

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.589 of 2016

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Ghanshyam Sharma & Anr

.... Appellant/s

Versus

Kumari Devi @ Ramkumari Devi & Anr

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sunil Kumar Dubey

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

2 16-09-2016 Heard learned counsel for the petitioners and learned
counsel for the respondents.

2. Perused the impugned order dated 11.07.2016 passed
by learned Subordinate Judge-I, Arwal in Title Suit No.97 of 2015
whereby the learned court below has rejected the application filed
by the petitioners to recall the order dated 27.01.2016 fixing the
case for ex-parte hearing.

3. The learned counsel for the petitioners submitted that
on 18.04.2016 for the first time the petitioners appeared in the case
and filed application for time to file written statement and on
11.05.2016 filed application for recall of the order but by the
impugned order the court below rejected the same. According to
the learned counsel, no summon was served to the petitioners
earlier, therefore, they could not appear. When they came to know,
they have appeared and immediately filed the application but no

opportunity has been granted. The learned counsel further submitted that if no opportunity is granted then it will cause irreparable loss and occasion failure of justice.

4. On the other hand, the learned counsel for the respondents submitted that the summons were served by publication of notice in daily newspaper, therefore, it is incorrect to say that no notice has been validly served on the petitioners.

5. Admittedly the suit is of the year 2015. The court below has fixed the case for ex-parte hearing by order dated 27.01.2016. Immediately the defendants-petitioners after appearance filed application seeking time to file written statement and also filed application for recall of the order fixing the case for ex-parte hearing. The court below on the basis of publication of notice held that the notice has been validly served.

6. It may be mentioned here that in cases of setting aside ex-parte decree the Limitation Act provides that for the purpose of Article 123 the substituted service under Rule 20 of Order V of the Code of Civil Procedure shall not be deemed to be due service. Now, therefore, once the petitioner appeared and filed an application before the court below that no summon was served on him then the other side has to prove the fact that in fact notice was duly served.

7. It may further be mentioned here that in the present case there is no evidence on record to show that the notice was validly served. As such, if publication in the newspaper is not a due service then the petitioners, who are defendants in the court below, have filed the application for setting aside the order dated 27.01.2016 which shows their bonafide. The court below in the facts and circumstances of the case, therefore, has wrongly refused to exercise a jurisdiction vested in it by law. The court below should have granted time to file written statement. However, the learned counsel for the petitioners undertakes before this court that written statement will be filed in the court below within one month from today.

8. In view of the aforesaid facts and circumstances of the case and undertaking given by the petitioners this civil miscellaneous application is allowed. The order fixing the case for ex-parte hearing is hereby set aside. The petitioners are granted time for only one month from today to file written statement in the court below failing which the court below is directed to proceed according to law.

(Mungeshwar Sahoo, J)

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