and his evidence brought conviction to the mind of the learned Judge that in fact the plaint and summons had been duly served.

6. The defendant's evidence as to the non-service of notice of the plaint, and of suppression of such notice, in my opinion, is wholly unconvincing, and weighing with considerable care the evidence on both sides, which is more or less oath against oath, we are satisfied that the evidence of the peon and the identifier deserves credit and carries conviction to our minds, and satisfies as that the plaintiff did in fact serve the summons on the defendants as alleged.

7. The defendant No. 1 states that he only became aware of the fact that an ex parte decree had been obtained against him on the 10th January 1918; although his house and garden and the other property connected therewith had been attached in " pursuance of the ex parte decree on the 6th December 1917. The defendant No. 1 relates a rather peculiar story as to how he became aware of the

fact of the ex parte decree; and in support of this version of his case he has to rely upon the evidence of P. W. No. 2, a man by the name of Fakir Chand Lal. The evidence of this witness, in my opinion, on its face, is incredible of belief, and obviously concocted and designed for the purpose of giving some plausible show of pretence to reality in support of the defendant's application. The evidence of this witness is quite unworthy of credence.

8. The learned Subordinate Judge adopted this view and with his expression of opinion we entirely concur. Accordingly this miscellaneous appeal against the refusal to set aside the ex parte decree under Order IX, rule 13, must be rejected.

9. I turn for a moment to consider the ex parte decree of the 11th June 1917. The record is before us and it is our privilege and prerogative, once a record is before us which is erroneous and so erroneous as manifestly to amount to an injustice, to exercise our powers of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require. If the record were not before us, but sufficient materials were before us to induce us to send for the record to correct a gross error apparent on the face of the record, we should accede to that application in the exercise of the powers conferred upon us, not u/s 115 of the Civil Procedure Code, but under the wider and larger powers conferred upon us u/s 107 of the Government of India Act.

10. In this case the record is before us, and it is transparent upon the face of that record that a wrong has been done by the learned Subordinate Judge in assessing the mesne profits payable by the defendant No. 1 to the plaintiff upon a totally wrong and erroneous principle, so erroneous and wrong as to amount to a want of a fair trial of the issue as to mesne profits as between the plaintiff and the defendant No. 1. We think that we should be erring in our duty if we avoided acting as we thought we ought to act.

11. Although we refuse the defendant No. 1's application as made, we think that in the exercise of our powers we should set aside that portion of the ex parte decree which was obtained by the plaintiff relative to the assessment of the mesne profits. This we accordingly do and the order of the learned Subordinate Judge with reference to the assessment of the mesne profits amounting to a sum of Rs. 1,200 is set aside. The rest of the order of the learned Subordinate Judge with regard to the recovery of possession of the holding in suit will stand.

12. It follows that the case must now be remanded in pursuance of our order to the learned Subordinate Judge for an enquiry as to the proper sum to be awarded for mesne profits payable by the defendant No. 1 to the plaintiff and of such enquiry the defendant No. 1 shall have due notice.

13. In the circumstances of this case no costs can be awarded to either party.