

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.689 of 2016

1. Most. Sabuj Devi, Wife of late Krit Narayan Singh
 2. Sanjay Kumar Singh, Son of late Krit Narayan Singh,
Both Resident of Village- Mahuari, P.S Sheohar, District Sheohar.
- ...Respondents ... Appellant/s

Versus

Bachcha Singh, Son of late Jat Narayan Singh, Resident of Village-
Mahuaria, PS Sheohar, District Sheohar.

... ... Respondent/s

Appearance :

For the Appellant/s	:	Mr. Surendra Kishore Thakur Mr.Devendra Kumar, Advocate
For the Respondent/s	:	Mr.Vaidehi Raman Singh

CORAM: HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT

Date : 26-08-2019

Heard.

2. This miscellaneous appeal has been filed for setting aside the judgment and decree dated 05.04.2016 and 25.04.2016 passed by District Judge, Sheohar in Title Appeal No.28 of 2010 by which the learned District Judge has set aside the ex parte judgment and decree passed by Sub-Judge, 3rd , Sitamarhi (now Sheohar) passed in title suit no.165 of 2007 and remanded the case for de novo trial with a cost of Rs.20,000/-.

3. Plaintiff filed a title suit No.165 of 2007 for declaration of title and recovery of possession and also for declaration that sale deed dated 26.07.2006 executed by Mithilesh Kumar Singh in favour of Bachcha Singh to be null and void. Further case of the plaintiff is that by two registered sale deeds dated 14.07.2006, 30.05.2005, 12 ½ decimals and 7



decimals of land were purchased and same were amalgamated upon which the house of the plaintiff was constructed and he was in peaceful possession over the purchased land and same was mutated in his favour.

4. Due to enmity, defendant also purchased the land measuring 18 decimals vide sale deed dated 26.07.2006 executed by Mithilesh Kumar Singh on 26.07.2006 in favour of defendant having full knowledge of prior sale and, thereafter, plaintiff has been dispossessed from the property and as such he has filed this case for declaration of title and recovery of possession and also for setting aside the subsequent sale deed executed in favour of defendant.

5. On summons being issued, defendant appeared but defendant even after appearance did not file his written statement. The trial court by order dated 20.01.2009 fixed the case for ex parte hearing. Defendant appeared on 06.04.2009 and filed a petition for time and the case was adjourned for 16.05.2009 but on the said date, neither defendant appeared nor filed any written statement and on said date, one witness was examined on behalf of the plaintiff. Subsequently, a petition was filed on behalf of the defendant for recall of ex parte hearing and to adjourn the matter and permit him to file the



written statement and, thereafter, on 17.04.2009, defendant cross-examined the plaintiff witness Mohal Mahto but did not file written statement. On 20.04.2009 the defendant pressed their application for recall for the ex parte hearing which was rejected by the trial court on 29.04.2009. Although the defendant did not file written statement but cross-examined the witnesses produced on behalf of the plaintiff and lastly on 24.07.2009 defendant appeared and cross-examined other witnesses but did not file written statement.

6. The suit was decreed on 12.03.2010 by judgment and decree passed by the trial court under Order 17 Rule 2 and 3, and against said ex parte judgment and decree, the defendant filed title appeal No.28 of 2010 in which notices were issued and the plaintiff appeared and contested the title appeal.

7. The defendant-appellant filed an application stating therein that for the first time on 20.05.2010 they came to know about decision of title suit and had filed a time application on 06.04.2009 and, thereafter, left the pairvi. On 29.04.2009 the prayer of the defendant to recall ex parte hearing on a petitioner filed under Order 9 Rule 7 was rejected and against the said order, defendant – appellant filed civil revision No.1464 of 2009 before the High Court and after passing of the judgment and



decree, they withdrew their civil revision as same had become infructuous.

8. It has been submitted on behalf of the appellant that Title Appeal No.28 of 2010 was filed without any application for condoning the delay in filing appeal, however, the matter was heard and by impugned order the same was remanded for de novo trial.

9. It has been submitted on behalf of the appellant that against ex parte order, the aggrieved person has two options either he can file an application under Order 9 Rule 13 for setting aside the ex parte decree on the ground that he was prevented by sufficient cause for not appearing in the trial court when the matter was called out, or can file an appeal under Section 96(2) of CPC on the merit of the ex parte judgment and decree.

10. The appellate court in para 5 of its judgment and decree has recorded which is as following:-

“After issuance of summons defendant not appeared before court below to contest the claim of plaintiff. Lastly on 25.09.2008 service declared against the defendant and case fixed on 20.01.09 for ex parte hearing. On 06.04.2009 defendant appeared and filed a petition for recalling the ex parte hearing on the ground of illness. Similarly on 14.06.2009 plaintiff filed rejoinder against petition dated 06.04.2009, petition dated 06.04.2009 and its rejoinder dated 16.04.2009 upon which order be passed by learned Sub-Judge vide his order dated 29.04.2009 in which para 7 of order sheet clearly shows that defendant has got knowledge about the suit but he did not appear



before the court knowingly. Ingredients of Order 9 Rule 7 or 6 not covered by the defendant. On the ground non production of document in proved of content of petition dated 06.04.2009 as a result petition dated 06.04.2009 was rejected by court below with observation that defendant may participate in the further hearing of the suit and after that plaintiff/respondent adduced oral evidence and produced documentary evidence.”

11. The appellate court in paragraph nos.11 and 12 has held that defendant appeared before the lower court and in order to get substantial justice, case should be decided on merit and after setting aside the order of trial court has remanded the matter for de novo trial.

12. The Apex Court in the case of ***Bhanu Kumar Jain vs. Archana Kumar & Ors*** since reported in ***(2005) 1 SCC 787***, has held as follows:-

“24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds: (i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and (ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree



passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein.”

13. After hearing learned counsel for the appellant and learned counsel for the respondents, this Court finds that the judgment and order passed by the appellate court as impugned in this appeal is not sustainable either in law or on facts. The appellate court on appeal being filed under Section 96(2) of CPC against ex parte judgment and decree can consider the appeal on merit as well as interlocutory order passed during pendency of suit against which no appeal or revision has been preferred as postulated under Section 105 of CPC. It cannot look into the issue whether the proper service of summons were effectuated on defendants or not as same can be decided after leading evidence in a proceeding under Order 9 Rule 13 CPC before the same Court which passed the ex parte decree. Dismissal of petition of defendant under Order 9 Rule 7 of CPC during pendency of suit does not bar him from filing petition under Order 9 Rule 13 of CPC after passing of ex parte



judgment and decree against him.

14. For the reasons as stated above, the judgment and decree passed by the appellate court is not sustainable and is, accordingly, set aside. The matter is remitted to the appellate court to decide the appeal of the appellant on the basis of principles laid down by the Apex Court in its judgment and order rendered in the case of *Bhanu Kumar Jain (supra)* within three months from the date of receipt/production of copy passed by this Court.

15. This miscellaneous appeal is disposed of.

Let the LCR be returned forthwith to the court below.

(S. Kumar, J)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	18.11.2019
Transmission Date	NA

