

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.459 of 2021**

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Dinesh Yadav Son of Late Kashi Yadav, Resident of Mauza-Chiri, P.S.-
Ghoshi, P.O.-Bharthu Chiri, Bharthu, District-Jehanabad, Bihar, PIN-804432.

... .. Petitioner

Versus

Chandra Shekhar Singh Son of Late Maheshwari Singh Resident of Village-
Chiri Tola, Jagdishpur, P.O.-Bharthu, P.S.-Ghoshi, District-Jehanabad.

... .. Respondent

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Appearance :

For the Petitioner/s : Mr. Anjani Kumar Sinha
For the Respondent/s : Mr. Rama Kant Singh

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**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

ORAL ORDER

5 25-04-2022 Heard learned counsel for the petitioner.

Present petitioner was defendant in Title Suit No. 135 of 2008. 19.09.2016 was the date fixed in the trial court. The plaintiff did not appear, as such, the suit was dismissed in default under the provisions of order IX of the Code of Civil Procedure, 1908, hereinafter to be referred to as 'the Code'.

On that day, as submitted by learned counsel for the petitioner, a witness on behalf of the defendant was present in the court. Later on, an application for restoration was filed and the suit was restored to its original file and number. Against that order, the petitioner preferred Miscellaneous Appeal No. 09 of 2019, which was dismissed by the impugned order.

The learned counsel for the petitioner has submitted that when a witness on behalf of the defendant was present in



the court for its examination, the suit could not be legally dismissed in default under the provisions of order IX of 'the Code'.

The learned trial court has dismissed the suit in default, vide order dated 19.09.2016, under the provisions of order IX Rule 8 of the Code which reads as follows.

“Procedure where defendant only appears. –Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.”

from bare perusal of order IX Rule 8 of 'the Code', it becomes clear that when the plaintiff is absent and the defendant is in appearance, the suit shall be dismissed unless the defendant admits the claim or part thereof.

As submitted by the learned counsel for the petitioner, the defendant did not admit the claim of the plaintiffs nor any part thereof. As such, the learned court below had no option but to dismiss the suit in default. Order IX Rule 8 of 'the Code' does



not make any distinction whether the witness is present in the court on behalf of the defendant or not. *Sine qua non* of Order IX Rule 8 of 'the Code' is non appearance of the plaintiff and appearance of the defendant. On 19.09.2016, admittedly, the plaintiff was absent and the defendant was present. As such, the submission of learned counsel for the petitioner is not tenable.

Accordingly, this civil miscellaneous petition is being dismissed.

(Nawneet Kumar Pandey, J)

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