

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.621 of 2016**

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Hriday Narayan Kumar & Ors

.... Appellant/s

Versus

Smt. Jaya Singh & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Najmul Hoda

For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO**

ORAL ORDER

2 19-09-2016 (1) Heard the learned counsel for the petitioners and the

learned counsel for the respondents.

(2) Perused the impugned order dated 02.07.2016 passed
by Sub Judge III, Buxar in Miscellaneous Case No.11 of 2010
whereby the learned Court below has rejected the application filed
by the present petitioner under Order VII Rule 11(a) C.P.C.

(3) It appears that partition suit was filed by the present
petitioner. The suit was decreed ex parte against defendant No.1.
Thereafter, the respondent No.1 herein Smt. Jaya Singh filed the
application under Order IX Rule 13 C.P.C. before the Court below
for setting aside the ex parte decree against defendant No.1,
Upendra Kumar on the ground that she is the power of attorney
holder of defendant No.1 and the judgment and decree has been

passed against said Upendra Kumar.

(4) This petitioner filed application before the Court below for rejection of the said miscellaneous case on the ground that it is not maintainable at the instance of Jaya Singh who is purchaser from Upendra Kumar, defendant No.1. The said application was rejected against which CWJC No.12196 of 2014 was filed. This Court in CWJC No.12196 of 2014 by terms of order dated 17.08.2015 held that the application under Order IX Rule 13 C.P.C. is maintainable at the instance of Jaya Singh who is power of attorney holder and even if she is purchaser then also according to Section 146 C.P.C. she is claiming through the defendant No.1 and accordingly, dismissed the said writ application filed under Article 227 of the Constitution of India.

(5) The petitioners thereafter filed petition for special leave to appeal No.649 of 2016 before the Supreme Court. The Supreme Court by terms of order dated 18.01.2016 held that we do not find any merit in this petition and accordingly, the petition for special leave was dismissed. Thereafter, this application under Order VII Rule 11(a) C.P.C. has been filed by the present petitioner praying for rejection of the plaint on the ground that there is no complete cause of action for proceeding in this application under Order IX Rule 13 C.P.C. The Court below by

the impugned order has rejected this application holding that this application regarding maintainability/rejection of the application under Order IX Rule 13 C.P.C. has already been rejected earlier, therefore, the application is rejected.

(6) The learned counsel for the petitioner submitted that the application under Order IX Rule 13 C.P.C. at the instance of a third party is not maintainable. Smt. Jaya Singh is a purchaser. The defendant No.1 has not filed this application for setting aside ex parte decree, as such, the miscellaneous case itself is not maintainable. The photocopies of the power of attorney has been filed by the respondent No.1 which is not at all admissible and in fact, the respondent No.1, Smt. Jaya Singh, who is a purchaser, has only option to file a suit for partition in view of the decision of the Supreme Court, AIR 1953 Supreme Court 487 and 1956 BLJ 602.

(7) On the other hand, the learned counsel for the respondent No.1 submitted that this application is frivolous and vexatious application and in fact, the same has been filed by the petitioner only to delay the disposal of the miscellaneous case filed by the respondent No.1 under Order IX Rule 13 C.P.C. Same matter is being reiterated again and again only with a view to put hindrances in the disposal of the proceeding under Order IX Rule



13 C.P.C. The learned counsel further submitted that when this matter has already been rejected earlier upto the Supreme Court, the same shall operate as resjudicata again in the proceeding as it is settled principles of law that an order passed at one stage shall operate as resjudicata in the same proceeding in subsequent stage also. According to the learned counsel, the application filed by the petitioner is to cause delay and for causing delay, the petitioner is adopting dilatory tactics by abusing the process of the Court. The respondent No.1 is the power of attorney holder of defendant No.1 and, therefore, she has filed the application on behalf of defendant No.1 and admittedly, the judgment and decree is ex parte against defendant No.1, in such circumstances, the same cannot be held to be not maintainable.

(8) Perused the impugned order. Perused the order passed by this Court in CWJC No.12196 of 2014. From perusal of the order of this Court in the aforesaid writ application , it appears that this question regarding maintainability under Order IX Rule 13 C.P.C. has already been decided and it was held that the application at the instance of respondent No.1 is maintainable. The Supreme Court has dismissed the petition for special leave as stated above. Now, therefore, so far maintainability matter is concerned, it is final.



(9) So far the rejection of the application under Order VII Rule 11(a) is concerned, it may be mentioned here that the provision provides for rejection of the plaint if the plaint does not disclose a cause of action. Without going to the question of application of Order VII Rule 11 C.P.C., I am deciding the points raised by petitioner. The application under Order IX Rule 13 C.P.C. is not a plaint. It is only an application and supplementary affidavit can be filed to supplement any deficiency. If the judgment and decree is ex parte then application under Order IX Rule 13 is always maintainable. In the present case at our hand, admitted fact is that the judgment and decree is ex parte against defendant No.1. The defendant No.1 has given power of attorney to respondent No.1 and, therefore, at the instance of the respondent No.1, the application has been filed under Order IX Rule 13 C.P.C. which has already been held to be maintainable by this Court which was confirmed by the Supreme Court.

(10) So far the provision as contained in Order VII Rule 11(a) is concerned, the Hon'ble Supreme Court in the case of **Liverpool & London S.P. & I Association Ltd. v. M.V.Sea Success I and another, (2004) 9 Supreme Court Cases 512** has held that "whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must



be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.” In the present case, the argument advanced by the learned counsel for the petitioner is that there is incomplete cause of action. In my opinion, this is misconceived argument.

(11) The Hon’ble Supreme Court again in **(2015) 8 Supreme Court Cases 331 (P.V. Guru Raj Reddy and another v. P. Neeradha Reddy and others)** held that “rejection of the plaint under Order 7 Rule 11 of C.P.C is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be



so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

(12) In the present case, from perusal of the order of this Court as well as the Supreme Court, the same question has already been decided. It further appears that when the petitioner herein was putting hindrances in the trial of the miscellaneous case under Order IX Rule 13 C.P.C., the respondent No.1 has filed CWJC No.8464 of 2013 and this Court by terms of order dated 12.09.2013 directed the Court below to proceed expeditiously and further directed not to grant adjournments without any cogent reason. This application under Order VII Rule 11 C.P.C. has been filed thereafter. Now, therefore, it becomes clear that the petitioners are putting hindrances in trial of the application under Order IX Rule 13 C.P.C. by adopting dilatory tactics by filing

frivolous and vexatious applications.

(13) The Hon'ble Supreme Court in the case of **Ram Rameshwari Devi and others v. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249** has given guidelines for shortening the civil litigation vide paragraph 52(c). The Hon'ble Supreme Court held that **“imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties.** At paragraph 54, the Hon'ble Supreme Court has held that **“while imposing cost, we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different Courts. We have to also broadly take into consideration the prevalent fees structures of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopy, court fee etc.”** At paragraph 55, again it has been held **“the other factor which should not be forgotten while imposing costs is for how long the defendants or respondents**

were compelled to contest and defend the litigation in various Courts.”

(14) This miscellaneous case under Order IX Rule 13 C.P.C. has been filed in the year 2010 and the petitioners herein have been able to drag the matter for last five years on one or other grounds by misusing the process of the Court. Therefore, the delaying tactics which is being adopted by the party for getting benefit should be dealt with strongly from the very beginning by the Court so that it will be a lesson to the others and in future, the same dilatory tactics for the purpose of getting benefit and harassing the other party by abusing the process of Court would not be adopted. Unless this message is given to the litigant, who are trying to misuse the process of the Court, the disposal of civil cases cannot be shortened and wrongdoer will always try to harass the other helpless litigant. The Court cannot be a silent spectator and dance at the instance of a litigant who is misusing the process of the Court. This present case is one of the such instances. In this matter, reference may also be made to the decision of this Court in **2016(3) PLJR 1022(Gyan Infra Build Pvt. Ltd. & Anr. v. Smt. Mamta Sinha @ Rupam & Ors.)**.

(15) The Hon'ble Supreme Court in the case of **U.P. State Road Transport Corporation v. State of U.P. and**



another, AIR 2005 Supreme Court 446 has held that “the principle of res judicata is based on the need of giving a finality to judicial decisions. The principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of S. 11 of Code of Civil Procedure in this respect. Res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.” This decision also fully applies in the present case.

(16) In view of the above facts and circumstances of the case and the settled principles of law laid down by the Supreme Court it cannot be said in any way that the order passed by the Court below is without jurisdiction or that the order passed by the Court occasion failure of justice or it has been passed in the manner not permitted by law so as to call for an interference under Article 227 of the Constitution of India.

(17) However, considering the conduct of the petitioner, this civil miscellaneous case is dismissed with cost of Rs.10,000/- to be paid by the petitioner to the respondent No.1. The petitioner shall deposit the said cost within one month in the Court below

and if such cost is deposited, the respondent No.1 will be at liberty to withdraw the same. If the cost is not deposited, the same shall be realized through the process of the Court.

(Mungeshwar Sahoo, J)

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