

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.179 of 2019

Kameshwar Roy @ Kameshwar Prasad aged about 57 years (Male) son of Late Kripa Roy, resident of Village- Rasulpur, Sutihar, P.S.- Derni, District- Saran at Chapra

... .. Petitioner

Versus

1. Suresh Singh Son of Late Jamuna Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
2. Arun Singh Son of Late Jamuna Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
3. Anil Singh Son of Late Jamuna Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
4. Subodh Singh Son of Late Jamuna Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
5. Sushila Devi Daughter of Late Jamuna Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
6. Meera Devi Daughter of Late Jamuna Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
7. Asha Kunwar Wife of Late Dileep Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
8. Rajo Kunwar W/o Late Sheoji Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
9. Mukesh Singh Son of Late Sheoji Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
10. Tulsi Singh Son of Late Sheoji Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
11. Ram Briksh Singh Son of Late Sheoji Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
12. Mostt. Rajmati Kunwar W/o Late Bhola Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
13. Rajeshwar Roy Son of Late Kripa Roy Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
14. Baij Nath Roy Son of Late Kripa Roy Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
15. Shambhoo Roy Son of Late Kripa Roy Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
16. Mostt. Kalawati Devi Wife of Late Bishwanath Roy Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
17. Mukesh Roy Son of Bishwanath Roy Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
18. Dharmendra Roy Son of Late Surendra Roy Resident of Village- Rasulpur,



Sutihar, P.S.- Derani, District- Saran at Chapra

19. Jitendra Roy S/o Late Surendra Roy Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra
20. Jivendra Singh @ Jaivindra Singh Son of Late Kameshwar Singh Resident of Village- Rasulpur, Sutihar, P.S.- Derani, District- Saran at Chapra

... .. Respondents

Appearance :

For the Appellant/s : Mr.Kamala Kant Tiwary, Advocate
For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 28-03-2019

This application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 15.09.2018 passed by the learned Sub-Judge, Sonapur, Saran in Execution Case No. 6 of 2016 whereby the application dated 07.07.2018 filed by the petitioner for stay of execution of decree dated 11.09.2013 passed in Partition Suit No. 394 of 2001 has been dismissed.

2. Learned counsel for the petitioner submitted that the petitioner is son of defendant no. 3. The plaintiff has obtained the judgment and decree in his favour in Partition Suit No. 394 of 2001 by playing fraud. The trial court while deciding the suit has wrongly and illegally passed an ex-parte judgment and decree in favour of the plaintiff holding that the plaintiff is entitled for 1/2 share in Khata No. 499, Plot No. 354 and 113 and whole of the landed property in Schedule-1 of the plaint. The entire process



of partition suit has been done ex-parte without valid service of notice upon the defendant no. 3 and his legal heirs. He submitted that defendant no. 3 had no opportunity to place his case before the court below. Misc. Case No. 6 of 2015 has been filed in the court of Sub-Judge, Sonapur, Saran, which is still pending. During the pendency of the said case, the impugned order dated 15.09.2018 has been passed, which is patently illegal, unjust and fit to be set aside.

3. On hearing the petitioner and perusing the impugned judgment, I find that Partition Suit No. 394 of 2001 was decided vide judgment dated 30.08.2013 and a decree had already been passed on 11.09.2013 by the learned Sub-Judge-II, Saran at Chapra. The petitioner did not file any statutory appeal against the aforesaid judgement and decree passed by the learned Sub-Judge-II. He has filed an application for staying the proceeding of the execution case on the ground of pendency of Misc. Case No. 6 of 2015 filed for setting aside the ex-parte judgment and decree passed in the partition suit. The said application has been annexed as Annexure-3 to the present application wherein it has been pleaded that an application bearing 6 of 2015 has been filed by the defendant for setting aside the decree which is pending in the



court, hence, the further proceeding of the execution case be stayed.

4. From a reading of the application filed by the petitioner in the court below, it does not appear that any pleading has been taken regarding non-service of the summons upon the defendant.

5. It would be relevant to note here that order 9 rule 13 of the Code of Civil Procedure (for short 'CPC') stipulates that when an ex-parte decree is passed against the defendant, he may apply to the court by which decree was passed for an order to set it aside and if he satisfies that summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him upon such term as to cost payment to court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

6. From a reading of the application filed by the petitioner in the court below, I do not find that any pleading has been taken by him that the summon was not duly served upon him or that the defendant was prevented by sufficient cause from appearing when the case was called for hearing.



7. In absence of either of the aforesaid two grounds having been taken, no illegality can be found with the order impugned.

8. Accordingly, the application is dismissed.

(Ashwani Kumar Singh, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	03.04.2019
Transmission Date	

