

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.302 of 2019

1. Sona Devi (Female) aged about 50 years, Daughter of Late Bishwanath Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
2. Rajendra Prasad Jaiswal @ Rajendra Bhagat (Male) aged about 77 years, son of Late Saryug Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
3. Ashok Bhagat @ Ashok Jayaswal (Male) aged about 65 years, son of Late Saryug Bhaga @ Late Saryu Jayaswal resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
4. Premrata Devi (female) aged about 70 years, Daughter of Late Saryug Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
5. Kiran Devi (Female) aged about 45 years, Daughter of Late Saryug Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
6. Ankhi Devi (Female) aged about 60 years, daughter of Late Chandrama Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
7. Rachana Bharti (Female) aged about 40 years, daughter of Ramjee Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
8. Rajesh Kumar (Male) aged about 45 years, Son of Ramjee Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
9. Reeta Kumari (Female) aged about 30 years, Daughter of Ramjee Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.

... .. Defendants-Petitioners

Versus

1. Hari Chandan Mandal son of Late Babulal Mandal resident of Village- Khabaspur, P.O. Rani Diyara, P.S. Pirpainty, District- Bhagalpur.
 2. Karoo Mandal son of Late Babulal Mandal resident of Village- Khabaspur, P.O. Rani Diyara, P.S. Pirpainty, District- Bhagalpur.
 3. Siyaram Mandal son of Late Deo Narayan Mandal resident of Village- Khabaspur, P.O. Rani Diyara, P.S. Pirpainty, District- Bhagalpur.
 4. Yogendra Mandal son of Late Tipu Mandal resident of Village- Khabaspur, P.O. Rani Diyara, P.S. Pirpainty, District- Bhagalpur.
 5. Baiju @ Bajrangi Mandal son of Late Jaglal Mandal resident of Village- Khabaspur, P.O. Rani Diyara, P.S. Pirpainty, District- Bhagalpur.
- Plaintiffs-Opposite parties.
6. Meera Devi Daughter of Late Bishwanath Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.



7. Krishnanand Bhagat son of Late Saryug Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
8. Surya Narayan Bhagat son of Late Saryug Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
9. Kailash Bhagat son of Late Saryug Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.
10. Durga Devi Wife of Late Saryug Bhagat resident of Village- Dayalpur, P.O. Dayalpur, P.S. Kahalgaon, District- Bhagalpur.

... ..Defendants-Respondents

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Appearance :

For the Petitioners : Mr.Ranjan Kumar Jha, Advocate
For the Respondents : Mr.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 02-05-2019

This application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 17.09.2018 passed by learned Sub-Judge, Kahalgaon in Title Suit No. 38 of 1993 whereby the petition dated 07.04.2017 filed by the defendants-petitioners has been rejected.

2. The petition dated 07.04.2017 filed by the defendants-petitioners has been brought on record as Annexure-4A to this application.

3. On perusal of the same, I find that no provision of law under which the petition was filed is mentioned. However, on reading the contents of the application, I find that the defendants-petitioners had prayed for recall of the order dated 29.11.2016 and to permit them to file written statement to contest the suit.



4. In the said application, it has been contended that the suit had been fixed for hearing on the petition of the defendants dated 26.09.2011 and the rejoinder of the plaintiff dated 12.12.2012 on 11.11.2016 and thereafter on 29.11.2016. Since the defendant could not turn up on 29.11.2016, the petition dated 26.09.2011 was dismissed. The application dated 07.04.2017 was contested by the plaintiffs-opposite parties. They contended that sole purpose for filing of the application was to further delay the proceeding of the case with ulterior motive.

5. Having heard learned counsel for the parties, vide impugned order dated 17.09.2018, learned Sub-Judge, Kahalgaon rejected the application filed by the defendant-petitioner. The operative part of the order reads as under :-

“Heard both side and perused the record from perusal of record it appears that the petitioners petition dated 26.09.2011 have prayed for recall of order dated 19.02.2007 by which this suit has been decreed ex-parte against them. The proper remedy for setting aside an ex-parte decree is either to file an appeal of a misc. case under O 9 r 13, but the petitioners have not taken recourse of any of them. The petition dated 26.09.2011 appears to be devoid of merit hence rejected.”



6. The trial court has thus held that the petition filed by the defendant is not maintainable as the prayer made is for recall of the order dated 19.02.2007 by which the suit had been decreed ex-parte.

7. For setting aside an ex-parte decree against the defendant an application under Order IX, Rule 13 of the CPC can be entertained only on two grounds-

“(a) where the summons were not duly served,

and

(b) where the defendant failed to appear when the case was called for hearing due to sufficient reason.”

8. The limitation period for filing an application for setting aside an ex-parte decree is 30 days.

9. In the present case, it would appear from the order impugned that the suit got decreed against the defendant on 19.02.2007. It is not a case in which the defendants were not served with summons. They filed an application for recall of the order dated 19.02.2007 on 26.09.2011. The said application for recall also got dismissed on 29.11.2016 due to non-prosecution. Thereafter, another application for recall of the order dated 29.11.2016 was filed by the defendants on 07.04.2017. The said



application has been dismissed by the trial court vide impugned order dated 17.09.2018.

10. Having considered the submissions of the petitioner, I see no illegality in the order impugned dated 17.09.2018. The ex-parte decree passed against the defendants could not have been recalled in absence of any application under Order IX, Rule 13 of the CPC.

11. Accordingly, I see no justification to interfere with the order impugned in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

12. The application is dismissed.

(Ashwani Kumar Singh, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	07.05.2019
Transmission Date	NA

