

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.237 of 2008

Most. Lakhi Devi wife of late Suryalal Dubey, R/o. Village-Tali Khurd, P.O. Tali, Via-Mairwa, P.S. Guthani, District- Siwan

... .. Appellant/s

Versus

1. Kamal Kishore Dubey
2. Bharat Dubey both sons of late Muni Lal Prasad Dubey, R/o. Tali Khurd, P.O. Tali, Via-Mairwa, P.S. Guthani, District- Siwan
3. The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Shashi Shekhar Dvivedi, Sr. Advocate Mr. Parth Gaurav, Advocate Mr. Anshu Raj Singh, Advocate Ms. Shambhavi Shankar, Advocate
For the Respondent/s	:	Mr. Janardan Prasad Singh, Sr. Advocate Mr. Deepak Kumar, Advocate Mr. Shailendra Singh, Advcoate Mr. Anwar Karim, AC to GP-10

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT
Date : 28-01-2019

Heard learned counsel for the parties.

2. This appeal has been preferred, under Order XLIII Rule 1(d) of the Code of Civil Procedure, against the order dated 05.03.2008 passed by learned Additional District Judge, FTC No.5, Siwan, in Miscellaneous Case No.2 of 2006 under Order IX Rule 13 of the Code of Civil Procedure.

3. A brief background of this case is that respondents had filed Probate Case No.4 of 1992 in the Court of learned District Judge, Siwan, for grant of Probate in respect of



the Will said to be executed by late Suraj Lal Dubey. The probate matter was contested by the appellant Most. Lakhi Devi. As such, the probate case was converted into Title Suit No.1 of 1992/1 of 2004. During pendency of the suit, the appellant could not do pairvi of the case regularly. Hence, ex parte judgment was passed in the title suit on 21.11.2005. Thereafter, the appellant filed a petition bearing Misc. Case No.2 of 2006 under Order IX Rule 13 of the Code of Civil Procedure. The miscellaneous case was dismissed on contest by the impugned order for the reason that the appellant failed to establish reasonable cause for her non-appearance in the suit. For this conclusion the learned Court-below considered the material on record.

4. The dismissal of prayer for setting aside ex parte decree is under challenge in this appeal.

5. Submission of the learned senior counsel for the appellant is that appellant is a widow. She is a very old lady and normally lives in West Bengal along with her brother and nephew. On 07.07.1992 she had appeared in the suit through Advocate Mr. Surendra Nath Pandey. Beside this case she had to come to Siwan in the matter of some criminal cases also pending against her. Mr. Surendra Nath Pandey was not



properly doing pairvi in the case. Hence, Mr. Ram Dayal Tiwari, Advocate, was replaced. However, he could also not attend the case regularly. In the meantime, before the ex parte judgment was passed, the case records traveled to different Courts for at least 11 times, fully detailed in the memo of appeal, without notice to the learned counsel appearing for the appellant or to the appellant in the event of refusal of notice by the learned counsel. The law is well settled that on transfer of the case records non-issuance of notice to the parties who have already appeared would amount to “sufficient cause” for setting aside ex parte decree or dismissal of the suit.

6. On the other hand, learned senior counsel for the respondent submits that in criminal matter the appellant was regularly doing pairvi at the same station where the title suit arising out of the probate case was pending. Therefore, it cannot be said that the explanation put forward by the appellant for non-appearance in the suit is reasonable and acceptable. The Court-below has examined in detail the circumstances of non-appearance of the appellant which was not due to the reasons beyond her control. The Court-below further considered the delay in approaching the Court for setting aside the ex parte decree.



7. There is no dispute that the case records before the learned Court-below was transferred from one Court to another for 11 times. The record of the learned Court-below does not show that ever any notice on transfer was served on the learned counsel appearing for the appellant or on his refusal to the appellant. Once record was seen by Mr. Surendra Nath Pandey, Advocate, though he was disengaged by the appellant and Mr. Ram Dayal Tiwary, Advocate, was authorized to do pairvi.

8. In **Ram Sukul Pathak and Others V. Kesho Prasad Singh and Others** reported in **AIR 1918 Patna 341**, a Special Bench of this Court held that where an order of transfer of an appeal from one court to another is made it is desirable that notice should be given in every case to the parties or their representatives. The Court observed as follows:

“An important order such as the transfer of a case from one Court to another should in variably be communicated to the persons concerned and in token of such communication the signatures of the parties or their pleaders should be obtained and when the signature is not obtained the order sheet should show that the information has been communicated.”

9. In **Hiralal and Others V. The State of Bihar and Others** reported in **AIR 1968 Patna 439**, a Bench of this



Court followed the aforesaid ratio and in paragraph-5 of the judgment recorded as follows:

*“Learned Counsel for the appellants has referred me to the Special Bench decision of this Court in **Ram Sukul Pathak v. Kesho Prasad Singh, AIR 1918 Pat 341**, which has laid down the correct procedure should be followed by the courts while transferring cases suo motu to some other courts. In that case, the appeal was pending before the District Judge, Arrah. Before the date fixed for the hearing of the appeal, the case had been transferred to the court of the subordinate Judge, Arrah. Notice of the transfer was not given to the parties or their lawyers. Though the appellant was present in court, he could not attend the court of the Subordinate Judge when the appeal was called out for hearing and consequently the appeal was dismissed for default. The appellant filed a restoration application, which was rejected by the Subordinate Judge. The contention raised by the appellant was that the District Judge, while transferring the case to the Subordinate Judge should have informed the parties or their lawyers that the case had been transferred. Hence, there was an appeal in the High Court. Sir Dawson-Miller, C.J. who delivered the judgment of the Special Bench, observed as follow:*

“It seems to me that it would be desirable in these cases where an order of transfer is made that notice should be given in every case to the parties or their representatives. I find a passage in the judgment of Jwala Prasad, J., which deals with this point and with which I entirely agree He says:

‘In my mind such an important



order as the transfer of a case from one court to another should invariably be communicated to the persons concerned and in token of such communication the signature of the parties or their pleaders should be obtained and when the signatures are not obtained the order-sheet should show that the information has been communicated”

10. The judgment of the single Judge Bench in **Hiralal's** case (Supra) was partly overruled by a Division Bench of this Court in **Sri Vishnu Kant Jha V. Sri Dinesh Jha and others** reported in **AIR 1993 Patna 135**. However, the principle was reiterated in paragraph-15 of the judgment which reads as under:

“Further question would arise in this case as to what procedure should be followed in relation to the party who is appearing, namely, who has filed a case through lawyer or is contesting the same through lawyer by filing Vakalatnama in the case. In cases where transfer order has been passed suo motu without giving notice to any of the parties or the same has been passed upon an application filed by any of the parties without giving any notice to other party, in such an eventuality, where a party has appeared in a case through counsel, the Court should give notice of transfer to the counsel of the parties who have already entered appearance. In case, counsel for the parties refuse to accept notice of transfer and show their inability to work before the transferee court, the court would be obliged to sent notice to those parties whose counsel have refused to accept notices of transfer. If neither such steps



are taken nor it is proved that such a party had knowledge of transfer of the case from any other source, then it can be safely said that “sufficient cause” was shown within the meaning of O. IX R. 4, 7, 9 and 13 of the Code and the final order passed by transferee court either dismissing the suit for default or passing ex parte decree of order, would be liable to be set aside on this ground alone.”

11. This case is covered by the judgment in the aforesaid cases. The record reveals that the case record was transferred on 28.08.1993, on 06.04.1995, on 25.07.1995, on 30.01.1996, on 27.11.1996, on 04.07.2000, on 08.06.2001, on 27.02.2003, on 26.06.2003, on 02.08.2004 and on 20.05.2005. For the first time, on 20.05.2005 the Court directed the petitioner to inform Opposite Party (the appellant herein). The information was given to Sri Surendra Nath Pandey, Advocate, who was no longer lawyer of the appellant after 07.07.1992; rather on 21.05.2003 itself Sri Surendra Nath Pandey had specifically mentioned on the record that he has no instruction in the matter. The order sheet of the Court-below does not show that any information or communication to the appellant or her pleader was there about the transfer of the case. From the case law aforesaid, it is evident that transfer made by the Court suo motu or on the petition of a party always requires that notice of the transfer must be given to the parties or their lawyers.



12. In that view of the matter, I hold that the appellant had reasonable excuse for non-appearance before the transferee Court. This alone could be recorded as sufficient cause within the meaning of Rule 9 of Order IX of the Code of Civil Procedure. This Court is satisfied that the appellant had no knowledge about the transfer of the case to different Courts. Hence, the ex parte judgment passed in the case behind the back of the appellant is not sustainable in law. Therefore, order dated 05.03.2008 passed in Miscellaneous Case No.2 of 2006 stands set aside and accordingly the ex parte judgment dated 21.11.2005 passed in Title Suit No.1 of 1992/1 of 2004 also stands set aside and the suit is ordered to be restored to its original file. The same is directed to be proceeded with expeditiously. This order has been passed in presence of the parties. Hence, no fresh notice be needed in the suit which shall be listed before the appropriate concerned court-below on 25.02.2019 when the parties shall appear thereat suo motu.

13. With the aforesaid observation, this appeal stands allowed. However, no cost in the facts and circumstances of the case.

14. I.A. No.9009 of 2016 is a compromise petition filed under Order XXIII Rule 3 of the Code of Civil Procedure



between the sole appellant and respondent No.2 Bharat Dubey.
Parties may file it in the pending suit.

(Birendra Kumar, J)

Mkr./-

AFR/NAFR	AFR
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