
(1920) 12 PAT CK 0006

In the Patna High Court

Mahanth Bhikhan Gir Gossain

APPELLANT

Vs

Jalpadat Jha and Others

RESPONDENT

Date of Decision : 15-12-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148, 151

Citation : AIR 1921 Patna 293 : 62 Ind. Cas. 113

Hon'ble Judges : Jwala Prasad, J

Bench : Single Bench

Judgement

Jwala Prasad, J.—This is an application in revision to set aside the order of the District Judge, dated the 12th May 1920, dismissing Miscellaneous Appeal No. 33 of 1920. That appeal was against the order of the Munsif, dated the 7th April 1920, the Munsif having dismissed summarily an application of the petitioner to set aside an ex parte order pasted by him on the 31st of January 1920, under Order XXI, Rule 90. By this order the Munsif set aside the sale of a holding held on the 6th April 1917 in execution of a rent-decree. The petitioner purchased the holding of the opposite party judgment-debtor at the Court sale and obtained delivery of possession on the 27th November 1917. The application to set aside the sale was made on the 23rd of August 1919, more than two years after the date of the sale.

2. Under Rule 92 of Order XXI, notice was required to be served upon the petitioner of the application made to set aside the sale under Rule 91. The notice issued was returned unserved on several dates, and ultimately on the 21st of January 1920 the peon returned the service with the remark that the notice was handed over to Sarda Prasad, Patwari, on behalf of the petitioner, but he refused to give any receipt for the same. This service was accepted by the Court, holding that the service was sufficiently proved. The applicant purchaser did not appear and the order was passed by the Munsif, setting aside the sale on the examination of the judgment-debtor, on the 31st January 1920.

3. On the 17th March 1920 the purchaser-applicant made an application for

setting aside the order of the Munsif of the 31st March passed under Order XXI, Rule 90, on the ground that no notice was served upon him and that the order setting aside the sale was passed behind his back and that he came to know of it during the agricultural operations, when interference with his possession was offered by the judgment-debtor. The application purported to be under Order IX, Rule 13, mentioning that the Court might deal with it under any other section of the Code. The Court entertained a doubt as to whether the application was entertainable under the CPC and accordingly called upon the petitioner to satisfy the Court about it. The Munsif heard the petitioner on the 7th April in support of his application, in order to find out under what section or law the application was made. On that date the Munsif held that the application did not come under Order IX, Rule 13, or under Order XLVII, Rule 1, nor u/s 151 or 148 of the Code of Civil Procedure. He also held that the petitioner ought to have appealed against the order and that there was no satisfactory reason for the delay in making the application. Upon this view the Munsif "rejected the application summarily," on the 7th April 1920.

4. The learned District Judge agreeing with the Munsif dismissed the appeal. The result has been that the application of the petitioner has not been considered on merits, particularly the ground urged by him that the order passed by the Munsif setting aside the sale was without jurisdiction, inasmuch as no notice of the application was given to him. Rule 92 clearly provides that "No order shall be made unless notice of the application has been given to all persons affected thereby."

5. An order passed without any notice would, therefore, be without jurisdiction and will amount to no order at all.

6. True, it has been held by this Court that an application to set aside an ex parte order passed under Order XXI, Rule 90, cannot be dealt with under Order IX, Rule 9, *Bhubaneswar Prasad Singh v. Tilakdhari Lal* 49 Ind. Cas. 617 : 4 P.L.J. 135 : (1919) at. 75, which in itself is in accordance with the decision of their Lordships of the Judicial Committee in the case of *Thakur Prasad v. Fakirullah* 17 A. 106 (P.C.) : 5 M.L.J. 3 : 22 I.A. 44 : 6 Sar. P.C.J. 526 : 8 Ind. Dec. 393. In fact, there is no particular section in the CPC under which the application of the petitioner can clearly come, but an application of this kind must for obvious reasons be within the cognizance of the Court, inasmuch as an order passed ex parte without notice to the person affected thereby is calculated to cause irremediable injury to the party. In some cases he may have no right to appeal, or if he has any right to appeal, it may have been barred by time on account of the ignorance of the order passed. He may have also in certain cases no right of bringing any suit to contest the order passed behind his back. In the present case the sale took place in 1917 followed by the delivery of possession. The application for setting aside the sale was made in 1919, two years after the sale. The decree being for rent is now already barred, more than three years having elapsed long before the application to set aside the sale was made. If the

application of the petitioner be thrown out, as has been done by the Munsif, on the ground that it was not entertainable under that section or rule of the Code of Civil Procedure, the obvious result would be that the decree obtained by the petitioner will not be enforceable in Court. To meet such cases the Legislature has provided ample power in the Code by enacting Section 151. That section says that "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

7. But for this power the Court will not be able to give redress to parties for the injuries caused by its own orders or on account of the abuse of its own process to which it lent its sanction and support. Maclean, C.J., in the case of Bibee Tulsiman v. Harihar Mahato 9 C.W.N. 81 at p. 83, where the order was passed u/s 89 of the Transfer of Property Act without notice to the mortgagor, observed as follows:

The Subordinate Judge proceeded upon the footing that the Court had no such power; he did not go into the merits. I respectfully differ from that view. I think that the Court has an inherent power to deal with an application to set aside an order made ex parte, and to set it aside upon a proper case being substantiated. I can find nothing in the CPC to militate against this view.

8. This case was followed in Sudevi Devi v. Sovaram Agarwallah 10 C.W.N. 306 at p. 310, where on the basis of a conditional mortgage decree an order making it absolute and for ejecting the defendant was obtained without notice to him. Woodroffe, J., observed as follows:--"It is an elementary principle that (in the absence of any special legislative rule excusing notice) no order should be made in favour of one party against and to the prejudice of another, unless that other has had an opportunity of showing that it should not be made. And the Court has an inherent power to deal with an application to set aside an order made ex parte and to set it aside upon a proper case being substantial."

9. In the case of Bharat Chandra Nath v. Yasin Sarkar 41 Ind. Cas. 586 : 21 C.W.N. 769 (Fletcher and Richardson, JJ.) Richardson, J., observed:

If the Subordinate Judge was right, as I think he was, in holding that Order IX, Rule 9, was inapplicable, he had, nevertheless, in my opinion, inherent power on a proper application being made by the respondent to review the order and to enquire whether the respondent had or had not a reasonable cause for not appearing on the date appointed for the hearing of his petition.

10. When the weight of opinion is so strong I have no hesitation in following it, and adopting the words of Richardson, J., quoted above, as my reason for the purpose of deciding the present case. In accordance with the directions given in the case of Bibee Tulsiman v. Harihar Mahato 9 C.W.N. 81 at p. 83 I would send the case back to the lower Court for trial on merits. The costs of remand will abide the result of this litigation. Hearing fee one gold mohur.