

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.278 of 2014

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1. Bateshwar Upadhyay, S/o Late Brij Bhushan Upadhyay.
 2. Mihir Kumar Upadhyay S/o Sri Bateshwar Upadhyay.
 3. Sameer Kumar Upadhyay S/o Sri Bateshwar Upadhyay.

All R/o Village-Babhangawan, P.O.-Gundi, P.S. Krishnagarh (Barhara),
District-Bhojpur (Bihar) at present residing at sector-III, House no. 631, Bokaro
Steel City, District-Bokaro (Jharkhand)

.... Appellant/s

Versus

1. Geeta Devi W/o Sri Krishna Kumar Gupta, R/o Village & P.O.-Saraiya, P.S.
Krishnagarh (Barhara), District-Bhojpur (Bihar).
2. Kusum Devi W/o Sri Chhathu Prasad, R/o Village-Sinha, P.O.-Sinha Ghat,
P.S.-Barhara, District-Bhojpur (Bihar)
3. Sanjay Upadhyay S/o Dashrath Upadhyay.
4. Barmeshwar Upadhyay S/o Late Rishi Muni Upadhyay.

Serial nos. 4 and 5 are R/o Village-Babhangawan, P.O.-Gundi, P.S.-
Krishnagarh (Barhara), District-Bhojpur (Bihar).

5. Most. Chandramano Devi, W/o Late Kandha Prasad Pandey, D/o Late Surith
Upadhyay, R/o Village-abhangawan, P.O. Gundi, P.S. Krishnagarh (Barhara),
District-Bhojpur (Bihar)

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Dhanendra Chaubey
For the Respondent no. 1 : Md. Ataul Haque

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

Date: 28-11-2017

Heard learned counsel for the appellants and learned
counsel for the respondent no. 1 on this miscellaneous appeal.

2. This miscellaneous appeal has been filed against the



judgment dated 30.01.2014 passed by VIth, Ad-hoc District Judge, Bhojpur at Ara in Title Appeal no. 115 of 2009 whereby the learned Appellate Court allowed the aforesaid appeal filed by the respondent no. 1 on cost of Rs. 3,000/- and remanded the case to the court below with direction to decide the case after giving opportunity to respondent no. 1 of cross-examination of the witness of the appellants-plaintiffs.

3. Factual matrix of the case is that the appellants had filed Title Suit no. 52 of 2003 for declaration of sale deed executed by imposter of Surith Upadhyay in favour of defendants-II set void, illegal and forged document and also for declaration of the sale executed by defendant-II set void and illegal and for declaration that Consolidation Officer, Barhara has no right to grant permission for execution of sale deed etc.

4. The respondent no. 1 put her appearance in the aforesaid suit and filed written statement. But, subsequently, she disappeared and did not adduce either any ocular or documentary evidence in buttress of her case. While other defendants of the said suit did not put their appearance in the case despite service of notice. Hence, the aforesaid suit proceeded ex parte against them. Issue was framed by the learned trial court on the basis of pleading of the parties and the appellants adduced ocular as well as



documentary evidence in buttress of their case and after hearing the appellants and perusing the record, learned trial court decreed the aforesaid suit on contest against respondent no. 1 and ex parte against rest of the defendants-respondents vide judgment dated 21.04.2009.

5. Being aggrieved and dissatisfied with the aforesaid judgment, the respondent no. 1 filed Title Appeal no. 115 of 2009 and after hearing the parties and perusing the record, learned Appellate Court passed the impugned judgment as detailed in the earlier paragraph.

6. Being aggrieved and dissatisfied with the aforesaid judgment of the Appellate Court, the respondents of the Title Appeal no. 115 of 2009 have preferred the present miscellaneous appeal.

7. It is submitted by the learned counsel for the appellants that the respondent no. 1 put her appearance in the case and filed written statement. Thereafter, she disappeared and neither take any step nor adduced any evidence in buttress of her case. While other respondents did not put their appearance in the case despite service of notice. Hence, considering the evidence adduced by the appellants on record, the trial court decreed the suit of the appellants. As the said suit was decreed by the trial court after considering the facts and evidence available on record it should not



have been remanded merely on the ground that the respondent no. 1 was not given opportunity to cross-examine the witnesses of the appellants and controvert the documents filed by them as it is not the ground for the remand of the case under Order XLI Rule 23 CPC. Under Order XLI Rule 24 CPC, the appellate court is required to decide the case on the basis of evidence available on record itself and not remand the case. As there is sufficient evidence on record adduced by the appellants and as the case of the appellants stood admitted to the respondents as the respondents did not cross-examine their witnesses, the learned Appellate Court ought to have decided the case on merit considering the facts and evidence available on record and not remanded the case to the trial court.

8. On the other hand, it is submitted by the learned counsel for the respondent no. 1 that respondent no. 1 is the vendee of one of the heirs of the common ancestor and is having 1/3rd share in the property in question. She has taken the aforesaid case in the court below by filing her written statement. But as no information of filing any document or adducing any witness in the court below by the appellants has been given to her either by the court below or by the appellants, she could not cross-examine the witnesses and adduce evidence to rebut the same and she has been deprived of natural justice by the trial court. Considering the aforesaid aspect of the



case, the learned Appellate Court remanded the case to the trial court to decide it after giving opportunity of cross-examination of the witnesses of the appellants and adducing evidence in rebuttal of the evidence of the appellants to her which is liable to be upheld.

9. From perusal of record, it appears that the respondent no. 1 was the defendant no. 1 in the Title Suit no. 52 of 2003 filed by the appellants. She had put her appearance in the case and filed written statement. But, subsequently, she left pairve in the case and neither did turn up to cross-examine the witnesses of the appellants nor did adduce any evidence to controvert the evidence adduced by them. While rest defendants did not put appearance in the case despite service of notice. Hence, the case was proceeded ex parte against them. Considering the facts and evidence available on record, learned trial court had decreed the aforesaid suit of the appellants on contest against respondent no. 1 and ex parte against rest of the respondents.

10. The learned Appellate Court appears to have remitted back the case to the trial court merely on the ground that no opportunity of cross-examination of witnesses of the appellants and to adduce the documents in rebuttal of the documents filed by the appellants have been given to the respondent no. 1.

11. From perusal of record, it further appears that



respondent no. 1 has full knowledge of pendency of the said suit against her as she has filed written statement, but, subsequently left pairve in the case. It is not expected either from the court or from the plaintiffs to approach such absentee defendants and invite her to appear in the case and contest the same rather it is the paramount duty of the said defendant to be watchful regarding her interest in the suit and contest the same. But, the respondent no. 1 appears to have not discharged the aforesaid duty rather there was utter negligent/recklessness and laxity on her part in dealing with the case. Hence, in my considered opinion, she is not entitled to get any relief to contest the case at this stage. Under Order XLI Rule 24 CPC, if the evidence in the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court is required to finally determine the suit and not to remand the case to the court below. In the case under hand, there is sufficient evidence on record as adduced by the appellants both oral and documentary and hence learned Appellate Court ought to have decided the aforesaid appeal on merit considering the evidence available on record instead of remanding the case on the aforesaid flimsy ground.

12. In view of the aforesaid facts and circumstances of the case, I find and hold that the impugned judgment passed by the learned Appellate Court is wrong, illegal and is set aside.



Accordingly, this appeal is allowed.

(Prakash Chandra Jaiswal, J)

rohit/-

AFR/NAFR	NAFR
CAV DATE	N.A.
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