

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.19718 of 2014

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1. Raj Nath Verma son of Jag Lal Verma
2. Bhartendu Verma son of Raj Nath Verma
3. Rajesh Verma son of Raj Nath Verma All residents of village - Azad Nagar, P.S. Naubatpur, District - Patna

.... Petitioners

Versus

1. Sri Ramdeep Verma
2. Sri Sarvanand Verma
3. Sri Parmanand Verma All sons Late Ram Janam Verma @ Ram Janam Mahto All residents of village - Azad Nagar, Chairman, P.S. Naubatpur, District - Patna
4. Most. Panwan Devi widow of Late Sudhram Mahto resident of village - Azad Nagar, Chairman, P.S. Naubatpur, District - Patna
5. Shashikant Verma son of Rajnath Verma resident of village - Azad Nagar, Chairman, P.S. Naubatpur, District - Patna

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Abhya Kumar

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 29-09-2016

Heard the learned counsel for the petitioners.

The legal sustainability of the impugned order by which the learned court below has restored the suit to its original position has been questioned by the defendant-petitioner by filing this application under Article 227 of the Constitution of India.

The facts are not in dispute that the suit was dismissed by order dated 30.05.2011 for default. The said order has been annexed herewith as Annexure-1. Thereafter, the plaintiff of that suit filed a petition for restoration of the suit. The learned court below



after hearing the plaintiff and considering the evidence adduced by him has restored the suit to its original position by the impugned order. The learned counsel for the petitioners has strongly submitted that the learned court below has committed error of jurisdiction in entertaining the petition and passing the impugned order restoring the suit without issuing notice to the defendants. It has been contended that on the day fixed for hearing i.e. 30.05.2011 the plaintiff did not appear but there was pairvi on behalf of the defendant and therefore the provision of Order 9 Rule 9 C.P.C. should have been resorted to for restoration of the suit but the learned court below has entertained the petition for restoring the suit, filed under Order 9 Rule 4 C.P.C by the plaintiff and allowed it without issuing notice. The learned counsel has relied upon the decisions in the case of **Deo Saran Prajapat Vs. Banwari Lal ,1990 B.L.J. Page 527** and in the case of **Prahlad Pursty Vs. Sheekh Abdul Rahman, AIR 1966 Orissa 232** in support of his contention.

After considering the submissions and perusal of the impugned order, it is evident that the learned court below has taken into notice the provision under which the petition for restoration has been filed and thereafter has concluded that there was no necessity for issuing notice to the defendant. The dismissal of the suit for default as envisaged under Order 9 are of two types; the first type of



dismissal has been envisaged under Rule 3 and another is dismissal for default as envisaged Rule 8 of the said Order 9 C.P.C. The provision for restoration has been made in Rule 4 and Rule 9 C.P.C respectively. From the comparative perusal of both the provisions, it is transparent that the necessity for issuing notice to the defendants in case of the prayer for restoration has been emphasized only in Rule 9 C.P.C and such a necessity has not been mentioned in Rule 4 C.P.C. From the perusal of the order dated 30.05.2011 (Annexure-1), it does not appear that the defendant-petitioner was present when the suit was called out for hearing. It is well settled that merely filing of pairvi on behalf of the parties is not accepted, as his presence, envisaged under this provision. In that view of the matter, this Court is not inclined to accept the submission made on behalf of the petitioners that the learned court below has committed error of jurisdiction in entertaining the petition filed by the plaintiff under Order 9 Rule 4 C.P.C in view of the evident fact that on that day none of the parties was present when the suit was called out for hearing. At this juncture, the learned counsel for the petitioners has prayed for filing a supplementary affidavit, stating the fact, regarding his presence, before the court at the time when the suit was called out for hearing. This Court is again not inclined to allow such prayer because if the defendant-petitioner was present on 30.05.2011 before the court when the suit



was called out for hearing but his presence has not been recorded in the impugned order then it amounts to error of record in the impugned order itself for which the petitioner ought to have approached the learned court below itself.

For the aforesaid reasons and discussions, this Court is not inclined to invoke the jurisdiction under Article 227 of the Constitution of India.

The application is, accordingly, dismissed.

(V. Nath, J)

Nitesh/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	13.12.2016
Transmission Date	

