

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Revision No.13 of 2016**

=====

Safira Khatoon Daughter of Late Muzaffer Hussan and wife of Late Hadaittulah Mian resident of Vill. - Fursatpur, P.S. - Persa at present P.S. - Derni, District - Saran, at present resident of Village - Arna, P.S. - Bheldi, District - Saran.

....Plaintiff/Opposite Party No.1/Petitioner  
Versus

1. Ebrar Ahmed son of Mustaque Ahmed
  2. Ishrat Zahan wife of Mustaque Ahmed
  3. Iffat Zahan @ Naaz daughter of Mustaque Ahmed
  4. Farhat Zahan @ Guriya daughter of Mustaque Ahmed
  5. Apsana Khatoon daughter of Mustaque Ahmed
  6. Asrar Ahmed son of Mustaque Ahmed
- All residents of Vill - Fursatpur, P.O. - Sutihar, P.S. - Derni, District - Saran.
7. Moinul Haque
  8. Niyaz Ahmed Both Opposite Party No. 7 and 8 are sons of late Abdul Hakim both residents of vill. - Jitwarpur, P.S. - Derni, Distt. - Saran.
  9. Ezaz Ahmed son of Mohammad Khan resident of P.S. - Garkha, District - Saran.
  10. Rahmatullah Ansari son of Late Emam Ali Ansari resident of Vill. - Suthiar Tola, P.S. - Derni, District - Saharsa.
  11. Raushan Ara wife of Mohammad Rafique resident of Vill. - Fursatpur, Pragana - Goa, P.S. - Persa at present P.S. - Derni, District - Saran.

.... Respondent/s

=====

**Appearance :**

For the Petitioner/s : Mr. Digvijay Narayan Singh  
For the Respondent/s : Mr.

=====

**CORAM: HONOURABLE MR. JUSTICE V. NATH**  
**ORAL JUDGMENT**

2      16-02-2016                      Heard Mr. Sanjay Kumar Ghosarvey, learned counsel  
  
for the petitioner both in the Admission matter as well as in the  
  
interlocutory application (I.A. No. 1350 of 2016), filed for stay  
  
of the proceeding of the suit in the court below.

2. This revision application has been filed for setting  
  
aside the order passed by the learned court below in

Miscellaneous Case No. 20 of 2013 allowing the prayer on behalf of the defendants for setting aside ex parte decree.

3. The suit for partition was filed by the petitioner, wherein, applicants of the Miscellaneous Case No. 20 of 2013( Under Order 9 Rule 13 of the C.P.C), were impleaded as defendant nos. 1 to 6. It has not been disputed by the learned counsel for the petitioner that though the defendant nos. 1 to 6 and other defendants appeared in the suit and filed their written statement but the suit was later on dismissed for default, and after restoration, no notice was given to the defendants for hearing of the suit. It also transpires from the impugned order that in Miscellaneous Case No. 20 of 2013 the applicant-opposite parties examined their witnesses and the petitioners were also heard and adduced their own evidences. The learned court below after scrutiny of the evidence and also considering the stand taken by the learned counsel for the plaintiff-petitioner, has passed the impugned order setting aside the ex parte decree and restoring the suit to its original position.

4. Mr. Sanjay Kumar Ghosarvey, learned counsel appearing for the petitioner has submitted that the opposite parties(defendant nos. 1 to 6) had full knowledge of the pendency of the suit and its restoration, but they malafidely did



not appear only to harass the petitioners. It has also been submitted that Miscellaneous Case No. 20 of 2013 was barred by limitation but the court below has committed material irregularity in allowing the prayer without condoning the delay. Learned counsel for the petitioner has also submitted that the defendants had appeared intermittently even after the restoration of the suit, but no material from the records of this revision application could be brought to the notice of the Court to substantiate the said fact.

5. After considering the submissions and perusal of the records, it transpires that the defendant nos. 1 to 6 filed Miscellaneous Case No. 20 of 2013 under Order 9 Rule 13 of the C.P.C., to set aside the ex parte decree against them in the suit for partition. The learned court below after hearing the parties and considering the material evidence of the parties has allowed the prayer of the defendant nos. 1 to 6-opposite parties. It does not appear from the impugned order that the conclusion arrived by the learned court below on the basis of the materials on record are unreasonable or perverse in any manner.

6. It is also transparent from the impugned order that a definite stand has been taken on behalf of the petitioners in the court below that the suit was never posted for ex parte hearing



nor any notice was served upon defendant-applicants. At this juncture it will be profitable to notice the observations of the Apex Court in the case of **Sushil Kumar Sabharwal vs Gurpreet Singh & Ors** reported in (2002) 5 SCC 377 that the provisions of Order 9 Rule 6 C.P.C casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the court is conferred with a discretion to make an order that the suit be heard ex parte. It has also been held that 'it is the knowledge of the "date of hearing" and not the knowledge of the "pendency of suit" which is relevant for the proviso abovesaid.

7. It would also be apposite to mention here that a decree passed under Order 8 Rule 10 C.P.C is an ex parte decree and the same can be assailed under the provision of Order 9 Rule 13 C.P.C as laid down by this Court in the case of **Lalit Narain Singh vs The President, Religious Trust Board & Another** reported in **AIR 2006 Pat 23**.

8. The submissions on behalf of the petitioner with regard to condonation of delay is also not substantiated in view of the averments made in the petition dated 06.05.2013(Annexure 4), on the basis of which Miscellaneous

Case No. 20 of 2013 was initiated, that the defendant nos. 1 to 6-  
opposite parties got the knowledge of the ex parte decree only on  
03.04.2013. Moreover the issue of bar of limitation does not  
appear from the impugned order to have been pressed.

9. For the aforesaid reasons and discussion, this Court  
does not find that the court below has committed any error of  
jurisdiction or material irregularity in passing the impugned  
order.

10. This revision application is, accordingly,  
dismissed.

**(V. Nath, J)**

Ranjan/-

|   |  |  |  |
|---|--|--|--|
| U |  |  |  |
|---|--|--|--|