

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.897 of 2016**

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Jagdish Yadav & Ors

Versus

.... Appellant/s

Gayanand Yadav & Ors

.... Respondent/s

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with

CIVIL MISCELLANEOUS JURISDICTION No.197 of 2016

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Aniruddh Chaudhary

Versus

.... Appellant/s

Indradeo Chaudhary & Ors

.... Respondent/s

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Appearance :

(In C.Misc. No.897 of 2016)

For the Appellant/s : Mr. Shailendra Kumar Dwivedi

For the Respondent/s : Mr.

(In C.Misc. No.197 of 2016)

For the Appellant/s : Mr. Sanjay Kumar Pandey No-5

For the Respondent/s : Mr.

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

2 14-09-2016 1. Heard the learned counsel, Mr. Shailendra Kumar Dwivedi, for the petitioner and the learned counsel, Mr. Sanjay Kumar Pandey No.5 for the respondent No.4. Since the impugned order relates to the respondent No.4 only, the other respondents are not required to be heard, therefore, I heard both the parties in admission matter.

2. This Civil Misc. application under Article 227 of the Constitution of India has been filed by the plaintiff petitioners for setting aside the order dated 13.04.2016 passed by the learned Sub Judge V, Gopalganj in Title Suit No.544 of 2007 whereby the

Court below has allowed an application under Order 9 Rule 7 CPC filed by defendant No.4 respondent No.4 and recalled the ex.-parte order dated 01.12.2011 and also permitted the respondent No.4 to file written statement on payment of cost of Rs.50,000/-.

3. It may be mentioned here that against the part of the order whereby cost of Rs.50,000/- has been imposed, the defendant No.4- respondent No.4 has filed Civil Misc. application No.197 of 2016. The plaintiffs have filed the present Civil Misc. application against that part of the order whereby the defendant No.4 was allowed to file written statement.

4. The learned counsel, Mr. Shailendra Kumar Dwivedi, for the plaintiff petitioner submitted that the suit was filed by the plaintiff petitioner for setting aside the sale deed executed by defendant No.2 in favour of defendant No.1. During the pendency of the suit, defendant No.2 executed another sale deed in favour of defendant No.4, therefore, an application was filed by the plaintiff petitioner under Order 1 Rule 10 CPC for adding the purchaser. The application was allowed and the purchaser was added as defendant No.4 in the suit who is respondent No.4. The vendor of the defendant No.4 is contesting the suit. Both the parties adduced their respective evidences. The defendant No.4 has been examined as D.W.8 on behalf of defendant on 24.07.2015 wherein



he has admitted the fact that he knows both parties and that he had not filed written statement in the suit. Thereafter, the evidences of both the parties were closed and arguments were also closed. Thereafter, the case was once posted for judgment by terms of order dated 26.02.2016, the case was posted for judgment on 29.02.2016. However, due to one reason or the other, the Judgment could not be delivered on 19.02.2016. At this stage, the defendant No.4 filed application under Order 9 Rule 7 CPC on 19.03.2016. In view of these, the application under Order 9 Rule 7 itself was not maintainable but the Court below without considering the provision of law has allowed the same and even without considering the conduct of the petitioner allowed him to file written statement after recalling the ex.-parte order. The learned counsel placed reliance on the Judgment of the Hon'ble Supreme Court reported in **(2012) 2 SCC 196 Rasiklal Manikchand Dhariwan Vs. NSS Food Products.**

5. On the other hand, the learned counsel for the respondent No.4 submitted that the respondent No.4 was added as party in the year 2011 and notices was never served on him. The Judgment could not be delivered and subsequently again after 29th February, 2016, the Court is proceeding and hearing both the parties, therefore, Order 9 Rule 7 application was maintainable as



such the Court below has rightly allowed the same. The learned counsel further submitted that the Court below has granted the cost considering the laches on the part of the petitioner but the cost awarded is much higher and excessive in comparison to the laches and omission and commission committed by the defendant No.4. Therefore, the cost part may be modified and reasonable cost may be awarded. According to the learned counsel, if the defendant No.4 is not allowed to contest the suit, it will be injustice to the defendant No.4.

6. Perused the impugned order. Admittedly, the argument of both the parties were closed. From perusal of the order dated 26th February, 2016, it appears that the Court below in categorical term recorded that the arguments of both the parties have been closed and the case is reserved for judgment fixing 29th February, 2016. It is also admitted fact that defendant No.4 has been examined as D.W.8 on 24.07.2015. He is not denying that he had no knowledge about the suit. In the evidence, he clearly stated that he is defendant No.4 who had not filed the written statement. From perusal of the impugned order, it appears that the Court below nowhere assigned any reason as to why at this stage, the defendant No.4 was allowed to file the written statement and to contest the suit. It is also admitted fact that the vendor of the



defendant No.4 is contesting the suit. The defendant No.1 who is purchaser and this defendant No.4 is also subsequent purchaser have already examined as witnesses. From the examination of defendant No.4 as D.W.8 till the conclusion of the argument of the suit, no steps were taken by this defendant No.4 and no reason has been assigned nor the Court below has considered this aspect of the matter.

7. The Hon'ble Supreme Court in the case of *Kailash vs Nanhku (2005) 4 SCC 480* has held that **'no doubt the provision as contained in Order 8 Rule 1 CPC although couched in the mandatory form, it is not mandatory rather it is directory. The Court is not powerless to permit written statement being filed if Court requires such written statement.'** The Hon'ble Supreme Court further held that **'the object behind substituting Order VIII, Rule 1 CPC in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness**



which is a basic element of justice cannot be permitted to be buried. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order 8 of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance, however, the consequences of non-compliance may be read in by necessary implication. The provision being in the domain of the procedural law and considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, it has to be held to be directory and not mandatory. Moreover, under Order 8 Rule 9, in spite of the time-limit appointed by Order 8 Rule 1 having expired, the Court is not powerless to permit a written statement being filed if the Court may require such written statement. Under Order 8 Rule 10, the Court need not necessarily pronounce judgment against the defendant who failed to file written statement as required by Order 8 Rule 1 or Rule 9. The Court may still make such other order in relation to the suit as it thinks fit.'

8. Further, the Hon'ble Supreme Court in the aforesaid decision has held that 'the extension can be only by way of an



exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction, howsoever brief they may be.' In the present case at our hand, there is no satisfactory reason recorded in the order passed by the Court below.

9. The Hon'ble Supreme Court in the case of *Rasiklal Manikchand Dhariwal Vs. M.S.S. Food Products (2012) 2 SCC 196* has held that 'once the hearing of the suit is concluded and the suit is closed for Judgment, Order 9 Rule 7 CPC has no application at all. The very language of Order 9 Rule 7 makes this clear. This provision presupposes the suit having been adjourned for hearing. Adjournment for the purposes of pronouncing Judgment is no adjournment of the "hearing of the suit". Merely because some applications were filed and trial Court heard those application, it cannot be said that it is covered by the expression "appeared on the day fixed for his appearance". The Court has also not considered these settled principle of law enunciated by the Supreme Court.

10. So far the conduct of the petitioner defendant No.4 is concerned, it may be mentioned here that he has already been examined as D.W.8 in the suit on behalf of his vendor on 24.07.2015. He was watching the proceeding. The case was



posted for judgment by terms of order dated 26.02.2016. It clearly means that the arguments of both the parties were closed and the case was posted for judgment. For the first time on 19th March, 2016, application has been filed by the defendant No.4 respondent No.4 under Order 9 Rule 7 CPC. In view of the decision of the Supreme Court at this stage, when the argument had already been concluded by both the parties, there is no question of application of Order 9 Rule 7 arises. It appears that the defendant No.4-respondent No.4 is trying to delay the disposal of the suit by adopting dilatory tactics. The Courts of law are meant for imparting justice between the parties. Many times unscrupulous persons find the Court process a convenient lever to retain the illegal-gain indefinitely. In such circumstances, the Courts have the jurisdiction to deal with these situation for doing justice and while administering justice, it should not be forgotten that for doing justice to one party injustice be done to other party. The balance should be maintained.

11. The Hon'ble Supreme Court in the case of ***Ram Rameshwari Devi Vs. Nirmalal Devi (2011)8 SCC 249*** has also given guidelines that **'imposition of actual, realistic or proper cost and / or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and**

forged and fabricated documents by the litigant. Imposition of heavy costs would also control unnecessary adjournments by the parties.'

12. In the present case in view of the above facts and circumstances of the case, in my opinion, the defendant is only trying to delay the disposal of the suit and frivolous and vexatious application has been filed before the Court below. The Court below without applying the judicial mind in one line has allowed the application filed by the defendant No.4.

13. Thus, the Civil Misc. application No.897 of 2016 is allowed. The impugned order is set aside and the defendant-respondent No.4 is directed to pay cost of Rs.10,000/- to the plaintiff-petitioner within one month from today. He must deposit the cost. If cost is deposited in the Court, the plaintiff shall be at liberty to withdraw the same. If cost is not deposited as stated above, the same shall be realized through the process of the Court.

14. The impugned order thus set aside in its entirety. The other Civil Misc. application No.197 of 2016 filed by defendant No.4 is thus dismissed.

(Mungeshwar Sahoo, J)

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