

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Second Appeal No. 370 of 2017**

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1. Binod Prasad, Son of Vishwanath Prasad, resident of Barh, Stationpar, Police Station Barh, District- Patna, presently residing at Mohalla Ramchandrapur, Police Station Laheri, District- Nalanda.
  2. Sunil Kumar, Son of Mishri Lal, resident of Mohalla Mogal Kuan, Police Station Sohasarai, District Nalanda.
  3. Bhola Prasad, Son of Late Ramchandra Prasad, resident of Mohalla Jalalpur, Town Biharsharif, Police Station Sohasarai, District- Nalanda.

... .. Appellants

Versus

1. Dahu Mahto alias Dahu Bhagat, Son of Late Leela Mahto, resident of Mohalla Choti Pahari, Post Office- Sohasarai, Police Station Sohasara, District- Nalanda.
2. Anil Kumar, Son of Sri Dahu Mahto alias Dahu Bhagat, resident of Mohalla Choti Pahari, Post Office- Sohasarai, Police Station Sohasara, District- Nalanda.

... .. Respondents

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**Appearance :**

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| For the Appellant/s  | : | Mr. Syed Firoz Raza |
|                      |   | Mr. Khatim Reza     |
| For the Respondent/s | : | Mr. Anil chandra    |

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH**

**JUDGMENT AND ORDER**

**ORAL**

**Date : 26-04-2018**

The second appeal has been placed for hearing under Order XLI Rule 11 of the Code of Civil Procedure, 1908.

2. The appellants have put to challenge the judgment and decree, dated 30.03.2017, passed by learned District Judge, Nalanda, at Biharsharif, in Title Appeal No. 22 of 2016, whereby he has affirmed the judgment and decree, dated 03.03.2016, passed in Misc. Case No. 69 of 2008, whereby learned Sub Judge IV,



Nalanda, at Bihar Sharif had dismissed the objection of the appellants, under Order XXI Rule 97 read with Section 151 of the Code of Civil Procedure, 1908.

3. The second appeal has been placed under the heading “For Hearing Under Order XXI Rule 11 CPC”. I have heard Mr. Syed Firoz Raza, learned Counsel for the appellants and Mr. Anil Chandra, learned Counsel for the respondents at length and since I am of the view that no substantial question of law is involved in the present second appeal, which requires determination by this Court, it is being disposed of at this stage itself by the present judgment and order.

4. The suit premises is a shop, admittedly owned by respondent no. 1. Respondent no. 2 is son of respondent no. 1, who was tenant of respondent no. 1 of the suit premises. The eviction suit was decreed on 22.04.2008 and accordingly a decree of eviction was passed. The respondent no. 1 filed execution case, for execution of the decree, dated 22.04.2008, which gave rise to Execution Case No. 05 of 2008. The appellants filed objection in the said execution case, under Order XXI Rule 97 of the Code of Civil Procedure, 1908, which came to be dismissed by learned Sub Judge V, Nalanda, at Bihar Sharif, by his judgment and decree, dated 03.03.2016. Against the said judgment, dated 03.03.2016,



passed by learned Sub Judge V, the appellants filed appeal before the learned District Judge, Nalanda, at Biharsharif, giving rise to Title Appeal No. 22 of 2016, which has been dismissed by the judgment and decree under appeal.

5. This is how the present second appeal has been filed against the judgment and decree, dated 30.03.2017, passed by learned District Judge, Nalanda, at Biharsharif.

6. Evidently, respondent no. 1 is the decree holder and respondent no. 2 is the judgment debtor in the said Execution Case No. 05 of 2008. The appellants, in their objection in the execution case, took the plea that initially the elder brother (Vijay Kumar) of appellant no. 3, who is cousin of appellant Nos. 1 and 2, had taken a shop from respondent no. 1 in the year 1988 and under a deed of agreement, dated 22.12.1988, the said Vijay Kumar had started his business in the name and style "New Pal Hotel", in which the appellants were engaged as business partner with the said Vijay Kumar. Since the shop, which was let out initially, was not adequate to carry on the business smoothly, and there was dire need of more vacant land, which was adjacent to the main shop, in the year 1993, a fresh agreement was arrived at between the respondent no. 1 and Mishri Lal, father of appellant no. 2, on 20.12.1993, which was to be in force from 01.01.1994 to



31.12.1995. It was their further case that since the business was earning substantial profit, the respondents pressurized them to accept them as partners in the business. Vijay Kumar, the original tenant, refused to accept the respondents as partners of the business and he retired himself from the business. Thereafter, the respondents again started pressurizing the remaining partners of the business, who were still engaged in the business,. The remaining partners of the business (the appellants herein) accepted them as partners under compulsion, and thus appellants agreed to take respondent no. 2 as a partner in the business, whereafter respondent no. 1 executed a showee deed of lease, on 12.01.1996, in the name of respondent no. 2 for a period of five years, commencing from 01.12.1996 up to 31.01.2001, in which the entire premises were shown under three schedules therein, in which the appellants continued with their business in the same manner and in the same name and style. After the lease agreement expired, on 19.01.2001, respondent no. 1 again executed a deed of lease, commencing from 01.02.2001 to 31.01.2006 in favour of respondent no. 2. It was the specific case of the appellants that they, along with respondent no. 2, had executed a registered deed of partnership, dated 23.01.2001 and when second deed of lease was executed, these appellants again executed deed of partnership



on 24.03.2006. It was their case that respondent no. 2, since had started residing out of the said town, willingly retired from the partnership business after due accounting of profit and loss; whereas the appellants remained in the premises as tenants and dealt with their business. They also pleaded that as was being done earlier, they paid monthly rent @ Rs. 1500/- up to December, 2008, and in token of receiving rent, the respondent no. 1 used to make endorsement of payment in a notebook. They asserted that thereafter respondent no. 1 refused to accept monthly rental on the pretext that he would realize a sum of Rs. 5,000/- per month and Rs. 5,00,000/- by way of advance, which was not agreeable to these appellants. They asserted, in addition, that they had started tendering monthly rent through money orders since respondent no. 1 had refused to accept the monthly rental. They further asserted that on 10.09.2008, they got some hint about filing of a suit in respect of the suit premises by respondent no. 1, whereafter on enquiry they learnt about the filing of Execution Case No. 05 of 2008. According to the appellants, the suit was collusive in nature as the appellants were not impleaded as parties in the said suit and suppressing material facts, they tried to secure eviction of the appellants from the suit premises.



7. The objection, so filed by the appellants, in Execution Case No. 05 of 2008, gave rise to registration of Misc. Case No. 69 of 2008.

8. The respondents filed their separate responses in the said Misc. Case No. 69 of 2008. The respondent no. 1 took objection over the maintainability of the miscellaneous case, under Order XXI rule 97 of the Code of Civil Procedure, 1908, asserting that the appellants do not have any right over the disputed shop, since respondent no. 2 was the tenant. The appellants were neither the tenants nor they had paid any rent; rather, they were set up by the appellant no. 2 to present the miscellaneous petition. The disputed shop was self-acquired property of respondent no. 1, over which respondent no. 2 did not have any right, title or interest. He denied the assertion of the appellants that the said Vijay Kumar had given any advance money and that he was in any way concerned with the shop. He also denied the case of the appellants that they carried out any business in the disputed shop with the said Vijay Kumar. As has been noticed, respondent no. 2 denied of having received any rental from the appellants or demanded any such rent.

9. The respondent no. 2, in his response, asserted that he did not have any right over the disputed suit premises. According



to him, he had taken lease of the premises firstly for the period of 5 years, beginning from 12.01.1996. Subsequently, the lease agreement between the respondent no. 2 with respondent no. 1 was extended on 19.01.2001 and 10.02.2006 and period of the last lease agreement was up to 09.02.2011. He asserted that respondent no. 1 did not have any right against him during the subsisting period of lease. He accepted that after execution of the lease deed, he had made the appellants as partners and sub-let the suit premises to them for rental of Rs. 14,000/- per month. He asserted that the appellants were not tenants under respondent no. 1; rather, respondent no. 2 was the tenant of respondent no. 1. Firstly, on this ground he opposed the miscellaneous case that the appellants did not have any right to object execution of the eviction.

**10.** It appears from the impugned orders that the parteis adduced their evidence, both oral and documentary, to establish their rival pleadings and claims. The Executing Court, i.e. the Court of learned Sub Judge V, Nalanda, at Biharsharif, upon examination of the evidence on record, adduced in the proceeding, under Order XXI Rule 97 of the Code of Civil Procedure, 1908, concluded that the disputed property was self-acquired property of respondent no. 1. He further concluded that respondent no. 2 had taken the shop on lease through registered deed from his father,



respondent no. 1. The respondent no. 2, while entering into the partnership with the appellants had not obtained any kind of permission of respondent no. 1 and such agreement was, therefore, not binding upon the respondent no. 1. Learned Sub Judge V further held that the appellants did not enter into any agreement of lease with respondent no. 1 and they failed to prove by any documentary or cogent oral evidence that they were paying rent to respondent no. 1.

**11.** Applying the provision of Section 12 of the Bihar Building (Lease, Rent and Eviction) control Act, 1982, (hereinafter referred to as 'the Act'), learned Sub Judge V concluded that the appellants were not tenant of respondent no. 1 and were not paying rent to him nor any advance money was paid to him and, therefore, they did not have any legal right to interfere with the execution of the decree, dated 22.04.2008.

**12.** The findings recorded by learned Sub Judge V have been affirmed by learned District Judge, Nalanda, at Biharsharif, on an appeal preferred by the appellants.

**13.** Mr. Syed Firoz Raza, learned Counsel appearing on behalf of the appellants, has heavily relied on Order XXI Rule 101 of the Code of Civil Procedure, 1908, and has submitted that the Executing court is duty bound to determine all questions, including



question relating to right, title or 'interest' in the property arising between the parties to a proceeding on an application under Order XXI Rule 97 of the Code of Civil Procedure, 1908, which are relevant to adjudication of such application. He has emphasized on the expression 'interest', occurring in Order XXI Rule 101 of the Code of Civil Procedure, 1908, to contend that the appellants were, on the basis of their pleadings, in a position to make out a case that they had interest in the disputed property by virtue of the agreement, which they had entered into with respondent no. 2, the son of respondent no. 1. On the strength of the said agreement with respondent no. 2, who was, admittedly, the tenant of respondent no. 1, they had developed interest in the disputed shop. While deciding objection of the appellants, the Executing Court ought to have considered this aspect, which it failed to do. The appellate court below, according to him, also failed to appreciate this significant aspect of the matter and wrongly dismissed the appeal.

**14.** According to him, following are the substantial questions of law, which the present second appeal involves:-

“1. Whether the objectors-appellants are coming in possession of the suit premises from 1988 having right, title and interest to maintain the objection under Order XXI Rule 97 of the Code of Civil Procedure?



2. Whether the father (Landlord) and son (tenant) collusiveness could extinguished the right of the appellants?

3. Whether the partnership hotel business with the son of landlord tantamount to termination of earlier possession of the appellants?

4. Whether the father filed eviction suit against the son is a collusive suit?"

**15.** Mr. Anil Chandra, learned Counsel appearing on behalf of respondent no. 1, has referred to Section 12 of the Act and has submitted that in view of the clear language of the said provision, the objection made by the appellants, under Order XXI Rule 97 of the Code of Civil Procedure, 1908, was not maintainable. In addition, he has relied on a decision of this Court, in the case of **Md. Neyazul Haque and Another v. Fahima Siddiqui and Another**, reported in **2011 (3) PLJR 944**, and Supreme Court's decision, in the case of **Atma Ram Builders Private Limited v. A. K. Tuli and Others**, reported in **(2011) 6 SCC 385**.

**16.** After having heard learned Counsel for the parties, I have given my anxious consideration to the submissions made on their behalf and other materials available on record. In the background of the plea, which has been taken to resist the



execution proceeding, I should, first, take note of the statutory provisions, under Section 12 of the Act, which reads thus:-

**“12 - Binding nature of the order of the Court on all persons in occupation of the building —** Notwithstanding anything contained in any other law, where the interest of tenant, in any premises is determined for any reason, whatsoever, and any order is made by the Court under this Act, for the recovery of possession of such premises, the order shall be binding on all persons who may be in occupation of the premises and vacant possession thereof shall be given to the landlord by evicting all such persons therefrom:

Provided that nothing in this section shall apply to any person who has an independent title to such a premises or to tenant who has been inducted with the express written permission of the landlord himself personally.”

**17.** Before I advert to the provision under Section 12 of the Act, it needs to be kept in mind that Eviction Suit No. 03 of 2007 was filed and decided under and in accordance with the provisions under Section 11 of the Act. Section 11 of the Act prescribes the grounds, which are available for eviction of a tenant



in possession of any premises. Section 11 of the Act contains *non-obstante* clause and reads thus:-

“(1) ‘Notwithstanding’ anything contained in any contract or law to the contrary but subject to the provisions of the Industrial Disputes Act, 1947 (Act XIV of 1947), and to those of Section 18, where a tenant is in possession of any building, he shall not be liable to eviction therefrom except in execution of a decree passed by the Court on one or more of the following grounds:”

**18.** Section 12 of the Act also contains *non-obstante* clause and in clear terms, it lays down that notwithstanding anything contained in any other law, where the interest of a tenant in respect of any premises is determined and any order is made by the Court under any Act, the order shall be binding on all persons who might be in occupation of the premises. The exception to this general rule is that this does not apply to any person who has an independent title to such premises or the tenant who has been inducted with the express written permission of the landlord himself personally. Section 12 of the Act, apparently, has overriding effect over ‘any other law’. It envisages that despite any other provision in any other law, the order of the Court made under



the Act for recovery of possession of premises, where interest of the tenant has been determined, shall be binding on all persons.

**19.** In my view, therefore, considering the clear language used in Section 12 of the Act, there cannot be any resistance to execution of an order for recovery of possession except on the ground mentioned in the said section itself by way of proviso, i.e. when a person has an independent title to such premises or if the tenant who has been inducted with the express written permission of the landlord himself personally.

**20.** Learned Counsel for respondent no. 1 has rightly relied on the decision of this Court, in the case of **Md. Neyazul Haque** (supra). The Supreme Court's decision, in the case of **Atma Ram** (supra), has been considered in the case of **Md. Neyazul Haque** (supra), with special reference to paragraphs 4 and 5 thereof, which, in my view, are appropriate for the present judgment also, which are being re-produced herein below:-

“4. It is deeply regrettable that in our country often litigations between the landlord and tenant are fought up to the stage of the Supreme Court and when the tenant loses in this Court then he starts a second innings through someone claiming to be a co-tenant or as a sub-tenant or in some other capacity and in the second round of litigation the matter



remains pending for years and the landlord cannot get possession despite the order of this Court. The time has come that this malpractice must now be stopped effectively.

5. After our order dated 06th October, 2010, the counsel of the tenant should have advised the tenant to vacate the premises in question like a gentleman before or on the expiry of six months from 06.10.2010 but unfortunately they advised the tenant to put up some other person claiming independent right against the landlord as a sub-tenant and start a fresh round of litigation to remain in possession. In this manner, our order dated 06.10.2010 was totally frustrated.”

**21.** Learned Counsel appearing on behalf of the appellants has not been able to make out his case with reference to Order XXI Rule 101 of the Code of Civil Procedure, 1908, firstly, for the reason that the said provision has to be read with *non-obstante* clause, occurring in Section 12 of the Act. The appellants have not found to be tenants of respondent no. 1 by the Courts below, based on the evidence on record. The findings are concurrent, which cannot be said to be perverse. The question of determination of the interest of the appellants in a proceeding arising out of eviction suit was limited to the relationship of tenant and landlord between them and respondent no. 1. Though they



attempted to develop a case of payment of rent to respondent no. 1 in order to establish their claim of being tenants of respondent no. 1, they could not establish the same.

**22.** In the background of the discussions, as above, in my opinion, the second appeal does not involve any substantial question of law to be determined by this Court. This appeal has, therefore, no merit. The appeal is, accordingly dismissed at this stage itself.

Prabhakar Anand/-

**(Chakradhari Sharan Singh, J.)**

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| CAV DATE          | N/A        |
| Uploading Date    | 30-04-2018 |
| Transmission Date | N/A        |

