

LALDHARI MISTRI (DEAD) THR. LRS. & ANR.

A

v.

VIJAY KUMAR

(Civil Appeal No. 5780 of 2008)

JULY 13, 2017

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[R.F. NARIMAN AND SANJAY KISHAN KAUL, JJ.]

Code of Civil Procedure, 1908 – Or. IX r.13 – Ex parte decree – Setting aside of – Eviction decree was passed in favour of landlord-father of original appellant no.1 – Present suit for specific performance on the ground that respondent purchased the said property from landlord when eviction was already ordered – Ex parte decree passed – Trial court and appellate court dismissed the application filed by appellants for setting aside the ex parte decree – On appeal, held: The records show that respondent never appeared before the lower courts – Commissioner who visited the suit property also did not find him present in the suit property – Respondent was asked to appear before court personally for giving evidence, however, he never appeared and his evidence was closed – Respondent appears to be a doubtful entity – Case made out for setting aside the ex parte decree – Suit be heard on merits – Specific performance.

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Allowing the appeal, the Court

Held: 1. The first curious incident took place when an advocate Commissioner was sent to examine the tenanted premises. In a suit filed by respondent Vijay Kumar in order to declare that the eviction decree obtained was void, the advocate Commissioner visited the premises, stated to be in possession of the said Vijay Kumar since 1989. However, there was no trace of Vijay Kumar. The second visit yielded the same result. Apart from this, in the proceedings under Order IX Rule 13, the trial Court specifically ordered, as a last chance, that Vijay Kumar to appear before the Court personally for giving his evidence, and if he does not so appear, the evidence will be closed. Vijay Kumar never appeared and the evidence was so closed. On 21.11.2002, the Appellate Court in the Order IX Rule 13

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A proceedings likewise recorded that though directed to be physically present in Court, Vijay Kumar was not physically present and, in fact, at no point of time was ever physically present in any Court. [Para 8] [409-F-H; 410-A-B]

B 2. Having regard to the facts, it seems that Vijay Kumar is himself a doubtful entity. Even assuming that a person called
 C Vijay Kumar existed, who has in fact filed proceedings both in 1986 and 1994, it is clear that the very nature of the suit of 1994 plus the fact that Vijay Kumar himself has never surfaced either
 D in Court or at the tenanted premises, it can be said, at the very least, that this gentleman has been put up by the tenant in order to stultify a final decree of eviction obtained by the landlord of the premises way-back in 1992. Having regard to the peculiar facts and circumstances of the case and in the interest of justice, orders dated 11.12.2001 passed by the trial Court, 29.05.2004 by the Appellate Court and the impugned order dated 31.08.2005 passed by the High Court are set aside and as a result the ex-parte decree is set aside. It is further directed that suit no.14 of 1986 be set down for hearing on merits. [Paras 9, 10] [410-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No.5780 of 2008.

E From the Judgment and Order dated 31.08.2005 of the High Court of Judicature at Patna in Civil Revision No.1139 of 2004.

Gaurav Agrawal, Adv. for the Appellants.

Samir Ali Khan, Adarsh Upadhyay, Anurag Kishore, Advs. for the Respondent.

F The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. The present dispute arises out of an ex-parte decree of 09.06.1987 which was sought to be set aside under Order IX Rule 13 of the Code of Civil Procedure, 1908.

G 2. The appellant before us, having knocked at the doors of the Court, has been turned away by not less than three Courts. In that it was stated that he had both been deemed to be served with the summons in the suit as well as the fact that from the date of knowledge of the ex-parte decree, had filed the application to set it aside a year and a half later.

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3. Fact is indeed stranger than fiction, as the unfolding of the drama of this case shows. This case has a somewhat chequered history, which we will advert to briefly. A

4. The dispute in the present case relates to a residential house situated in Munger, District Bihar. One Hira Mistry, father of the original appellant No.1 and grandfather of the appellant No.2, was the owner of the said house, which was let out to one Surendra Narayan Sinha. Eviction proceedings were instituted by the said Hira Mistry against the said tenant in which eviction was ordered on 21.12.1979; then reversed in first appeal on 24.02.1986; and again reversed in second appeal on 02.04.1992. B

5. We have been informed at the Bar that a Special Leave Petition has also been preferred from the second appellate judgment and decree which has been dismissed. This is as far as one set of proceedings is concerned. C

6. At this point, the facts get a little curious. There is alleged to be an agreement to sell between Hira Mistry, the landlord and one Vijay Kumar on 17.02.1983 at a point when eviction had already been ordered against the tenant. This agreement to sell became the subject-matter of a specific performance suit filed in the year 1986 which resulted in the ex-parte decree aforesaid of 09.06.1987. D

7. It is difficult to fault the trial Court and the Appellate Court when they dismissed the application under Order IX Rule 13. Both the grounds given cannot be said to be perverse. However, the facts of the present case are such that it has become necessary for us, in order to do complete justice, to set aside the three orders against the appellant. E

8. The first curious incident takes place when an advocate Commissioner is sent to examine the tenanted premises. In a suit filed on 12.07.1994 by Vijay Kumar in order to declare that the eviction decree obtained is void, the advocate Commissioner visited the premises, stated to be in possession of the said Vijay Kumar since 1989. What he found there, however, was the daughter of the tenant with no trace of the said Vijay Kumar. Not only does he visit the premises on 04.10.1998, but the second visit on 21.10.1998 yields the same result, in which the self-same finding is recorded. Quite apart from this, in the proceedings under Order IX Rule 13, on 30.01.1999, the trial Court specifically ordered, as a last chance, that Vijay Kumar appear before the Court personally for F

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A giving his evidence, and if he does not so appear, the evidence will be closed. Vijay Kumar never appeared and the evidence was so closed. On 21.11.2002, the Appellate Court in the Order IX Rule 13 proceedings likewise recorded that though directed to be physically present in Court, Vijay Kumar was not physically present and, in fact, at no point of time was ever physically present in any Court.

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C 9. It seems to us, having regard to the facts afore-stated, that Vijay Kumar is himself a doubtful entity. Even assuming that a person called Vijay Kumar exists, who has in fact filed proceedings both in 1986 and 1994, it is clear that the very nature of the suit of 1994 plus the fact that Vijay Kumar himself has never surfaced either in Court or at the tenanted premises, it can be said, at the very least, that this gentleman has been put up by the tenant in order to stultify a final decree of eviction obtained by the landlord of the premises way-back in 1992.

D 10. Having regard to the peculiar facts and circumstances of the case and in the interest of justice, we set aside the orders dated 11.12.2001 passed by the trial Court, 29.05.2004 by the Appellate Court and the impugned order dated 31.08.2005 passed by the High Court, all of which result in our setting aside the ex-parte decree dated 09.06.1987, and direct that Suit No. 14 of 1986 be set down for hearing on merits.

E 11. Since the suit is pending for a long time before the Sub-Judge, Munger, we direct that the said suit be heard and disposed of within a period of one year from today.

12. The appeal is allowed in the aforesaid terms.

F 13. Status quo as to possession to continue till the suit is decided finally.

G 14. We have received excellent assistance from Mr. Gaurav Agrawal, learned counsel appearing for the appellants and Mr. Samir Ali Khan, learned counsel appearing for the respondent, who have acted in the highest traditions of the Bar, and who were extremely fair both to their respective clients and to the Court.