
(2006) 11 PAT CK 0128
In the Patna High Court

Hriday Ranjan Prasad and Others

APPELLANT

Vs

Sarayug Mahato and Others

RESPONDENT

Date of Decision : 30-11-2006

Acts Referred:

Citation : (2006) 11 PAT CK 0128

Final Decision : Allowed

Judgement

Chandramauli Kr. Prasad, J.—Defendant 4th Set-petitioners aggrieved by the order dated 18-5-2005 passed by the Subordinate Judge, Bettiah in Partition Suit No. 84 of 1994, allowing the application filed by the defendants 4 to 6 Opposite Party Nos. 10 to 12 herein for recall of the order directing the case to proceed against them ex parte, have preferred this application.

2. Short facts, giving rise to the present application are that when defendant Nos. 10 to 12 despite service of notice did not appear, the trial Court by order dated 20-2-1998, directed the suit to proceed ex parte against them. Thereafter, the plaintiffs evidence began on 28-7-1998 and 12 of their witnesses were examined up to 14-2-2000. The evidence of defendants 4th set started on 14-3-2000 and 24 witnesses were examined on their behalf till 30th of April, 2001. Argument in the case started on 17-2-2003 and after argument on several dates 6-8-2003 was fixed as the last date for argument but it did not fructify.

3. On 18-8-2003, defendants 4 to 6 filed application for recall of the order dated 20-2-1998 and for giving them opportunity to file written statement and contest the suit which was contested by the defendants 4th set but by the impugned order, the prayer of defendant 2nd set has been allowed on payment of a cost of Rs. 500/- to the contesting defendants.

4. Mr. Mahesh Narayan Parbat, appearing on behalf of the petitioners, submits that the Court below has passed the impugned order only on the concession of the plaintiffs that it had no objection to the prayer made by defendants 4 to 6. He points out that before passing the impugned order, the Court below ought to

have been satisfied that the defendants 10 to 12 had shown good cause for recall of the order and he should not have recalled the order only on plaintiffs' concession. Thus according to the learned Counsel, the Court below exceeded in jurisdiction in recalling the earlier order directing for proceeding with the case against the said defendant ex parte.

5. Mr. Shashi Shekhar Dwivedi, Senior Advocate, appearing on behalf of opposite party Nos. 10 to 12, however, submits that by the impugned order no delay shall be caused in hearing the suit and hence shall not cause any prejudice to the petitioners, therefore revisional jurisdiction u/s 15 of the Code of Civil Procedure, is not fit to be exercised. He points out that this Court may fix the time limit for filing of the written statement by these defendants to overcome the grievance of the defendants 4th set that it shall unnecessarily linger the suit. He also points out that defendants 10 to 12 having shown sufficient cause, the Court below did not err in passing the impugned order. In support of his submission, he has placed reliance on a judgment of this Court in the case of Dr. Dinesh Chandra Jha and Ors. v. Anil Kumar Jha and Anr. 1996 (2) PLJR 808 and my attention has been drawn to the following paragraphs of the said judgment:

8.- It has to bear in mind that the order of a Court, directing 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 9, 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 provide 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 such 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 Subordinate 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.

8. Having appreciated the rival submission, I find substance in the contention of Mr. Parbat. The Court below has not recalled the order on the ground that notices were not served on the defendants 10 to 12, the plea put forth by them. It is relevant here to state that notices for service on them were published in the Newspaper. The Court below had passed the order for proceeding against the aforesaid defendants ex parte by order dated 20-2-1998 and the said defendants have chosen to file the application for recall after more than five years on 18-8-2003 after a large number of witnesses have already been examined.

7. In my opinion, in a case in which the Court had passed order for proceeding of the suit ex parte against a party, it possesses power to give chance for hearing to such party but sine qua non for the exercise of the power is that on the adjourned date of hearing, such a party appears and shows good cause for his non-appearance. I am of the opinion that mere concession by the plaintiff, cannot be said to be good cause for the exercise of power, in the face of the fact that the contesting defendants are opposing the said prayer.

8. Reverting to the decision of this Court in the case of Dr. Dinesh Chandra Jha (supra), relied on by Mr. Dwivedi, same in no way supports the case of defendants 10 to 12. In the said case, it has been observed that opportunity can be given only when good cause is shown. The Court below had not passed the order being satisfied that good cause has been shown.

9. As regards the prejudice, I am of the opinion, that in case the defendants 10 to 12 are given the opportunity to file the written statement, it shall have liberty to recall the witnesses examined by the plaintiffs as also defendant 4th set and that shall surely cause prejudice to the contesting defendants.

10. Ordinarily I would have remitted the matter back to the Court below for reconsideration but the Court below having rejected the only plea of defendants 10 to 12 of non service of notice and there being no other plea, remand shall serve no purpose at all

11. I am of the opinion that the Court below exceeded in its jurisdiction in passing the impugned order and same is fit to be interfered with by this Court in exercise of its revisional jurisdiction.

12. In the result, this application is allowed, order dated 18-5-2005 passed by the Subordinate Judge, Bettiah in Partition Suit No. 84 of 1994, is set aside.

13. No cost.