

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5657 of 2011

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1. Sheo Hari Agarwal son of Sri Sagar Mal Agarwal Resident Of Mohalla-
Purani Bazar, P.S. Nawada, District- Nawada

.... Petitioner

Versus

1. Raj Kumari Devi W/O Lallu Prasad Resident of Village- Rajauli, P.S. Rajauli, District- Nawada
2. Sujit Kumar son of Lallu Prasad Resident Of Village- Rajauli, P.S. Rajauli, District- Nawada
3. Vijay Kumar son of Lallu Prasad Resident Of Village- Rajauli, P.S. Rajauli, District- Nawada
4. Deepak Kumar son of Lallu Prasad Resident Of Village- Rajauli, P.S. Rajauli, District- Nawada
5. Pankaj Kumar son of Lallu Prasad Resident Of Village- Rajauli, P.S. Rajauli, District- Nawada
6. Chandan Kumar son of Lallu Prasad Resident Of Village- Rajauli, P.S. Rajauli, District- Nawada
7. Bhola Prasad @ Bhola Ram son of Late Mahavir Prasad @ Mahavir Ram Resident Of Village- Rajauli, P.S. Rajauli, District- Nawada
8. Rajesh Prasad @ Rajesh Ram son of Late Mahavir Prasad @ Mahavir Ram Resident Of Village- Rajauli, P.S. Rajauli, District- Nawada

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Jitendra Prasad Singh

For the Respondent/s : Mr. Chitragupt Prasad

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR
MANDAL
ORAL ORDER

5 17-08-2015 Heard Mr. Jitendra Prasad Singh counsel for the

petitioner and Mr. Chitragupt Prasad for the respondents-

defendants.

Petitioner of Misc. case no. 03 of 2006 has filed the
present application aggrieved by the order dated 28.12.2010
passed by the learned Additional Munsif-V , Nawadah.

A brief background of the case shall be relevant for

consideration:-

The plaintiff filed the suit for declaration of title and recovery of possession. The same was dismissed for non-prosecution. The plaintiff had option to file another suit and/or to seek restoration of the suit as provided under Order 9 Rule 9 of the CPC. The plaintiff chose to file an application for restoration of the suit which gave rise to Misc. case no. 3 of 2006. In some of the paragraphs thereof the date of dismissal of the suit was incorrectly noted as 23.08.2006 which was/were corrected under authentication of the lawyer as 04.08.2006 which is the correct date of dismissal of the suit. Necessary correction in the office copy was, however, not made. The matter was taken up after few years when an affidavit on behalf of the plaintiff was filed under Order 8 Rule 4 of the Code in which the date of dismissal of the suit was mistakenly described as 23.8.2006. This was obviously for the reason that no correction was made in the office copy of the Misc. case no.3 of 2006 retained by the counsel. The plaintiff was examined and cross-examined. At this stage, it was revealed to the plaintiff that there was an obvious mistake in stating the correct date of dismissal of the suit. In such circumstances, an application (Annexure-3) was filed seeking permission of the court for recall of the plaintiff for his

examination as applicant-witness no.1. The same was considered and rejected by the trial court under the impugned order as, in the opinion of the court, would necessarily result in further cross-examination of the witness. Such correction in the evidence of the witness would not be permissible /desirable.

A counter affidavit has been filed to oppose the prayer.

Mr. Singh, counsel for the petitioner, submits that the mistake was patently obvious and, in the interest of justice, the trial court ought to have allowed the same particularly when the discretion in this regard is vested in the Court under Order 8 Rule 17 of the Code. Conversely, the counsel for the respondents opposed the prayer and contended that even during cross-examination the plaintiff witness stated the same date. There is no prayer for further cross-examination of the witness. Once the discretion vested in the court has been exercised against the petitioner, this court should not find flaw therewith.

I have considered the rival submissions. When a suit is dismissed for non-prosecution, the plaintiff has several remedies to choose from. The plaintiff could have filed a substantive suit or seek restoration thereof. In his wisdom, the plaintiff sought restoration of the suit. In the original petition, the



copy whereof has been enclosed as Annexure-1 it appears, the date of dismissal of the suit was printed as 23.8.2006 which was corrected under authentication by the lawyer as 4.8.2006. The contention of the petitioner is that owing to sheer mistake such correction could not be made in the office copy retained by the counsel. Such mistake appears to be bonafide. When the plaintiff adduced evidence or filed the affidavit he was obviously going by the statements made in the petition filed for restoration. It is a matter of common knowledge that in our society the parties give evidence as per the instruction or the legal advice of his counsel. There was no correction made in the date of dismissal of the suit in the office copy, and as such, the witness deposed to the same effect. No malafide can be imputed to the plaintiff in doing so. The ends of justice demand resolution of the dispute on merit and not by taking recourse to the technical flaws like the one in the case at hand although in doing so the defendant has been put to inconvenience.

Regard being had to the above, I am of the considered view that the trial court ought to have allowed the application of the plaintiff-petitioner for his recall for examination-in-chief/cross-examination. The order rejecting the said prayer passed by the trial court being not subservient to the

cause of justice is set aside on deposit/payment of a cost in the sum of Rs 800/- in favour of the contesting defendants. The trial Court shall allow the plaintiff to examine himself afresh in the light of the prayer made in the petition (Annexure-3). The respondent shall thereafter be at liberty to cross examine him.

The writ application is allowed.

(Kishore Kumar Mandal, J)

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