

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.425 of 1991

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Against the judgment and the preliminary decree dated 13.5.1982 passed by Sri
Mundrika Prasad, Sub-Judge Ist, Patna in Title Partition Suit No. 134 of 1979

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1. Lal Babu Singh @ Lal Babu son of Late Late RamKhelawan Mahto
2. (i) Birmati Devi wife of Late Deo Babu Singh
2. (ii) Guddu Singh son of Late Deo Babu Singh
2. (iii) Laddu Singh son of Late Deo Babu Singh
3. (a) Chathiya Devi wife of Late Nathun Singh
4. Bhubneshwar Singh son of Late Khirodhar Mahto
5. Mathura Singh of of Late Nathun Singh
6. Vidyanand Singh son of Late nathun Singh
7. Ashok Singh @ Ashok Kumar Singh son of late Nathun Singh
8. Rajpati Devi wife of Late Sheo Shankar Singh
9. Smt. Mahapati Devi wife of Sri Binay Prasad Singh
10. Smt. Anusuiya Devi wife of Sri Ganesh Prasad Singh

.... Appellant/s

Versus

1. (a) Smt. Girija Devi wife of Late Mahanand Singh
1. (b) Pappu Kumar son of Late Mahanand Singh
1. © Kusum KUMari D/o Late Mahanand Singh
1. (d) Puja Kumari D/o Late Mahanand Singh
2. (a) Most. Sita Devi wife of Late Gauri Shankar Singh
2. (b) Chitralekha Devi D/o Late Gauri Shankar Singh and wife of Ganesh Singh
2. © Sunita Devi wife of Upendra Singh and D/o Gauri Shankar Singh
3. Bindeshwar Singh son of Late Kamal Singh
4. Dineshwar Singh son of Late Kamal Singh
5. Ramnath Singh son of Late Kamal Singh
6. Ram Bali Singh son of Late Ram Prasad Singh
7. Smt. Phuljhari Devi wife of Late Ram Prasad Mahto
8. Aruna Devi wife of Late Kamal Singh
9. (a) (i) Madhuri Devi wife of Late Nirmal Singh
9. (a) (ii) Ganesh Singh son of Late Nirmal Singh
9. (a) (iii) Ramesh Singh son of Late Nirmal Singh
9. (b) Vijay Singh son of Late Dhanushdhari Singh
10. (a) Rekhimuni Devi wife of Late Mahabir Singh
11. Mrs. Noor Jehan wife of Mr. A. Sharaf
12. Mrs. Shanaj Parween D/o Maqsood Alam
13. Md. Firoz sonof Late Abdus Subhan
14. Mr. Zeenat Parween W/o M. P. Altarush
15. Smt. Afra Khatoon wife of Md. Yasun
16. Shabana Hashmi wife of Md. Anwar Alam
17. Md. Sarwar Khan son of Late Ashgan Khan
18. Mrs. Aqlima Khatoon wife of Wasi Ahmad
19. Shahnaj Ahmad son of Awali Akhtar
20. Jawed Ahmad son of Noorul Hoda
21. Shahnaz Reyazi wife of M. M. Ansari
22. Firoz Ahmad son of Isteyaque Ahmad

.... Respondent/s

with

Miscellaneous Appeal No. 112 of 1991

Against the order dated 27th February, 1991, passed by Sri Rameshwar Tiwary, Sub-Judge Ist, Patna in Misc. Case No. 69 of 1988

1. Lal Babu Singh @ Lal Babu son of Late Ram Khelawan Mahto
 2. (a) Most. Birmati Devi wife of Late Deo Babu Singh
 2. (b) Guddu Singh son of Late Deo Babu Singh
 2. © Laddu Singh minor son of Late Deo Babu Singh under the guardianship of his mother
 3. (a) Smt. Chaita Devi
 4. Bhubneshwar Singh son of Late Khirodhar Mahto
 5. Mathura Singh son of Late Nathun Singh
 6. Vidyanand Singh son of Late Nathun Singh
 7. Ashok Singh @ Ashok Kumar Singh son of Late Nathun Singh
 8. Smt. Rajpati Devi wife of Late Sheo Shankar Singh
 9. Smt. Mahapati Devi wife of Sri Binay Prasad Singh
 10. Smt. Ansuiya Devi wife of Sri Ganesh Prasad Singh
-Defendants..... Applicants..... Appellants

Versus

1. (a) Smt. Girija Devi wife of Late Mahanand Singh
 1. (b) Pappu Kumar son of Late Mahanand Singh
 1. © Kusum Kumari D/o Late Mahanand Singh
 1. (d) Puja Kumari D/o Late Late Mahanand Singh
 2. (a) Sati Devi wife of Late Gauri Shankar Singh
 2. (b) Chitralekha Devi D/o Late Gauri Shankar Singh
 2. © Sunia Devi D/o Late Gauri Shankar Saingh
 3. Bindeswar Singh son of Late Kamal Singh
 4. Dineshwar Singh son of Late Kamla Singh
 5. Ramnath Singh son of Late Kamla Singh
 6. Ram Bali Singh son of Late Ram Prasad Mahto
 7. Smt. Phuljhari Devi wife of Late Ram Prasad Mahto
 8. Aruna Devi wife of Late Kamal Singh
-Defendants Ist Party.... Opposite Ist Party... Respondent Ist Party
9. (a) (i) Madhiya Devi wife of Late Nirmal Singh
 9. (a) (ii) Ganesh Singh son of Late Nirmal Singh
 9. (a) (iii) Ramesh Singh son of Late Nirmal Singh
 9. (b) Vijay Singh son of Late Dhanushdhari Singh
-Defendants 2nd party... Opposite Party.... Respondent 2nd Party
10. (a) Rekhimuni Devi wife of Late Mahabir Singh
-Defendants 3rd Party... Opposite Party.... Respondent 3rd party
- Respondent/s

Appearance :

(In FA No. 425 of 1991) (In MA No. 112 of 1991)

For the Appellants : Mr. Ganpati Trivedi, Sr. Advocate
Mr. Sanjay Kumar Mishra, Advocate
For Respondents : Mr. Amarendra Narayan, Advocate

Mr. Ramesh Singh, Advocate
Mr. J. N. Thakur, Advocate
Mr. Dhananjay Mishra, Advocate

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CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA
C.A.V. JUDGMENT
Date: 13-05-2015

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The instant miscellaneous appeal has been filed by the appellants for setting aside the order dated 27.02.1991 passed in Miscellaneous Case No. 69 of 1988 whereby and whereunder the learned Sub-Judge I, Patna dismissed the miscellaneous case on the ground that the appellants having fully knowledge of Title Partition Suit No. 134 of 19789 allowed the suit to be decreed ex-parte and further holding that miscellaneous case was hopelessly time barred.

2. The First Appeal No. 425 of 1991 has been filed by the appellants against the ex-parte order, dated 13.05.1982, passed in Title Suit No. 134 of 1979, whereby and whereunder the suit was decreed ex-parte and the plaintiff was declared entitle for 1/6th share.

3. To appreciate the facts it is necessary to deal with the factual matrix of Title Partition Suit No. 134 of 1979 which was filed by the plaintiff for carving out his 1/6th share in the suit property on 21.04.1979 and it was ordered to put up the same with Shiresthdar Report. Some defect was pointed out by the Shiresthdar and for removal, 2-3 dates were given to the plaintiff and, on 5.11.1979, after removal of defect, the said suit was admitted and summons were directed to be issued. On 19.12.1979 plaintiff filed attendance and date was given 30.01.1980 to issue summons and again vide order, dated 30.01.1980, the office was directed to issue summons on defendants which was issued on 01.02.1980 through Nazarat, thereafter, on behalf of plaintiff petition to issue interim injunction was filed and on that petition ad interim injunction was issued against defendant nos. 1 to 9 an 10 restraining them from disposing 1/8th share of the



plaintiff in each of the suit plots and show cause within 7 days from the receipt of the notice as to why the said order should not be made absolute. The plaintiff was directed to file requisite for issuance of notice and injunction order at once. This order was passed on 11.02.1980, thereafter, amendment petition was filed on behalf of plaintiff which was allowed. Show cause notice was also issued through Nazarat and in order, dated 20.03.1980, it has been mentioned that on defendant no. 5, 11, 16 and 18 summons have been served as they have received summons themselves whereas on defendant no. 17 no summons was served and on rest defendants it has been served on refusal and accordingly, direction was given to file affidavit in support of the service of summons and date was given on 30.03.1980 but on 30.03.1980 being Sunday, the file was put up on 31.3.1980 and on 31.3.1980 plaintiff filed an application under Order 5 Rule 20 read with Section 151 of the C.P.C. for issuance of summons on defendants through Gazette/paper publication whereupon the learned court below passed an order directing the plaintiff to take steps for publication of summons in Gazette by 29.04.1980. Thereafter, on several dates the plaintiff did not comply the court's order and on 16.12.1980, draft of gazette notice was filed by the plaintiff. On 26.03.1981 the plaintiff furnished the copy of publication and the said Title Partition Suit was fixed for ex-party hearing on 09.04.1981.

4. On 12.05.1982 ex-parte hearing was completed and the record was fixed for ex-parte order on 13.05.1982 and on 13.05.1982 ex-parte order was passed decreeing the suit.

5. The applicant Lal Babu Singh and others filed Misc. Case No. 69 of 1988 on 21.07.1988 under Order 9 Rule 13 of the Code of Civil Procedure (hereinafter referred to as 'of the Code') for setting aside the ex-parte decree, dated 13.05.1982, passed in Title Partition Suit No. 134 of 1979 and to restore the



suit to its original file stating therein that a registered notice dated 23.06.1988 was received, issued by Sri Prem Kumar Verma, Advocate Commissioner, intimating therein that he has been appointed as Advocate Commissioner by the Court of Sub-Judge-I, Patna for local inspection and to carve out a separate takhta. Accordingly, they appeared before the Advocate Commissioner, on 01.07.1988, and learnt that ex-parte decree has been obtained, on 13.05.1982, by the plaintiff opposite party no. 1 and accordingly, petition for time was filed and Advocate Commissioner allowed the time till 23.07.1988. An application for inspection of the record of the said title partition suit was filed on 21.07.1988 and the record was got inspected through Sri Ahosk Kumar, Advocate on the same day and then, it was found that summons of the suit were not served and a false and collusive report was obtained. Neither the process server nor the postal peon ever went to the house of the applicants or tendered any summon or registered envelopes. Everything has been obtained bala-bala by the plaintiff by bringing the court peon and postal peon in his collusion. According to the applicant, the partition had taken place long-long ago and the plaintiff and his father and grand-mother had already sold away the properties received in the partition through registered sale deeds in favour of the applicants and other persons and there was no chance of success and, as such, the plaintiff managed to obtain ex-parte decree. It further transpires that the notice was published in the District Gazette and not in local newspaper as required under amended C.P.C.

6. Against the aforesaid contentions, the opposite parties filed rejoinder stating therein that miscellaneous case is not maintainable, it is time barred as it has been filed after lapse of more than six years, summons and Mushanna were filed and the court issued the same, the process server of the court and the postman tendered the summons and Mushanna but the petitioners refused



to receive the same and then the notices were hanged on the walls. Defendant nos. 5, 11, 18 and 19 received their summons personally but in spite of that the applicants defendants in spite of knowledge of the title partition suit and service of summons did not appear and thereafter, publication was made in official Gazette of Patna District and then, the suit was taken for ex-parte hearing. Further case of opposite party no. 1 is that the opposite party no. 1 and the petitioners are members of joint family governed by Mitakchhara School of Hindu Law, and only with a view to prolong the litigation they did not appear. There was a proceeding under Section 145 Cr.P.C. and all the applicants were parties in the said proceeding as first party and the opposite party no. 1 was the third party and in that proceeding under Section 145 Cr.P.C., the applicant got knowledge about Title Partition Suit No. 134/79. There was another proceeding under Section 145 Cr.P.C. between Ram Ayodhya Rai and others and the Opposite Party was second party along with the applicant of this miscellaneous case and in that proceeding opposite party no. 1 filed show cause giving details of Title Partition Suit No. 134 of 1979 in the year 1981 and the said 145 Cr.P.C. was dropped on the ground of pendency of Title Partition Suit No. 134 of 1979. On the basis of pleadings of the parties two points for consideration by the court were formulated which are as follows:

- “1. Whether this misc. case is maintainable ?
2. Whether the petitioners-defendants have got knowledge of filing of T.P.S. No. 134/79 and whether the summons were served upon them ?”

7. The applicants examined altogether 5 witnesses and filed Exts. 1 to 4 series. On the other hand opposite party no.1 examined altogether 7 witnesses and got exhibited documents as Ext. A to L series.



8. Learned sub-Judge- I, Patna decided both points against the applicants. The learned Sub-Judge has come to the conclusion that the applicants have got knowledge about the Title Partition Suit No. 134 of 1979 and intentionally allowed the suit to be decreed ex-parte and further came to the conclusion that though there are 8 applicants but on the Misc. Application filed under Order 9 Rule 13 of the Code only Nathun Singh has signed and verified and no other applicants have put their signatures or LTI at the foot of the application and further hold that this Miscellaneous Case has been filed after lapse of six years from the date of decree and the delay has not been explained. Learned Sub-Judge has held that this miscellaneous case has been filed on 26.07.1988 which is apparently wrong, as a matter of fact, this miscellaneous case has been filed on 21.07.1988. Against that judgment the Miscellaneous Appeal No. 112 of 1991 has been filed.

9. Learned counsel for the appellants arguing in this appeal has submitted that on perusal of the order sheet of the Title Partition Suit No. 134 of 1979, it is apparent that no steps for issuance of simultaneous issue of summons for service by post in addition to personal service as required under Order 5 Rule 19 A of the Code was ordered to be taken nor the court below in the order issuing summons mentioned any reasons/circumstances of the case considering it unnecessary. By virtue of Civil Procedure (Amendment Act) 1976 Order 5 Rule 19 A of the Code was inserted with effect from 01.02.1977 and by virtue of further amendment Order 5 Rule 19A was deleted with effect from 01.07.2000. Thus, suit having been filed in 1979 and decreed ex-parte on 13.04.1982, the procedure for issuance of simultaneous service of summons under Order 5 Rule 19 A was applicable but that has not been done. Further from the records it transpired that no summon was served on defendant no. 17 vide order dated



20.03.1980 but in spite of that a direction was given to the plaintiff to file an affidavit in support of service of summons. There is no mention of receipt of the report filed by the process server as required under Order 5 Rule 17 of the Code nor an affidavit by process server had been filed accompanying return of the summons as required in Form No. 11 of Appendix B of the Code but in spite of that only on the petition of the plaintiff issuance of summons on defendants through gazette was ordered. According to the learned counsel for the appellants, there is gross violation of Order 5 Rule 19 A of the Code which is mandatory in nature. Learned counsel has relied upon the judgment in the case of **Union of India Vs. SriLaxmi Oil Mills** reported in **AIR 1984 Patna Page 252** wherein it has been held that the courts are required to simultaneously issue notices under ordinary course and registered post and accordingly, the Division Bench held that service was not proper and allowed the appeal after setting aside the order passed in miscellaneous case. Further reliance has been placed upon the judgment in the case of **Bhagwan Singh & Ors. Vs. Ram balak Singh & Anr.** reported in **AIR 1988 Patna Page 166** wherein it has been held that issuance of summons only under Order V Rule 1 of the Code, Court not ordering issuance of summons for service by registered post nor recording reasons why it considered it unnecessary in the circumstances of the case, held service of summons was not valid. Learned counsel for the appellant has further submitted that in the present case the court below in gross violation of law has directed for publication of summons in Gazette on 31.01.1980. The steps for substituted service can only be taken after compliance of the Rules of Order 5 Rule 1 to 18. On perusal of that it can be resorted to only two conditions are satisfied: (a) that there is reason to believe that defendant is keeping out of the way for the purpose of avoiding the service or not and (b) for any other reason the summons could not be served in ordinary way.



Placing reliance upon the decision in the case of **Smt. Yallowa vs. Smt. Shantawa** reported in AIR 1997 SC page 35. It has been submitted that when the summons cannot be served in ordinary way, then only the course of substituted service can be taken. In the present case, while directing the plaintiff to take steps for substituted service vide order dated 31.03.1980, the learned Sub-Judge has not recorded its satisfaction to the above effect. Further reliance has been placed upon the judgment in the case of **Ram August Tiwary vs. Bindeshwari Tiwary & Ors.** reported in **AIR 1972 Patna page 142**. It has been further been submitted that only if it is proved that summons has been duly served, the court may order of hearing the suit ex-parte. In the present case summons were not duly served as steps for service of summons as provided under Order 5 Rule 19A of the Code had not been taken and as entire mode of service of summons under ordinary course has not been exhausted. Hence, the steps taken for service of summons by adopting a mode of substituted service was not proper and, as such, the order fixing the suit for ex-parte hearing was without jurisdiction and illegal. Learned Sub-Judge has given a finding that the defendants had got full knowledge of the suit but there is no finding in the impugned order that the defendant had knowledge of the hearing of the suit and there is great distinction between knowledge of date of hearing and the knowledge of pendency of the suit and for that reliance has been placed upon the judgment in the case of **Sushil Kumar Sabharwal vs. Gurpreet Singh & Ors.** reported in **(2002) 5 SCC 377** para 11 & 12.

10. According to the learned counsel for the appellants, the applicants for the first time, came to learn about the ex-parte decree, on 23.06.1988, when they received notice of Advocate Commissioner and after inspection of record Miscellaneous Case was filed on 21.07.1988 i.e. within 30

days from date of knowledge and, as such, the miscellaneous case was within time.

11. On behalf of respondents it has been submitted that the applicants have full knowledge about the pendency of title partition suit. In their presence, proceeding under Section 145 Cr.P.C. was dropped on the ground of pendency of title partition suit, but they did not choose to appear. Further miscellaneous application has been signed only by Nathun Singh and not by other applicants and, as such, learned court below has rightly held that the miscellaneous case is not maintainable. The order passed in Misc. Case No. 69 of 1988 is just, proper and has been passed in accordance with law. Learned court below before passing the impugned order had granted adequate opportunity to the parties to place their cases, adduce documentary and oral evidence and the learned court below after taking into consideration of law as well as facts and evidences brought on record in the case, passed the impugned judgment. It has further been submitted that for the same and similar issues the applicants have filed First Appeal No. 425 of 1991 also and this miscellaneous appeal also and, in both, the ground is of improper tender of service. Onus to substantiate and negate refusal of notice is on the person denying it and the petitioners of miscellaneous case have failed to prove that notice was not served properly. In the miscellaneous case it has been stated that after inspection of record, it transpires that process server or postal peon has not arrived at their houses and, as such, now in this appeal the appellants cannot take plea that through the registered or ordinary post summons were not served. The parties to the suit are agnates and family members, they are residing in same premises so they have got full knowledge about the hearing in title partition suit. Learned counsel has relied upon the judgment in the case of **Krishna Kumar Singh vs Smt. Viodya Devi & Ors.** reported in **2002 (2) PLJR**



page 113. Mere allegation that process server or postal peon did not tender the notice is not helpful for setting aside the ex-parte decree without substantiating the elements of fraud and malafide and for that reliance has been placed on the decision in the case of **A.C. Ananthaswamy & Ors. Vs. Boraiah (D) by Lrs.** reported in **2005 (1) PLJR page 20**. Learned trial court had noticed the process server's act in recording refusal of service and found it valid service and then ordered for Gazette publication. Further irregularities in service of summons cannot be a ground for invoking the procedure of Order 9 Rule 13. The defendants were very much aware of the partition suit but evaded to contest the suit since the reliefs sought in the suit was not prejudicial to their interest. The plaintiff claimed relief of entitlement of 1/6th share in the property and, as such, the appellants have not contested it and intentionally allowed the suit to be decreed ex-parte. The suit is of 1979 and the decree is of 13.05.1982 and, as such, equity will not go in favour of setting aside the decree in the absence of sufficient cause which prejudiced the interest of defendants- appellants herein. In the case of deliberate non-appearance the equity of order 9 Rule 13 cannot be invoked.

12. On the basis of rival contentions of the parties, following points are for consideration before this Court (i) whether there was due service of notice on the defendants in the suit in question and (ii) the order fixing the suit for ex-party hearing was proper and legal.

13. The above points appears interconnected so, they are taken together. Applicants, in order to proving their case, have examined altogether 5 witnesses and have also filed documents marked as Ext.1 to 4 series.

14. On behalf of opposite party no. 1 altogether 7 witnesses have been examined and documents have been filed which are marked as Ext. A to L series.



15. AW 1 Nathun Singh is the applicant no. 4. he has stated that he came to know about the judgment and decree from Prem Kumar Verma, Advocate Commissioner and summons and notices were not served on him. He has been cross-examined and his attention was drawn towards the earlier proceeding under Section 145 of the Cr.P.C. AW 2 Deo Babu Singh is applicant no. 2. He has also similarly stated that from notice of Advocate Commissioner, he came to know about the judgment and decree passed in Title Partition Suit No. 134 of 1979 on 23.06.1988. He has also been cross-examined. He cannot say the names of other applicants. AW 3 is a formal witness and has proved the notice sent by Prem Kumar Verma, Advocate Commissioner. AW 4 Raghubir Prasad has stated that Kuddush Khan and Budhan Paswan are own men of Mahanand Singh. During cross-examination he has admitted that he is Sarhu of Deo Babu Singh, applicant no. 2. AW 5 Lal Babu Singh is applicant no. 1 and he has also stated that summons and notices of Title Partition Suit No. 134 of 1979 were not served upon them and Budhan Paswan is on inimical term. He has been cross-examined and he has stated that he does not know about Bihar Gazette. Ext. 1 is the notice sent by Sri Prem Kumar Verma, Advocate, dated 21.06.1988, regarding carving out of separate takhta. Ext. 2 is certified copy of deposition of Mahanand Singh in Title Suit No. 9 of 1974 wherein Mahanand Singh has admitted that he is joint only with his father and on the basis of this document which is Ext. 2, it has been argued that Mahanand Singh has admitted regarding partition from applicants long-long ago. Ext. 3 is the certified copy of deposition of Budhan Dushadh in a criminal case. From this it reveals that Budhan Dushadh has deposed against Ganauri Singh regarding theft of paddy crop. Ext. 4 is certified copy of FIR. From this document it reveals that Mahanand Singh brought a case for bicycle theft under Section 379 of the Indian Penal Code in which Shiv

Shankar Singh, Basudev Singh were remanded to jail.

16. On behalf of opposite party no. 1, OPW 1 is Dhanushdhari Singh. He has stated that summons and notices were received by the applicants from the court peon and after receiving the same, he went to the house of Lal Babu, Deo Babu and Muneshwar Singh and informed them regarding filing of title partition suit by Mahanand Singh and requested to appear in the case. He has been cross-examined wherein he has deposed that his ancestral house was in Rastiganj village of Phulwari Police Station. He has sold his house of Razabazar 5-6 years back to one Bineshwar Singh. OPW 2 Ram Ayodhya Rai has stated that he was the member of first party in a proceeding under Section 144 Cr.P.C. which was converted into 145 Cr.P.C. and in that case Mahanand Singh and others were the members of second party and Mahanand Singh (O.P. No. 1) filed a petition about the pendency of Title Partition Suit No. 134 of 1979 and accordingly, the proceeding was dropped and the properties of the proceedings were attached under Section 146 Cr.P.C. He has stated that entire members of the case have got knowledge about the Title Partition Suit. He has given wrong year of 145 Cr.P.C. proceeding. OPW 3 Mahanand Singh is the Opposite Party no. 1 himself. He has stated that process server of the Court, namely, Dil Mohammad, went to serve the summons and notices of the Title Partition Suit No. 134 of 1979 and Dhanushdhari Singh, Mahabir Singh, Phuljhari Devi and Damyanti Devi received summons while other defendants including applicants after knowing the contents of the summons refused to receive the same and then, the same was hanged in the house in his presence as well as in presence of Kudush Khan and Budhan Paswan. He has proved summons of cases and notices of injunction both and endorsement of the process server which have been marked as Ext. A, B, C, and D series. He has stated about 145 Cr.P.C. proceeding wherein he has filed



petition stating the pendency of Title Partition Suit No. 134 of 1979 and, as such, the applicants being aware of pendency of Title Partition Suit No. 134 of 1979 since then. He has proved the certified copy of written statement of another proceeding under Section 145 Cr.P.C. OPW 4 Dil Mohammad is a retired peon of Civil Court, Patna. He has stated that he being the process server after receiving the summons and notices of Title Partition Suit No. 134 of 1979 went at the addresses and the defendants Dhanushdhari Singh, Damyanti Devi, Phuljhari Devi received their summons whereas other defendants refused to receive the same, then he served the same by hanging on their houses. Its service report has been marked as Ext. F to F/21. He has also been cross-examined and he has deposed that the witness Kudush Khan and parties are his villagers. OPW 5 Budhan Paswan is also a witness of service report of summons and notices. He has stated that some of the defendants received the summons in his presence while others refused to receive the same. Thereafter, Dil Mohammad, the court peon, in his presence and in presence of Kudush Khan, served the summons and notices by hanging the same in the houses of defendants. Suggestion has been given that he is on inimical term with the applicants. OPW 6 Onkar Nath Singh has also stated that he was present when the process server went to serve the summons and notices but, admittedly, he is not a witness of summons. OPW 7 Ram Janam Singh is an Advocate Clerk and he has proved the report of Sri Ram Babu regarding loss of original record of proceeding under Section 145 Cr.P.C. Ext. A, A/17 are signatures of Mahanand Singh as identifier of service report of summons. Ext. B to B/16 are signatures of Kudush Khan as one of the witness of service report of summons. Ext. C to C/16 are LTI of Budhan Paswan on summons as one of the witness and Ext. D to D/3 are signatures and LTI of identifier and witnesses on the summons and notice of injunction petition. Ext. E



is carbon copy of written statement filed in proceeding under Section 145 Cr.P.C. Ext. F To F/21 are service report of process server on the back side of summons and notices of Title Partition Suit No. 134 of 1979. Ext. G series are two letters written by Incharge Deputy Collector regarding loss of records of Case No. 839(M)77 and 495(M)79 of under Section 145 Cr.P.C. Ext. H is the certified copy of written statement filed by Mahanand Singh in Case No. 495(M)79 and Ext. I is the certified copy of order, dated 6.6.1981, passed in Case No. 839(M)77 under Section 145 Cr.P.C. Ext. J is certified copy of notices of Case No. 495(M)79. Ext. K is the certified copy of written statement of Ram Chandra Paswan and others of Case No. 203(M)79 under Section 145 Cr.P.C. and Ext. L is photo stat copy of certified copy of deposition of Gauri Shankar Singh in Case No. 495(M)79.

17. From careful consideration of evidences available on the record, there is no doubt that in proceeding under Section 145 Cr.P.C. disclosure was made by O.P. No. 1 regarding pendency of Title Partition Suit No. 134 of 1979, so knowledge about pendency of Title Partition Suit No. 134 of 1979 is proved but it is not proved regarding knowledge of hearing of that title partition suit.

18. From perusal of the record of title partition suit, it is apparent that no steps for issuance of simultaneous issue of summons for service by post in addition to personal service as required under Order 5 Rule 19 A of the Code was ordered to be taken nor the court below in the order issuing summons mentioned any reasons/circumstances of the case considering it unnecessary. Normally, under Order V Rule 1 of the Code when a suit is instituted, summons have been issued to the defendants to appear and answer the claim on a date specified therein and where the summons has been issued, the court directs the defendants to file the written statement on the date of his appearance and an entry to that



effect is made in the summons. The defendants to whom summons has been issued under Sub-Rule (1) of Order V of the Code may appear in person or by a counsel duly instructed and able to answer of the material questions relating to the suit. Such was normal procedure till before Rule 19A order V of the Code was inserted in 1976 which came into effect from 1.2.1977 . It is pertinent to quote Rule 19A of the Code which are as follows:

“19A(1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carried on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.”

19. Thus from perusal of the proviso of Rule 19 A of the Code, it is apparent that issuance of summons for service by registered post is not required only where in the facts and circumstances of the case, court considers it unnecessary otherwise the court is required to direct to issue summons simultaneously to be served by registered post with acknowledgment due. In the instant case, the court has not recorded anything to that effect for not directing to issue the summons simultaneously. Further from perusal of order, dated 20.03.1980, it reveals that no summons was served on defendant no. 17 and there is no service report that on the appellants the summons were served personally and in that order direction was given to the plaintiff to file an affidavit. It is



relevant to state that procedure for acceptance of service on refusal has been mentioned in order 5 Rule 17 of the Code. Order 5 Rule 17 of the Code enjoins with a duty upon the process server to furnish a report endorse thereon or indicates thereto stating therein that he has so affixed on gate, the circumstances under which he did so and the name and place and the person if any by whom he was identified and by whom presence a copy was affixed there. Appendix B Form No. 11 of the Code lays down a procedure for filing an affidavit of process server to accompany return of summons and notices. But an affidavit by process server had not been filed accompanying return of the summons as required in Form No. 11 of Appendix B of the Code. On 31.1.1980 plaintiff filed an application under Order 5 Rule 20 of the Code read with Section 151 of the Code for issuance of summons on defendants through Gazette whereupon the learned court below without assigning any reason and without recording his satisfaction that the summons could not be served in the ordinary way and it has reason to believe that defendants are keeping out of the way for the purpose of avoiding the service directed the plaintiff to take steps for publication of summons in the Gazette and the plaintiff filed draft of Gazette notice on 16.12.1980 which was sent for publication and, on 26.03.1981, the plaintiff furnished the copy of Gazette publication and accordingly, the suit was fixed for ex-party hearing on 09.04.1981. Knowledge of pendency of suit and knowledge of hearing of the suit is quite distinct. Learned court below has not arrived at a finding that the defendants has knowledge of the hearing of the suit rather on the basis of dropping of proceeding under Section 145 Cr.P.C. on the ground of pendency of title partition suit, learned court below arrived at a finding that the defendant had got full knowledge of the suit. In the case of **Sushil Kumar Sabharwal** (supra), paragraph 11 and 12 of the judgment is being quoted hereinbelow:



Para-11- “The High Court has overlooked the second proviso to Rule 13 of Order 9 CPC, added by the 1976 Amendment which provides that no court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff’s claim. It is the knowledge of the “date of hearing” and not the knowledge of “pendency of suit” which is relevant for the purpose of the proviso abovesaid. Then the present one is not a case of mere irregularity in service of summons; on the facts it is a case of non-service of summons. The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross-examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiff’s claim which he did not avail and utilize.”

Para 12: “The provision contained in Order 9 Rule 6 CPC is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the court may make an order that the suit be heard ex parte. The provision casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel satisfied in the sense of being “proved” that the summons was duly served when and when alone, the court is conferred with a discretion to make an order that the suit be heard ex parte. The date appointed for hearing in the suit for which the defendant is summoned



to appear is a significant date of hearing requiring a conscious application of mind on the part of the court to satisfy itself on the service of summons. Any default or casual approach on the part of the court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the trial court would have been conscious of its obligation cast on it by Order 9 Rule 6 CPC, the case would not have proceeded ex parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.”

20. In the present case the publication was done in Gazette and not in daily news paper circulated in the area and, as such, it can be held that there was no due service of summons on the defendants-appellants and the learned court below did not take any steps for directing the plaintiff to take steps for issuing summons simultaneously i.e. under ordinary process and registered cover with AD, though at the relevant time order 5 Rule 19A of the Code was in force and was in effect since 1.2.1977.

21. Points ii- The courts are required to simultaneously sent notices in the ordinary course and by registered post but in the present case, the learned court below did not take step for issuance of summons by registered post. The procedure, thus, adopted by the court below in issuing summons by ordinary course only was wrongly adopted. In the present case as compliance of Order 5 Rule 19 A of the Court has not been done and, as such, it is obvious that no order was required to be passed for substituted service and further the substituted service was done by publication in Gazette and not in daily newspaper circulated in the area. It is therefore, obvious that the case would not have been fixed for ex-

parte hearing. In the case of **Sri Laxmi Oil Mills** (supra), no steps was taken for issuance of summons in ordinary course and only summons were sent through registered post and then the Hon'ble Court allowed the appeal and set aside the order passed by the court below in miscellaneous case and ex-parte decree was also set aside.

22. The arguments as advanced on behalf of respondents appears not convincing and the rulings, as cited above, are also not applicable in the facts and circumstances of the present case and as has already been discussed above "knowledge of pendency of the suit" and "knowledge about hearing of the suit" are quite distinct and, as such, it is proved that the applicants have got no knowledge about the hearing of Title Partition Suit No. 134 of 1979 and they have received no summons of Title Partition Suit. The process server, OPW No. 4, has admitted that witness Kudush Khan and parties are his villagers and, as such, the case of the applicants that process server submitted report in collusion of the plaintiff and notices were served bala-bala appears probable and reliable. Further there is no compliance of Order 5 Rule 19A of the Code and, as such, the points formulated above are decided in favour of the appellants-applicants and against the respondents opposite parties.

23. From the date of knowledge i.e. from the notice of Advocate Commissioner, the miscellaneous case has been filed within 30 days i.e. on 21.7.1988 and, as such, that is within time. On Vakalatnama filed along with miscellaneous application, all the applicants have signed and on the miscellaneous case only Nathun Singh has signed and has sworn affidavit, thus, it can be inferred that miscellaneous application was filed by all the applicants and not only by Nathun Singh. Learned Sub-Judge has wrongly recorded in para 11 that the miscellaneous case was filed on 26.7.1988, as a matter of fact, the miscellaneous

case was filed on 21.7.1988.

24. In the result, this miscellaneous appeal is allowed, the ex-parte judgment and decree passed in Title Partition Suit No. 134 of 1979 is hereby set aside. Accordingly, judgment passed in Misc. Case No. 79 of 1980 is also hereby set aside.

25. Let the record of Title Partition Suit No. 134 of 1979 be returned to the court of Sub-Judge-I, Patna with a direction to dispose of the same as early as possible taking the same on priority basis. The applicants will file the written statement within one month from the date of receipt/production of a copy of this judgment in the court below.

26. As Misc. Appeal No. 112 of 1991 has been allowed and as such, First Appeal No. 425 of 1991 has become infructuous and accordingly, the same is hereby dismissed as infructuous.

(Jitendra Mohan Sharma, J)

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