

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.53 of 2009

**(Against the order dated 22.10.2008 passed by the learned A.D.J.,
F.T.C. V, Chapra in Miscellaneous Case No.4 of 2000).**

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Jagdish Narain Singh

..... Respondent-Petitioner-Appellant
Versus

Ram Prit Singh & Ors

..... Appellants-Opposite Parties-Respondents
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Appearance :

For the Appellant/s : Mr. Nagendra Rai, Advocate

For the Respondent/s : Mr. S.S.P. Yadav, Advocate
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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL JUDGMENT

Date: 23-01-2015

1. This Miscellaneous Appeal has been filed against the order dated 22.10.2008 passed by the learned A.D.J., F.T.C. V, Chapra in Miscellaneous Case No.4 of 2000 whereby the learned court below has dismissed the Miscellaneous Case filed by the appellant for rehearing of the title appeal being title appeal No.56 of 1985/150 of 1986).

2. It appears that the plaintiff-respondent filed title suit No.11 of 1980 for declaration of title and confirmation of possession. The said suit was contested by the defendant-appellant. Thereafter, the plaintiff filed title appeal No.56 of 1985 before the lower appellate court. The father of the appellant appeared in the said



title appeal before the lower appellate court. Two vakalatnama were filed on his behalf, one on 15.10.1985 and the second on 09.12.1985. Thereafter, the title appeal was decided in absence of the appellant herein. The father of the present appellant filed Miscellaneous Case under Order 41 Rule 11 C.P.C. for rehearing of the title appeal alleging that the counsels, Mr. Kameshwar Narain Singh and Shankar Prasad Yadav were engaged on behalf of the appellant and he has paid their fees but subsequently he learnt that the appeal has been decided ex parte. The son of the present appellant enquired into the matter and learnt that the senior counsel, Mr. Kameshwar Narain Singh had died and the other Advocate, Shankar Prasad Yadav did not appear in the hearing of title appeal. The plaintiffs-respondents herein filed reply/counter-affidavit to the Miscellaneous Case denying all the allegations made by the appellant. By the impugned order, the court below dismissed the Miscellaneous Case recording a finding that no pairvi was being done since 1994 and this is the negligence and carelessness of the respondent-applicant, therefore, he is not entitled for condonation of delay and also cannot get benefit of Order 41 Rule 21 C.P.C. Accordingly, the Miscellaneous Case was dismissed.

3. The learned counsel, Mr. Nagendra Rai appearing on behalf of the appellant submitted that the learned court below while rejecting the Miscellaneous Case has not at all considered the



evidences produced by the present appellant in support of the case pleaded in the Miscellaneous Case and rejected the same on the ground that since 1994, no pairvi has been done. According to the learned counsel, in title appeal, day to day filing pairvi or hajiri is not necessary. The appellant is to be present when the appeal is taken up for hearing. In the present case, the court below has not at all recorded any finding as to whether the Miscellaneous Case could have been rejected on the ground for non-filing of pairvi on behalf of the respondent. The appellant engaged the Advocate and the Senior Advocate died and the other Advocate did not do any pairvi when the appeal was called on for hearing. Therefore, for the fault of the Advocate, the appellant should not be punished. The learned counsel, Mr. Rai relied upon the decision of the Supreme Court in the case of Rafiq and another v. Munshilal and another, A.I.R. 1981 Supreme Court 1400. The learned counsel further relied upon 2000(4) PLJR 104 Supreme Court (State of M.P. and anr. v. Pradeep Kumar and anr.) paragraph 12. On the basis of this decision, the learned counsel submitted that “the effort of the court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, but to see whether it is possible to entertain his grievance if it is genuine.”

4. On the other hand, the learned counsel, Mr. Yadav



appearing on behalf of the respondents submitted that both the decisions relied upon by the learned counsel for the appellant are not applicable in the present facts and circumstances of the case. According to the learned counsel, two Advocates were engaged and the case of the appellant itself is that fees were paid to Kameshwar Narain Singh and also to the other Advocate namely, Shankar Prasad Yadav. If the submission of the learned counsel for the appellant is accepted then in all cases, the respondent will never appear and on the ground that the Advocate did not take part in the appeal, therefore, the appeal may be re-heard. According to the learned counsel, this is not the intention of the legislature. The learned counsel further submitted that according to the decision of the Supreme Court relied upon by the learned counsel for the appellant itself, there must be a genuine case of the applicant. The court below found that there is no explanation at all and on the ground of inaction of the Advocate, only the judgment and decree which was passed by the court below legally cannot be set aside. The appellant could have filed appeal against the said judgment if at all there is any defect. On these grounds, the learned counsel submitted that the Miscellaneous Appeal be dismissed.

5. Perused the record. The appellant in the Miscellaneous Case has raised the grounds that two Advocates were engaged. Fees were paid to the Advocates. Out of them, one



Advocate died but the other Advocate did not appear when the appeal was called on for hearing. In support of this case of the appellant, the appellant has examined witnesses. So far the submission of the learned counsel that the court below has not discussed the evidences available on record is concerned, since this Court is exercising the appellate jurisdiction, this Court can also refer to the evidences produced by the appellant. The son of the appellant has been examined as P.W.1. He has stated the same thing as pleaded in the Miscellaneous Case filed by the appellant under Order 41 Rule 21 C.P.C. P.W.2 is Rajesh Singh who is formal in nature. P.W.3 has also stated that at the time of engaging the Advocate, the appellant had paid fees to the Advocates who assured that they will do all types of pairvi and shall appear on behalf of the appellant. These are the evidences in support of the case pleaded by the plaintiff.

6. Order 41 Rule 21 C.P.C. reads as follows:

“21. Re-hearing on application of respondent against whom ex parte decree made.- Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.”

7. In view of this provision, if the Court is satisfied



that the party applying for re-hearing was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-heard the appeal. In the present case, the case of the appellant is that notice was served and he engaged two Advocates, one died but the other did not appear. Therefore, the question is whether for non-appearance of the Advocate, who was engaged by the appellant, the appeal can be re-heard which has been decided on merit.

8. So far the decision relied upon by the learned counsel for the appellant i.e. A.I.R. 1981 Supreme Court 1400 is concerned, it appears that in that case, the case was dismissed for default for inaction of the Advocate. Likewise, the other decision 2000(4) PLJR 104 Supreme Court is also regarding the dismissal of the appeal by the High Court. In the present case, the respondents did not appear and appeal can be re-heard only if he shows that the respondents i.e. the Advocate of the respondents was prevented by sufficient cause. It may be mentioned here that for hearing of the appeal, the personal appearance of the party is not necessary. The Advocate is required to appear at the time of hearing. Therefore, so far Order 41 Rule 21 C.P.C. is concerned, on the ground that the Advocate did not appear, the appeal cannot be restored.

9. Since the decisions relied upon by the learned



counsel for the appellant were rendered in different situations of the facts, those are not to be followed blindly in the present case. It is settled principles of law that “the Court should not place reliance upon a judgment without discussing how the factual situation fits in with a fact situation of the decision on which reliance is placed, as it has to be ascertained by analyzing all the material facts and the issues involved in the case and argued on both sides. A judgment may not be followed in a given case if it has some distinguishing features. A little difference in facts or additional facts may make a lot of difference to the presidential value of a decision. A judgment of Court is not to be read as a statute, as it is to be remembered that judicial utterances have been made in setting of the facts of a particular case. One additional or different fact may make a world of difference between the conclusions in two cases. Disposal of cases by blindly placing reliance upon a decision is not proper.” Reference may be made in the case of **Narmada Bachao Andolan v. State of Madhya Pradesh & Anr., A.I.R. 2011 Supreme Court 1989**, paragraph 59.

10. Admittedly, in the present case, as stated above, the only ground taken by the appellant is inaction of the Advocate. In my opinion, inaction of the Advocate is not a ground of re-hearing of the appeal.

11. Thus, I find no merit in this Miscellaneous Appeal and accordingly, it is dismissed. If law provides, the appellant may approach appropriate forum by initiating appropriate proceeding.

(Mungeshwar Sahoo, J)

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