

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11391 of 2014

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Premlata Devi W/o Ramanand Mandal Resident of Mohalla Maksoospur Kali
Asthan, P.S. Kasim Bazar, District Munger.

.... Petitioner/s

Versus

Srimati Prema Devi W/o Sri Rabindra Kumar Mehta Resident of Mohalla - Village
Puraniganj, Kansi Tola, P.S. Kasim Bazar, District Munger.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Shailendra Kumar Sinha, Adv
For the Respondent/s : Mr. Harshwardhan Sahay, Adv

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 02-08-2016

Heard Mr. Shailendra Kumar Sinha, learned counsel
for the petitioner and Mr. Harshwardhan Sahay, learned counsel for
the respondents.

2. Questioning the legal acceptability of the impugned
orders by which the learned court below has allowed the petition
under Order 7 Rule 11 C.P.C filed on behalf of the respondents and
dismissed the Miscellaneous Case No. 9 of 2010, the present
application has been filed under Article 227 of the Constitution of
India.

3. The facts which are not in dispute is that the ex parte
decree in a suit for specific performance was passed against the
present petitioner who were defendants therein. The petitioners
thereafter filed a petition under Order 9 Rule 13 C.P.C praying for
setting aside the ex parte decree and Miscellaneous Case No. 14 of



2007 was instituted thereupon. However, the said Miscellaneous Case No. 14 of 2007 came to be dismissed for default. The petitioners then filed Miscellaneous Case No. 01 of 2008 for restoration of the Miscellaneous Case No. 14 of 2007 but again this Miscellaneous Case No. 01 of 2008 was also dismissed for default. Thereafter the petitioner filed Miscellaneous Case No. 9 of 2010 for restoration of the earlier Miscellaneous Case No.01 of 2008. During the pendency of this case, the petition under Order 7 Rule 11 C.P.C was filed on behalf of the Opposite Party-respondents praying for rejection of the application which was the basis of the initiation of the Miscellaneous Case No. 09 of 2010. By the impugned order the learned court below has come to the finding that the petitioners had been extremely negligent in doing pairvi in earlier two cases and further also that no reasonable cause has been assigned on behalf of the petitioner for non appearance in those miscellaneous cases. Accordingly, learned court below by the impugned order has allowed the prayer made under Order 7 Rule 11 C.P.C as made on behalf of the opposite party and dismissed the Miscellaneous Case No. 09 of 2010 as not maintainable.

4. Mr. Shailendra Kumar Sinha, learned counsel for the petitioner has submitted that the court below has committed error of jurisdiction in allowing the petition filed under Order 7 Rule 11 C.P.C on behalf of the Opposite Party-respondents. It has



been contended that the provision of Order 7 Rule 11 C.P.C does not apply to such miscellaneous proceeding for restoration, as its application is confined to rejection of a plaint in a suit, and the order in that regard is a deemed decree against which only an appeal lies. It has also been argued that the court below has further committed material irregularity in coming to the finding that no reasonable cause has been furnished by the petitioner for restoration of the earlier two miscellaneous cases and further that the petitioner had been negligent in pursuing the matter even when no opportunity of hearing was granted to the petitioner. It has been pointed out by the learned counsel for the petitioner that the matter was not fixed for hearing on the day when the impugned order has been passed but the learned court below has proceeded to decide the matter on merits as well.

5. Mr. Sahay learned counsel for the respondents has submitted that the petitioner has been extremely negligent in pursuing the matter and therefore, the restoration petition i.e. Miscellaneous Case No. 9 of 2010 was simply an abuse of the process of the court. It has been propounded that the court below has committed no error of jurisdiction or illegality in accepting prayer of the respondents for rejection of the miscellaneous case under Order 7 Rule 11 C.P.C.

6. After considering the submissions and perusal of the



impugned order, it is manifest that the Miscellaneous Case No. 9 of 2010 has been filed for restoration of the earlier restoration application i.e. Miscellaneous Case No. 01 of 2008. From the perusal of the impugned order, it is also demonstrably clear that the Miscellaneous Case No. 9 of 2010 was not fixed for hearing on merits rather the petition filed by the respondent under Order 7 Rule 11 C.P.C only was taken up for consideration. The learned court below while accepting the prayer of the respondent for rejection of the petition of Miscellaneous Case No. 9 of 2010 has also recorded the finding that the petitioner had been extremely negligent in pursuing the earlier cases and have failed to assign sufficient cause for restoration as prayed. This Court is of the opinion that the court below has committed error of jurisdiction in rejecting the Miscellaneous Case No. 9 of 2010 on merits when the said matter was not fixed for hearing and the petitioner has not been granted opportunity to establish her case as pleaded by adducing evidence or otherwise. Moreover, the provision under Order 7 Rule 11 C.P.C is not applicable to a proceeding for restoration and this position of law has not been disputed by the learned counsel appearing for the respondents.

7. In view of the aforesaid facts and circumstances, the application is allowed and the impugned order is set aside and the learned court below is directed to take up the hearing of



Miscellaneous Case No. 9 of 2010, and dispose of the same on merits. It is however clarified that this court has not gone into the merits of the case of the rival parties which shall be decided by the learned court below on the basis of submission and materials produced by the respective parties without being prejudiced by this order.

8. Learned counsel for the parties have jointly prayed that the court below be directed to dispose of Miscellaneous Case No. 9 of 2010 within a period of two months.

9. Learned counsel for the parties have further submitted that they would instruct their respective clients to co-operate in order to complete the hearing of the case within two months. Accordingly, learned court below is directed to dispose of Miscellaneous Case No. 9 of 2010 preferably within a period of two months from the date of receipt/production of a copy of this order.

(V. Nath, J)

Ranjan/-

AFR/NAFR	NAFR
CAV DATE	N.A.
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