

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.32 of 2016

1. Chandra Narain Jha Son of late Radha Jha
2. Suraj Kant Jha Son of late Nand Kishore Jha
3. Dharnidhar Jha son of late Suresh Jha. All Resident of Village Agroul, P.O. Jahangirpur, Lagma, P.S. Singhia, District- Samastipur.

... .. Petitioner/s

Versus

1. Krishna Kumar Jha @ Krishna Kant Jha
2. Manoj Jha
3. Saroj Jha, all sons of late Uma Kant Jha
4. Asha Devi
5. Buchani Devi
6. Majia Devi
7. Renu Devi, all daughter of late Uma Kant Jha
8. Ratneshwar Jha
9. Gyaneshwar Jha
10. Brahmeshwar Jha. All sons of late Kameshwar Jha
11. Rajani Devi D/o late Kameshwar Jha
12. Most. Shyama Devi Wife of late Kameshwar Jha
13. Digambar Jha son of late Shree Prasad Jha. All Resident of Village Agroul, P.O. Jahangirpur, Lagma, P.S. Singhia, District- Samastipur.
14. Most. Sabitri Devi W/o late Chandra Shekhar Jha
15. Subhash Jha
16. Prabhas Jha
17. Hare Ram Jha. All sons of late Chandra Shekhar Jha
18. Shambhu Nath Jha
19. Kailash Jha
20. Badri Narain Jha @ Deelip Kumar Jha all sons of late Radha Jha
21. Chandra Kant Jha
22. Hari Narain Jha
23. Shiv Shankar Jha all sons of late Nand Kishore Jha
24. Nand kumar Jha
25. Gonu Jha @ Murlidhar Jha Both sons of late Suresh Jha
26. Ugan Jha
27. Suman Kumar Jha @ Sugan Jha Both sons of late Arjun Jha



28. Most Urmila Devi W/o late Arjun Jha
29. Smt. Gaya Ojhain wife of Rajeshwar Jha
30. Sita Devi D/o late Rajeshwar Jha
31. Niras Jha S/o late Rajeshwar Jha. All Resident of Village Agroul, P.O. Jahangirpur, Lagma, P.S. Singhia, District- Samastipur.
32. Radha Jha
33. Fulo Jha, Sons of late Asharfi Jha. Both resident of Village Shiv Nagar, P.O. Shiv Nagar, P.S. Biraul, Distt.- Darbhanga.
34. Nunu Kant Jha S/o late Chuman Jha, resident of Village- Dath, P.O. Bharwari, P.S. Hasanpur, Distt.- Samastipur.
35. Rama Kant Jha
36. Shyama Kant Jha, Sons of Kapleshwar Jha
37. Kaushia Jha
38. Balram Jha, Both sons of late Tara Kant Jha
39. Mandvi Devi W/o late Prithvi Yadav
40. Baidya Nath Yadav
41. Satyendra yadav
42. Mukund Yadav, Sons of late Prithvi Yadav.
43. Bindu Kumari, D/o late Prithvi Yadav. All Residents of Village- Agroul, P.O.- Jahangirpur, Lagma, P.S.- Singhia, District- Samastipur.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Bhupendra Narain, Advocate Mr. Shailendra Kumar, Advocate
For the Respondent/s	:	Mr. Shashi Shukla Dvivedi, Senior Advocate Mr. Shashwat, Advocate

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 08-03-2019

Heard learned counsel for the parties.

2. This civil revision has been preferred, under Section 115 of the Code of Civil Procedure, against the order dated 05.11.2015, passed by the learned Additional District Judge-Vth, Samastipur in Miscellaneous Appeal No.17 of 2008.



3. The petitioners were defendants among other several defendants in Partition Suit No.285 of 1970. The copy of order sheet of the civil suit brought on the record as *Annexure 2* to the supplementary affidavit would reveal that on 13.07.1972, the court recorded that notice on the defendants, except defendant Nos.21 and 22 were returned with remarks “***Did not accept***”. The subsequent order reveals that only step for fresh service against defendant Nos.21 and 22 was taken and on 14.03.1973 the court passed following orders:-

“वादी उपस्थिति दाखील करते हैं। प्रतिवादी नं० 21 और 22 पर कार्ड तामिला की रसीद आ गई है। दिनांक 16/05/1973 को वाद विषय निश्चित करने या अग्रिम अन्य उचित आदेश के लिए उपस्थित किया जाय।”

4. On 16.05.1973, the court passed following orders:-

“वादी उपस्थिति दाखील करते हैं। प्रतिवादी गण उपस्थित नहीं होते हैं। दिनांक 29/05/1973 को एक पक्षिय सुनवाई के लिए रखा जाय।”

5. Thereafter, on 29.05.1973, defendant Nos.3 and 8 filed *Vakalatnama* as well as a petition for recall of the order of ex parte hearing. Defendant No.3, *Chandra Narain Jha* is one of the petitioner herein. The ex parte order was recalled on 03.07.1973 and the suit was running for framing of issues. Again on 12.02.1974, the court posted the matter for ex parte hearing which is as follows:-



“वादी उपस्थिति देते हैं। प्रतिवादी पैरवी नहीं करते हैं। वाद कवल से ही एक पक्षिय सुनवाई हेतु निश्चित है। दिनांक 01/03/1974 वास्ते एकपक्षिय सुनवाई।”

Thereafter, ex parte decree was passed in the suit on 08.07.1974.

6. For setting aside the ex parte decree aforesaid, the petitioners filed an application under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, which was registered as Miscellaneous Case No.07 of 2008. The said petition filed on 21.05.2008 was dismissed on 12.08.2008, without any enquiry regarding genuineness of the claim of the applicants; mainly on the ground that after thirty four years of ex parte judgment and decree, the petitioners had approached the court.

The court further found that one of the petitioner, *Chandra Narain Jha* had already appeared in the suit and on his prayer, ex parte order was recalled, however, subsequently he left the *Pairvy*. Petitioner *Chandra Narain Jha* is full brother of petitioner *Chandra Kant Jha*. Hence, *Chandra Kant Jha* had knowledge of the suit. The court further found that the petitioners were not believable that for such a long time they had no knowledge of the ex parte judgment. The court recorded that in a preliminary decree, only share of the parties is decided



and in final decree proceeding the applicants should participate and put their grievance.

7. The petitioners challenged the aforesaid order dated 12.08.2008 passed in Miscellaneous Case No.07 of 2008 in Miscellaneous Appeal No.17 of 2008 before the learned District Judge, Samastipur and by order dated 05.11.2015, the Miscellaneous Appeal was also dismissed almost on the same ground on which petition under Order IX Rule 13 of the Code was dismissed at the admission stage itself.

The appellate court's order dated 05.11.2015 has been challenged in this civil revision application.

8. Contention of the learned counsel for the petitioners is that there is non-compliance of the requirement of Order IX Rule 6 of the Code before placing the suit for ex parte hearing. There is non-compliance of mandate of law to afford opportunity to the petitioners to lead evidence on their claim of no service of notice as well as should have been given opportunity to explain the delay in approaching before the court.

9. Submission of the learned counsel for the petitioners is that even 13 acres of self-acquired land has been made subject matter of the partition suit and the issue whether such land is self-acquired or joint family property would be proved by leading evidence in the suit itself.



10. On the other hand, learned counsel for the opposite parties submits that service of notice is not required when the party appears through *Vakalatnama* or he had knowledge of the case. The record would reveal that the applicants had knowledge, hence, the trial court was not obliged to grant relief under Order IX Rule 13 of the Code in view of the second proviso to Rule 13 of the Code. He next submits that this is not a case wherein fraud has been committed in taking signature of L.T.I. of petitioner No.1 on the *Vakalatnama* filed in the case, rather he voluntarily filed *Vakalatnama*, which would be evident from the statement in para 7 in the present civil revision application, which reads as follows:-

“That the defendant Nos.3 and 8 were in service as teachers posted in Middle School Lagma and Primary School Ghordaur in the District of Darbhanga. The plaintiff No.4, Digamber Jha was also teacher. He approached the defendant No.3 and 8 that amicable settlement be made in the suit for future relationship between the parties. The said defendant Nos.3 and 8 had no knowledge of their properties and they without taking consent from their fathers ‘Karta’ of the family agreed to the offer made by plaintiff No.4 and in this way their signatures were obtained on Vakalatnama by the plaintiff No.4 and filed the same in the suit.”

11. Learned counsel for the petitioner at this juncture pointed out that the *Vakalatnama* handed over to plaintiff No.4 was accepted by Mr. Rama Shankar Prasad, an Advocate, vide *Vakalatnama* at Annexure-1 and the same Mr. *Rama Shankar Prasad* was appearing as an Advocate on behalf of plaintiffs-



respondents in Miscellaneous Appeal No.17 of 2008. He further submits that even if knowledge of one of the petitioner is assumed, non-compliance of law against other defendants cannot be accepted and knowledge be thrust upon them.

12. Relevant portion of Order IX Rule 6 of the Code of Civil Procedure reads as follows:

“Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then (a) When summons duly served- if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte.”

13. How the service of summons would be proved is mentioned in Order V Rule 19 of the Code which provides that:

“Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit.”

Reliance has been placed on *Firm Harnarain Rajnarain and Others Vs. Smt. Tara Sinha*, reported in AIR 1974 Patna 351 (V 61 C 98).

14. Contention is that in the present case there is no material that serving officer had filed any affidavit and even if he would have filed affidavit, his examination in the court was necessary for satisfaction that summons was duly served. The requirement of service of summons was considered by a Bench



of this Court in ***Wakil Bhagat Vs. Rambriksh Bhagat & 4 Others***, reported in ***1998 (2) PLJR, Page 294***. In para 6 of the judgment, the Bench observed as follows:-

“From the aforesaid order, it is manifest that the procedure adopted by the trial court is not in consonance with Order IX Rule 6 of the Code. The correct procedure, which should have been adopted by the court below, was to record satisfaction about the service of summons and then to post the case for ex parte hearing, if not for filing the written statement. Moreover, one day adjournment by the court for ex parte hearing was not proper.”

15. I find that in the civil suit also the trial court did not record satisfaction regarding service of summons, which is requirement of law. Hence, in absence of such finding, the service of summons was not acceptable, nor posting of the case for ex parte hearing was justified.

16. It is further notable that application under Order IX Rule 13 of the Code was dismissed without affording opportunity to the petitioners to lead evidence. Identical matter was considered by this Court in ***Jang Bahadur Sahni and Another Vs. Jagan Sahni and Others***, reported in ***2013(3) PLJR, Page 501***. In para 15 of the judgment, the Court recorded as follows:-

“A copy of the Miscellaneous Case has been placed on record at Annexure 4 of the supplementary affidavit and paragraphs 4 to 7 thereof amply explains the delay in preferring the case after a lapse of 11 years. The learned trial court thus fell in grave error in dismissing the Miscellaneous Case for want of an application under Section 5 of the Limitation Act without affording opportunity to the petitioners to substantiate their averments regarding date of knowledge of the ex parte judgment and decree. The perusal of the judgment and



order passed by the trial Court under challenge further manifests that the plea of the petitioners regarding forgery in the matter of filing of the Vakalatnama on their behalf, has been rubbished as a lie without even affording them opportunity to establish the claim. Matters involving limitation as well as forgery are matters which require leading of evidence and cannot be disposed of in a summary manner without allowing opportunity to the party concerned to establish their claim. The contentions advanced by Mr. Sinha appearing for the plaintiff-opposite parties charging the petitioners with neglect and abandonment of the proceedings is a rebuttable presumption and the party affected required opportunity to rebut the same. The order of the appellate Court is no different as even the appellate Court has failed to appreciate that no opportunity was provided to the petitioners to establish their case and aid and assistance of oral and documentary evidence.”

17. Since the court considering the miscellaneous application also acted with material irregularity in not adopting the procedure of giving opportunity to the petitioners to explain their reason for non-appearance and for delay in approaching the court for setting aside ex parte decree. In the circumstances, the said order is also not sustainable in law. The lower appellate court did not rectify the material irregularity apparent on the face of record. Hence, the impugned order is also fit to be set aside in exercise of this jurisdiction.

18. I do not find substance in the submission of the learned counsel for the respondents that since one of the petitioners had knowledge of the suit, that knowledge is binding on other petitioners and other defendants also. The rule is of personal service of notice on each of the defendants. Only for



petitioner No.1 joining with other petitioners for setting aside ex parte order, knowledge of the suit cannot be assumed against all in absence of service report.

19. I find no merit in the reasons of the court below that since petitioner No.1 had knowledge of the suit, hence it would be assumed as knowledge to all the defendants. The law requires personal service of notice to all the defendants.

20. To conclude, there was no material before the learned trial Court to substantiate that summons were duly served on all the defendants, especially on petitioner Nos.2 and 3; rather it should have been proved that the summons were duly served before the Court could have ordered that the suit be heard ex parte. As such, there is clear non-compliance of Order IX Rule 6 of the Code of Civil Procedure. When the petitioners filed application for setting aside ex parte decree, the Court hearing the miscellaneous application must have allowed opportunity to the petitioners to lead evidence on their claim that no service of notice was ever effected against them or they had no knowledge. Besides the aforesaid, the petitioner should have been allowed opportunity to explain the delay of 34 years in approaching the Court for setting aside the ex party decree. Therefore, the said Court also acted with material irregularity and illegality in exercise of its jurisdiction. The learned lower appellate Court



affirmed the order which was suffering from material irregularity. Hence, the impugned order passed by the learned lower appellate Court is also not sustainable. If the suit is restored to its original file, the worst that would happen would be that the dispute would be adjudicated to the satisfaction of the parties. The issue as to whether any particular suit property is self-acquired property or joint family property cannot be decided in a final decree proceeding. Hence, the learned Courts below have erred in declining relief to the petitioners by asking them to place their grievance in final decree proceeding.

21. In the result, the impugned order as well as the order passed in miscellaneous case and ex parte decree stands *set aside* on payment of cost of Rs.10,000/- by the petitioners to the plaintiffs of the suit and the partition suit is directed to be restored to its original file. The trial court is directed to expedite the disposal of the suit.

(Birendra Kumar, J)

abhishek/-

AFR/NAFR	AFR
CAV DATE	N.A.
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