

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Revision No.20 of 2016

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Mahanth Sant Sharan Das @ Sant Sharan Das Chela Of Late Mahanth Sheetal
Das Resident of vill. - Parbatta at Kabirpanthi Math, Parbatta, Post office and
Police Station Parbatta, Pargana - Farkiya, Sub - Division and Sub - Registry -
Gogri, District – Khagaria Petitioner/s

Versus

1. Pradeep Tiwary
 2. Anil Kumar Tiwary
 3. Sunil Kumar Tiwary
 4. Mukund Tiwary All are sons of Late Bishwanath Tiwary Resident of vill. -
Parbatta, P.O. Parbatta, P.S. Parbatta, Pargana - Farkiya, Sub - Division and
Sub - Registry - Gogri, District – Khagaria Opp.Parties
- =====

Appearance :

For the Petitioner/s	:	Md.Waliur Rahman, Adv
	:	Mr.Rajesh Kumar, Adv
	:	Mr. Nishant Kumar Sinha, Adv
For the Respondent/s	:	Mr.

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 22-02-2019

Heard learned counsel for the petitioner. No one appears on behalf of the opposite parties in spite of valid service of notice on opposite party Nos.1 to 4.

2. Petitioner had brought T.S.No.16 of 2002 in the court of learned Munsif, Khagaria against the opposite parties herein.

3. Learned counsel for the petitioner submits that defendant had not filed any written statement in the suit rather the matter was pending for hearing on a petition of the defendants dated 25.05.2005 when the suit was dismissed for default by order dated 29.04.2010. Contention is that order dated 29.04.2010 would itself make it clear that the matter was



pending for hearing on the petition of the defendant/opposite parties herein. However, no one appeared on call. Hence, the suit was dismissed.

4. Submission is that the dismissal was apparently under Order 9 Rule 3 C.P.C. and not under order 9 Rule 2 C.P.C. which provides for dismissal of the suit where summons not served in consequence of plaintiff's failure to pay the cost. Order 9 Rule 3 of the Code of Civil Procedure reads as follows:

“3. Where neither party appears, suit to be dismissed.-Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.”

5. Contention is that the suit was not fixed for hearing as the hearing of the suit begins under Order XVII C.P.C. only after settlement of the issue under Order XIV C.P.C. The suit had not reached even the stage of settlement of issues. The impugned order would itself reveal that the matter was fixed for hearing on the petition of the defendant. If the parties were not appearing on call the learned court below should have passed appropriate order on that petition.



6. Submission is that learned court below has exercised jurisdiction with material irregularity and illegality as such the order dated 29.04.2010 is not sustainable. However, when the petitioner approached the same court for setting aside dismissal of the suit under Order 9 Rule 4 C.P.C., the same was registered as Misc.Case No.02 of 2010 and in casual manner, the miscellaneous case was rejected by the impugned order dated 29.11.2013 only on the ground that the petitioner failed to satisfy the court that there was reasonable explanation for non-appearance.

7. Since the dismissal order of the suit was itself bad in law, for the reason that the requirement of law to the extent that the suit should have been fixed for hearing before dismissal under Order 9 Rule 3 C.P.C. was not fulfilled nor it was a case that the suit was called on for hearing rather on the date, the matter was pending for hearing and disposal of petition of the defendant. The impugned order, whereby prayer for setting aside the illegal and irregular order was refused, can also not be sustained in law. Hence, order dated 29.11.2013 passed in Misc. Case No.02 of 2010 as well as order dated 29.04.2010 passed in T.S. No.16 of 2002 are hereby set aside and it is directed that



the suit be restored to its original file and the matter should proceed according to law.

8. With the aforesaid observation, this revision application stands allowed.

(Birendra Kumar, J)

Nitesh/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	26.02.2019
Transmission Date	NA

