

(1930) 12 PAT CK 0005
In the Patna High Court

Mt. Muratbati and Others

APPELLANT

Vs

Lattoo Choudhury and Others

RESPONDENT

Date of Decision : 02-12-1930

Acts Referred:

Citation : AIR 1931 Patna 87

Hon'ble Judges : Jwala Prasad, J

Bench : Division Bench

Judgement

Jwala Prasad, J.—This is an application by the plaintiffs to set aside an order passed by the Munsif of Bhagalpur refusing to set aside the order of dismissal of the plaintiffs' suit for non-appearance of both parties.

2. The plaintiffs instituted the suit on 21st June 1929 for recovery of money due under a mortgage bond. Defendants first party were the mortgagors, defendants second party were the subsequent mortgagee and defendants third party were the cosharers of the plaintiffs in the mortgage money. On 9th September 1929 defendants 1 to 4 applied for time to file written statement and the plaintiffs filed hajira. On 12th November 1929 plaintiffs filed hajira and defendants took time to file written statement. On 7th January 1930 defendants filed written statement and defendants 1 to 4 and the plaintiffs applied for time. On 10th February 1930 defendant 1 filed a written statement and the plaintiffs filed hajira. On 21st March 1930 issues were settled and the suit was adjourned to 8th May 1930. The case was called out at 8-25 a.m. but neither the plaintiffs nor the defendants appeared on call and the learned Munsif dismissed the suit for default under Order 9, Rule 3. Just after the order was passed the plaintiffs filed hajira and the defendants filed issues and written statement and applied for time. These applications were ordered to be kept with the record. The plaintiffs having come to know that the suit was already dismissed applied for setting aside the order of dismissal under Order 9, Rule 4, Civil P.C.

3. The petitioners' case was that their karpardaz, applicant 2 (one of the plaintiffs) was coming to Court having left his home between 4 and 5 a.m. on a

tomtom and was on the way stopped by volunteers of Gandhi who did not allow the tomtom to proceed further as that was the day when Gandhi was arrested and hartal was observed and the tomtomwala was picketted. The plaintiff therefore had to come on foot and reached Court at 8-30 just after the suit was dismissed for default. In support of his allegation the petitioner examined himself and another witness. The Court did not accept the evidence stating that the oral evidence of these two witnesses was "unsatisfactory" and rejected the plaintiff's application to set aside the order of dismissal. The Munsif does not give any reason for considering the evidence as unsatisfactory he did not accept because the evidence was only oral and was not supported by any documentary evidence. He has not also shown that the evidence given by the plaintiffs and his witness was intrinsically and internally wrong in any way and unworthy of credence. The fact that the plaintiff came to Court that very day supports his case that he had left his home five miles away in order to come to Court to look after his case but was prevented from some unavoidable cause to reach the Court in time, The Munsif did not look into the history of this case. His order sheet discloses that the suit was not an old one and the plaintiff ever since he lodged the plaint was diligent and has been appearing in Court with his witnesses and filed hazri. It was the defendants who were taking time after time and the plaintiff being diligent throughout the case would not have allowed the case to go for default and would not have been absent from the Court unless he was prevented from some unavoidable cause and that unavoidable cause is stated by the applicant to be the obstruction caused to him and his tomtomwala by the volun of Gandhi. In spite of this obstruction he came all the way on foot and reached the Court soon after the order of dismissal was passed. It seems to me that on looking at Orders 11 and 12 of 8th May 1930 that Order 12 which says that;

after the above order the plaintiff filed hazri and the defendant filed issues written statement and petition for time

was passed just after the previous order and in continuation of the order dismissing the suit for default. Thus the plaintiff arrived and explained the cause of the delay when the Munsif had just passed the order. In the circumstances the Munsif ought to have then and there set aside his first order dismissing the suit and proceeded to hear the case as hazri was filed. Not only that but the Munsif's order dismissing the entire suit of the plaintiff was without jurisdiction. The "defendants mortgagors in the written statement admitted the execution of the bond and passing of the consideration but pleaded some payments which being set off there was still money due to the plaintiffs on the bond in question. Therefore the whole claim of the plaintiffs could not be dismissed and the Munsif should have passed a decree in favour of the plaintiffs for the amount admitted by the defendants after setting off the amount said to have been paid by them. Even in the petition for setting aside the order of dismissal the fact of the defendants admitting plaintiffs' claim and disputing only to a portion of the claim was clearly and specifically brought out; still the Munsif did not consider that in passing his order on 16th June 1930. the subject-matter of this revision

4. In the petition for setting aside the order of dismissal another important fact was mentioned and that was that the parties had compromised their dispute and in this Court a regular petition of compromise has already been filed. This shows that both the parties wanted that their petty dispute in the case regarding part payment of the money due to the plaintiffs be decided and settled once for all so as to put a stop to the bitterness of litigation.

5. The order of the learned Munsif dated 16th June 1930 as well as of 8th May 1930 is set aside as being without jurisdiction and passed with material irregularity in the exercise of the jurisdiction vested in the Munsif. The case is restored to its original file and the compromise petition will be dealt with by the Court below and the suit disposed of in accordance with law.

6. The mortgagors defendants first party have appeared through an advocate in this Court and do not oppose this application. On the other hand they want that the case may be restored and the dispute be settled in the terms of the compromise filed in this Court. Let the compromise petition be also sent to the Court below.