
(2005) 07 PAT CK 0061

In the Patna High Court

Case No : Civil Revision No"s. 734 and 748 of 2004

Prabhunath Sahu @ Prabhunath Sah

APPELLANT

Vs

Nagina Singh and Others

RESPONDENT

Date of Decision : 08-07-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, Order 5 Rule 20
Transfer of Property Act, 1882 — Section 106

Citation : (2005) 2 BLJR 1593 : (2005) 3 PLJR 467

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

Bench : Single Bench

Advocate : S.S. Dwivedi, Binay Kumar Chowbey and Ranjan Kumar Dubey, for the Appellant; Kamla Pd. Roy and Umesh Pd. Singh, for the Respondent

Final Decision : Allowed

Judgement

S.N. Hussain, J.—These two civil revisions are between the same parties and arise out of the same proceeding and as such they were heard together and are being disposed of by this common order.

2. The petitioner was the plaintiff of Title Suit No. 236 of 1972, which he had filed for, among others, a decree of eviction of defendants from the suit land, which the plaintiff had leased out to the defendants by registered deed dated 16-8-1968 for ten years for a monthly rental of Rs. 125/- for running timber business, but according to the plaintiff, neither the defendants paid rent nor vacated the suit land even after service of notice u/s 106 of the Transfer of Property Act sent by the plaintiff determining the lease.

3. The said suit was decreed by the trial Court vide Judgment and decree dated 29-5-1987 against which the defendants filed Title (Eviction) Appeal No. 2 of 1987, but in the meantime the full period of lease expired. Thereafter, the defendants-appellants stopped appearing in the appeal and when the Court informed the counsel about the same, their counsel noted "No instruction" on the margin of the order-sheet. Consequently, when after several adjournments the

appeal was called out for hearing on 4-10-1996 and no one appeared to place the appellants case, the appeal was dismissed for default by the lower appellate Court.

4. Three years thereafter the plaintiff filed Execution Case No. 8 of 1999 before the learned Munsif, Motihari (East Champaran) and in that case when notices either by ordinary process or by registered post could not be served upon the defendants judgment-debtors substituted service of notice had to be resorted to by way of publication under Order V Rule 20 of the Code of Civil Procedure. But even thereafter the defendants neither appeared nor vacated the suit land, although, the period of lease had already expired much earlier and the decree in the suit had been affirmed by the appellate Court.

5. It appears that after six years of the dismissal of their appeal and after three years of the filing of the Execution Case, only opposite party No. 1 (one of the several defendants-appellants) filed Misc Case No. 1 of 2002 in the Court of 5th Additional District Judge, Motihari (East Champaran) for restoration of Title Appeal No. 2 of 1987. It is clear from the record that a joint decree was passed by the trial Court against the defendants, who had jointly filed Title Appeal, but apart from O.P. No. 1, no other defendants-appellant had chosen to challenge the order judgment of the lower appellate Court and join hands with the applicant.

6. It also transpires from the order-sheet of the Miscellaneous case that the plaintiff-petitioner appeared therein on 24-6-2003, and it were other co-appellants of O.P. No. 1, who were arranged as opposite parties in the Misc. case, did not appear in the case. The plaintiff respondent appeared in that case till 28-4-2004, and on 10-5-2004 the case was adjourned to 12-5-2004 for appearance of O.P. No. 5 Ram Bahadur Singh. But for reasons best known to it the Court below on 12-5-2004, fully realising that the plaintiff-respondent was not present and ignoring the said absence of OP. No. 5 Ram Bahadur Singh, ordered the applicant (OP. No. 1) to produce his evidence on the very next day i.e., on 13-5-2004, without passing any order for ex parte hearing and went on hearing the Miscellaneous case on day to day basis in the absence of the plaintiff and within a week the learned 5th Additional District Judge, Motihari (East Champaran) passed the impugned order dated 18-5-2004 allowing Misc. Case No. 1 of 2002 which is challenged in Civil Revision No. 748 of 2004.

7. The record of the case reveals that although on 10-5-2004 the case was adjourned for 12-5-2004 for appearance of OP. No. 5 Ram Bahadur Singh, but the Court below did not wait for him and expunged his name by order dated 14-5-2004, which could not have been legally done as he was one of the parties to the decree of the trial Court and was also a party in the appeal filed by the applicant of Misc. Case. This was obviously done to pass the order in undue haste, within a period of twelve days i.e., from 7-5-2004 till 18-5-2004 when the plaintiff, who was the opposite party in that case, could not appear. This procedure adopted by the Court is absolutely un-explainable specially in the circumstances that till April, 2004, when this plaintiff petitioner appeared, the

Misc. Case was delayed at the instance of the applicant (OP. No. 1) as he did not include his co-defendants-appellants as applicants in Misc Case, apart from the fact that he had filed the case after six years of the dismissal of the Title Appeal and after three years of filing of Execution Case in which even substituted service of notice by publication had to be made for him.

8. The said impugned order was passed by the learned lower Court allowing the Misc. Case only on the submissions of the applicant of that case (OP. No. 1) that he was a businessman mostly living in Assam and he had entrusted the appeal on his Karpardaz who took no step in the said appeal and only the Clerk of the Advocate appointed by him informed about the Execution Case later whereafter he came to know about the said case. The said averment as well as the evidence adduced on behalf of the said applicant was not at all reliable as it was he himself who had filed the appeal and hence he had full knowledge about the decree of the trial Court as well as ongoing appeal proceeding. But inspite of that no step was taken in the appeal for several years and even after disposal of the appeal; Misc. Case could not be filed for six long years, although, in the meantime Execution Case was initiated in which notices etc were duly sent, but when they were refused substituted service by way of publication was made. Furthermore, neither the Karpardaz nor the Advocate's Clerk of the applicant (OP. No. 1) deposed in the case nor supported his claim. Even the other co-defendants and co-appellants of the applicant neither accompanied him in the Misc. Case nor came to depose on his behalf. In the aforesaid circumstances, the defendant-applicant (OP. No. 1) completely failed to substantiate his frivolous claim. Hence, there were neither any occasion nor any justification for the lower Court to condone the delay in filing of the Misc. Case or for allowing the same by the impugned order.

9. The attitude and undue haste of the lower Court is also apparent from Paragraph 10 of the impugned order as in the said Misc. Case itself he directed the applicant (OP. No. 1) to file requisites for issuing fresh notice to the respondents of the Title Appeal, although, no order for issuing notice in Title Appeal can be legally passed in a Misc. Case. Furthermore, by the impugned order the appeal was re-admitted with cost of Rs. 1000/-, but admittedly the said cost had not been deposited on 18-5-2004 and hence there was no question of restoration of the appeal on that date. In the aforesaid circumstances, the order of the learned lower Court dated 18-5-2004 challenged in Civil Revision No. 748 of 2004 is absolutely illegal and without jurisdiction and the same is accordingly set aside and Civil Revision No. 748 of 2004 is allowed.

10. So far as order dated 20-5-2004 passed by the 5th Additional District Judge, Motihari (East Champaran), in Eviction Appeal No. 2 of 1987 which is under challenge in Civil Revision No. 734 of 2004 is concerned, it is quite apparent that the learned lower Court had restored the Eviction Appeal on 18-5-2004 with cost of Rs. 1000/- and the said cost was deposited on 21-5-2004 and hence the Eviction Appeal if at all, can be deemed to be restored on 21-5-2004 and not

before it. But it transpires from the record that O.P. No. 1 (applicant) filed a petition under Order XLI Rule 5 of the CPC on 20-5-2004 for stay of the Execution Case and on that date itself i.e., on 20-5-2004 the learned lower appellate Court passed an order for stay of the Execution Case during the pendency of the appeal.

11. The entire facts as aforesaid clearly show that the learned lower appellate Court was in some very undue has to pass orders in favour of O.P. No. 1 for reasons best known to him which is apparent from the fact that even before the Execution Appeal could be restored, an order for stay of the Execution Case was passed in Execution Case on 20-5-2004, although, on that date the Eviction Appeal did not legally stood restored. Such indulgence for a tenant-defendant who had lost in Eviction Suit and who had been a defaulter throughout various stages of the proceeding is quite strange specially in the circumstances when the term of the deed of lease on the basis of which he was inducted as a tenant had itself expired about three decades back.

12. In the case facts and circumstances, Civil Revision No. 734 of 2004 is also allowed and the impugned order of the learned lower appellate Court passed in Eviction Appeal No. 2 of 1987 on 20-5-2004 is set aside.

13. In the facts and circumstances of these cases, the learned Executing Court is directed to expedite Execution Case No. 8 of 1999 which is pending for six years and proceed to finalise the same without any further delay and without giving any undue adjournments to the Judgment-debtors.