

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.436 of 2018

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1. Mahendra Singh, son of Late Shyam Hari Singh, Resident of Village- Mosimpur, P.O.+ P.S.- Khushrupur, District- Patna.

.... Petitioner

Versus

1. Kumar Gaurav, son of Sri Ravi Shankar Singh @ Yogendra Singh, Resident of Village- Mosimpur, P.O.+ P.S.- Khushrupur, District- Patna.
2. The Estate of Late Dhanwanti Devi through Kumar Gaurav son of Sri Ravi Shankar Singh @ Yogendra Singh, Resident of Village- Mosimpur, P.O.+ P.S.- Khushrupur, District- Patna.
3. Ram Chandra Singh.
4. Rabindra Singh, Both sons of Sri Ravi Shankar Singh @ Yogendra Singh.
5. Sanchiya Devi, wife of Sri Ravi Shankar Singh @ Yogendra Singh
6. Dharmendra Prasad Singh, son of Ram Pyare Singh
7. Santosh Kumar
8. Rohit Kumar
9. Gautam Kumar
10. Rahul Kumar
11. Babita Devi
12. Prashant Kumar, All are sons & Daughter of Sri Ravi Shankar Singh @ Yogendra Singh. All Resident of Village- Mosimpur, P.O.+ P.S.- Khushrupur, District- Patna.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Dronacharya

For the Respondent/s : Mr. Mahendra Bharti

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL JUDGMENT

Date: 16-07-2018

Heard Mr. Dronacharya, learned counsel for the petitioner and Mr. Mahendra Bharti, learned counsel for respondent no. 1.

2. The petitioner is one of the objectors of Probate Case No. 128 of 2007 filed by Kumar Gaurav, Respondent No. 1. The petitioner has filed this Civil Miscellaneous Petition against the order



dated 21.12.2017, by which the petition of the petitioner to recall the order dated 16.04.2009, fixing the probate case for *ex parte* hearing and allowing the petitioner to file objection about the genuineness of the Will, has been rejected.

3. The sole question arises for consideration as to whether the notice was validly served on the petitioner and the petitioner had any knowledge about the pendency of the probate case (Title Suit No. 08 of 2008), but he did not appear.

4. Mr. Dronacharya, learned counsel for the petitioner submits that from perusal of the service report (Annexure-4), it would appear that the process server has reported that Opposite Party Nos. 1, 2 and 3 did not receive the notice of their names and also refuse to put their signatures on the receipt of process and consequently, the process server hung the notice on the western door of the house of the Opposite Party Nos. 1, 2 and 3.

5. It is submitted that upon receipt of such service report, the Court did not make any order as to whether the notice validly was served on Opposite Party Nos. 1, 2 and 3 or not. It was never held by the Court that the notices issued on the Opposite Party Nos. 1 and 2 in view of the report of the process server was ever validly served and suddenly vide order dated 16.04.2009, the Court fixed title suit No. 08 of 2008 (arising out of Probate Case No. 128 of 2007) for *ex parte*



hearing. The petitioner filed for recalling the said order fixing the case for *ex parte* hearing, but learned Additional Judge without recording any finding with respect to the valid service of notice or acceptance of same on the basis of service report passed order on mere presumption that the brother of the petitioner had earlier appeared and filed objection, therefore, the petitioner must have knowledge about the pendency of the suit and on such, the petition of the petitioner has been illegally rejected.

6. Mr. Mahendra Bharti, learned counsel for the respondent No. 1 submits that the petitioner in his petition has stated that he knew about the pendency of the suit from relatives but he did not disclose the name of the relatives. The source of the knowledge about the pendency of the title suit is uncertain. It has further been submitted that in view of the proviso under order 9 Rule 13 of the C.P.C., the irregularity in service of notice may not be a valid ground for setting aside the *ex parte* judgment and decree. In this regard, the learned counsel has placed reliance on a judgment passed in ***Mali Ram Sharma and another Vs. Smt. Gayatri Devi*** reported in ***AIR 1985 PATNA 116***.

7. Having considered the submission of both sides and on perusal of the records, I find that admittedly the notice issued to the Opposite Party Nos. 1 to 11. Petitioner is Opposite Party No. 3. The



process server handed over the notice to Opposite Party Nos. 4, 6, 7, 8, 9, 11 and Opposite Party No. 5, but the process server reported that Opposite Party Nos. 1, 2 and 3 refused to receive the copy of the notice and also declined to put signature on the service report. The process server submitted the report, but learned court below did not either accept or reject the service report. The learned Additional Judge did not hold the service of notice according to the process server report can be deemed to be validly served. Some of the objectors, who appeared, filed objection on such Probate Case No. 128/2007, which was converted to title suit No. 8 of 2008. The court did not ever record the finding about the validity of service of notice on Opposite Party Nos. 1, 2 and 3. On 16.04.2009, the court recorded the finding that Opposite Party No. 2 is the brother of Opposite Party Nos. 3 and 4 and therefore, the Opposite Party No. 2 and 3 must have knowledge about the pendency of the case. Accordingly, the suit was fixed for *ex parte* hearing. When the petitioner filed a petition for recalling the *ex parte* order, the court did not record any finding about the same. The report of process server or non-acceptance of the same deemed to be validly served but on this ground rejected the petition that the petitioner must have knowledge about the pendency of the suit as his brother was appearing from before. It has nowhere come either from the findings of the court below or from the side of Respondent No. 1



that the petitioner had knowledge about the pendency of the suit and he was not appearing. Therefore, I find that the order dismissing the petition of the petitioner for recalling the *ex parte* order fixing the suit for hearing *ex parte* is illegal.

7. Accordingly, the order dated 21.12.2017 is set aside and the petitioner is allowed to file objection within one month from the date of receipt/production of a copy of this order.

(Prabhat Kumar Jha, J.)

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AFR/NAFR	
CAV DATE	N.A.
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