

(2004) 09 PAT CK 0127**Patna High Court****Case No:** Civil Revision No. 62 of 2003

Mostt. Phulwati Devi and Others

APPELLANT

Vs

Md. Aslam and Another

RESPONDENT

Date of Decision: Sept. 30, 2004**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 2, Order 6 Rule 16, Order 7 Rule 11, Order 9 Rule 13

Citation: (2004) 4 PLJR 562**Hon'ble Judges:** S.N. Hussain, J**Bench:** Single Bench**Advocate:** Rajendra Prasad, for the Appellant; Rudradeo Kumar Sinha, for the Respondent**Judgement**

@JUDGMENTTAG-ORDER

S.N. Hussain, J.

Heard learned counsel for the parties. Petitioners are defendants in Eviction Suit No. 1/1991 which was filed by the opposite parties originally for eviction of one Tinkauri Mahto, the predecessor of the petitioners on the grounds of personal necessity of the plaintiffs and default by the defendants in payment of rent and also for recovery of arrears of rent from the defendants. Later, by amendment another relief for declaration of plaintiffs" title was added in the plaint in 1998.

2. The petitioners are aggrieved by order dated 9.10.2002 passed in the aforesaid suit by which the learned First Munsif, Munger, rejected their petition (Annexure-1) filed under Order VII, Rule II and Order-VI. Rule-16 of the CPC for dismissing the suit in limine as according to them, the plaint did not disclose any cause of action for trial.

3. The matter has a very chequered history as initially the plaintiffs had filed Eviction Suit No. 16 of 1990 (Annexure-A) against Tinkauri Mahto (predecessor of the petitioners) for his eviction on the grounds of personal necessity of the plaintiffs and default in payment of rent by the defendants. The said suit was dismissed by Judgment and decree dated 28.3.1992 (Annexure-B) by the First Munsif, Munger, after finding that the plaintiffs could not produce any document to show their title over the suit premises, that there was no relationship of landlord and tenant between the parties and that in the said circumstances there was no question of default and personal necessity. It appears that the said Judgment and decree was not challenged by the plaintiffs.

4. After about two years the same plaintiffs again filed an Eviction Suit bearing Eviction Suit No 1 of 1994 against the same defendant with respect to the same property raising the same grounds of default and personal necessity. The said suit was dismissed ex-parte by order dated 21.9.1994 (Annexure-C) as not maintainable and barred by res-judicata.

5. Against the said Judgment and decree of the trial court the plaintiffs filed Title Appeal No. 20 of 1994 which was allowed by the 3rd Additional District Judge, Munger, on 12.9.1997 (Annexure-D), holding that principle of res judicata would not be attracted as earlier no evidence could be adduced and remitted the matter to the trial court with direction to decide the suit on merits after considering the oral and documentary evidence of the parties with regard to their respective claims over the suit premises. The said Judgment and decree was not challenged by the defendants.

6. It was only thereafter that the plaintiffs got another relief added to their plaint for declaration of their title over the suit premises, whereafter by Judgment and decree dated 29.4.1998 (Annexure-E) the learned First Munsif, Munger, decreed the suit ex-parte holding that plaintiffs had proved their title over the suit land as well as the relationship of landlord and tenant between the parties by valid and reliable evidence.

7. Against the said ex-parte decree the defendants filed Misc. Case No. 8 of 1998 under Order-IX, Rule-13 of the CPC which was allowed by the learned Munsif and the ex-parte decree was recalled and the suit was restored. Thereafter, on 17.4.2001 issues were framed and the suit was placed for hearing. It was much thereafter that the defendants on 25.6.2001 filed the above mentioned petition (Annexure-1) under Order-VII, Rule-11 and Order-VI, Rule-16 C.P.C. for dismissing the suit in limine on the grounds that the plaint did not disclose any cause of action for the trial, as the cause of action as per the plaint is said to have arisen on 28.8.1992 when the earlier suit was dismissed on merits and hence the suit is barred by the law of limitation. This petition of the defendants has been dismissed by the impugned order as mentioned above.

8. The learned counsel for the defendants-petitioners submits that the plaintiffs failed to prove their ownership in the previous suit which was thus dismissed on merits against which no appeal was filed by the plaintiffs and hence they cannot legally raise the same claim again in this suit against the same parties with respect to the same property. The petitioners' learned counsel further averred that their petition was on two grounds, namely, res judicata as mentioned above and under-valuation as the plaintiffs had valued the suit premises at Rs. 10,000/- and paid ad valorem court fee thereon whereas the suit property was a seven rooms house over two kathas of land in municipal area of Munger but the question of valuation was not properly appreciated by the learned court below. He also contended that defendants-petitioners had no information of appellate order remanding the case to the trial court keeping all the questions open and hence the trial court was also to see the matters raised by them. It is claimed by the learned counsel for the petitioners that the plaint of this suit has to be rejected on the plaintiffs own pleading about the earlier suit and in this connection he relied upon the decision in case of Smt. Vasanti Devi and Anr. vs. Yadunandan Mahto, reported in 1998(2) P.L.J.R., 568, in which it has been held that question of res judicata is to be tried as a preliminary issue.

9. On the other hand, the learned counsel for the plaintiffs-opposite parties claimed that the rent of the premises was Rs. 50/- per month and hence the valuation of the suit for eviction was earlier fixed as Rs. 600/- which was enhanced by Rs. 10,000/- when relief for declaration of title only was added and hence the valuation of the suit was quite sufficient and the trial court had already accepted it as proper earlier. He further contended that no document or evidence of plaintiffs' ownership and parties' relationship of landlord and tenant could be produced in the earlier suit due to the fault of their counsel for which they cannot be legally punished. The learned counsel for the plaintiffs-opposite parties also averred that admittedly defendants had not appeared in the previous suit and hence the principle of res judicata was not applicable as per explanation-III to Section-II of the C. P. C. It was also claimed by the learned counsel for the opposite parties that the appellate Court having already held that there was no resjudicata and having remanded the matter to be decided on merits, the trial court cannot legally go against the appellate order which was final.

10. After considering the arguments of the learned counsel for the parties and after perusing the materials on record, it is quite apparent that the impugned order has been passed on the petition of the defendants under Order-VII Rule-11 and Order-VI Rule-16 C.P.C. Out of the said provisions Order-VI Rule 16 C.P.C. is with respect to striking out or amending the pleading which is unnecessary, frivolous, prejudicial, embarrassing, dilatory or abuse of process of the court and hence it is not at all applicable to the facts and circumstances of the case. So far the other provision of Order-VII Rule-11 C.P.C. is concerned, the defendants-petitioners have taken the plea (that the plaint does not disclose a cause of action, that the relief claimed in the

plaint is undervalued and that the suit appears from the statement in the plaint to be barred by res judicata.

11. So far the question of cause of action is concerned, it is apparent from the plaint of the subsequent suit that cause of action for declaration of plaintiffs' title and for eviction of defendants were properly and sufficiently stated and hence the plaint cannot be rejected on that ground. Furthermore, so far the question of valuation of the suit is concerned, the reliefs of the suit are two fold, firstly, for declaration of title and secondly for eviction and hence for the relief of eviction valuation to the tune of twelve months' rent has been given and so far the only other relief of declaration of title is concerned, a declaratory court fee was sufficient, but the plaintiffs had paid ad-valorem court fee on the value of the suit premises (Rs. 10,000/-) fixed by the plaintiffs, which the trial court had already accepted much earlier. Hence, on both the counts the plaint cannot be legally rejected, however, the trial court may decide the two matters at the time of final hearing of the suit.

12. So far the question of bar of res judicata is concerned, the appellate court in its Judgment dated 12.9.97 in Title Appeal No. 20 of 1994 had specifically held that res judicata was not attracted in the instant suit as the earlier suit was dismissed as no evidence was adduced by the plaintiffs and moreover in the said suit defendants had also not appeared and thus there was no question of res judicata. Furthermore, the said order of the appellate court was never challenged and hence the trial court was bound to decide the suit on merits without going into the question of res judicata as directed by the appellate court in its said order of remand. It appears that under these circumstances the defendants never filed any petition under Order-XIV, Rule-2 C.P.C. for deciding the question of res judicata as preliminary issue and hence the case law relied upon by the petitioners in Smt. Vasanti Devi and another, *supra*, is not applicable to the instant case.

13. It is, thus, necessary in the ends of justice that the suit be decided on merits so that the matter in issue be adjudicated fully and finally without any multiplicity of suits and proceedings, specially when the learned court below has specifically found that the defendants could not show under what right and capacity they are living in the suit premises. In the aforesaid circumstances, I find no illegality or jurisdictional error in the impugned order and accordingly this civil revision is dismissed.