

(2009) 08 PAT CK 0112
In the Patna High Court
Case No : C.R. No. 2159 of 2007

Jugal Kishore Khetan son Holders of late Mahabir Prasad
Khetan and Others

APPELLANT

Vs

Mohan Lal Khetan

RESPONDENT

Date of Decision : 13-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 21 Rule 21, Order 21 Rule 58, Order 21 Rule 97, Order 21 Rule 98

Citation : (2009) 4 PLJR 651

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Advocate : Ajit Kumar and Shailendra Kumar, for the Appellant; Sukumar Sinha and Abinash Kumar, for the Respondent

Judgement

S.N. Hussain, J.—This civil revision has been filed by the plaintiffs-decree holders-respondents 1st set-petitioners challenging order dated 23.7.2007, by which learned Additional District Judge-cum-F.T.C.-IV, Darbhanga allowed Misc. Appeal No. 10 of 2005, set aside order dated 27.6.2005 passed in Execution Case No. 19 of 1993 and remanded the matter to the executing court for fresh consideration and decision on the application filed by the sole intervenor appellant-opposite party under Order XXI Rules 98 and 99, read with Section 151 of the CPC (hereinafter referred to as "the Code" for the sake of brevity). This matter arises out of Eviction Suit No. 30 of 1985, which was filed by the petitioners against the tenants Zubaida Khatoon and others (not party to this civil revision) for their eviction on the ground of personal necessity under the provision of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 (hereinafter referred to as "the Act" for the sake of brevity). In the said suit, the defendants appeared and contested.

2. During the pendency of the eviction suit, the opposite party filed an application under Order I Rule 10 of the Code for adding him as a party to the eviction suit claiming to be a co-sharer alongwith the plaintiffs in the suit

premises. The said application was dismissed by the learned trial court vide order dated 24.4.1987, which was challenged by the opposite party in Civil Revision No. 579 of 1987. This Court, after considering the matter, rejected the aforesaid civil revision by order dated 7.3.1991 holding that the opposite party was not a necessary party and a third party right/title is not relevant for deciding an eviction suit under the Act.

3. It transpires that, thereafter, the defendants of the eviction suit filed an application in the eviction suit on 30.1.1992 stating that on 1.11.1989 he had handed over possession of the suit premises to the plaintiffs, who in turn had given the possession thereof to the opposite party (who was not a party to the suit). The said application was kept on record.

4. In the said eviction suit, both the plaintiffs (petitioners) as well as the defendants (not party to this revision) filed their respective pleadings and led their evidence, in which 22 witnesses and Ext.-1 series to Ext.-9 were adduced on behalf of the plaintiffs, whereas, 11 witnesses and Exts.-A to I were adduced on behalf of the defendants, whereafter arguments were also advanced on behalf of both the said parties, after considering which the learned Munsif-I, Darbhanga, decreed Eviction Suit No. 30 of 1985 by his judgment and decree dated 29.5.1993 after holding that the evidence produced did not prove that the tenants-defendants had handed over the possession of the suit premises to the plaintiffs and the plaintiffs had handed over its possession to any third party and that the relationship of landlord and tenant existed between the plaintiffs and defendants and that the plaintiffs had fully proved their bona fide personal requirement of the suit premises reasonably and in good faith. In the said judgment, it was specifically found that none of the evidence satisfactorily proved that the defendants had ever handed over the suit premises to the plaintiffs, whereas, the plaintiffs were able to prove by documentary evidence that the defendants were throughout in possession of the suit premises.

5. The said judgment and decree of eviction of the trial court was challenged by the defendants-tenants in Civil Revision No. 1475 of 1993 and a Bench of this High Court vide its order dated 10.12.1993 allowed the said revision application and remanded the matter back to the trial court. The said order of the High Court was challenged by the plaintiffs-petitioners in SLP No. 2225 of 1994, which was allowed by the Hon'ble Supreme Court vide its judgment dated 7.10.1994 and the order of the High Court was set aside and that of the trial court in the eviction suit was restored. However, it is noted that the defendants-tenants did not claim in those cases that he had handed over possession of the suit premises to any one during the pendency of the eviction suit.

6. In the said circumstances, the petitioners filed Execution Case No. 19 of 1993 for execution of the eviction decree passed by the trial court. In the said execution case, the opposite party filed an application bearing Misc. Case No. 34 of 1993 under Order XXI Rule 58 of the Code claiming to be a co-sharer in possession of the suit premises but the said application was dismissed by the

executing court on 26.8.1993. Similarly, the tenants-defendants-judgment debtors also filed an application bearing Misc. Case No. 93 of 1994 in the execution case under the provision of Section 47 of the Code but the said application was dismissed by the executing court on 5.7.1995 in view of the judgment and decree of eviction under execution, which was affirmed by the Hon''ble Apex Court.

7. It transpires that the opposite party again filed an application dated 8.12.1994 under the provision of under Order XXI Rules 98 and 99, read with Section 151 of the Code for adjudicating his claim and holding that he cannot be dispossessed by the decree holders as he was co-sharer of the plaintiffs and a suit for partition bearing P.S. No. 60 of 1985 filed by him was pending with respect to the property involved in the eviction suit as well as other properties. It was also claimed that in the aforesaid partition suit the plaintiffs filed an application for injunction for restraining the petitioners (plaintiffs of the eviction suit) from going over the suit premises and also from dispossessing the plaintiffs of the partition suit, which was rejected by the trial court after hearing the parties on 6.9.1993, against which the opposite party filed Misc. Appeal No. 302 of 1993, which was also dismissed by the High Court on 14.12.1995.

8. The executing court on the application of the intervenor-opposite party dated 8.12.1994 passed an interim order staying the proceeding of Execution Case No. 19 of 1993 during the pendency of the abovementioned Partition Suit No. 60 of 1985 vide its order dated 13.12.2001. The said order dated 13.12.2001 was challenged by the petitioners in Civil Revision No. 92 of 2002, which was allowed by this Court vide order dated 28.4.2004 specifically holding that the pendency of a partition suit is not a ground to stay the proceeding of the execution of a decree passed in an eviction suit and hence order dated 13.12.2001 passed by the executing court was set aside. Against the said order the opposite party filed SLP No. 18166 of 2004, which was dismissed by the Hon''ble Apex Court on 13.9.2004.

9. The said application dated 8.12.1994 filed by the opposite party in the executing court was taken up for final consideration by the executing court on 27.6.2005 and in view of the specific provisions of law and the aforesaid orders, it rejected the application of the opposite party vide its order dated 27.6.2005. Against the said order, the opposite party filed Misc. Appeal No. 10 of 2005, which was allowed by the lower appellate court vide order dated 23.7.2007 on the only ground that the executing court should have numbered the application of the opposite party dated 8.12.1994 filed under Order XXI Rules 98 and 99, read with Section 151 of the Code as a separate miscellaneous case and, only thereafter, should have proceeded with the said miscellaneous case under the provisions of Rule 459 of the General Rules for Civil Courts framed by the High Court of Judicature at Patna in 1954 as well as Section 141 of the Code and non-observance of the said provisions vitiated the order of the executing court, which was set aside and the matter was remitted to the executing court to reconsider

the matter after numbering the said application of the opposite party dated 8.12.1994 as a separate miscellaneous case and to decide the same in accordance with the pleadings and evidence of the parties as per the specific provisions of law within six months.

10. This order dated 23.7.2007 is under challenge in the instant civil revision (CR. No. 2159 of 2007) filed by the plaintiffs-decree holders-appellants-petitioners.

11. Learned counsel for the plaintiffs-decree holders-appellants-petitioners has vehemently challenged the impugned order of the learned court of appeal below dated 23.7.2007 on the ground that the application dated 8.12.1994 filed by the opposite party in the execution case under Order XXI Rules 98 and 99, read with Section 151 of the Code was absolutely frivolous, baseless and misconceived as it had been specifically held by the trial court in its judgment and decree of the execution case affirmed up to the Hon"ble Apex Court that the tenants (not party to the instant suit) had throughout been in possession of the suit premises and the opposite party had never come in possession thereof. It was also claimed that earlier another application of the opposite party bearing Misc. Case No. 34 of 1993 under Order XXI of the Code raising the same claim of being a co-sharer in possession was dismissed by the executing court on 26.8.1993, whereas, Misc. Case No. 23 of 1994 filed by the tenants-defendants-decree holders in the execution case under the provision of Section 47 of the Code raising a similar claim was also rejected by the executing court on 5.7.1995.

12. Learned counsel for the petitioners also stated that although the opposite party had filed his aforesaid miscellaneous application dated 8.12.1994 in the executing court under Order XXI Rules 98 and 99, read with Section 151 of the Code, but subsequently by filing a supplementary petition dated 23.8.1998 the opposite party had deleted Order XXI Rules 98 and 99 of the Code from his miscellaneous application dated 8.12.1994. In the said circumstances, the miscellaneous application in question not remaining under Order XXI Rules 98 and 99 of the Code, there was no occasion for the executing court for getting the said application dated 8.12.1994, which remained only u/s 151 of the Code, recorded as miscellaneous case.

13. Learned counsel for the petitioners has also averred that the law is clear in this regard that in an eviction suit filed by a co-sharer against his tenant, even the other co-sharers had no right to interfere. In this regard, he has relied upon a decision of the Hon"ble Apex Court in case of T. Lakshmipathi and Others Vs. P. Nithyananda Reddy and Others, as well as a decision of the Rajasthan High Court in case of Raman Lal Vs. LRs. of Rukmani, .

14. On the other hand learned counsel for the opposite party submits that he had filed an application under Order XXI Rules 98 and 99, read with Section 151 of the Code on 8.12.1994 in the execution case, whereafter a supplementary petition dated 22.8.1998 was, no doubt, filed by him for deleting the provision of

Order XXI Rules 98 and 99 of the Code, but the said supplementary petition was neither pressed nor moved by the opposite party and hence it was rejected as is clear from paragraph No. 3 of order dated 13.12.2001, which is an interim order of stay. Hence, the said miscellaneous application dated 8.12.1994 remained under the provision of Order XXI Rules 98 and 99, read with Section 151 of the Code.

15. It was also argued on behalf of the opposite party that once an application under Order XXI of the Code is filed in the execution case, the executing court has to register it as a miscellaneous case and to direct the parties to adduce evidence and, thereafter, to decide the same, but by order dated 27.6.2005 passed by the executing court, it is quite apparent that due procedure of law was not adopted nor the said miscellaneous application was decided in accordance with the provisions of law. It was also claimed that the executing court in its order dated 27.6.2005 did not consider the points raised and the provisions of law applicable to the claim of the opposite party that he had come in possession in 1989 during the pendency of the eviction suit and merely in one paragraph passed the order on the only ground that the possession was never given either to the decree holders or the opposite party. However, he claims that the points raised by the parties on the merit of the case was rightly not touched by the lower appellate court as the matter was remanded to the executing court for registering the said application dated 8.12.1994 as a miscellaneous case and to decide the same accordingly.

16. Considering the arguments of the parties, the materials on record as well as the specific provisions of law, it is quite apparent that the application dated 8.12.1994 passed by the opposite party was under Order XXI Rules 98 and 99, read with Section 151 of the Code and remained under the said provisions till the date of its disposal as is clear from order dated 27.6.2005. by which the executing court had disposed of the said application. Furthermore, from the interim order dated 13.12.2001 passed by the executing court, it is quite apparent that the supplementary petition dated 22.8.1998 for deletion of Order XXI Rules 98 and 99 of the Code was never moved or pressed and as such stood rejected. Thus, it is quite clear that the miscellaneous application dated 8.12.1994 throughout remained under the said provisions of law.

17. So far the question of duty of the executing court for registering such an application as a miscellaneous case is concerned, Rule 459 of the General Rules for Civil Courts framed by the High Court of Judicature at Patna in 1954 specifically provides that separate statements being provided to show applications for the execution of decrees, these will not be included under the head "miscellaneous (judicial)" cases, and it is intended that such other cases only as required a judicial enquiry or order should be included. A list is provided under the said Rule with respect to the cases, which are to be recorded under the said head without the special orders of the High Court and the said list included applications under Order XXI Rules 97 and 98 as per sub-rule (a)(viii) of

Rule 459. Furthermore Section 141 of the Code prescribes that the procedure provided under the Code in regard to suit shall be followed as far as it can be made applicable in all proceedings in any court of civil jurisdiction. In the said circumstances and according to the aforesaid provisions of law, it is quite apparent that a duty was cast upon the executing court to record such application under Order XXI Rules 98 and 99 of the Code as miscellaneous case and to proceed as per the specific provisions of law.

18. Law is well-settled in such matters. The Rule specifically provides procedure of miscellaneous case for the benefit of such persons against whom no decree is passed, yet they claim that they were being subjected to the execution of the decree. It is a short cut procedure without involving a long drawn suit so that the pleadings and evidence etc. are taken in the miscellaneous case and the right of the objector, if any, is decided by the executing court itself. In the said circumstances, the learned court below was quite justified in remanding the matter to the learned executing court for registering a miscellaneous case and deciding the application filed by the opposite party dated 8.12.1994 under Order XXI Rules 98 and 99, read with Section 151 of the Code on the pleadings and evidence of the parties and as per the specific procedures prescribed in the abovementioned provisions of law. The learned lower court has rightly not gone into the merits of the respective claims of the parties and this Court also does not want to enter into the merits or demerits of the claim of any of the parties as it has to be decided by the executing court. In the said circumstances, this civil revision is dismissed with a direction to the learned court below, before whom Execution Case No. 19 of 1993 is pending, to register application of the opposite party dated 8.12.1994 under Order XXI Rules 98 and 99, read with Section 151 of the Code as a miscellaneous case and give opportunity of producing evidence and placing arguments to both the parties and pass a speaking order on the said application within six months from the date of receipt/production of a copy of this order on the basis of the pleadings and evidence of the parties as well as the specific provisions of law keeping in view the orders of the Hon'ble Apex Court as well as this Court in Civil Revision No. 1475 of 1993 (10.12.1993), SLP No. 2225 of 1994 (7.10.1994), Civil Revision No. 92 of 2003 (28.4.2004) and SLP No. 18166 of 2004 (13.9.2004) and also the well settled principles of law.