

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.497 of 2018

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1. Sunil Kumar Verma son of Late Ganga Prasad resident of Mohalla- Kushwaha Colony, Rajendra Ashram, P.S. Civil Lines, District- Gaya.
 2. Anil Kumar Son of Late Ganga Prasad resident of Mohalla- House No. 204-T-Sector-9A Bokari Steel City, P.S. Sector-9 Harla, District- Bokaro, Jharkhand.
 3. Chandra Bhushan Prasad, son of Late Jagarnath Mahato, resident of Mohalla- Kushwaha Colony, Rajendra Ashram, P.S. Civil Lines, District- Gaya.
 4. Dharmendra Kumar, son of Late Bineshwar Mahato, resident of Village- Khaneta, P.S. Belaganj, District- Gaya.
 5. Aman Verma @ Dimpal son of Late Bineshwar Mahato, resident of Mohalla- Kushwaha Colony, Rajendra Ashram, P.S. Civil Lines, District- Gaya.
 6. Devanand Kumar, son of Late Bineshwar Mahato, resident of village- Khaneta, P.S. Belaganj, District- Gaya.

... .. Appellant/s

Versus

1. Kapildeo Prasad son of Late Paro Mahto
2. Lal Narayan Prasad son of Late Kesri Prasad, resident of Mohalla- Kushwaha Colony, Rajendra Ashram, P.S. Civil Lines, District- Gaya.
3. Manoj Devi @ Sushila Devi, daughter of Late Kedar Mahto.
4. Manorma Devi daughter of Late Kedar Mahto.
5. Rajendra Prasad son of Late Ishwar Dayal.
6. Raj Kishore Prasad, son of Late Ishwar Dayal all resident of Mohalla- Kushwaha Colony, Rajendra Ashram P.S. Civil Lines, District- Gaya.
7. Ram Dulari Devi wife of Late Ayodhya Prasad, resident of Mohalla- Tilha Godawari, P.S. Civil Lines, District- Gaya.
8. Subodh Chandra Gupta son of Late Bibhuti Chandra Gupta, resident of Mohalla-New Area, P.S. Civil Lines, District Gaya.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Prithivi Raj Singh
For the Respondent/s	:	Mr.

CORAM: HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT

Date : 13-05-2019

Heard the parties.

2. This miscellaneous appeal has been filed for setting
aside the order dated 16.05.2018 passed in miscellaneous case
No. 4/2017 passed by Additional District Judge, Fast Track



Court 1st, Civil Court, Gaya by which petition filed on behalf of appellants under Order 41 Rule 21 of CPC for re-hearing of Title Appeal No. 26/2017/66/2015 was rejected.

3. Briefly, stated the facts of the case is that appellants had filed an application under Order 41 Rule 21 of CPC for setting aside ex parte order dated 08.11.2017 passed in Title No. 26/17/66/15 as same was passed without any notice to the appellants and they had no knowledge about the title appeal and when they got information and knowledge with respect to ex parte order dated 08.11.2017 they immediately filed an application dated 14.12.2017 for setting aside the ex parte decree and upon said petition miscellaneous case No. 4/17 was registered by the appellate court.

4. The miscellaneous case filed by appellants was rejected by order dated 16.05.2018 without giving any opportunity to appellants to lead evidence that no notice was ever served upon them either by registered post or through process of court and the paper publication made by opposite party, said paper is not in circulation in the area nor appellants are subscriber of said newspaper, as such they have no knowledge about pendency of title appeal before the appellate court.



5. The appellate court rejected the application of appellants filed under Order 41 Rule 21 of CPC on the ground that same was filed beyond period of limitation as said petition is to be filed within 30 days from the date of decree and no application for condonation of delay was filed on behalf of appellants. Secondly, that there is no provision of adducing evidence in miscellaneous case filed under Order 41 Rule 21 of CPC.

6. Appellant had filed an application for re-hearing of the appeal on the plea of non service of appeal notice and not that he was prevented by sufficient cause at the time of hearing of appeal in their petition they had made categorical statement that from the inspection of record of title appeal the order sheet of appeal showed that appeal notices to Nazarat as well as by registered post were returned unserved and thereafter substituted service of notice in Prabhat Khabar was made. There is complete absence of satisfaction of the appellate court that respondents were deliberately avoiding service of notice or that the appeal notices cannot be served in the ordinary way or for any other reason. There was no oral or documentary evidence taken by the appellate court as to whether the newspaper in which notice was published was in circulation in the area where



defendants resided. There is complete non observance of mandatory procedure under lying under Order 5 Rule 9, Rule 17 and Rule 20 r/w Order 41 Rule 14 of CPC which required evidence in order to determine whether service of appeal notice on the defendants/appellants has been validly made or not.

7. After hearing the parties and considering the materials available on record, the order passed by the court below is not sustainable for the reasons that limitation for filing application under Order 41 Rule 21 of CPC in case services of notice has not been validly made is from the date of knowledge of decree and not from the date of decree, as such the petition of appellants was within time. Secondly, a miscellaneous case has to be instituted and opportunity to be given to petitioner to adduce evidence that notices were not served upon them and under provisions of 141 CPC with respect to miscellaneous proceeding the procedure as provided in regard to suits is also made applicable in miscellaneous proceeding, as such the order passed by the appellate court rejecting the miscellaneous case of petitioner under Order 41 Rule 21 of CPC for re-hearing the appeal is not sustainable in law and accordingly is set aside and the matter is remanded to the appellate court to grant opportunity to the petitioner-appellant to adduce evidence that



he had no knowledge of the pending appeal nor the notices were ever served upon him either through registered post or process server of the court and the notice published in newspaper is not in wide circulation in his area nor he is subscriber of the said newspaper. The opposite party is also entitled to lead evidence that petitioner had knowledge about the pendency of appeal and notices were properly and validly served upon him for which witnesses can be examined on his behalf with liberty to petitioner to cross-examine them on point of proper service of notice and thereafter the appellate court could decide the matter on the basis of evidence and material placed before it by the parties.

8. As a result, the order dated 16.05.2018 passed in miscellaneous case No. 4/2017 passed by Additional District Judge, Fast Track Court 1st, Civil Court, Gaya is set aside and matter is remanded to the appellate court which shall hear the matter afresh after giving sufficient opportunities to both the parties and to decide the matter in accordance with law.

(S. Kumar, J)

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AFR/NAFR	NAFR
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