

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.328 of 2019**

Chandra Shekhar Prasad aged about 70 years (male) Son of Late Ram Keshwar Prasad Sinha, Resident of Mohalla- Makhania Kuan, P.S.- Pirbahore, District- Patna.

... ..Plaintiff- Petitioner

Versus

Shashi Kant Singh aged about 38 years (Male) Son of Sri Vishnudeo Narayan Singh, resident of Village - Karkain, P.S.- Ghoswari, District- Patna, the Proprietor of Ranjan Medical, Makhania Kuan, Patna.

... ..Defendant- Respondent

Appearance :

For the Petitioner	:	None
For the Respondent	:	...

**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT**

Date : 16-05-2019

No one appears for the petitioner.

2. Perused the materials on record.

3. This application under Article 227 of the Constitution of India has been filed by the plaintiff-petitioner challenging the order dated 08.01.2019 passed by learned Munsif-I, Patna in Misc. Case No. 53 of 2018 whereby the petition filed under Order IX Rule 4 of the Code of Civil Procedure (for short 'CPC') for restoration of Eviction Suit No. 10A of 2011 has been rejected and the petition has been held to be not maintainable.

4. On perusal of the record, I find that in Eviction Suit No. 10A of 2011, learned Munsif-1, Patna had passed the judgment on 31.03.2018 whereby the suit for a decree of eviction of the defendant from the suit premises as described in Schedule-1



of the plaint and for arrears of rent as described in Schedule-11 of the plaint directing the defendant to evict and hand over vacant possession to the plaintiff was dismissed without cost.

5. The operative part of the said judgment reads as under :-

“From perusal of the case record it transpires that defendant of this case appeared on 04.05.2012. However, in spite of providing ample opportunity he failed to file his written statement and consequently he was debarred from filing his written statement on 25.09.2012. Further, the record had been running for plaintiff’s evidence since 05.10.2012 but plaintiff has not produced any witness and thereby his evidence has been closed on 16.09.2017. In these circumstances, it is amply clear that plaintiff has failed to prove his case as contained in his plaint. It is, therefore, ordered that the suit be and the same is dismissed without cost.”

6. Order IX Rule 4 of the CPC provides that where a suit is dismissed under Order IX, rule 2 or rule 3 of the CPC, then a fresh suit on the same cause of action is not barred if within limitation. An application for restoration of suit under Order IX Rule 4 is to be preferred within thirty days of dismissal of the



suit. Once the application for setting aside dismissal is allowed, the defendant becomes entitled to get notice of restoration. The requirement of notice to the defendant is mandatory and non-service of notice is sufficient to get the decree set aside.

7. Rule 2 of Order IX of the CPC provides that where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges, if any, chargeable for such service, or failure to present copies of the plaint as required by rule 9 of Order VII, the Court may make an order that the suit be dismissed. Proviso to rule 2 of Order IX of the CPC provides that no such order shall be made, if notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent on the day fixed for him to appear and answer.

8. Rule 3 of Order IX of the CPC provides that where neither party appears when the suit is called on for hearing, the court may make an order that the suit be dismissed.

9. Apparently, the eviction suit in question was not dismissed vide order dated 31.03.2018 either for non-service of summons in consequence of plaintiff's failure to pay costs or for non-appearance of the parties when the suit was called for hearing.



The suit was dismissed because the plaintiff was given ample opportunity between 05.10.2012 and 16.09.2017 to bring his witness but he failed to produce any witness whereafter his evidence was closed. Thereafter, the trial court passed judgment dismissing the suit holding therein that the plaintiff had failed to prove his case as contained in his plaint.

10. In absence of dismissal of the suit under rules 2 or 3 of Order IX, the trial court has rightly held that an application under Order IX Rule 4 of the CPC is not maintainable.

11. In that view of the matter, no case for interference with the order impugned in supervisory jurisdiction under Article 227 of the Constitution of India is made out. The application is dismissed.

(Ashwani Kumar Singh, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	23.05.2019
Transmission Date	NA

