

PATNA HIGH COURT

Ishwar Mahton

Vs

Sitaram Kumar

Civil Revn. No. 788 of 1951

(Imam, C.J. and Das, J.)

26.03.1954

JUDGMENT

Imam, C.J.

1. The only question involved in the present application is as to whether an application under Section 151, Civil Procedure Code could be filed to set aside an order passed on an application filed under Order 21 Rule 90, Civil Procedure Code

It appears that on 18-6-1951, an 'ex parte' order in Miscellaneous Case No. 27 of 1951, arising out of Rent Execution Case No. 143 of 1937, was passed setting aside a sale held in execution of a decree. It was to set aside this order that an application under Section 151 of the Code was filed on 1-8-1951. It is unnecessary to mention in detail as to the course which the litigation took as between the parties. It is enough to say that the Munsif on the merits came to the conclusion that "naked" fraud had been played in getting the notices and postcards served in Miscellaneous Case No. 27 of 1951. The Munsif also came to the clearest finding that the petitioners before him came to know for the first time of the existence of Miscellaneous Case No. 27 of 1951 when the opposite party before him filed their written statement in Title Suit No. 61 of 1949, and that was on 28-7-1951. He also came to the conclusion that after the Title Suit No. 61 of 1949 had been filed by the petitioners before him, the opposite party before him, who were defendants in the said suit, attempted to create supposed unimpeachable evidence to support a good defence in the suit by getting the sale set aside in the rent execution Case. The moment that was done they made their appearance in the title suit and filed their written statement. There can be no question, therefore, on the finding of the Munsif, that the order dated 18-6-1951, setting aside the sale passed by the Court in Miscellaneous Case No. 27 of 1951 was obtained as the result of fraud practised upon the Court, and it is on this basis that one must consider the contention raised by the learned Advocate on behalf of the petitioners in this Court that the application under Section 151 was not maintainable.

2. The learned Advocate contended that since the remedy by way of an appeal against the order setting aside the sale was available, no application under Section 151 of the Code was maintainable, and he relied upon the decision of the Calcutta High Court in - '*Sm. Bibhabati Debi v. Hrishikesh Agasti*¹', (A). The facts of that case, however, are quite different. What had happened in that case was that an application under Section 174 (3), Bengal Tenancy Act was dismissed for default. In such circumstances the applicant under the very section itself could prefer an appeal against the order of dismissal, and the order being an appealable one no application under Section 151 of the Code could be entertained. The judgment of the learned Chief Justice clearly indicates the basis for the decision. His Lordship observed that the Court cannot be asked to exercise its inherent powers to assist a litigant who has failed to exercise his powers which the Code had given him and that he has no right whatsoever to approach the Court and ask the Court to exercise its inherent powers to save him from his own default and carelessness. In the present case there is no question of the petitioners before the Munsif being guilty of any carelessness or being guilty of any default. They had been kept out of knowledge of the Miscellaneous Case No. 27 of 1951. The Court was made to believe that notices had been served when in fact they had not been served, and an order had been obtained from the Court by means of fraud having been committed on the Court. In my opinion, it is always within the inherent power of a Court to set aside its order which has been obtained by a fraud being committed upon it. It is patent that the application under Order 21 Rule 90, could not be finally decided without notice being served upon the opposite party to that application. A Court which passes an order in the belief that notices have been served and the opposite party have not cared to contest the application proceeds on the assumption that it has jurisdiction to dispose of the application according to law. If, however, that assumption is based as a result of fraud having been committed upon it, it seems to me that it is in the inherent power of the Court to set right the wrong done to it and to the party affected by a prejudicial order. The Munsif referred to a decision of single Judge of this Court in the case of - '*Bhikhan Gir Gossain v. Jalpadat Jha*²', (2) in support of this view. Although it is a decision of a single Judge, in my opinion, Jwala Prasad, J., set forth the correct view, supported as he was by two decisions of the Calcutta High Court, - '*Sudevi Devi v. Sovaram Agarwallah*³', and - '*Bharat Chandra v. Yasin Sarkar*⁴', In my opinion, the mere fact that the petitioners before the Munsif could have filed an appeal with a prayer for condonation of the delay in filing the appeal did not deprive them of the right to move the Court in the exercise of its inherent power to set aside an order passed by it obtained through fraud. I see no reason to think that the order passed by the Munsif was one without jurisdiction or was passed with jurisdiction but with material irregularity. The application is accordingly dismissed with costs. Hearing fee Rs. 32/-.

Das, J.

3. I agree.

Application dismissed.

Cases Referred.

¹83 Cal LJ 162

²AIR 1921 Pat 293

³10 Cal WN 306

⁴AIR 1917 Cal 31