

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1000 of 2016**

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Sunil Kumar Dugar

.... Appellant/s

Versus

Udyot Kumar Kothari & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Prabhat Ranjan Singh

For the Respondent/s : Mr. Subodh Kumar Jha

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

3 03-10-2016 1. Heard the learned counsel, Mr. J.S. Aroras, for the petitioner and the learned counsel, Mr. Subodh Kumar Jha, for the plaintiff respondent No.1.

2. Perused the impugned order dated 22.08.2016 passed by Sub Judge I, Birpur, Distt. Supaul in Title Suit No.146 of 2000 whereby the learned Court below rejected the application filed by the petitioner to recall the order dated 23.12.2010 whereby issues were framed and prayed for allowing him to file written statement and to contest the suit.

3. It appears that Title Suit No.146 of 2000 was filed by the plaintiff respondent for declaration of title and permanent injunction over the suit property. The petitioner was defendant No.19 in the said suit. Issues were framed on 23.12.2010 and the suit proceeded ex.-parte against the petitioner. An application was filed before the Court below by the petitioner for recall of the said

order whereby issues were framed on the ground that no summons were served on him, therefore, he had no knowledge about the pendency of the suit or the ex.-parte order. Rejoinder was filed by the plaintiff respondent and it is alleged that he had the knowledge and in fact his notice was accepted by respondent No.14 herein.

4. After hearing both the parties by the impugned order, the Court below held that notice was received by the respondent No.14 on behalf of the family members along with his own and, therefore, according to order 5 Rule 15 CPC, if any adult member of the family has received notice on behalf of other family members, it will be a valid service and accordingly, rejected the application filed by the petitioner.

5. The learned counsel, Mr. J.S. Arora, appearing on behalf of the petitioner submitted that in fact respondent No.14 himself had also not received the notice on his behalf what to speak of receipt of notice by him on behalf of defendant No.19. Respondent No.14 himself has appeared and filed an application before the Court below seeking permission to file written statement and to contest the suit on the ground that no notice was served on him. The learned counsel has annexed the A.D. which is Annexure '3' and '3/1'. On the strength of these documents, the learned counsel submitted that neither respondent No.14 nor



defendant No.19 has received the notice. Prior to proceeding the case ex.-parte, the Court below has not recorded any finding that the notice has been validly served on the petitioner or accepted the notice to have been validly served under Order 5 Rule 15 of the Code of Civil Procedure. The learned counsel submitted that in fact, no affidavit was filed before the Court below that the person who has received the notice was residing in the same house with the petitioner and, therefore, the Court below without considering these aspects of the matter by this impugned order now, accepting the notice as valid service prior to the proceeding ex.-parte against the petitioner.

6. On the other hand, the learned counsel, Mr. Jha, submitted that in fact all the family members including the respondent No.14 and 19 have executed a power of attorney in favour of defendant No.9, Saumerndrapad Singh Dugar and he was looking after the property on behalf of all the family members. In fact in the Court below, Saumerndrapad Singh Dugar had already appeared by filing Vakalatnama. According to the learned counsel, the suit property is the joint family property and all the members are residing in one house and in fact the address is also the same address. The notice was received by the family member on behalf of himself and on behalf of the others,



i.e., defendant No.15 has received the notice on behalf of respondent No.14 and defendant No.19 would be evident from Annexure '3' and 3/1'. Therefore, the Court below has rightly presumed that the notice had been validly served in view of the provision as contained in Order 5 Rule 15 of the Code of Civil Procedure.

7. The learned counsel for the respondent further submitted that injunction application was filed by the plaintiff respondent which was allowed. Against the said order, Saumerndrapad Singh Dugar had filed Misc. Appeal No.509 of 2001 wherein also the petitioner was party. At the time of hearing of this Civil Misc. application, the memo of appeal was produced before this Court.

8. The learned counsel further submitted that the source of information pleaded by the petitioner is not acceptable. The petitioner was trying to sell the property and was negotiating to sale the property through one Shabir and father-in-law of Shabir and in connection with that he was frequently visiting Supaul, as such the knowledge pleaded by the petitioner is only with a view to suit him in the present case.

9. From perusal of the impugned order, as stated above, it appears that the Vakaltnama filed before the Court below has been



annexed with the Civil Misc. application. Saumerndrapad Singh Dugar has executed the Vakalatnama as power of attorney holder of the family members wherein the name of the petitioner is not there. In other words, he is not the power of attorney holder of the petitioner. So far the Misc. appeal before the High Court is concerned, from perusal of the memo of appeal, I find that only Saumerndrapad Singh Dugar had filed the Misc. Appeal whereby this petitioner is respondent No.20. Nothing has been brought on record that in fact in that Misc. Appeal, notice has been served on the present petitioner and he had also appeared in the Misc. appeal. It further appears that the Court below nowhere recorded any finding that prior to proceeding the case ex-parte against the petitioner, notice was validly served on the defendant No.19, i.e, the present petitioner. For the first time, when this application is filed by the petitioner, the Court below has recorded the finding that under Order 5 Rule 15, the notice was validly served. Further, the Court below has not considered the point which is being raised by the petitioner before this Court which is supported by Ext.'3' and '3/1'. Only on the basis of the provision under Order 5 Rule 15 CPC, notice has been accepted as valid service. The Court below has also not recorded as to whether there was any affidavit filed by the party in the case in the Court below as to whether the

person who had received the notice on behalf of respondent No.14 and 19 was residing in the same house with defendant No.19 as provided under the provision stated. In my opinion, therefore, this Court while exercising supervisory jurisdiction under Article 227 of the Constitution of India cannot record any finding of fact after appreciation of the evidences either oral or documentary for the purpose of supervising the order. However, it appears that the Court below proceeded to reject the application filed by the petitioner in the manner not provided by law and without considering the materials available on record. So far points raised by the respondent is concerned also, the Court below has not dealt with in the impugned order.

10. In the result, this Misc. application is allowed. The impugned order is set aside. The matter is remanded back to the Court below for a fresh order according to law and then proceed accordingly. While passing fresh order, this order or any observation made by this Court shall not prejudice any one.

(Mungeshwar Sahoo, J)

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