

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16215 of 2013

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Md. Shakib Akhtar @ Md. Shakib Arshad

.... Petitioner/s

Versus

Md. Fazle Imam & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Karuna Nath Sahay

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

8 10-08-2017 **1.** Heard the learned counsel, Mr. Rajeev Kumar Verma,

for the petitioner and the learned senior counsel, Mr. S.

S.Dwivedi, for the respondent.

2. This writ application under Article 227 of the

Constitution of India has been filed by the defendant No.3

petitioner for setting aside the order dated 28.06.2013 passed by

the learned Munsif Ist, Darbhanga in Eviction Suit No.22 of 2005

whereby the learned Munsif had recalled his earlier order dated

12.07.2012 and 7th March, 2013.

3. It appears that aforesaid eviction suit was filed by the

plaintiff respondent under the Bihar Building (Lease, Rent and

Eviction) Control Act (hereinafter referred as the 'BBC Act') only

on the ground of personal necessity. Special procedure was being

adopted under Section 14 of the BBC Act. After evidence of both



the parties was closed, the defendant No.3 appeared and filed application to recall the ex.-parte order against him on the ground that he was living at Dubai and when he came to know, he filed the application. The defendant No.3-petitioner also prayed for permission to cross-examine the plaintiff witnesses and the defendants witnesses. The Court below allowed this application after granting leave to contest to the defendant No.3-petitioner. Defendant No.3 petitioner filed written statement. Subsequently, application was filed by the plaintiff respondent for recall of the said order passed by the learned Munsif on the ground that the father of the defendant No.3 and his brothers had already filed contesting written statement and have also cross-examine the plaintiff witnesses and the eviction suit is to be tried expeditiously under the special procedure, therefore, the application filed by the defendant No.3 should not have been allowed and the defendant No.3 should not have been allowed to cross-examine the witnesses of the plaintiff as well as the defendants. If the order is allowed to stand then it will occasion failure of justice because the matter will linger on. The Court below after hearing both the parties by the impugned order recalled the said orders holding that the earlier the order were passed adopting the procedure of Code of Civil Procedure and according to the learned Court below, the eviction



suit on the ground of personal necessity is to be decided in summary procedure and thus the learned Munsif recalled the earlier orders.

4. The learned senior counsel, Mr. Verma, appearing on behalf of the petitioner submitted that the order was passed on 12th July, 2012 against the plaintiff whereby the petitioner was allowed to cross-examine the witnesses of the plaintiffs and defendants but the said order was never challenged by the plaintiff but the learned trial Court sit over the said order as an appellate Court and has recalled the order by the impugned order which the Court has no jurisdiction, therefore, the impugned order be set aside and the petitioner be allowed to cross-examine the witnesses of the plaintiffs and the defendants and to adduce his evidence in support of his case.

5. On the other hand, the learned senior counsel, Mr. S. S. Dwivedi, appearing on behalf of the respondent submitted that the tenancy was not created in favour of defendant No.3 and at paragraph 5 of the plaint, it is specifically pleaded that the tenancy is in favour of defendant No.1 and 5. This fact is admitted by the written statement filed by the defendant No.3. At paragraph 13 of the written statement, the defendant No.3 clearly stated that



tenancy was created only in favour of defendant No.1. According to the learned senior counsel, defendant No.1 is the father of defendant No.3 and defendant No.2 and 4 are brothers of defendant No.3. The learned counsel further submitted that after publication of notice in newspaper when nobody appeared, the Court proceed ex.-parte against the defendant thereafter the one brother of defendant No.3 appeared and filed recall application which was allowed and case proceeded. Subsequently, again other brother appeared and filed recall application after one year which was allowed and they were allowed to contest the suit. The suit proceeded ex.-parte against the defendant No.1 and defendant No.3. Thereafter, the father of the defendant No.3 and 2 and 4, i.e., defendant No.1 appeared and filed recall application for recalling the ex.-parte order against him which was again allowed and then Section 15 application was filed by the plaintiff which was allowed but the defendants did not deposit the rent as directed by the trial Court under section 15 of the BBC Act. The defence was, therefore, struck off and at this stage, the defendant No.3 appeared and filed recall application and the Court below without considering the case that the tenancy was created in favour of defendant No.1 and defendant No.5 only which is admitted in the written statement allowed the recall application and permitted the



defendant No.3 petitioner to cross-examine the witnesses of the plaintiff and also defendants. In view of this fact, it was incumbent on the part of the plaintiff to file application for recall of the order and, therefore, the plaintiff filed the review application and considering the situation, the Court in exercise of jurisdiction under Section 151 of the Code of Civil Procedure has recalled the order. Therefore, no case for interference in exercise of supervisory jurisdiction under Article 227 of the Constitution of India is made out.

6. Perused the impugned order. The written statement of the defendant No.3 has been annexed by the petitioner in the supplementary affidavit. The plaint has also been annexed in the supplementary affidavit. From perusal of paragraph 5 of the plaint, it becomes clear that the statement has been made to the effect that the suit premises was let out to the defendant No.1 and 5. In the written statement at paragraph 13, it is admitted by the defendant No.3 that the tenancy was not in favour of defendant No.5 rather it was in favour of defendant No.1 only. At paragraph 6 of the written statement, it is also clearly mentioned that the defendant No.3 and the defendant have unnecessarily been impleaded in the suit. Now, therefore, in view of the pleadings of the parties, the real controversy between the parties was as to



whether the tenancy was in favour of defendant No.1 and 5 or was only in favour of defendant No.1. The defendant No.3 never claimed in the written statement that he is tenant of the plaintiffs nor he claimed that tenancy was created in his favour.

7. On the other hand, it is his case that he resides in Dubai in connection with his job. From perusal of the impugned order, it appears that the suit was fixed for ex.-parte hearing on 5.10.2005. Then on 25.10.2005, the defendant No.5 appeared and filed application for recalling the ex.-parte order. It was allowed on payment of cost of Rs.800/- and then the defendant No.4 appeared and filed an application for recalling the ex.-parte order against him dated 5.10.2005. On 09.02.2007, the ex.-parte order against defendant No.4 was recalled with cost. Thereafter, on 01.10.2007 the defendant No.5 filed his written statement and the defendant No.4 filed his written statement on 22nd February, 2008. Much after the filing of written statement by defendant No.4, the defendant No.1 in whose favour the tenancy was created appeared on 02.05.2008 and filed application for recall of ex.-parte order. On 22.08.2008, the Court allowed the application and ex.-parte order was recalled. Thereafter, the witnesses were examined by the parties. On 3.2.2010, Section 15 application was allowed against which civil revision was filed which was dismissed. The



evidence of the defendant was closed on 13th February, 2012 and the case was fixed for argument and thereafter on 24.02.2012, the defendant No.3 appeared and filed recall application for recalling ex.-parte order against him dated 05.10.2005. Thereafter, on 01.06.2012, the defendant No.3 filed application for recalling the witnesses for examination which was allowed by the order dated 12.07.2012 by the trial Court.

8. In view of the above facts, it is evident from the plaint, written statement and the impugned order, that this is one of instance which shows the mala fide intention of the defendants to linger an eviction suit and to harass the plaintiff. The suit was filed on the ground of personal necessity wherein it is clearly admitted that the tenant is defendant No.1, i.e., father of defendant No.2 to 4. The stand taken by the defendant No.1 and the defendant No.4 and defendant No.3 are the same as from perusal of the writ application, it appears that nowhere it is mentioned that the stand of defendants are different, i.e., the defence of these defendants are different rather admitted fact is according to the defendant No.3, petitioner himself has been unnecessarily made party in the eviction suit and that the defendant No.1 is only tenant of the suit premises. The defendants have been able to drag the mater from 2005 to 2017, i.e., for 12 years on one ground or the



other and the sequence of dates above mentioned shows the deliberate intention of the defendants to delay the disposal of eviction suit by hook or crook and by filing frivolous and vexatious application.

9. So far the submission of the learned counsel for the petitioner that the court below had no jurisdiction to recall the earlier order is concerned, it may be mentioned here that if the Court below had no jurisdiction to recall the orders then how the ex.-operate orders earlier which was passed against the defendant were recalled by the Court at the instance of the defendant. Therefore, in my opinion, this is only ornamental arguments advanced by the learned counsel for the petitioner.

10. As stated above, from perusal of the impugned order, it appears that the Court below considered various decisions of the High Court as well as Apex Court and has passed a reasoned order, therefore, in no case it can be said that the order passed by the Court below is without jurisdiction or it has been passed in the manner not permitted by law or that if the order is allowed to stand, it will occasion failure of justice. Rather if the impugned order is set aside, the plaintiff shall suffer serious loss and it will occasion failure of justice and, therefore, the impugned order



needs no interference in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

11. In the result, this writ application is dismissed with cost of Rs.10,000/- to be paid by the petitioner to the plaintiff respondent within one month from today in the Court below. The cost must be paid through the Court to the plaintiff respondent failing which the plaintiff shall be at liberty to realize the same through the process of Court.

(Mungeshwar Sahoo, J)

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