

(1996) 10 PAT CK 0020
In the Patna High Court
Case No : Civil Revision No. 540 of 1989

Dr. Dinesh Chandra Jha and Others

APPELLANT

Vs

Anil Kumar Jha and Others

RESPONDENT

Date of Decision : 16-10-1996

Acts Referred:

Citation : (1996) 10 PAT CK 0020

Final Decision : Allowed

Judgement

N. Pandey, J.—This civil revision application has been directed against an order dated 23.12.1988 in Misc. Appeal No. 26 of 1985 also the order dated 26.3.1986 in Misc. Case No. 42 of 1979, whereby the learned Sub-ordinate Judge refused to set aside the ex-parte decree in Money Suit No. 56 of 1978.

2. Short facts of this case are these: The plaintiffs filed Money Suit No. 56 of 1978 for adjudication that there was no reasonable cause for the defendants to institute the criminal case and, therefore, a decree for realisation of Rs. 5, 1000/- to compensate the alleged malicious prosecution be passed. Since the defendants did not appear, the suit was fixed on 17.1.1979 for ex-parte hearing. The matter was heard on that day. The Court fixed 18.1.1979 for final orders. But on 18.1.1979 two petitioners were filed on behalf of the defendants; one for adjournment of the case and the other to recall the order, fixing the case for ex-parte hearing. The learned court after hearing the parties fixed 19.2.1979 for orders. But on that day since another petition was filed on behalf of the defendants for time, the court pronounced order on 24.1.1979.

3. The grievance of the petitioners is that learned Sub-ordinate Judge although after hearing the parties on 18.1.1979 had fixed 19.1.1979 for orders on the petition, which was filed for recall of the order, fixed for ex-parte hearing, but unfortunately without giving any consideration about the said petition, decreed the case ex-parte on 24.1.1979.

4. The defendants thereafter, filed Misc. Case No. 42 of 1979 for setting aside the

ex-parte decree. A grievance was made since they had no knowledge about the Money Suit, because summons were never served, there was no occasion for them to appear in the suit prior to 17.1.1979. That apart, admittedly, since the defendants had appeared before the court and filed a petition on 17.1.1979 for recall of the order, it was not appear for the learned Sub-ordinate Judge to decide the case ex-parte without extending opportunity of hearing.

5. From the facts, noticed above, as well as the order sheet of the suit there appears no doubt the suit was taken up for ex-parte hearing on 17.1.1979. There is no denial that on that day itself a petition was filed for time by the learned Counsel, appearing on behalf of the defendants. But since he had no Vakalatnama, the case was fixed for orders on 18.1.1979. Undisputedly on 18.1.1979 a petition was also filed on behalf of the defendants to recall the order, whereby the case was fixed for ex-parte hearing. But no order on this petition was passed and on 24.1.1979 the case was decreed ex-parte, holding that in view of the judgment of the Court in Sukhlal Mahto and Ors. v. Amrit Mahto and Ors. 1970 BLJR 519, once a case was fixed for ex-parte hearing and judgment was reserved to some other case date, the court cannot set aside such order.

6. Mr. Mahto appearing for the opposite parties contended that all such questions have since been finally concluded by a finding of fact, no interference should be made with regard to such orders by the Court, while exercising the revisional jurisdiction. In support of his contention he placed reliance on a decision of the Apex Court in the case of The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway, .

7. Before advertng to the relevant provision of Order IX, Rule 7 of the Code of Civil Procedure, It would be appropriate to indicate that the facts of the case as reported in 1970 BLJR 519 [supra) was quite different. The said case was heard ex-parte and the court had kept the judgment reserved. Therefore, in those circumstances it was held that a court should not set aside ex-parte hearing. In the present case, admittedly before fixing the case for orders, a petition was filed by the defendants to recall the order, whereby, the suit was fixed for ex-parte hearing. Order IX, Rule 7 of the CPC prescribes that in case where the court had adjourned the hearing of the suit for ex-parte and the defendant appears before hearing and assigns good reasons for his previous non-appearance the court may upon such terms direct the matter to be heard in answer to the suit, as if the defendants had appeared on the date fixed for appearance. Therefore, if the defendants had appeared on 18.1.1979 and filed petition for recall of the order, fixed for ex-parte hearing it was proper for the court the adjudicate whether good reasons were assigned for non-appearance on the previous date.

8. It has to be bear in mind that the order of a court, directed a case for ex-parte. hearing is a mere statement of fact and is not an order against the defendants in a sense of "ex-parte decree" or "ex-parte order". Rule 7 of Order IX as I have already noticed, enumerates in a case where at the adjourned

hearing the defendant appears and by good reasons explains the cause of his previous non-appearance, the court can allow such party a chance for hearing. Such an opportunity cannot be refused mechanically. In support of such a view, a reliance can be made to a decision of the Apex Court in the case of Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, , where their Lordships have expressed their views in these words:

Then comes Rule 7 which provides that if at "an adjourned hearing" the defendant appears and shows good cause for his "previous" non-appearance", he can be heard in answer to the suit.

as if he had appeared on the day fixed for his appearance.

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.

9. In view of the discussions, made above, it is, thus, apparent that the learned court below has failed to exercise its discretion, because it considered that once case was fixed for ex-parte hearing, no interference was possible at the instance of defendants for recall of order.

10. Therefore, for the reasons stated above, the impugned judgment in Misc. Appeal No., 26 of 1985 as well as Misc. Case No. 42 of 1979 are hereby, set aside and the revision application is allowed to the extent, indicated above. The learned Sub-ordinate Judge is directed to restore back the Money Suit to its original position and decide the same after giving opportunity to both the parties. But in the background of the case, there shall be no order as to costs.