IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.19261 of 2010

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1. Virendra Kumar Singh S/O Late Nand Kumar Singh R/O Vill & P.O.- Bidaul, P.S.- Bihta, Dsitt.- Patna At Present Residing At Road No.-6 Rajeev Nagar, P.O.- Keshari Nagar, P.S.- Rajeev Nagar, Distt.- Patna
2. Chandrawati Devi W/O Virendra Kumar Singh R/O Vill & P.O.- Bidaul, P.S.- Bihta, Dsitt.- Patna At Present Residing At Road No.-6 Rajeev Nagar, P.O.-Keshari Nagar, P.S.- Rajeev Nagar, Distt.- Patna

.... Petitioner

Versus

Allahabad Bank, A Body Corporate Constituted Under Banking Companies (Acquisition And Transfer Of Undertings) Act, 1970 Having Its Head Office At 2, Netajee Subhash Road, Kolkata And A Branch Office Amongst Other Places At Sheikhpura, P.S.- Shashtri Nagar, Town & Distt.- Patna Through The Branch Manager, Sheikhpura

.... Respondent

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Appearance :

For the Petitioner/s : Mr. R.K.P.Singh, Advocate
Mr. Bal Bhushan Chaudhary, Advocate

For the Respondent/s : Mr. Shiv Mohan Saha, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

Date: 10-04-2018

Petitioners before this court were opposite parties before the court below. They have filed this writ application for quashing the order dated 04.06.2000 passed by Subordinate Judge-III, Patna in Miscellaneous Case No.04 of 2008 whereby and whereunder the order dated 09.07.2002 dismissing the Title (Mortgage) Suit No.247 of 1996 was set aside and the suit was restored to its original file and number.

2. Heard learned counsel for the petitioners and the respondent.

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3. The fact, in brief, is that the respondent-Allahabad Bank filed Title (Mortgage) Suit No.247 of 1996 on the file of Subordinate Judge, Patna against the petitioners and other defendants which in course of trial was dismissed for default on 09.07.2002. The respondent Bank having learnt about the dismissal order filed Miscellaneous Case No.04 of 2008 for setting aside the dismissal order which after hearing was allowed. The suit was filed for recovery for loan which was sanctioned in favour of one Sri Bhagwan Singh for purchasing a truck. The petitioner no.2 was a guarantor to the said loan and he had executed a deed of agreement to mortgage his property in favour of Bank by depositing her title deed as security. The said Bhagwan Singh defaulted in payment of installment of loan and the amount of loan with interest against Bhagwan Singh increased to Rs.6, 58,631/-. The suit was accordingly filed which after transfer came to the Court of Subordinate Judge-III, Patna on 18.06.1996. The defendant no.1 Bhagwan Singh appeared in the suit before issuance of summon and filed a petition praying therein to direct the plaintiff Bank to serve a copy of plaint upon him to enable him to file written statement. The copy was not served and the case proceeded ex-parte. The evidence was closed and the case was fixed for argument. At the time of argument, the court below found that the direction to serve copy of plaint on the defendant no.1 was not

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complied and so judgment could not be passed and the plaintiff was asked to secure appearance of defendants. The plaintiff filed a petition for publication in daily newspaper and accordingly the notices were published in daily newspaper 'Hindustan'. Thereafter the plaintiff left taking interest, in consequence of which the suit was dismissed in default on 09.07.2002.

4. Learned counsel for the petitioners submits that after five years of dismissal of the suit, the respondent filed miscellaneous case which was barred by limitation. The court below without condoning limitation in filing the miscellaneous case entered into hearing and allowed the miscellaneous case. The respondent Bank served a copy under Section 13 of SARFAESI Act in order to recover the loan from the petitioners and other defendants suppressing the fact that Title (Mortgage) Suit filed against the petitioners, stood dismissed for non-prosecution. The petitioners after receiving notice enquired and got information that the Title (Mortgage) Suit had already been dismissed on 09.07.2002. He further submitted that one of the defendants who had taken loan died on 17.08.2009 outside the State. He was residing in Uttar Pradesh and so he was not aware about the progress of the suit. The defendant Bhagwan Singh had already died on the date of publication of notice. The court below has allowed miscellaneous case against a dead person which is not sustainable. The respondent

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Bank after restoration of Title (Mortgage) Suit No.247 of 1996 left taking interest and the said suit has again been dismissed in default.

5. Learned counsel for the respondent, on the other hand, submits that the miscellaneous case has rightly been allowed considering the fact that defendants deliberately did not appear to contest the case. The impugned order does not require any interference and this writ application is fit to be dismissed.

6. On going through the submissions of both the parties, I find that one of the defendants Bhagwan Singh died on 17.08.2009 at Faridabad which is evident from death certificate of Bhagwan Singh annexed as Annexure 5 to the application. This fact has not been denied by the respondent. The notice for appearance of opposite parties was published in daily newspaper on 14.09.2009 on which date the defendant was not alive. Thus, the court below proceeded with hearing of Miscellaneous Case No.04 of 2008 against a dead person. The petition for limitation was filed but the court below without condoning limitation and assigning any reason admitted the miscellaneous case as per order dated 22.04.2009 subject to limitation. The court below has committed error in not passing the order on limitation petition before admitting the miscellaneous case. The court below while deciding the case on merit has observed that the circumstance mentioned in the petition is convincing and there

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was no willful laches on the part of the Bank. This observation is against the material on record and so the same is not sustainable.

7. In view of above discussions I find that the order allowing miscellaneous case restoring the Title (Mortgage) Suit No.247 of 1996 to its original file is not sustainable particularly in view of the fact that the said order was passed against a dead person. The impugned order is accordingly set aside and this writ application is allowed.

(Sanjay Kumar, J)

Harish/-

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CAV DATE	
Uploading Date	19.04.2018
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