

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4393 of 2013

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Anil Kumar S/O Late Saryu Prasad Resident Of Village - Silao Dih, P.S.
Silao, District – Nalanda.

.... Petitioner/s

Versus

Pramod Kumar S/O Rajkumar Mahto Resident of Village - Silao Dih, P.S.
Silao, District – Nalanda.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr.

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL ORDER

3 08-02-2016 Heard Mr. D.K. Sinha, the learned senior counsel
appearing on behalf of the petitioner.

Questioning the legality of the impugned order by
which the learned court below has set aside the ex parte decree on
the petition filed by the respondent under Order 9 Rule 13 C.P.C.,
the present application under Article 227 of the Constitution of
India has been filed.

Mr. Sinha, the learned senior counsel for the
petitioner has made three fold submissions. It has been firstly
submitted that the petitioner in the Miscellaneous Case No. 05 of
2010 did not appear after 04.07.2012 upto the date of the passing
of the impugned order and, therefore, the learned court below has
committed error of jurisdiction in allowing the said miscellaneous



case instead of dismissing the same. It has been next submitted that the evidence adduced on behalf of the respondent (petitioner in miscellaneous case) to establish the fact that he was residing at the relevant time in Aligarh were also not properly proved. It has been lastly submitted that the respondent (petitioner in miscellaneous case) has also failed to file the documents along with the petition under Order 9 Rule 13 C.P.C.

The facts are not in dispute that the suit for specific performance of contract was filed by the present petitioner against the respondent. The said suit was decreed ex parte and thereafter the sale deed has also been executed in favour of the present petitioner in pursuance to the decree for specific performance of contract. Later on, the respondent, who was defendant in the said suit, filed a petition under Order 9 Rule 13 C.P.C. for setting aside the ex parte decree of specific performance of contract against him. On the basis of the said petition, the Miscellaneous Case No. 05 of 2010 was initiated. The parties led their evidence and by the impugned order the learned court below has allowed the said miscellaneous case and set aside the ex parte decree in favour of the present petitioner.

The learned senior counsel for the petitioner has placed the order-sheet of the Miscellaneous Case No. 05 of 2010



in order to emphasize that the respondent did not appear after 04.07.2012 till the date of passing of the impugned order on 11.01.2013. It has, however, been accepted that prior to 04.07.2012, the respondent had adduced his oral and documentary evidence in the miscellaneous proceeding. In view of the provision as contained under Order 17 Rule 2 read with section 141 C.P.C., the court has the jurisdiction to proceed with the suit or proceeding if the evidence or a substantial part of the same on behalf of the party who has failed to appear on the date fixed for hearing is present on record and by legal fiction such party is deemed to be present. This position is further manifest from the explanation which has been added to Order 17 Rule 2 C.P.C. by amendment. As such, this Court does not find substance in the submission on behalf of the petitioner that the learned court below has the only option to dismiss the proceeding under Order 9 Rule 8 C.P.C. Further from the perusal of the impugned order, it is also apparent that the findings have been recorded by the learned court below upon the scrutiny of the oral and documentary evidence adduced on behalf of the parties. The issue of admissibility of any documentary evidence is to be raised at the threshold and not after the same has been adduced and considered by the court. Moreover, the probative value of a documentary evidence is

considered along with other evidence. It is not the case of the petitioner at present that the learned court below has passed the impugned order ignoring any material evidence. Further, no provision of law has been brought to the notice of the court requiring the filing of documentary evidence along with the petition for setting aside an ex parte decree.

In this view of the matter and also in view of the fact that the sale deed has already been executed in favour of the petitioner, this Court does not find it a fit case to invoke the extraordinary jurisdiction under Article 227 of the Constitution of India to interdict the impugned order.

The writ application is, accordingly, dismissed.

Devendra/-

(V. Nath, J)

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