
(2012) 10 PAT CK 0087
In the Patna High Court
Case No : Civil Revision No. 546 of 2010

Jang Bahadur Sahni and Another	Vs	APPELLANT
Jagan Sahni and Others		RESPONDENT

Date of Decision : 17-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2013) 3 PLJR 501

Hon'ble Judges : Jyoti Saran, J

Bench : Single Bench

Advocate : Ratna Deep Prasad, for the Appellant; Bipin Kumar Sinha, for the Respondent

Judgement

Jyoti Saran, J.—This civil revision application is directed against the judgment and order dated 17.4.2010 passed in Misc. Appeal No. 17 of 2009 whereby the District Judge, Vaishali at Hajipur while dismissing the appeal of the petitioner has been pleased to affirm the order dated 22.8.2009 passed in Misc. Case No. 4 of 2009 by learned Munsif-1st, Hajipur dismissing the Misc. case filed on behalf of the petitioner under Order 9 Rule 13 of the CPC (hereinafter referred to as the "Code") inter alia on grounds of limitation as also on merits. The facts of the case in brief is that a tide suit bearing T.S. No. 112 of 1994 was instituted by the opposite party No. 1 as against the husband of the petitioner No. 2 and the petitioner No. 1 herein alongwith one Chhathu Sahni seeking inter alia a declaration of his title over the suit land, detailed at the foot of the plaint as also for some ancillary reliefs.

2. Upon service of summons and the failure of the defendants to file their written statement who subsequently are also stated to have left pairvy of the matter, the suit was decreed ex parte in favour of the plaintiff under a Judgment and decree dated 3.9.1997/30.4.1998 placed at Annexure-C to the counter affidavit filed on behalf of the opposite party No. 1. The records of the trial Court manifests that

appearance on behalf of the defendant-petitioners through counsel was filed before the trial Court praying for time to file written statement but not only they failed to file any written statement, they left the pendency of the case altogether and whereafter the matter proceeded ex parte and was decreed in favour of the plaintiff in absence of any contest. An application filed on behalf of the defendant Nos. 1 and 2-petitioners herein under Order 9 rule 13 of the Code giving rise to Misc. Case No. 4 of 2009 placed at Annexure-4 of the application, was dismissed by the order dated 22.8.2009 on grounds of limitation and absence of sufficient cause. The trial Court held that although the Miscellaneous Case was filed after a lapse of 11 years of the passing of the judgment and decree in question but it was not accompanied with an application u/s 5 of the Limitation Act, 1963 and even the plea taken by the petitioners regarding absence of knowledge of the judgment and decree, was a blatant lie, considering the information available on the records of the proceeding. The order passed by teamed Munsif 1st, Hajipur in the Miscellaneous application was affirmed by the learned appellate Court when the Misc. Appeal No. 17 of 2009 preferred by the petitioners was dismissed by judgment and order dated 17.4.2010 and hence the present application.

3. I have heard Mr. Ratna Deep Prasad, learned counsel for the defendants-applicant-appellant-petitioners and Mr. Bipin Kumar Sinha, learned counsel for the plaintiff-opposite party No. 1.

4. Mr. Ratna Deep Prasad, learned counsel for the petitioner with reference to the pleadings made in the Miscellaneous Case, copy whereof has been placed on records at Annexure-4 to the supplementary affidavit, has submitted that a specific averment had been made by the petitioner that neither any notice by ordinary process nor by registered post had been received by the petitioner No. 1 or the husband of the petitioner No. 2 regarding the suit proceedings rather the judgment had been obtained by the plaintiff in a surreptitious manner. With reference to the statement made in paragraph 5 of the application it is stated that the petitioners for the first time became aware of the ex parte decree on 25.1.2009 from one co-villager Tulsi Sahni and whereafter they filed inspection slip on 28.1.2009 and whereafter the records were inspected on 3.2.2009 by their counsel Shri Kant Verma. It was further mentioned in the Miscellaneous application that the records of the suit proceedings revealed that a Vakalatnama had been filed on behalf of the defendants on 25.4.1995 by Sri Prabhat Kumar, Advocate and Sri Anil Kumar, Advocate which bore two left thumb impressions. It is stated that subsequently another Advocate Sri Jai Mangal Singh filed Vakalatnama on 25.9.2000 which contained one left thumb impression. The defendants specifically stated that the left thumb impressions on the Vakalatnama was an act of forgery and the same had been filed at the behest of the plaintiffs in collusion with defendant Chatthu Sahni for obtaining an ex parte decree. It was further pleaded that the petitioner No. 1 is semi literate and knows how to put signature and has been doing so in several documents executed by him. It was thus sought to be contended that the decree had been obtained by practicing fraud.

5. Mr. Ratna Deep Prasad, submits that these two relevant factors having been brought to the notice of the trial Court for maintaining the Miscellaneous Case namely absence of information of the ex parte judgment and decree and secondly that the appearance on their behalf in the trial Court was an act of fraud, the learned trial Court ought to have allowed the petitioners to establish their case by adducing evidence in support of their plea but the trial Court has dismissed the Miscellaneous Case without affording such opportunity to the defendants-petitioners and which order being de hors the statutory requirement and in teeth of principles of natural justice, cannot be sustained.

6. Learned counsel has made following submissions in support of his contentions:--

(a) The trial Court was under a duty to record satisfaction as regarding service of summons before proceeding ex parte. Reference was made to the judgments of this Court reported in (1) Dinanath Thakur Vs. Dinanath Sao ; and (2) Wakil Bhagat Vs. Rambriksh Bhagat and Others, .

(b) The trial Court has committed a serious error in dismissing the Misc. Case at admission stage without allowing the petitioners to adduce evidence. Reference was made to the judgment of this Court reported in Janki Devi Vs. Nandan Kumar Singh, .

(c) Even when the petitioners had disputed the LTIs appearing on the Vakalatnama on grounds forgery yet no steps was taken for comparison of the same nor opportunity was given to the petitioner to substantiate their contention. Reference was made to a judgment of this Court reported in Umesh Ram @ Umesh Rai and Others Vs. Nawal Kishore Prasad @ Nand Kishore and Others, .

(d) No finding has been recorded as regarding absence of summons on the husband of the petitioner No. 2, Nathuni Sahni who was defendant No. 1 in the trial Court.

(e) In absence of proper opportunity being provided to the petitioner to substantiate their contentions as regarding gathering of knowledge about the judgment and decree in question and regarding act of forgery on the LTIs appearing on the Vakalatnama, the order cannot be sustained.

7. The submissions have been strongly contested by Mr. Sinha, learned counsel appearing for the decree holder. He submits that there was sufficient evidence on the records of the proceedings to demonstrate that the petitioners having filed their appearance before the trial Court had abandoned the same and which left no option with the trial Court but to proceed against them ex-parte and in absence of any contest the judgment and decree was passed which did not warrant any interference.

8. It is stated that the defendant-petitioners are in habit of abandoning their appearance in Court case. It was submitted that earlier also in a matter arising

from T.S. Nos. 14 of 1985/195 of 1987 filed by opposite party No. 1 Jagan Sahni alongwith his wife in which the petitioner No. 1 was defendant No. 3, the husband of the petitioner No. 2 was defendant No. 4 and the defendant No. 3, Chhathu Sanhi was defendant No. 2, summons were issued to the defendants and after receipt of summons, the defendants appeared on 22.11.1985 and prayed for time to file written statement but 28 adjournments being granted to the defendants, the same was not filed rather the defendants left pairvy and the learned Court below upon accepting the service of summons proceeded for ex parte hearing and the suit was decreed by judgment and order dated 3.1.1990. It is stated that even in the present proceedings the defendants appeared on 25.4.1995 when Vakalatnama was filed on their behalf together with a time petition. It is stated that thereafter on 24.7.1995, 15.9.1995, 7/8.11.1995 adjournment was sought for filing written statement which was never filed and since after 3.2.1996 the defendants left pairvy. It is thus canvassed that just like in the earlier suit proceedings even in the present case the defendants abandoned their claim and by order dated 5.12.1996 they were debarred from filing written statement. It is stated that in the circumstances, the learned trial Court having no other option proceeded with the ex parte hearing of the suit and by judgment and decree dated 3.9.1997 the suit was decreed in favour of the plaintiff in terms of the relief prayed thereunder.

9. Mr. Sinha, thus submits that the records do manifest that the defendants have neglected the proceedings and having filed appearance, the defence regarding absence of knowledge about the proceedings is wholly incorrect as the husband of the petitioner No. 2 and the opposite party No. 1 are relatives and thus the story of the absence of knowledge is false, as they had all along knowledge about the proceedings. It is thus submitted that the orders impugned does not warrant indulgence and the application is fit to be dismissed.

10. I have heard learned counsel for the parties and have perused the materials on record.

11. As is manifest from the rival contentions, the entire claim of the defendants-petitioners and the outcome of the present proceedings rests on the following issues:--

(a) Whether it is mandatory to file an application u/s 5 of the Limitation Act in a proceeding under Order 9, Rule 13 of the Code even when the delay is explained on the basis of the date of knowledge gathered by the petitioners in the main application;

(b) Whether the petitioners were prevented by sufficient cause; and

(c) Whether the petitioners were provided sufficient opportunity to establish their case regarding non-service of summons, date of gathering knowledge about the judgment and decree and the alleged forgery committed on the Vakalatnama.

12. Section 123 of the Limitation Act prescribes the limitation period of 30 days

for the party concerned to prefer an application under Order 9, Rule 13 of the Code from the date of decree, where summons were duly served and in other cases, within 30 days from the date of knowledge of the judgment and decree. In the former category i.e. where the application is filed within 30 days of the judgment and decree, there is no question of any application u/s 5 of the Limitation Act rather the occasion if any, arises only in the latter case. Even in the latter case if the application under Order 9, Rule 13 is filed within 30 days of the knowledge gathered by the defendant of the ex parte decree, there is no requirement of a separate application u/s 5 of the Limitation Act if the delay has been explained in the main application itself in context with the date of knowledge of the ex parte decree. Reference in this regard is made to a judgment of the Supreme Court reported in Bhagmal and Others Vs. Kunwar Lal and Others, paragraphs 12 and 13 which reads as follows:--

12. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellant-defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex parte and also the ex parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellant-defendants for making the Order 9, Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order 9, Rule 13 application was, in our opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely right in coming to the conclusion that appellant-defendants were fully justified in filing the application under Order 9, Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hypertechnical view that no separate application was filed u/s 5.

13. The application under Order 9, Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchnama that the respondent 1-plaintiff would get his suit withdrawn or dismissed. The said compromise panchnama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellant-defendants, which was proved in the further proceedings, was quite justifiable. The appellant-defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient.

13. It is thus not in all cases of an application under Order 9, rule 13 of the Code

being filed after 30 days of the judgment and decree that a petition for condonation of delay must accompany such application rather it is only in matters where despite knowledge, a delay occurs in preferring the application within 30 days thereafter, that an application u/s 5 of the Limitation Act is a must for condonation of delay. As a corollary where the delay is attributed to absence of knowledge and finds explanation in the application filed within 30 days of gathering knowledge of the judgment and decree then the applicant is not under any legal obligation to file a separate application for condonation of delay.

14. A copy of the Miscellaneous Case has been placed on record at Annexure-4 of the supplementary affidavit and paragraphs 4 to 7 thereof amply explains the delay in preferring the case after a lapse of 11 years. The learned trial Court thus fell in grave error in dismissing the Miscellaneous Case for want of an application u/s 5 of the Limitation Act without affording opportunity to the petitioners to substantiate their averments regarding date of knowledge of the ex parte judgment and decree. The perusal of the judgment and order passed by the trial Court under challenge further manifests that the plea of the petitioners regarding forgery in the matter of filing of the Vakalatnama on their behalf, has been rubbished as a lie without even affording them opportunity to establish the claim. Matters involving limitation as well as forgery are matters which require leading of evidence and cannot be disposed of in a summary manner without allowing opportunity to the party concerned to establish their claim. The contentions advanced by Mr. Sinha appearing for the plaintiff-opposite parties charging the petitioners with neglect and abandonment of the proceedings is a rebuttable presumption and the party affected required opportunity to rebut the same. The order of the appellate Court is no different as even the appellate Court has failed to appreciate that no opportunity was provided to the petitioners to establish their case with aid and assistance of oral and documentary evidence.

15. The manner in which the matter has been dealt is manifest from the order of the trial Court when on 1.8.2009 the trial Court records the Hazri of the petitioner and thereafter posts the matter for orders on 22.8.2009. The material irregularity in the order of the trial Court and the denial opportunity to the petitioners has not even been noticed by the appellate Court who has proceeded in a mechanical manner to affirm the opinion expressed by the trial Court.

16. The judgment rendered in the case of Bhagmal (*supra*) is a complete answer to the infirmity in the order of the Court(s) below on the issue of limitation and that the Miscellaneous Case should not have been dismissed unilaterally on grounds of absence of a limitation petition as the delay was explained in the main application itself. Even on merits, where the petitioners specific case was that summons had not been validly served upon them and that the Vakalatnama purportedly filed on their behalf, was an act of forgery, the Miscellaneous Case was not to be disposed of in a summary manner without affording opportunity to the petitioners to establish their claim by oral and documentary evidence and by examining the Process Server and the Advocate concerned, who had filed the

Vakalatnama. This opportunity not being provided, clearly the right of petitioners stands infringed rendering the orders impugned unsustainable.

17. For the reasons aforesaid, the order dated 17.4.2010 passed in Misc. Appeal No. 17 of 2009 and the order dated 22.8.2009 passed in Misc. Case No. 4 of 2009 are set aside and the matter is remitted back to the Court of Munsif 1st, Hajipur, District-Vaishali for consideration and disposal afresh and in accordance with law.

18. The Civil Revision Application is allowed but without any order as to costs. Let the lower Court records received in the matter be transmitted back to the Court of Munsif 1st, Hajipur, District Vaishali in sealed cover forthwith.