

(2011) 11 PAT CK 0044
In the Patna High Court
Case No : Civil Revision No. 1679 of 2005

Dudh Nath Singh

APPELLANT

Vs

Sheonath Singh (since dead) and substituted by (i) Most
Bhorni Kuar (ii) Baliram Singh (iii) Parushram Singh (iv)
Shambhu Nath Singh (v) Narander Singh (vi) Santosh Kumar
Singh (vii) Raj Kumari Devi (viii) Indu Devi

RESPONDENT

Date of Decision : 11-11-2011

Acts Referred:

Citation : (2011) 11 PAT CK 0044

Final Decision : Dismissed

Judgement

Honourable Mr. Justice Vijayendra Nath

1. Heard the learned counsel appearing on behalf of the petitioner as well as the opposite parties.
2. This revision application has been filed against the appellate order passed in Misc.Appeal No. 38 of 2005/3 of 2005 by Additional District Judge II, Gopalganj, allowing the appeal and setting aside the order dated 14-03-2005, passed by Additional Munsif II, Gopalganj, in Misc. No. 08/2001 dismissing the miscellaneous case filed for setting aside the ex-parte decree passed in T.S.No. 187 of 1988 of the said court.
3. The matrix of facts, not in dispute, is that T.S. No. 187 of 1988/134 of 2000 had been filed by the petitioner/plaintiff seeking declaration of title, recovery of possession and mesne profits as well as ancillary relief for injunction. The predecessor of the opposite parties of this revision application was the sole defendant in that suit and after his death the present opposite parties had been substituted in his place in this revision application.
4. The defendant appeared in the suit and filed his written statement and participated in the proceedings of the suit for some time thereafter and then left appearing in the suit. Issues were framed and the suit was heard ex-parte. After

considering the evidence and submissions of the plaintiff, the trial court passed ex-parte decree in the suit on 30-8-2001 granting all the reliefs sought by the plaintiff.

5. The defendant filed an application under Order 9 Rule 13 C.P.C. on 16-12-2001 praying for setting aside the ex-parte decree and Misc. Case No. 8 of 2001 was registered before the court of Additional Munsif II, Gopalganj, on the basis of the said application. After hearing both the parties and considering the rival evidence the trial court dismissed Misc. Case No. 8 of 2001 by order dated 14-3-2005 holding that the applicant (defendant) had failed to establish sufficient cause for his non-appearance in the suit after filing the written statement. The defendant thereafter filed miscellaneous appeal against this order and the appellate court by the impugned order dated 25-7-2005 has allowed the appeal, set aside the order dismissing the application under Order 9 Rule 13 C.P.C. and directed the trial court to resume hearing of the suit.

6. The learned counsel appearing on behalf of the petitioner has firstly submitted that the application filed by the defendant under Order 9 Rule 13 C.P.C. for setting aside the ex-parte decree was barred by limitation and no petition for condoning the delay had been filed explaining the delay and praying for its condonation. It has thus been urged that the appellate court has not considered this aspect, although specifically raised by the plaintiff-petitioner and has wrongly allowed the prayer for setting aside the ex-parte decree. It has further been submitted that the appellate court has ignored material evidence on record showing that the ground of illness, propounded by the defendant, for justifying his non-appearance was false. It is the contention of the learned counsel that the appellate court below has misread the evidence which shows that the defendant had been active during the period when he had claimed himself to be ill.

7. Per contra, the learned counsel appearing on behalf of the opposite parties has submitted that the application filed by the defendant under Order 9 Rule 13 C.P.C. giving rise to Misc. Case No. 8 of 2001 had been filed within the prescribed period of limitation from the date of knowledge of the ex-parte decree. It has further been contended that the appellate court has fully considered the evidence on record and has rightly taken the view that the sufficient cause shown by any party in the proceeding under Order 9 Rule 13 C.P.C. should be considered liberally and not to be considered strictly for the purpose of penalizing a party. It has been also urged that the impugned order does not suffer from jurisdictional error and therefore no interference should be made in the impugned order in revisional jurisdiction.

8. The first issue raised in this revision application is that the application filed by the defendant under Order 9 Rule 13 C.P.C. was barred by limitation. Article 123 of the Limitation Act provides a period of 30 days for filing an application to set aside a decree passed ex-parte and the said period begins to run from the date of decree, and in case of non-service of summons or notice, from the date of knowledge of the decree to the applicant. The provision of Article 123 of the

Limitation Act reads as follows:

123. To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte.

Thirty days

The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

9. As stated above, the period of limitation begins to run from the date of the ex-parte decree for filing the petition for setting aside the same and in cases summons or notice had not been duly served upon the applicant, only then the period begins to run from the date of knowledge of the ex-parte decree. In the present case admittedly the defendant appeared in the suit in the initial stage, but after participating in the proceeding for a few dates after filing of the written statement, he left to take part in the proceeding of the suit. In normal course, in such a case if an ex-parte decree is passed, the period of limitation for filing the application for setting aside the same will begin to run from the date of the decree. However, from the facts mentioned in the impugned appellate order it appears that in the later stage of the suit, when the defendant was not appearing, the plaintiff had made a prayer for amendment of the plaint and sought to add the relief for recovery of possession of the suit land from the defendant. Originally, the plaintiff had prayed besides the main relief of declaration of title, the relief for injunction restraining the defendant from interfering in his possession over the suit land and also from changing its nature. The prayer for addition of relief for recovery of possession by amendment was clearly a new relief and this prayer for amendment was allowed without notice to the defendant. The requirement of notice to the defendant in case of amendment of plaint has been considered by a bench decision of this Court in Jharkhand Mines and Industries Ltd. and Another Vs. Nand Kishore Prasad and Others, and their Lordships have held as follows:

...It was incumbent on the court to see to it that the notice of the amended plaint was served on the defendant. The Code of Civil Procedure, in my opinion, casts a duty on the court to see that the defendants are made aware of any amendment in the plaint, whether the amendment be in regard to the addition of parties or in regard to the contents thereof.

10. It is no where the case of the petitioner that the court directed notices to be issued to the defendant with a view to make him aware about the amendment of the plaint and such notice was duly served upon the defendant. The learned counsel for the petitioner tried to wriggle out of this position by submitting that the copy of the amendment petition was served upon the counsel appearing for the defendant in the suit. But, unfortunately there is no pleading to that effect and there is also no material on the record to establish the service of a copy of the amendment petition upon the counsel for the defendant. In the revision application also there is no averment in this regard made by the petitioner even

though in the order impugned in this revision application, this fact had been specifically mentioned and relied upon by the appellate court as one of the grounds going in favour of the defendant. As such, in absence of necessary pleading it is difficult to accept the above said submission of the learned counsel for the petitioner. The defendant, thus, was not given an opportunity to file his written statement/additional written statement by the court before proceeding to hear the suit and pass ex-parte decree. As held in M/S Jharkhand Mines and Industries Ltd.(supra) on this ground alone the ex-parte decree stands vitiated and is fit to be set aside.

11. Even otherwise also, in the facts and circumstances mentioned above, the period of limitation would not begin to run from the date of ex-parte decree, but from the date when the defendant got the knowledge of the ex-parte decree on the basis of amended plaint of which no notice was issued and served upon the defendant. Thus, the first submission of the learned counsel regarding limitation is not fit to be accepted.

12. It has also been submitted by the learned counsel for the petitioner that the finding of the appellate court below accepting the sufficiency of cause for non-appearance, as furnished by the defendant, was not corroborated by the evidence on record. The perusal of the impugned order shows that the appellate court below has reappraised the evidence of the parties and thereafter has reached to the finding that the defendant has established the facts showing sufficient cause preventing him from appearing in the suit at the time of its hearing. This is clearly a finding of fact and in revisional jurisdiction the same cannot be interfered with on reappraisal of evidence as prayed on behalf of the petitioner. The learned appellate court below has acted within its jurisdiction in recording the finding of fact on its own appreciation of evidence and there is no material irregularity committed in recording the finding. As such, there is no force in the submission of the learned counsel in this regard

13. For the foregoing reasons, I do not find any merit in this revision application, which is, accordingly, dismissed. However, as T.S.No. 187 of 1988, the hearing of which is to resume as directed by the impugned order, if not already resumed, is an old suit, the trial court is directed to expedite the hearing and conclude the same preferably within a period of six months from the date of production/receipt of a copy of this order without granting unnecessary adjournments.