

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Revision No.249 of 2011

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1. Indu Devi W/O Shivdani Sah Resident Of Village Itahari, Police Station Naya Ram Nagar, Post Office Naya Ram Nagar, District Munger.

.... Petitioner/s

Versus

1. Niranjana Mandal & Orsniranjana Mandal S/O Late Bharti Mandal Resident Of Mohalla Pakki Gali, Betwan Bazar, Police Station Kasim Bazar, Post Office Munger, District Munger.

2. Murari Prasad S/O Late Taraknath Prasad Resident Of Mohalla Maksuspur Kali Asthan, Police Station Kasim Bazar, Post Office Munger, District Munger.

3. Mostt. Krishna Devi W/O Late Raj Kishore Prasad Resident Of Mohalla Maksuspur, Kali Asthan, Police Station Kasim Bazar, Post Office Munger, District Munger

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Harshwardhan Sahay

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
ORAL ORDER

8 13-10-2017 Heard learned counsel for the petitioner as well as learned counsel for the respondents.

The present Revision petition has been preferred against the judgment dated 20.09.2011 passed by the learned Additional District Judge F.T.C-II, Munger in Miscellaneous Appeal No. 127 of 2008 by which and whereunder he has set aside the order dated 13.06.2008 passed by learned Sub-Judge II, Munger in Miscellaneous Case No. 3 of 2008.

It would appear from perusal of the record that Title suit no. 127 of 1998 was filed by the petitioner/ plaintiff against



the respondents/ defendants. The respondents/ defendants appeared in the aforesaid Title suit but subsequently, left parvi as a result whereof the learned Sub-Judge II, Munger proceeded with the case and framed the issue and recorded the evidence of the plaintiff/ petitioner and accordingly, pronounced judgment on 03.11.2007. The opposite 1st party filed Miscellaneous Case No. 3 of 2008 under Order 9 Rule 13 of the Civil Procedure Code for setting aside the judgment dated 03.11.2007 passed in Title suit no. 127 of 1998. The learned Sub-Judge II, Munger vide order dated 13.06.2008, dismissed the above stated Miscellaneous Case No. 03 of 2008 on the ground that petition under order 9 Rule 13 of the Civil Procedure Code was not maintainable as the Title suit no. 127 of 1998 had been decreed on merit. The opposite 1st party/ defendant challenged the order dated 12.06.2008 before the Additional District Judge, FTC-II, Munger in Miscellaneous Case No. 03 of 2008 which was allowed vide impugned judgment dated 20.09.2011 holding that petition under Order 9 Rule 13 against the judgment dated 03.11.2007 passed in Title suit no. 127 of 1998 was maintainable.

Learned counsel appearing for the plaintiff/ petitioner submits that the learned Additional District Judge, F.T.C-II, Munger committed error in allowing the above stated



Miscellaneous Appeal as he failed to take note of this fact that the Title suit no. 127 of 1998 was decreed on merit and, therefore, Order 9 Rule 13 of the Civil Procedure Code was not applicable.

On the other hand, learned counsel appearing for the opposite parties submits that the learned Additional Judge rightly allowed the Miscellaneous Appeal because the learned Sub-Judge-I, Munger passed the aforesaid order dated 03.11.2007 under Order 9 Rule 6 of the Civil Procedure Code. In support of his contention he referred a decision **reported in A.I.R 1987 SC 42 as well as (2003) 5 SCC 641**. The ratio of above stated judgments goes to show that for application of Order 17 Rule 3 of the Civil Procedure Code, the absentee party must adduced evidence and if the absentee party has not adduced any evidence, the court shall proceed in any one of the modes prescribed under order 9 of the Civil Procedure Code.

Having heard the rival contentions of both the parties I went through the record. Admittedly, in Title suit no. 127 of 1998, the opposite parties appeared but later on, left the pairavi. Furthermore, it is admitted position that the opposite parties/defendants failed to appear before the court when suit was taken up for hearing. Order 9 Rule 6 of the Civil Procedure Code says that if the plaintiff appears and defendant does not appear when



the suit is called for hearing, the court may make an order that the suit be heard ex-parte. Therefore, learned Sub-Judge, Munger was duty bound to proceed ex-parte in the aforesaid case. I do agree with the finding of the learned appellate court that only mentioning in the judgment that the suit is decreed on contest does not preclude the defendant from filing the petition under Order 9 Rule 13 of the Civil Procedure Code. Therefore, I do not find any illegality, irregularity or Impropropriety in the impugned judgment dated 20.09.2011 passed in Miscellaneous Appeal no. 12 of 2008.

It is obvious from perusal of the impugned judgment that the learned appellate court only set aside the order dated 13.06.2008 passed in Miscellaneous Case No. 03 of 2008.

Therefore, in the aforesaid circumstance, this Revision petition stands disposed of directing the learned Sub-Judge-II, Munger to pass a fresh order in Miscellaneous Case No. 03 of 2008 in accordance with law within a month from the date of receipt/ production of a copy of this order.

(Hemant Kumar Srivastava, J)

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