
(1993) 01 PAT CK 0014
In the Patna High Court
Case No : Civil Revision No. 252 of 1988

Sri Vishnu Kant Jha

APPELLANT

Vs

Sri Dinesh Jha and Others

RESPONDENT

Date of Decision : 29-01-1993

Acts Referred:

Citation : (1993) 01 PAT CK 0014

Final Decision : Dismissed

Judgement

Radha Mohan Prasad, J.—The present revision application is directed against the order dated 28-11-1987 passed by Sub-Judge III, Darbhanga, in Misc. Case No. 5/86 filed by opposite party No. I under Order IX Rule 13 of the Civil P.C. (hereinafter referred to as "the Code") whereby the ex parte judgment and decree dated 25-6-1977 and 12-7-1977 respectively have been set aside.

2. On 19-7-1969 a partition suit being P.S. No. 117/69 was filed in the Court of Sub-Judge, Darbhanga by the petitioner for a preliminary decree for partition claiming 1/3rd share in Schedule I and Schedule II properties and also for carving out a separate Patti with respect to the same by appointing Pleader Commissioner and, further, for delivery of separate possession over the same.

3. The petitioner is the plaintiff. The case of the petitioner is that after the institution of the suit summonses were issued to the defendants by the trial Court and after several warnings defendant No. 1, Pashupati Jha, now dead, grand-father of opposite party No. 1, appeared in the suit and filed his written statement. Similarly, defendant No. 2, now dead, full brother of defendant No. 1, also appeared and filed his written statement and both contested the suit jointly. Summonses were also issued to opposite party No. 1, who was defendant No. 11, and finally it was served on him through his address in the Military service where he was then posted. The further case of the petitioner is that opposite party No. 1 had full knowledge and notices of the date of hearing of the suit at all stages. It is further alleged that later the other defendants, who had appeared and also filed their written statements, withdrew from the contest and allowed

the suit to be decided ex parte.

4. The case of opposite party No. 1 is that he was in Army Service Corps as Wireless Operator from 31-3-1967 to 31-3-1982 and after his retirement he ordinarily resides at Bhilai where he is carrying on business. Further, case of opposite party No. 1 is that he occasionally visited his village to take care of his ancestral property and on 30-8-1986 he had come to his village when he learnt from one Shilanath Jha of village Kabilpur that the petitioner obtained some decree against him with respect to some ancestral properties. Thereupon he enquired about the same from his Pattidar and came to know about the ex parte decree. However, when the said Pattidar could not give any satisfactory reply as to why opposite party No. 1 was not informed about the case, he became suspicious and filed information petition and got the record of the case inspected through his Advocate on 9-9-1986. After the said inspection he came to know that no summons was served upon him and on the basis of the said ex parte decree, the petitioner was trying to obtain final decree without any notice to the opposite parties. Accordingly, opposite party No. 1 filed aforementioned miscellaneous case for setting aside the ex parte decree.

5. Opposite party No. 1 in the said miscellaneous case claimed that the notice had not been served upon him and that he had no knowledge of the said ex parte decree prior to 30-8-1986 and he had been greatly prejudiced by the passing of the same and that it is a fraudulent decree fit to be set aside. Opposite party No. 1 has also claimed that he was prevented by sufficient cause in not appearing in the suit and contesting the same and, further, that the other members of his family were ill disposed to him and as such he had reason to believe that they only in order to put him in loss did not inform him about the suit. It appears that later the case was transferred to the Court of 2nd Additional Sub-Judge, Darbhanga. The witnesses were examined on behalf of the parties in miscellaneous case and after detailed hearing the impugned order was passed.

6. Mr. Tara Kant Jha, learned counsel appearing for the petitioner firstly submitted that from the reading of the letters of the Commanding Officer, Exts. "A" and "A/1", it would appear that opposite party No. 1 had full knowledge about the suit in question and, therefore, according to him, opposite party No. 1 was not prevented by sufficient cause in not appearing in the suit and contesting the same.

7. The contents of the aforementioned two exhibits may usefully be quoted hereunder:--

"No. 4083/ 100Y/XRegistered by post

IV CORPS SIGNAL REGIMENT C/O 99 ARMY POST OFFICE 6 NOV. 70

From

The Commanding Officer

To.

The Sub Judges Court, Dist. DARBHANGA

Sub. -

SUMMONS FOR SETTLEMENT PARTITION SUIT NO. 117 OF 1969

Reference Summon for Settlements dated 3 Oct. 70.

2. No. 14204102 Sigmu Dinesh Jha of this writ is required to appear in your court on 11 Nov. 70 in connection with Suit No. 117 torn (Shri Vishnu Kant Jha s/o Late Rameshwar Jha, the resident of Village BALBHADRA PUR, Tole KABILPUR, Pargana DARBHANGA). The individual is serving in an operational area and his services cannot be spared at present due to exigencies of service. The hearing of the case may be postponed till another date preferably during Jan.-Feb. 71, when the individual can be sent on leave.

Ext.-A Misc. 5/86 Sd/- Illegible Sub Judge III 19.9.87

Yours faithfully, Sd/- Illegible (Krishna Nandan)

Capt. OFFICIATING OFFICER COMMANDING"

"262 Signal Regiment C/O 56 APO 06 Mar. 81

246/03/Sig3/104

2nd Additional Sub Judge, Darbhanga Post Laheriasarai Dist. Darbhanga (Bihar)

DISTRIBUTION OF LAND 1. Reference your case file No. 117/1969 and letter dated 24 Feb. 81.

2. No. 14204102 Lance Naik Dinesh Jha, who is serving in this Regiment cannot be sent to attend your court on 23 Mar. 81 due to exigencies of service. He may however be sent on leave in the month of May, 81.

3. It is requested that any date during May or June may please be given to settle his case, when he will be on leave.

Ext. A/1 Sd/-Illegible Misc. 5/86 (S. P. Singh) Sd/-Illegible Captain Sub Judge III Adjutant 19.9.87 for Commanding Officer" In view of the contents of the said letters it is difficult to accept the submission of the learned counsel for the petitioner that the summons/ notice had been served on opposite party No. 1 and that he had knowledge about the suit. The contents of the said letters of the Commanding Officer do not indicate at all that the summons/ notice had been served on opposite party No. 1 and/or that he had knowledge about the suit in question at all. It appears that the Commanding Officer on receipt of the notice/ summons on his own expressed the inability to spare opposite party No. 1 to attend Court as he was serving in the operational area. In that view of the matter, the submission of the learned counsel for the petitioner that opposite party No. 1 was not prevented by sufficient cause in not appearing in the suit

and contesting the same cannot be accepted and, therefore, I do not find any reason to interfere with the impugned order in exercise of the revisional jurisdiction of this Court.

8. Mr. Jha then submitted that the court below has erred in law in holding that the transferor court was duty bound to send a separate notice to each party in respect of the transfer of the case and thereby in holding that the record would show that the same had not been complied.

9. The court below relied on a decision of this Court reported in Kishore Kumar Agrawal Vs. Basudeo Prasad Gutgutia and Another, , which, according to the learned counsel, requires reconsideration as no fresh notice is required to be given to the parties if suit/case is transferred by an administrative order.

10. From the order dated 26.2.1992 it appears that on the aforesaid submission of Mr. Jha this case was referred to Division Bench by the learned single Judge for reconsideration of the judgment of this Court in the case of Kishore Kumar Agrawal (supra) wherein, as general proposition, it has been held that in every case of transfer the transferor court is duty bound to send a separate notice to each party in respect of the transfer of the case. This point was considered by the learned single Judge to have a far-reaching consequence on the speedy disposal of the suits/cases and, therefore, his Lordship directed this case to be heard by a Division Bench. Accordingly, this matter has come up before us.

11. According to the said decision, the learned single Judge was considering the point as to whether the transferor court was required to serve notices on the party about the transfer of the case in the facts and circumstances of that case. However, while dealing with the said point the learned single Judge laid down a general law that in every case of transfer the transferor court is duty bound to send a separate notice to each party in respect of the transfer of the case, after taking into consideration that the party has to appoint a new lawyer in the transferee court. In my opinion, it is difficult to agree with the said view, laying down as a general proposition. "

12. The object behind the issue and service of summons under Order V of the Code is to bring the facts regarding the institution of the suit to the defendants and give opportunity to them to file the written statement of his defence and contest the suit. In that view of the matter, once this procedure has been complied with, then there is neither any provision in the Code for issuance of second summons nor there can be any requirement or obligation on the part of the court to do so. The Court under the provisions of the Code is required to issue summons to the defendants in a suit to appear and answer the claim on a date to be therein specified. Further, proviso to Rule 1 of Order V provides that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim. Section 24 of the Code provides the general power of transfer and withdrawal. It provides that on the application of any of the parties and after notice to: the parties and after

hearing such of them as desired to be heard or of its own motion without such notice, the High Court or District Court may at any stage transfer/ withdraw any suit, appeal or any other proceeding. From the reading of the aforesaid provision it is clear that the power of transfer and withdrawal is to be exercised after notice to the parties if an application is filed by the parties otherwise the Court is empowered to do so of its own motion without such notice.

13. It is well settled that where language of a statute is explicit and unambiguous, while interpreting the same, a Court should give literal interpretation to it unless such an interpretation would lead to an absurdity. So far as the case of transfer on an application by any of the parties is concerned, requirement of notice is a must, and if the same is not given and a higher Court is moved against the order of such a transfer, generally the order will be liable to be interfered with unless the revisional court exercising powers u/s 115 of the Code comes to the conclusion that if the order of transfer is allowed to stand, the same would not occasion a failure of justice nor the same would cause irreparable injury to the party against whom it was made.

14. So far as the case of suo motu transfer is concerned, the language of statute is very explicit that power can be exercised without issuing notice to the parties. It is well settled that as a general rule the principle of audi alteram partem is applicable in each and every action wherever the same is proposed to be taken against a party. It is also well settled that application of the aforesaid principle can be excluded either expressly or by necessary implication. In the case of such transfer, application of the principle of audi alteram partem has been expressly excluded by the legislature. Therefore, before exercising power of suo motu transfer by District Judge or this Court, no notice is necessary to be served upon any of the parties. Reference in this connection may be made to a Division Bench decision of this Court in Baijnath Prasad Singh Vs. Dasrath Prasad Singh and Another, Full Bench decision of Madras High Court in Annamalai Chettiar v. Ramanathan Chettiar AIR 1936 Mad 55 and Division Bench decisions of Rajasthan High Court, Allahabad High Court and Oudh Court in Devichand Vs. Rikhab Chand and Another, , Ram Das and Another Vs. Habib Ullah, and A.S. De Mello and Another Vs. New Victoria Mills Co. Ltd. , besides two decisions by two single Judges of Allahabad High Court in Fatem Begem v. Imdad Ali AIR 1920 All 249 and Umesh Chandra Bharadwaj v. Mahesh Chandra Sharma AIR 1983 All 290 and one decision by a single Bench of Nagpur Court in the case of Firm B. Sitaram v. B. Ladhuram AIR 1916 Nag 123 In the aforesaid cases, directly against the order of transfer, higher Court was moved and in none of them a party after passing of the order of transfer challenged the final order passed by transferee court on the ground that the order of transfer was passed without notice to him.

15. Further question would arise in this case as to what procedure should be followed in relation to the party who is appearing, namely, who has filed a case through lawyer or is contesting the same through lawyer by filing Vakaiatnama in

the case. In cases where transfer order has been passed suo motu without giving notice to any of the parties or the same has been passed upon an application filed by any of the parties without giving any notice to other party, in such an eventuality, where a party has appeared in a case through counsel, the Court should give notice of transfer to the counsel of the parties who have already entered appearance. In case, counsel for the parties refuse to accept notice of transfer and show their inability to work before the transferee court, the court would be obliged to send notice to those parties whose counsel have refused to accept notices of transfer. If neither such steps are taken nor it is proved that such a party had knowledge of transfer of the case from any other source, then it can be safely said that "sufficient cause" was shown within the meaning of Order IX, Rules 4, 7, 9 and 13 of the Code and the final order passed by transferee court either dismissing the suit for default or passing ex parte decree or order, would be liable to be set aside on this ground alone.

16. The other question that arises in the case is as to what procedure should be followed in relation to those defendants/ opposite parties who have duly received summonses from the transferor court, but have failed to appear in spite of service thereof and the suit or proceeding has been transferred either in exercise of suo motu powers without giving notice or in exercise of powers of transfer upon an application without giving notice to such a party. Can it be said that transferee court is obliged to issue fresh notice to such a party? I do not find any reason why notice should go again to such a party from transferee court. Once a party has been served with summons and he fails to appear on a date fixed in the summons but subsequently intends to appear, it cannot be said as a general rule that that very party will suffer, if no summons is issued afresh by transferee court. Such a party can, in that eventuality, go to the court from which it had received summons and from there it can very well know to which court proceeding has been transferred. Such a party in the event of non-service of fresh summons from transferee court would not generally suffer in any manner. Rather, on the other hand, if it is laid down that if such transferee court is required to issue notice afresh to the parties who have failed to appear in spite of service of summons from transferor court, then that would amount to causing unnecessary delay in disposal of the proceedings and would not serve cause of justice. It is common experience that cases are transferred on many occasion from one court to another for administrative reasons. If all the time notices are required to be given to such parties, then the suit will never become ready and there will be undue delay in disposal of cases for no justifiable reason. There may be cases where there are several dozens non appearing defendants and in some cases their number may exceed even hundred. If it is laid down that transferee court is required to serve notice upon such defendants, then laying down such a law cannot be said to be in furtherance of justice, but the same would put hindrance in the speedy trial. Such an interpretation would be contrary to the intention of the legislature also as by Central Act 104/76, various amendments have been made in the Code and many amendments have been made for speedy

trial of cases and immediate implementation of the judgment/ order through process of the executing court, e.g., if an execution case is levied within a period of three years from the date of decree, requirement of service of notice of the execution proceeding upon judgment debtor has been dispensed with.

17. If such a non-appearing party after ex parte disposal of the case is able to satisfy the court that on the date fixed in the summons, he had reasonable cause for non-appearance on the date fixed in the summons and subsequently he could not appear at the time when the proceeding was taken up for ex parte hearing by the transferee court, because upon enquiry from transferor court he was not able to know to which court the proceeding was transferred in spite of the fact that he had promptly taken steps and was acting diligently, then that may be considered sufficient cause for setting aside the order/ decree.

18. In the case of Kishore Kumar Agrawal (supra), the correctness of which was doubted and, therefore, this case was referred to Division Bench, the defendant had appeared in the suit and applied for time to file written statement but thereafter the case was transferred from the Court of District Judge, Munger to the Court of Subordinate at Jamui who passed an ex parte order. When an application for setting aside ex parte decree was filed, the same was rejected by the trial court, but this Court allowed the appeal and set aside the ex parte decree upon the ground that no notice of transfer was sent to the party and has laid down a general law that in each and every case of transfer, fresh notice is required to be sent from transferee court. From perusal of the judgment of that case, it does not appear that no notice of transfer was given to the counsel of the defendant who had appeared in the suit at Munger and he had refused to accept the same. "*"

19. It may be stated that even if a case is transferred to a court, which is at a different station, either by virtue of general order of transfer passed by High Court or District Judge or by specific order of transfer in any individual case without giving notice of transfer to the parties, in my view, it is not necessary for the transferee court to give notices of transfer to the parties in each and every case. It is common experience that where cases are transferred by virtue of general order of transfer for various reasons, one of them may be creation of new court, many counsel shift their practice to the station where cases are transferred or new court is established. Some of the lawyers frequently visit those places where cases are transferred. In such cases, a lawyer who had been engaged and the client who engaged him may like to retain the file with him. Therefore, in such cases, transferor court should inform the lawyers who are appearing for the parties either for the plaintiff-appellant or defendant-respondent by giving notices to them regarding transfer and if they accept the notices of transfer, no transfer notice is necessary to be sent to the party from the transferee court, otherwise notices shall be sent to such parties from the transferee court. If a party has not appeared pursuant to service of summons by the transferor court, in such cases also, fresh notice/summons is not required to

be issued from the transferee court for the reasons stated in the foregoing paragraphs to avoid unnecessary delay in disposal of cases.

20. Learned counsel appearing on behalf of the petitioner has also placed reliance upon the decision of Special Bench of this Court in *Ram Sukul Pathak v. Kesho Prasad Singh* AIR 1918 Pat 341 and the decision of a learned single Judge of this Court in the case of *Hiralal and Others Vs. State of Bihar*, besides the decision of this Court in the case of *Kishore Kumar Agrawal* (supra). Learned counsel appearing on behalf of the opposite party has placed reliance upon a Division Bench decision of this Court in the case of *Lal Bahadur Sah Vs. Ram Narain Nayak*, wherein it has been laid down after thoroughly considering the matter that the observation in the case of *Ram Sukul Pathak* (supra) that notice of transfer is necessary to be given is obiter dicta and I am in respectful agreement with the view expressed in the case of *Lal Bahadur Sah* (supra). Their Lordships while concluding have observed that the question of notice arises where a party or his counsel has no knowledge. By expression "party or his counsel", their Lordships, in my view, meant that the party who has appeared or counsel of such a party. In the case of *Hiralat* (supra) also like the case of *Kishore Kumar Agarwal* (supra) general law has been laid down that notice of transfer is a must. In my considered view, both the aforesaid rulings are fit to be overruled.

21. Accordingly, I hold that the decisions of this Court in the cases of *Kishore Kumar Agarwal* (supra) and *Hiralal* (supra) laying down a general proposition that a court is bound to give separate notice to each party in respect of transfer of a case, do not lay down correct law and the same are hereby overruled.

22. Accordingly, I do not find any merit in the revision application and the same is dismissed, but without costs.

B.N. Agrawal, J.

23. I entirely agree.