

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4475 of 2013

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1. Smt. Nirmala Devi W/O Sri Rampukar Singh R/O Vill+ P.O- Shekhpur, P.S- Ahiyapur, District- Muzaffarpur.
 2. Smt. Savitri Devi W/O Sri Pawan Prasad R/O Vill- Akharaghat Road, P.O- G.P.O, Muzaffarpur, P.S- Town, District- Muzaffarpur.
 3. Smt. Kamini Kaushal W/O Prem Kumar Singh R/O Mohalla- Balughat, P.O- G.P.O. Muzaffarpur, P.S- Town, District- Muzaffarpur.
 4. Smt. Sarita Devi W/O Sri Jitendra Singh R/O Vill- Agrail, P.O- Chand Parna, P.S- Patepur, District- Vaishali. Petitioner/s

Versus

1. Saiyad Jamil Hussain S/O Late Saiyad Aradat Hussain R/O Vill- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur (New Shekarpur), P.S- Ahiyapur, District- Muzaffarpur.
2. Saiyad Gaffar Hussain S/O Late Saiyad Aradat Hussain R/O Vill- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur (New Shekarpur), P.S- Ahiyapur, District- Muzaffarpur.
3. Saiyad Jalil Hussain S/O Late Saiyad Aradat Hussain R/O Vill- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur (New Shekarpur), P.S- Ahiyapur, District- Muzaffarpur.
4. Saiyad Gulab Rabbani S/O Late Saiyad Aradat Hussain R/O Vill- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur (New Shekarpur), P.S- Ahiyapur, District- Muzaffarpur.
5. Saiyad Jaffar Hussain S/O Late Saiyad Aradat Hussain R/O Vill- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur (New Shekarpur), P.S- Ahiyapur, District- Muzaffarpur.
6. Gulnaz Bano @ Kaushav D/O Late Saiyad Akhtar Hussain R/O Village- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur, (New Shekarpur, P.S- Ahiyapur, District- Muzaffarpur.
7. Saiyad Nasivan Bano W/O Saiyad Ekbal Haidar And D/O Late Saiyad Akhtar Hussain R/O Mahamadpur Mubarak, P.O- Maniyari, P.S- Maniyari, District- Muzaffarpur.
8. Saiyada Sahar Bano W/O Saiyad Kalbe Ahmad And D/O Saiyad Akhtar Hussain R/O Village- Rusulpur, P.O- Rusulpur, P.S- Balia, District- Katihar.
9. Saiyada Hasan Bano W/O Md. Kasimhussain R/O Village- Gopalpur, P.O- Gopalpur, P.S- Hussainganj, District- Siwan.
10. Fiza Begum W/O Late Saiyad Kasim And D/O Late Saiyat Aradat Hussain R/O Vill- Saraiya Chak, Mustafa @ Sipahpur, P.O- Bhikanpur, (New Shekhpur), P.S- Ahiyapur, District- Muzaffarpur.
11. Hajra Begum W/O Late Mirja Mustafa R/O Vill- Saraiya Chak, Mustafa @ Sipahpur, P.O- Bhikanpur, (New Shekhpur), P.S- Ahiyapur, District- Muzaffarpur.
12. Saiyad Ali Abas Assadi S/O Saiyad Jalil Hussain R/O Village- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur, (New Shekarpur, P.S- Ahiyapur, District- Muzaffarpur.
13. Saiyad Md Ali S/O Saiyad Jalil Hussain R/O Village- Saraiya Chak Mustafa @ Sipahpur, P.O- Bhikanpur, (New Shekarpur, P.S- Ahiyapur, District- Muzaffarpur.
14. Smt. Meena Singh W/O Krishna Singh R/O Village- Kalyani, P.O- Harkhauli, P.S- Gaaighat, District- Muzaffarpur. ... Respondents.

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Appearance :

For the Petitioner/s : Mr.

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT

6 17-12-2015

Heard the learned counsel for the petitioners and the learned counsel appearing for the respondent no.12.

The learned counsel for the petitioners has submitted that the respondent no.12 and 13 are the only contesting respondents in this appeal and they had alone filed the miscellaneous case in the court below.

The learned counsel appearing for the respondent no.12 has raised no objection to the prayer made in the interlocutory applications (I.A.No.6296/2014 & I.A.No. 5349/2015) filed for substitution of the heirs and legal representatives of the deceased respondent nos.3 and 5 respectively.

In view of the submissions and the facts stated in the two interlocutory applications, the prayer of substituting the heirs and legal representatives of the deceased respondent nos.3 and 5 is allowed and the heirs and legal representatives of the deceased respondent nos.3 and 5 as stated in the substitution application respectively are substituted in place of respondent nos.3 and 5 after expunging their names from the application.

Heard the learned counsel for the parties on merits.

With the consent of the parties, this writ application is being disposed of at this stage.

Assailing the impugned judgment by which the appellate court below has set aside the order of the trial court rejecting the petition under Order 9 Rule 13 C.P.C., the petitioners have filed this writ application under Article 227 of the Constitution of India.

Shorn of unnecessary details, the facts are manifest that the petitioners as plaintiffs filed T.S.No.455/06 for declaration of title with regard to the properties mentioned in the suit. The said suit was decreed on contest and ex parte against the present respondent no.12 and 13 with regard to the claim of the petitioners for property mentioned in Scheduled-III of the plaint. The respondent no.12 and 13 thereafter filed a petition under Order 9 Rule 13 C.P.C. praying for setting aside the ex parte decree against them. The trial court after hearing the parties and considering the evidence came to the conclusion that the summons were validly served upon the non-appearing defendants and on this basis refused to allow the prayer for setting aside the ex parte. In appeal the appellate court, however, has overturned the order of the trial court, allowed the appeal and set aside the ex parte decree

in question.

Earlier the notice was issued to the respondents. After valid service of notice only respondent no.12 has appeared through his counsel who has been heard on merits. No other respondent including the respondent no.13 appeared when the matter has been called out. It would be relevant to mention here that the learned counsel for the petitioners has submitted that the respondent nos.12 and 13 are the only contesting respondents in this application as they were the only two applicants in the miscellaneous case filed under Order 9 Rule 13 C.P.C. in the trial court.

Mr. Singh, the learned counsel appearing for the petitioners has submitted that the appellate court below while reversing the order of the trial court has not taken into consideration the evidence on record and has passed the order in mechanical manner. It has been pointed out that the process server filed affidavit regarding the service of notice on the present respondent no. 12 and 13 and was also examined in the proceeding and has fully supported the fact of service of notice. It has been further canvassed that a proceeding under Section 144 Cr.P.C. was initiated in between the parties during the pendency of the suit wherein also the opposite parties which included the present

respondent nos. 12 and 13 appeared and filed their show cause wherein the specific objection to the maintainability of the proceeding under Section 144 Cr.P.C. was taken on the ground of pendency of the suit. It has further been submitted that there were sufficient evidence which have been considered by the trial court for turning down the prayer of the respondent nos.12 and 13 for setting aside the ex parte decree but the appellate court below has not reappraised the same.

The learned counsel appearing for the respondent no. 12, however, has submitted that he has no instruction with regard to the proceeding under Section 144 Cr.P.C. and also with regard to the show cause filed in the said proceeding the copy of which has been annexed with the present application. No other submission has been made on behalf of the respondent no.12.

After considering the submissions and considering the facts and circumstances of the case, it is manifest that the decree in T.S.No.455/2006 has been passed ex parte against the respondent nos.12 and 13 and they filed the petition under Order 9 Rule 13 C.P.C. for setting aside the ex parte decree. The burden of proof therefore of non-service of summons was squarely upon the present respondent nos.12 and 13. Both the parties led evidence in the Misc.Case No.02/08 and the trial court has

analyzed the evidence of the parties and thereafter reached to the conclusion that the notices/summons were validly served upon the applicants (respondent nos.12 and 13) in the suit and they had knowledge of the proceeding of the suit. The appellate court, however, by the impugned order has not taken pains to discuss those evidence and to reach to a different conclusion after reappraisal with its own reasonings. The cryptic manner in which the appellate court has dealt with matter cannot be sustained in law. The appellate court was required to scrutinize the pleadings and evidence of the parties and thereafter reach to its own conclusion while reversing the order of the trial court. In this view of the matter this Court is inclined to allow this application, set aside the impugned order and remit the matter back to the appellate court below to decide the appeal afresh in accordance with law preferably within a period of three months from the date of receipt /production of a copy of this order. It is so done accordingly.

The writ application is allowed with aforesaid direction.

(V. Nath, J)

Nitesh/-

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