

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Revision No.46 of 2015

1. Sri Kuldeotaji through their Sewait and Manager, namely, Sri Anil Kumar Nande, son of Late Pratap Narayan Nande.
2. Sri Anil Kumar Nande, son of Late Pratap Narayan Nande, Sewait and Manager of Sri Kuldeotaji, petitioner No.1, Both residents of Mohalla- Purani Bazar, Sonar Patti Road, Ward No.21, P.O., P.S. and District- Muzaffarpur.

... .. Plaintiffs/Opp.Parties/Petitioners

Versus

1. Sri Nathu Ram Narnoli son of Late Lakhi Prasad Narnoli.
 2. M/s Narnoli and Company through Nathu Ram Narnoli. Both resident of Village- Purani Bazar, Sonar Patti Road, Ward No.21, P.O., P.S. and District- Muzaffarpur. ...Defendants/Applicants/Opp.Parties.
 3. Sri Narayan Prasad Narnoli,
 4. Sri Murlidhar Narnoli, Both sons of Late Lakhi Prasad Narnoli and both resident of Mohalla- Purani Bazar, Sonar Patti Road, Ward No.21, P.O., P.S. and District- Muzaffarpur. Respondent/s
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Appearance :

For the Petitioner/s : Mr.S.S. Dwivedi, Sr.Adv.
For the Respondent/s : Mr.J.S.Arora, Sr.Adv.

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 01-02-2019

Heard learned counsel for the parties.

2. A juristic person, Kuldeotaji, through its Sewait and Manager-Anil Kumar Nande filed eviction Suit No.02 of 2001 against the petitioner and others for their ejectment on the ground of personal necessity and default in payment of rent. Arrears of rent was also claimed in the suit.

3. Status of the defendants is that defendant No.1 M/s Narnoli and Company is a partnership firm and three full brothers who were arrayed as defendant Nos.2 to 4 were partners of the firm.



4. On 12.08.2002, all the defendants appeared in the suit and on 26.11.2002, joint written statement was filed admitting the fact that they are tenants in suit premise, however, were paying agreed rent and are not defaulters nor the plaintiff had any bonafide personal necessity. On 19.05.2006, the learned trial court asked the defendants to pay the current rent in view of the provisions of Section 15 of the Bihar Building (Lease, Rent and Eviction) Control Act, 1982. The defendants did not comply the order. Hence, defence was struck off on 13.06.2006. Thereafter, the plaintiff led evidence and the suit was decreed ex parte on 31.10.2006.

5. The defendants challenged the ex parte decree in an application under Order 9 Rule 13 C.P.C. on 30.03.2007 vide Misc. Case No.07 of 2007. In the miscellaneous case, the defendants stated that opposite party No.3 i.e. full brother of the applicants got some papers signed by the applicants for making party in the said eviction suit and now it appears that said paper signed by the applicant has been converted into a written statement of the eviction suit. The contents of written statement was never read over or explained to the applicants of miscellaneous case. They further asserted that the applicants have no knowledge about the court working and had full faith in opposite party No.3. As



such, opposite party No.3 was allowed and entrusted to make pairvy but opposite party No.3 under collusion with opposite 1st party (plaintiffs) did not make proper pairvy in the suit and allowed the suit to be decreed ex party by putting the applicant in dark.

6. Learned senior counsel for the petitioners submits that miscellaneous application was hopelessly barred by limitation. Hence, it should have been dismissed on this ground alone. Article 123 of the Limitation Act, 1963 provides period of 30 days for filing application to set aside a decree passed ex parte and the limitation would start from the date of decree or where summons or notices was not duly served when the applicant got knowledge of the decree. In the present case, there is no case that summons or notices were not duly served because the applicant had already appeared in the suit. Hence, date of knowledge would not be applicable and the learned court below has erred in holding that from the date of knowledge, the miscellaneous application was within time. In the circumstance, the learned court below has acted illegally, ignoring the provisions of law, and with material irregularity.



7. Next contention is that the ex parte decree can be set aside, on proof of the facts mentioned in Order 9 Rule 13 C.P.C. which reads as follows:

“13. Setting aside decree ex parte against defendants-In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the 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 as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set



aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

Explanation – Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

8. Learned senior counsel appearing for the opposite parties submits that at the time of admission of the miscellaneous case, the question of limitation was considered by the learned



court below and the petitioners did not challenge the aforesaid order.

9. Learned senior counsel for the petitioners submits that no such order is there on the record of miscellaneous case. Even if such order is there, the question of limitation can be looked into at the stage of the appellate proceeding.

10. Learned senior counsel for the opposite parties next submits that the fraud as alleged in the miscellaneous petition by the opposite parties also comes as reason for non-appearance in the suit. Therefore, reasonable excuse was there with the applicant.

11. Next contention is that application under Order 9 Rule 13 C.P.C. was maintainable in view of the judgment of the Hon'ble Supreme Court in the case of ***Prakash Chander Manchanda and Anr. Vs. Smt. Janki Manchanda***, reported in ***AIR 1987 SC 42*** and if the application was maintainable and court below has allowed the application for substantial justice, the suit should have been decided on contest by the parties and the impugned order should not be interfered in exercise of this supervisory jurisdiction. In ***Prakash Chander Manchanda Case***, the Hon'ble Supreme Court had interfered with the order of the High Court for the reason that application under Order 9 Rule 13 C.P.C. was dismissed by the learned trial court as not maintainable,



on the ground that the suit was disposed of under Order 17 Rule 3 and not under Order 17 Rule 2 of C.P.C. In the present facts and circumstances of this case, that case law is not applicable. This Court has not held that application under Order 9 Rule 13 C.P.C. was not maintainable before the learned court below rather this Court is of the view that there was no merit in the application under Order 9 Rule 13 C.P.C. and learned court below has exercised jurisdiction illegality and with material irregularity as noted above.

12. A perusal of the aforesaid provisions would make it abundantly clear that ex parte decree can be set aside, if the applicant satisfies the court that summons was not duly served. In this case, the applicants of the miscellaneous case, have not stated that summons were not served on them. The second ground is that when the applicant was prevented by any sufficient cause from appearing when the suit was called on for hearing. According to learned counsel this does not cover a case of fraud committed by one of the defendants against another defendant nor the learned court below has examined the matter in this light. Therefore, apparently no ground existed with the learned court below to set aside the ex parte decree.



13. The provisions of Order 9 Rule 13 C.P.C. does not permit setting aside of the ex parte judgment when the defendant alleges fraud against another defendant especially when the suit is for ejectment against the firm and its partners. Fraud played by a partner against another partner may give rise to other remedies but the same cannot come in the way of the ex parte decree of ejectment when material on the record shows that all the partners appeared in the eviction suit and filed their respective vaklatnamas and written statement. Opposite parties have not made out any other case of their non-appearance on the date of hearing of the suit or on the date of passing of the ex parte judgment. Similarly, the learned court below should not have condoned the delay contrary to the provisions of Article 123 of the Limitation Act, 1963.

14. In the result, the impugned order is not sustainable in law and it is held that the learned court below has acted in exercise of jurisdiction with illegality and material irregularity.

15. Accordingly, the impugned order is set aside and this civil revision application stands allowed.

(Birendra Kumar, J)

Nitesh/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	05.02.2019
Transmission Date	NA

