

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7590 of 2016

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Uma Shankar Sah & Ors

.... Petitioner/s

Versus

Sushila Devi & Anr

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Pankaj Kumar

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

4 14-09-2016

Heard learned Senior Counsel Mr. Dhruv Narain for the petitioners and learned counsel Mr. Jai Prakash Verma for the respondents.

2. This writ application has been filed under Article 227 of the Constitution of India by the plaintiffs-petitioners for setting aside the order dated 27.02.2016 passed by learned 9th Additional District Judge, Muzaffarpur in Miscellaneous Appeal No.25 of 2006 whereby the court below has allowed the appeal filed by the defendants-respondents under Order 43 Rule 1 (d) of the Code of Civil Procedure.

3. It appears that the plaintiffs-petitioners filed Title Suit No.51 of 1975 praying for partition of their 1/3rd share in the suit property. The defendants-respondents on receiving summons appeared in the suit in the year 1976. The suit was then abated under Section 4(b) (c) of Consolidation Act. It revived in 1996 and



again notice was issued. The defendants-respondents appeared on 29.08.1997. In spite of several adjournments for filing written statement they did not file written statement. Therefore, they were debarred from filing the written statement. Subsequently they filed written statement on 08.07.2000, which was not accepted by the court below on 13.09.2000. The defendants-respondents did not challenge either of the order passed by the trial court. Thereafter the court below proceeded to decide the suit under Order 8 Rule 10 of the Code of Civil Procedure and the judgment and decree was passed on 27.03.2001. This judgment and decree was not challenged by the defendants-respondents by filing regular appeal under Section 96 of the Code of Civil Procedure. The defendants instead of filing appeal filed an application under Order 9 Rule 13 of the Code of Civil Procedure praying for setting aside the ex-parte judgment and decree, which was registered as Miscellaneous Case No.08 of 2001. The trial court after hearing the parties by order dated 11.09.2006 held that in the case of judgment and decree passed under Order 8 Rule 10 of the Code of Civil Procedure the application under Order 9 Rule 13 is not applicable. Against the said order of the trial court the defendants filed miscellaneous appeal being Miscellaneous Appeal No.25 of 2006. The lower appellate court by this impugned judgment allowed the

miscellaneous appeal.



4. The learned Senior Counsel for the petitioners submitted that since the judgment and decree has been passed by the trial court under Order 8 Rule 10 CPC, the provision as contained in Order 9 Rule 13 is not applicable. The trial court also dismissed the application i.e. miscellaneous case under Order 9 Rule 13 CPC recording finding to that effect. The lower appellate court did not decide this question but on surmises and conjectures recorded finding that if no opportunity is given to the defendants to adduce the evidence in the case, it will be injustice to the defendants and, therefore, has set aside the trial court order and the judgment and decree of the court below has also been set aside. According to the learned Senior Counsel, the Court has no jurisdiction to set aside the judgment and decree in the manner which has been done by the lower appellate court without recording any finding regarding maintainability of the application under Order 9 Rule 13 CPC.

5. On the other hand, learned counsel Mr. Verma for the respondents submitted that the lower appellate court has rightly held that there was sufficient reason for not contesting the suit by the defendants which is covered under Order 9 Rule 13 CPC. Therefore, on the basis of evidences the court below recorded a

clear finding that the defendants-respondents were residing outside the State of Bihar i.e. Assam and if no opportunity is granted to them to contest the suit, it will be injustice to them. In such circumstances, the order impugned cannot be interfered with in exercise of supervisory jurisdiction.

6. It is not disputed that the partition suit was filed by the plaintiffs-petitioners in the year 1975. The defendants appeared in the suit in the year 1976 earlier and again after notice in 1997. Thereafter they did not file written statement till 1999. They filed the written statement only after they were debarred from filing the written statement. Since they were debarred, the court below rejected the written statement considering the conduct. The defendants did not challenge the said order before higher courts. Thereafter judgment and decree was passed under Order 8 Rule 10 CPC.

7. Order 8 Rule 10 CPC reads as follows:-

“10. Procedure when party falls to present written statement called for by Court.- Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.”

8. In view of this provision the judgment and decree passed under Order 8 Rule 10 CPC is appealable under Section 96 of the Code of Civil Procedure.

9. It will not be out of place to mention here that this judgment and decree was not challenged by the defendants before the appellate authority on merit. Instead of challenging the judgment and decree in appeal they filed an application under Order 9 Rule 13 CPC being Miscellaneous Case No.08 of 2001.

10. Order 9 Rule 13 CPC reads as follows:-

“13. Setting aside decree ex parte against defendant-In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit” (proviso and explanation are not equated here).

11. In view of this provision Order 9 Rule 13 CPC is applicable only if the defendant against whom ex-parte decree is passed:

- (i) satisfies the Court that summons was not duly served or
- (ii) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

12. In the present case, at our hand, no such ground is available to the defendants as summons have been duly served on them twice and they had also appeared in the suit as far back as in the year 1976 and 1997.

13. In an application under Order 9 Rule 13 CPC falling in the second category the court has to see the existence or otherwise of sufficient cause for non-appearance on the date when he was proceeded ex-parte by the court. Here as stated above the 1st portion of Rule 13 is not applicable. So far 2nd portion (2nd category) is concerned also the defendants appeared and when the case was fixed for ex-parte hearing they filed written statement. Therefore, at that stage they showed the sufficient ground but the court below considering the conduct of the defendants rejected written statement. This order was not challenged. Again after ex-parte decree in the proceeding under Order 9 Rule 13 CPC same ground is raised by the defendants which had already been rejected. In view of the present facts and circumstances the defendants are not entitled for any relief.

14. Now in these situation if liberal view is taken then in all cases the defendant will appear and then will not file written statement. When the case will be fixed for ex-parte hearing he will

file written statement explaining sufficient cause. If cause is accepted then all right and if not accepted, he will sleep then after ex-parte decree application under Order 9 Rule 13 CPC will be filed. This will amount to abuse of the process of court.

15. This court in the case of **Satya Narayan Sah Vs. Brij Gopal Mundra, A.I.R. 1991 Patna 60** held that notices had already been served on the defendant who had also appeared, there was no need to fix any date for ex-parte hearing and the court could proceed under Order VIII Rule 10 CPC and pronounce the judgment followed by a decree. The learned trial court was fully justified in doing that and that cannot be called to be an ex-parte decree. At paragraph 4 of the decision it is held that the application filed on behalf of the defendant under Order 9 Rule 13 CPC was, therefore, not maintainable as the decree was not an ex-parte decree. Again same view has been reiterated in **1997 (2) B.L.J. 618 (M/s Vasant Talkies Vs. Sri Prakash)**.

16. From perusal of the lower appellate court judgment, it appears that the lower appellate court has not decided the question regarding maintainability of Order 9 Rule 13 CPC application which was the main reason assigned by the trial court for rejection of the application under Order 9 Rule 13 CPC. In view of the above facts and circumstances of the case since the

judgment and decree passed by the trial court is passed under Order 8 Rule 10 CPC, Order 9 Rule 13 CPC is not applicable at all. Since it was not applicable, the appellate judgment passed by the lower appellate court without recording any finding that the miscellaneous case under Order 9 Rule 13 CPC was maintainable or not and setting aside the order of the trial court and also the judgment and decree passed by the trial court under Order 8 Rule 10 CPC is without jurisdiction. The lower appellate court has, therefore, proceeded to decide the case in the manner not permitted by law.

17. In view of the above facts and circumstances, the judgment dated 27.02.2016 passed by 9th Additional District Judge, Muzaffarpur in Miscellaneous Appeal No.25 of 2006 is hereby set aside. The trial court order is restored.

18. Thus, this writ application is allowed.

(Mungeshwar Sahoo, J)

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A.F.R.

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