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**(2009) 08 PAT CK 0047**  
**In the Patna High Court**  
**Case No : C.R. No. 260 of 2007**

Gauri Shankar Prasad

APPELLANT

Vs

Lakshman Prasad Bhagat and Jagdish Karak

RESPONDENT

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**Date of Decision :** 03-08-2009

**Acts Referred:**

**Citation :** (2009) 08 PAT CK 0047

**Final Decision :** Dismissed

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## **Judgement**

Abhijit Sinha, J.—The plaintiff of Eviction Suit No. 27 of 2001 has preferred this revision u/s 115 C.P.C. for setting aside the order dated 5.1.2007 passed therein by Sri Rajiv Ranjan, Munsif 1st Court, Darbhanga, whereby he has allowed the petition dated 22.11.2006 filed by defendant No. 2 (Opp. Party No. 1 herein) for recalling the order dated 18.7.2002 and thereby rectified the earlier order dated 18.7.2002 ordering for proceeding against defendant No. 2 (Opp. Party No. 1 herein) ex parte.

2. It appears that the Eviction Suit had been filed by the plaintiff on various grounds including the ground of defendant No. 1 having sub-let some portion of the land-cum- building under his tenancy to defendant No. 2 without the landlord's consent in contravention of Sub-section (1)(a) of Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act (hereinafter referred to as "the B.B.C. Act"). It further appears that after the plaintiff's evidence was over and as many as 16 witnesses on behalf of defendant No. 1 had been examined, defendant No. 2 having come to know of the pendency of the suit against him and of order dated 18.7.2002 directing for the suit to proceed ex parte as against him, he filed a petition on 22.11.2006 for recalling the said order and permitting him to file his written statement and contest the suit before proceeding further with the suit itself. A rejoinder to the said petition of defendant No. 2 was filed by the plaintiff on 27.11.2006 praying for rejecting the prayer of defendant No. 2 on amongst others the grounds that it was not maintainable and the party had come at a belated stage and that since violation of the terms of tenancy comes within

the purview of Section 11 of the B.B.C. Act, speedy trial under the special provision of Section 14 of the B.B.C. Act is mandated and a question of regular suit does not arise. The learned Munsif having heard the parties allowed the petition filed by defendant No. 2 on payment of cost of Rs. 500/- and, accordingly, recalled the order dated 18.7.2002 giving an opportunity to defendant No. 2 to contest the suit. Grievance was also raised against the court permitting defendant No. 2 to file written statement and contest the suit without the said defendant filing an affidavit stating the grounds on which he sought to contest the suit or obtaining leave.

3. It has been submitted on behalf of the plaintiff-petitioner by referring to the impugned order that the process server had reported that defendant No. 2 refused to receive the summons on the ground that he had already received the summons sent through the Post Office and that defendant No. 2 was identified to the process server by the plaintiff and witnesses Ram Chandra Yadav and Markandey Yadav, who though present at the place however had refused to sign as witnesses. It was also submitted that since the registered summons with A/D issued against defendant No. 2 had not been received by the court within the stipulated time, the court had rightly presumed that notice had duly been served on defendant No. 2 and due to non-appearance notwithstanding service of notice the court had rightly by order dated 18.7.2002 directed for proceeding against defendant No. 2 ex parte. Reliance was sought to be placed on the decision in Union of India (UOI) Vs. Ujagar Lal,

4. Mr. Sukumar Sinha, learned Senior counsel for defendant No. 2 (Opp. Party No. 1 herein) has on the contrary submitted that the court was required to satisfy itself that notice had validly been served on defendant No. 2, but in the instant case the court had accepted the service of notice on defendant No. 2 as summons sent through registered post had not been returned and summons sent through ordinary process was accepted on the so called report of the process server without satisfying itself that the report was a correct one and the summons had been duly served.

5. Admittedly, defendant No. 2 had denied service of summons on him whereas the plaintiff claimed service of notice on refusal.

6. Rule 19 of Order V C.P.C. requires returning of the summons on refusal to be verified by affidavit of the process server.

7. The plaintiff has not asserted that the process server had sworn an affidavit nor is it available from the impugned order as to whether an affidavit had been sworn by the process server.

8. The CPC has prescribed Form No. 11 of Appendix "B" in its First Schedule for affidavit by the process server of summons or notice. If there is an affidavit, it means that the process server has stated something on oath and it puts him on the guard to speak the truth. The provision of Rule 19 of Order V C.P.C. in a way minimizes the chances of service bala bala and defendants/judgment debtors

coming to court to state that process server had not come to their places or that they had not been served with summons/notice.

9. In *Sushil Kumar Sabharwak v. Gurpreet Singh* AIR 2007 SC 2370 it was observed that the provisions of Order IX Rule 6 C.P.C. casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel satisfied in the sense of being "proved" that the summons was duly served when and when alone, the court is conferred with a discretion to make an order that the suit be heard ex parte.

10. From the impugned order itself, it appears that the learned Munsif himself was very much in doubt as to whether summons had been validly served on defendant No. 2 moreso because as per the report of the process server although defendant No. 2 had been identified by the plaintiff himself in the presence of the two witnesses, Ram Chandra Yadav and Markandey Yadav, the witnesses had refused to put their signatures as witnesses.

11. The second submission of the learned Counsel for the petitioner seems to be ill founded, since per the plaintiff-petitioner's own submissions, the defendant No. 2 was not inducted by him but by defendant No. 1. Therefore, there was no requirement for defendant No. 2 to file any application to seek leave of the court to contest the suit but he could certainly file his written statement to protect his own interests.

12. In the face of the discussions made above, I find no apparent illegality, impropriety or irregularity in the impugned order, which is hereby upheld. There being no merit in the revision application, the same is dismissed.