

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Civil Revision No.1131 of 2008**

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1. Ram Krishan Yadav @ Ram Krishna Yadav.

2. Anatlal Yadav @ Anant Lal Yadav, Both sons of Bindeshwari Yadav, both  
resident of village-Rupauli, Tola-Ketawan, P.S.-Singheshwar, District-  
Madhepura.

.... .... Petitioner/s

Versus

Shambhu Prasad Yadav son of Bhubneshwari Yadav, resident of village-Rupauli,  
Tola-Ketawan, P.S.-Singheshwar, District-Madhepura.

.... .... Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. B.N.P SINGH

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE V. NATH**

**ORAL JUDGMENT**

**Date: 22-01-2016**

Heard Mr. B.N.P. Singh, the learned senior counsel  
appearing on behalf of the petitioners and Mr. R.M. Pandey, the  
learned counsel appearing on behalf of the opposite party.

This revision application has been filed by the plaintiffs  
against the impugned order dated 11.06.2008 by which the learned  
court below has allowed the petition filed by the opposite party under  
Order 9 Rule 13 C.P.C. and set aside the decree passed in Title  
Partition Suit. No. 06 of 1979.

The factual expose' are that a suit for partition was filed  
by the plaintiff-petitioners for declaration of title and confirmation of  
possession. Some of the defendants including the present opposite



party appeared in the suit and filed their written statements. The other defendants did not appear in the suit. However, the opposite party who had filed his written statement left the contest in the suit and did not lead any evidence. The plaintiffs led his evidence and ultimately the suit was decreed by judgment and decree dated 17.01.1997. The defendant-opposite party, thereafter, filed a petition under Order 9 Rule 13 C.P.C. for setting aside the said decree. The Misc. Case No. 02 of 1997/26 of 1998 was initiated upon the said petition. The parties led their evidence and by the impugned order the learned court below has set aside the judgment and decree passed in Title Partition Suit No. 06 of 1979 and placed the same for hearing.

Mr. Singh, the learned senior counsel appearing for the plaintiff-petitioners has assailed the impugned judgment/order on two counts. Firstly, it has been contended that the petition filed under Order 9 Rule 13 C.P.C. by the defendant-opposite party no. 1 praying for setting aside the judgment and decree of the partition suit was not maintainable as the decree passed in the said suit was not ex parte. Drawing attention of the court towards the last operative part of the judgment (annexed with this revision application), the learned senior counsel has submitted that the suit has been mentioned therein to have been decided on 'contest'. On this premises, it has been propounded that once after the judgment in question itself mentions the fact of



dismissal of the suit on contest, the aggrieved party can have the remedy by way of appeal or any other remedy in accordance with law but the provision for setting aside the ex parte decree as envisaged under Order 9 Rule 13 C.P.C. would not be attracted. It has, therefore, been emphasized that the learned court below has wrongly decided the issue of maintainability which has been specifically raised by the plaintiff-petitioners and has also wrongly given a finding that the word 'contest' came to be mentioned in the judgment by inadvertence when the learned court below being not the appellate court, lacked the jurisdiction to correct the judgment and decree. The learned counsel has placed his reliance on the decision in the case of **Firm Sood Traders Vs. Paras Ram, 1985 H.P. 93** and in the case of **Ram Kishun Yadav Vs. Baldeo Chaudhary 1980 (28) B.L.J.R. 34**. Elaborating his submissions on this count, it has been further argued that the fact that the defendant-opposite party no. 1 appeared and filed his written statement not being in dispute, the court had the jurisdiction to decide the suit even in his absence in view of the provisions as contained in order 17 Rule 2 which also therefore excludes the application of the provisions of Order 9 Rule 13 C.P.C. The learned senior counsel has placed reliance upon the decision by the Apex Court in the case of **Sangram Singh Vs. Election Tribunal Kotah, A.I.R. 1955 S.C. 425** in order to substantiate his stand that



under Order 17 Rule 2 C.P.C. the court has got the widest discretion to proceed with the suit. The second contention on behalf of the petitioners is that the learned court below has committed error of record in recording the finding that the plaintiff-petitioners in their deposition have admitted the fact of illness of the opposite party. Taking a categorical stand in this regard, the learned senior counsel, after placing the deposition of the concerned witness, has submitted that there has been no such admission which has been taken into notice by the learned court below for holding the explanation furnished by the opposite party to be sufficient. No other submission has been made on behalf of the petitioners.

Mr. Pandey, the learned counsel for the opposite party, has supported the impugned order and has submitted that the learned court below has committed no error of jurisdiction in entertaining the petition filed by the opposite party under Order 9 Rule 13 C.P.C. and disposing it of on merits by allowing the prayer of the opposite party for setting aside the judgment and decree in question. It has been the stand of the learned counsel that the fact that the opposite party after appearance and filing written statement did not contest the suit and did not lead any evidence in support of the averments made in the written statement is not in dispute and in this backdrop there cannot be any ambiguity that the court proceeded ex parte against the



opposite party. It has been propounded by the learned counsel that the word 'ex parte' has been given wide interpretation and has not been confined to cases of total non-appearance of the defendants in the suit. It has been further posited that the conspectus of the provision of Order 17 Rule 2 and 3 does not leave any doubt that in a suit when the defendant is absent on the date of hearing and no evidence at all has been led on his behalf, the court can proceed only under the provisions of Order 9 C.P.C. and it is only when there is some evidence on record on behalf of the party who is absent on the date of hearing that the court has the jurisdiction to pass the decision in the suit and by fiction such party would be deemed to be present. Drawing the attention of this Court to the facts and findings as mentioned in the impugned order, the learned counsel for the opposite party has submitted that the petition filed by the opposite party under Order 9 Rule 13 was maintainable in law and more so when the learned court below in the impugned order itself has recorded that the word 'contest' in the judgment has come to be mentioned inadvertently. Refuting the contentions on behalf of the petitioners regarding maintainability of the proceeding before the learned court below it has been further argued that as the court has jurisdiction to proceed only under the mode prescribed in Order 9 C.P.C. there remains no doubt that the provision of Order 9 Rule 13 C.P.C. was



applicable in the facts and circumstances of the case. The learned counsel has placed reliance upon the decision by the Apex Court in the case of **Mahesh Dattatray Thirthkar Vs. State of Maharashtra, 2003 SC. 3547**. The further contention by the learned counsel for the opposite party is that the opposite party has adduced evidence including the evidence of the doctor who has been examined as P.W.- 3 in support of his illness and has further pointed out that the learned court below after considering the submissions and evidence on record has recorded the finding that the opposite party was prevented by sufficient cause in not appearing in the suit. It has been thus submitted that the statement by the plaintiff's witness was not the sole basis of the satisfaction of the learned court below. It has also been argued that the discretion exercised by the learned court below is normally not open to interference in revisional jurisdiction unless the same is shown or established to be unreasonable or perverse in any manner.

After considering the submissions as well as facts materials on record, it is manifest that the learned court below by the impugned order has set aside the judgment and decree passed in Partition Title Suit No. 06 of 1979 under the provisions of Order 9 Rule 13 C.P.C. The fact has not been disputed by the petitioners that the opposite party after filing the written statement did not contest the suit and has not adduced any evidence. In this background, the word



‘contest’ as mentioned in the last operative sentence of the judgment in question appears to have been inadvertently made and the learned court below has also mentioned in the impugned order the same fact. It is well settled that the mistake of the court would not prejudice the rights of the parties. As there is admittedly no material to show that the word ‘contest’ as mentioned in the last operative sentence of the judgment in question was justified on any ground, this Court does not find any error in the impugned order where the court below has found that the word ‘contest’ has been inadvertently mentioned in the judgment in question. The contention on behalf of the petitioners that such a course was open only in appeal against the judgment and decree does not appear in the facts and circumstances of the case to have substance as any dispute before the court is not to be determined on the basis of some inadvertent error occurring in the judgment/order of the court which can always be corrected or clarified by the court under its inherent jurisdiction and the aggrieved party must not be relegated to seek remedy by way of filing regular appeal.

The argument on behalf of the petitioners that the petition filed under Order 9 Rule 13 by the opposite party was not maintainable because the court had the jurisdiction under Order 17 Rule 2 C.P.C. to proceed with the disposal of the suit in other modes as well and it was not necessary to follow the modes prescribed under

Order 9 C.P.C. is also not supported by the provision of Order 17 Rule 2 C.P.C. For ease of reference the provision of order 17 is quoted hereinbelow.

*“2. Procedure if parties fail to appear on day fixed.- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.*

The above said provision clearly mentions that if the court decides, in the circumstance when the parties or any one of them is absent, to dispose of the suit, it has the jurisdiction only to proceed under one of the modes prescribed under Order 9 C.P.C. Much emphasis has been laid on behalf of the petitioners to the words ‘make such other order as it thinks fit’ to support the contention that the jurisdiction of the court to dispose of the suit in modes other than as directed in that behalf by Order 9 has not been excluded. However, this submission appears to have been made ignoring the explanation which has been incorporated purposely to avoid the varied interpretation given to the above phrase “make such other order as thinks fit” and conferring jurisdiction upon the court to proceed with case assuming the presence of such party who is in fact absent but on whose behalf evidence or substantial part of the evidence has already

been recorded.

Even otherwise also the phrase “or make such other order as it thinks fit” has been interpreted as not enabling the court to dispose of the suit on the merits but only to grant a further adjournment and it would be profitable have to take into notice the full bench decision of the Madhya Pradesh High Court in the case of **Rama Rao Vs. Shantibai, A.I.R. 1977 M.P. 222** where it has held as follows:-

*“9. ....We also think that the expression “such other order as it thinks fit” used in R. 2 permits disposal of the suit and not a decision thereof on merits contemplated by R. 3, in a mode other than that provided in O. 9, e.g., by an order of adjournment.....”*

The underlying meaning of the aforesaid phrase has also been succinctly explained in the Full Bench decision of the Allahabad High Court in **M.S. Khalsa Vs. Chiranji Lal, A.I.R. 1976 All. 290** as follows:-

*“58.....In my opinion it is not quite an accurate statement of the law to say that the only order that the court can, under the last clause of Rule 2, pass is to adjourn the hearing to some other date. The court can also pass such other order in favour of the absenting party as the circumstances may justify.*

59.....*There are more than one reason. In the first place, the phrase “make such other order as it thinks fit” contemplates an order other than one which can be passed under Order IX. Order IX contemplates the disposal of the suit against the non-appearing party. If the plaintiff fails to appear the suit can be dismissed for default under Rule 8 of Order IX. If the defendant fails to appear, the suit is liable to be decreed ex parte under Order IX, Rule 6 (1) (a). Ex hypothesi, the court cannot, under this clause, pass an order disposing of the suit against the non-appearing party. That is the only bar.”*

In view of the above pronouncements, it is difficult to align with the submission on behalf of the petitioners that the court is empowered to dispose of the suit against the absent party who has not led any evidence, in a mode other than that provided in Order 9 C.P.C. by deriving jurisdiction from the phrase “or make such other order as it thinks fit” occurring in Order 17 Rule 2 C.P.C. The same view has been taken in the case of **Firm Sood Traders Vs. Paras Ram, 1985 H.P. 93** though, the said decision has been relied upon by the learned senior counsel for the petitioners. The decision relied upon in the case of **Ram Kishun Yadav** (supra) is clearly distinguishable on the facts as in the present case the opposite party has not challenged the



judgment and decree in question on merits. The decision relied upon by the learned senior counsel for the petitioners in the case of **Sangram Singh Vs. Election Tribunal Kotah, A.I.R. 1955 S.C. 425** also does not support the contention on behalf of the petitioners that in presence of specific provision in Order 17 Rule 2, the court can proceed to dispose of the suit in a mode other than that prescribed under Order 9, and the word “widest discretion” used by their lordships cannot be construed out of the context of the said decision. Instead, the principles laid down in the case of **Mahesh Dattatray Thirthkar Vs. State of Maharashtra, 2003 SC. 3547** are nearer to facts of the present case. This Court therefore, does not find any error of jurisdiction or material irregularity in the findings by the learned court below that the petition filed under order 9 Rule 13 C.P.C. by the opposite party is maintainable.

The next submission on behalf of the petitioners is that the learned court below has wrongly recorded the finding that the opposite party was prevented by sufficient cause from not appearing in the suit when it was called out for hearing, and this finding is vulnerable for the reason that the learned court below has committed error of record in stating that the plaintiffs’ witness has accepted the illness of the opposite party. From the perusal of the findings of the learned court below it does not appear that the learned court below has



proceeded solely on the basis of the said statement of the witness examined on behalf of the plaintiffs rather the learned court below has recorded its conclusion after scrutiny of the entire evidence laid on behalf of both the parties. Moreover, the said witness on behalf of the plaintiffs has also stated about the illness of the opposite party but has qualified it only by the fact the opposite party was suffering from cold and cough. As such, it cannot be held that the court below has committed any error of record and the finding of fact is vitiated for the said reason. This Court has also not been persuaded to find that the conclusion arrived by the court below upon scrutiny of evidence on record is unreasonable or cannot be a possible view. The endeavour on behalf of the petitioners during the course of submission for re-appreciation of evidence to interdict the findings of fact cannot as such be countenanced under the revisional jurisdiction.

The fact is not in dispute that the suit has been filed for partition and the civil rights of the parties are there before the court for adjudication. It is just and proper that the civil litigation should be decided as far as possible on merits after affording reasonable opportunities of hearing to the parties concerned. The consequence of the impugned order is only that the suit would now be decided on merits and this course in no view of the matter would be prejudicial to either of the parties.

In view of the aforesaid reasons and discussions, this Court does not find error of jurisdiction or illegality in any manner in the impugned judgment/order passed by the learned court below.

The civil revision application is, accordingly, dismissed.

Devendra/-

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(V. Nath, J)