

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Civil Revision No.81 of 2016**

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Md. Tashalim, s/o late Md. Yusuf, r/o vill-Jalalpur, PS-M.H. Nagar, District-Siwan  
..... Petitioner/s

Versus

1. Ahamadi Khatun, d/o late Md. Sadik, r/o vill-Otani Patti, PO- Badaka Gaon, PS- Mirganj, Dist- Siwan
2. Ashama Khatoon, d/o late Md. Sadik, r/o vill-Otani Patti, PO- Badaka Gaon, PS- Mirganj, Dist- Siwan

..... Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. Chandra Kant

For the Respondent/s : Mr.

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

**ORAL JUDGMENT**

**Date: 03-04-2017**

Heard Mr. Chandrakant, learned counsel for the petitioner.

The present revision application has been filed against the order dated 29.01.2016 passed by the appellate court in Misc. Appeal no. 28 of 2012 setting aside the order of the trial court rejecting the prayer of the defendants under Order 9 Rule 13 C.P.C., granting the prayer of the defendants for setting aside the ex-parte decree passed in the suit.

From the submissions on behalf of the petitioner and the materials on record, it is evident that the T.S. no. 116/89 was filed by the petitioner for partition of the property. The said suit was eventually decreed ex-parte. Subsequently, two miscellaneous cases



i.e. Miscellaneous case no. 11 of 2003 and Miscellaneous case no. 12 of 2003 were filed by respective defendants under Order 9 Rule 13 of the Code of Civil Procedure praying for setting aside the ex-parte decree. The trial court dismissed the two miscellaneous cases by common order dated 06.11.2012. The appellants of Miscellaneous case no. 12 of 2003 alone preferred Miscellaneous Appeal no. 28 of 2012 against the said order. The appellate court below, on reappraisal of evidence, has come to the finding that the summons in the suit was not validly served upon the appellants and accordingly, by the impugned order, has allowed the appeal setting aside the order passed in the Miscellaneous case no. 12 of 2003.

Mr. Chandrakant, learned counsel for the petitioner has submitted that the appellate court below has ignored the material evidence on record including the order-sheet of the revision application as well as Special Leave Petition which was filed by the plaintiff/ petitioner against the order passed in the suit rejecting his prayer for annulment in the plaint. It has been contended that in the said revision application as well as the Special Leave Petition, the notice was issued to the opposite parties 1 and 2 ( the applicants in the Misc. case no. 12 of 2003). On this basis, it has been propounded that there would be presumption of valid service of notice and knowledge of the pending suit to the opposite party nos. 1 and 2. It has also been



pointed out that the address of the opposite party nos. 1 and 2 is same as given in the suit as well as in the civil revision application and Special Leave Petition.

It has also been convassed that the applicants of Miscellaneous case no. 11 of 2003 did not challenge the order of dismissal of the said miscellaneous case and therefore, also the impugned order setting aside the ex-parte decree in entirety cannot be legally sustained.

After careful consideration of the submissions on behalf of the petitioner, this Court finds that suit was filed by the petitioner for partition of the joint properties. The opposite parties no. 1 and 2 were defendants in the suit alongwith other defendants. The opposite parties no. 1 and 2 had filed Miscellaneous case no. 12 of 2003 while other defendants had filed their separate Miscellaneous case no. 11 of 2003 for the same prayer for setting aside the ex parte decree passed in the said suit (T.S. 116/89). Both the Miscellaneous case no. 11 of 2003 and 12 of 2003 were dismissed by the common order. The applicants of Miscellaneous case no. 11 of 2003 did not file appeal against the dismissal of the Miscellaneous case no. 11 of 2003 and it was the opposite parties no. 1 and 2 who preferred the Miscellaneous appeal no. 28 of 2012 challenging the order dismissing there Miscellaneous case no. 12 of 2003. In this factual background, it



cannot be said that the appellate court has committed illegality or material irregularity in setting aside the ex parte decree in the suit in entirety after reversing the findings against the opposite parties no. 1 and 2 as recorded by the trial court in Miscellaneous case no. 12 of 2003. It is not the case on behalf of the petitioner that his claim for partition as made in the suit was distinct and severable as against the opposite parties no. 1 and 2 vis-à-vis other defendants. This court, therefore, is unable to align with the submission on behalf of the petitioner that the impugned order is vulnerable for the said reason.

The appellate court below after considering the evidence on record has come to the conclusion that applicants were not served with notice/ summons in the suit. The court below has also considered the other facts and circumstances as well as the evidence on record before coming to the conclusion that opposite party nos. 1 and 2 has sufficient cause for setting aside the ex-parte decree. This Court also does not find substance in the submission on behalf of petitioner for raising presumption of knowledge of the suit in view of the alleged notice issued in the civil revision application and Special Leave Petition to the opposite parties no. 1 and 2. The appellate court below has considered the order (Ext. C) passed in Civil Revision Application and also the order (Ext. C/1) passed in Special Leave Petition who found nothing in the same to conclude that the opposite



parties no. 1 and 2 were present in their proceedings or the notice issued to them had been validly served.

Even otherwise also, the finding of facts have been recorded by the appellate court on the basis of evidence which were acceptable and could have been relied upon. The dictum has been well laid by the Apex Court in **M/S DLF Housing vs. S. Singh 1969 (3) SCC 807** that in revisional jurisdiction, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the court to try the dispute itself.

For the above reasons and discussions, this Court comes to the conclusion that the court below has not committed error of jurisdiction or illegality in passing the impugned order.

As such, this application, *sans* merit, is accordingly, dismissed.

(V. Nath, J.)

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| CAV DATE          | N.A.       |
| Uploading Date    | 11.05.2017 |
| Transmission Date |            |

