
(2001) 03 PAT CK 0008
In the Patna High Court
Case No : Misc. Appeal No. 227 of 1993

Haribansh Tiwari and Others	Vs	APPELLANT
Sonamati Kunwar and Others		RESPONDENT

Date of Decision : 15-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Citation : (2001) 2 PLJR 371

Hon'ble Judges : Ashok Kr. Verma, J

Bench : Single Bench

Advocate : Dhrub Narain and Raghu Nandan Kumar Singh, for the Appellant;
Uma Shankar Singh for the Respondents no. 2, for the Respondent

Final Decision : Allowed

Judgement

Ashok Kumar Verma, J.—This Misc. Appeal has been filed by the defendants against the order passed in Misc. Case no. 16 of 1992 by the 4th Subordinate Judge, Sasaram, whereby he has rejected the petition of the defendants filed under Order 9 rule 13 and Section 151 of the CPC for setting aside the ex parte decree passed in Title Suit No. 43 of 1991 by Sri Bharat Jee Mishra, Fourth Subordinate Judge, Rohtas at Sasaram. The plaintiffs had filed the suit for declaration that the sale deed executed by the defendants 6th set in favour of defendants 1st set to defendants 5th set was forged, collusive, invalid, void and inoperative. According to the appellants, who were petitioners in Misc. Case no. 16 of 1992, the Title Suit, which had been decreed ex parte, had been fixed for settlement of issues and hearing on the petition filed for appointment of receiver on 2.11.1992 and without the settlement of the issues the title suit was heard on 3.11.1992 and it was decreed ex parte on 20.11.1992. The appellant, Haribansh Tiwari was taking steps on behalf of the defendants in the title suit and he had been taken ill on 1.11.1992 and he could not know the date fixed for hearing of the title suit. Sri Paras Nath Pathak, who was the lawyer of the defendant-appellants in the court below had got paralytic stroke and he had gone to

Varanasi for the medical treatment. When defendant no. 7. Haribansh Tiwari recovered from the illness on 22.11.1992, he came to Sasaram and learnt about the illness of his lawyer, Sri Paras Nath Pathak and he enquired about the case from another lawyer and learnt that the title suit had been decreed ex parte. Thereafter on 14.12.1992 the petitioners (appellants) filed a petition in the court of the learned Subordinate Judge for setting aside the ex parte decree.

2. It was argued by the learned lawyer for the appellants that the order sheet dated 9.9.1992 of the Title Suit No. 43 of 1991 shows that the case had been fixed on 2.11.1992 for settlement of the issues and hearing on the petition for appointment of receiver and the order sheet dated 3.11.1992 of Title Suit No. 43 of 1991 shows that the ex parte hearing of title suit had been started and the ex parte order was passed on 20.11.1992 and the order dated 11.11.1992 of the title suit shows that a petition for time had been filed on behalf of the defendants and it was ordered to be kept on record as the date fixed in the case was 12.11.1992 and again on 12.11.1992 petition for time had been filed on behalf of the defendants. It was also argued by the learned lawyer for the appellants that the appellant, Haribansh Tiwari had been taken ill and his lawyer Sri Paras Nath Pathak has suffered Paralytic stroke and, therefore, he could not take proper steps at that time in the title suit.

3. It was contended by the learned lawyer for the Appellant that it has been held by the Supreme Court in the case of G.P. Srivastava Vs. Shri R.K. Raizada and Others, , that in setting aside ex parte decree against the defendant the ground that the defendant was prevented by any sufficient cause from appearing must be liberally construed where defence is reasonable and defendant approaches the court for setting aside ex parte decree within statutory period and non-appearance is not mala fide or intentional.

4. During the hearing of the Misc. case for setting aside the ex parte decree passed in Title Suit No. 43 of 1991 by the 4th Subordinate Judge, three witnesses had been examined on behalf of the petitioners (appellants) and three witnesses had been examined on behalf of the opposite parties. A. W. 1, Gopal Chaubey, who is an advocate's clerk has stated that Haribansh Tiwari had gone to him to enquire about the Title Suit no. 43 of 1991 on 23.11.1992. He has also said that during that period, Sri Paras Nath Pathak, Advocate had suffered paralysis and had gone to Varanasi. He has said in his cross examination that he does not know as to when Sri Paras Nath Pathak, Advocate was taken ill and when he had recovered. It may not be possible for a person to know about the exact date of illness and recovery of another person. There does not appear any reason to disbelieve his evidence. A.W. 2, Haribansh Tiwari, who was defendant in Title Suit No. 43 of 1991 has stated that he was taking steps in that case on behalf of the defendants and Sri Paras Nath Pathak, Advocate was his lawyer, who had suffered paralysis. According to him, he was ill from 1.11.1992 to 20.11.1992, which is supported by A.W. 3, Dr. Jagannath Singh, who has stated that he had treated Haribansh Tiwari from 1.11.1992 to 20.11.1992, who was

suffering from fever and jaundice. Ext. 1 is his medical certificate.

5. O.P.W. 1, Srikant Tiwari, has stated that Haribansh Tiwari was never ill. In view of the evidence of A.W. 3, Dr. Jagannath Singh, the statement of O.P.W. 1, Srikant Tiwari, cannot be accepted. This witness O.P.W. 1, Srikant Tiwari has said in his cross examination that Sri Paras Nath Pathak, Advocate had suffered paralysis and he does not know as to on which date, month and year he had suffered paralysis. He has also admitted in his cross examination that time petition had been filed on behalf of the defendants on the date on which the Title Suit No. 43 of 1991 was decreed ex parte. O.P.W. 2, Arvind Tiwari and O.P.W. 3, Bishwas Tiwari have stated that Haribansh Tiwari was not ill in November, 1992. The Medical Officer (Dr. Jagannath Singh), who is A.W. 3, has clearly stated that he had treated Haribansh Tiwari from 1.11.1992 to 20.11.1992. Therefore, evidence of O.P.W. 2, Arvind Tiwari and O.P.W. 3 Bishwash Tiwari is not worthy of reliance. The above facts and circumstances clearly show that the defendants were prevented by sufficient cause from appearing in Title Suit No. 43 of 1991 when the suit was called out for hearing. The impugned order dated 10.6.1993, passed in Misc. Case no. 16 of 1992 by the 4th Subordinate Judge, Sasaram is not tenable in law and it is fit to be set aside. Accordingly, this Misc. Appeal is allowed and the order dated 10.6.1993 passed by 4th Subordinate Judge, Sasaram in Misc. Case no. 16 of 1992, arising out of Title Suit No. 43 of 1991 is set aside and the ex parte decree dated 20.11.1992, passed by 4th Subordinate Judge, Sasaram in Title Suit No. 43 of 1991 is also set aside. The learned Subordinate Judge will dispose of the Title Suit No. 43 of 1991 in accordance with law after giving opportunity of hearing to both the parties and will not give unnecessary adjournments to any of the parties and will dispose of the Title Suit No 43 of 1991 preferably within three months from the date of receipt of a copy of this judgment