

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.339 of 2018

1. Mahesh Manjhi, son of Late Gulabi Manjhi,
2. Manai Manjhi, son of Late Gulabi Manjhi,
3. Kanhiya Manjhi, son of Late Gulabi Manjhi,
4. Mallu Manjhi, son of Late Gulabi Manjhi,
5. Mosst. Gulbia Devi, wife of Late Dhanesh Manjhi,
6. Rajesh Kumar Manjhi, son of Late Daulat Ram,
7. Umesh Kumar Manjhi, son of Late Daulat Ram,
8. Bideshi Kumar Manjhi, son of Late Daulat Ram,
9. Kushwanti Devi, Daughter of Late Dhanesh Manji,

All resident of Village- Bhitbherwa, P.S.- Gopalganj, District- Gopalganj.

... .. Petitioner/s

Versus

1. Pama Devi, daughter of Late Nageshwar Singh,
2. Arti Devi, daughter of Late Nageshwar Singh,
3. Guddi Devi, daughter of Late Nageshwar Singh,
4. Poonam Devi, W/o Late Saryug @ Yashbir Singh,
5. Ashwani Singh, Son of Late Saryug @ Yashbir Singh,
6. Ayushi, D/o Late Saryug @ Yashbir Singh,
7. Vickky Singh @ Ranshir Singh, Son of Late Prabhat Singh,
8. Amla Pandit, son of Late Gokhula Pandit,
9. Yogendra Pandit, son of Late Gokhula Pandit,
10. Kamal Pandit, Son of Madhura Pandit,
11. Diwakar Singh, Son of Late Ramchandra Singh,

All resident of Village- Bhitbherwa, P.S.- Gopalganj, District- Gopalganj.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Chandra Kant Mr. Pankaj Kumar Dubey
For the Respondent/s	:	Mr. Rajendra Narayan, Sr. Adv. Mr. Satya Ranjan Sinha Ms. Seema Kumari

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA

JUDGMENT AND ORDER

C.A.V.



Date : 24-11-2022

The present application has been filed against the order, dated 18.12.2017, passed in Misc. Appeal No. 02 of 2017, by learned Additional District Judge-V, Gopalganj, whereby the learned District appellate court has affirmed the order, dated 13.01.2017, passed in Misc. Case No. 02 of 2017, by learned Sub Judge-I, Gopalganj, whereby the petition filed by the petitioners-defendants, under Order IX Rule 13 of the Code of Civil Procedure has been held to be not maintainable.

2. The father of respondent nos. 1 to 3/plaintiff filed Title Suit No. 557 of 2004 for declaration of right and title over the suit land and also for a declaration that the defendants have no right to interfere in the possession of the plaintiff. The relief for recovery of possession was also prayed in the said suit.

3. The claim of the plaintiff is based upon the sale deeds, dated 02.12.1988, executed by defendant no. 7 in favour of the plaintiff. Defendant nos. 1 to 6, i.e. the petitioners, appeared through vakalatnama on 02.02.2005, and sought time for filing written statement. Defendant Nos. 7 to 9 appeared on 10.02.2005 and filed their written statement supporting the case of the plaintiff and again time was sought on behalf of the defendant nos. 1 to 6 to file written statement. On 04.04.2005, defendant nos. 1 to 6 were



debarred from filing written statement and on 24.08.2006, the learned Trial Court decreed the suit directing the defendant nos. 1 to 6 to hand over possession of the suit property to the plaintiff within a period of 30 days. The decree against defendant nos. 1 to 6 was ex-parte and against defendant nos. 7 to 9, it was on contest.

4. The plaintiff-decree holder filed Execution Case No. 26 of 2016 for execution of the decree and summonses were sent to the judgment debtors-petitioners in the execution case. According to the petitioners, only after summonses were received by them, they came to know that ex-parte judgment and decree has been passed against them.

5. The petitioners thereafter filed Misc. Case No. 02 of 2017, under Order IX Rule 13 of the Code of Civil Procedure for setting aside ex-parte judgment and decree, *inter alia*, on the grounds that summonses were not served upon them and after inspection of the suit record, the petitioners came to know that vakalatnama was filed on their behalf by one Vijay Kumar Prasad, Advocate; whereas, according to the petitioners, they neither executed any vakalatnama nor authorized any Advocate to contest the suit on their behalf.

6. The miscellaneous case (Misc. Case No. 02 of 2017) filed by the petitioners for setting aside the ex-parte judgment and



decree has been dismissed by learned Sub Judge-I, Gopalganj, vide order, dated 13.01.2017, at the stage of admission, holding that the petition, under Order IX Rule 13 of the Code of Civil Procedure, is not maintainable. This was on the ground that the petitioners had filed vakalatnama and even after giving sufficient opportunity, they did not file written statement despite having knowledge of the suit.

7. Against the order, dated 13.01.2017, passed in Misc. Case No. 02 of 2017, the petitioners filed Misc. Appeal No. 02 of 2017, which has also been dismissed by learned Additional District Judge-V, Gopalganj, vide order, dated 18.12.2017, affirming the order, dated 13.01.2017, passed in Misc. Case No. 02 of 2017, by learned Sub Judge-I, Gopalganj, holding that the miscellaneous appeal filed by the petitioners is not maintainable.

8. Learned Counsel for the petitioners argued that for the sake of argument, if it is presumed that after filing vakalatnama, the petitioners had left pairvi in the suit, leading to passing of the ex-parte judgment and decree, even in that situation also, the petition, under Order IX Rule 13 of the Code of Civil Procedure, is maintainable. He relied upon the provisions of Order IX Rule 6 (1) (a) of the Code of Civil Procedure and submits that Order IX Rule 6 (1) (a) of the Code of Civil Procedure talks about



fixing a suit for ex-parte against the defendant and as per Order XVII Rule 2 of the Code of Civil Procedure, the Court may proceed with the case/suit if the party failed to appear on the date fixed in the suit and may dispose of the suit in one of the modes under Order IX of the Code of Civil Procedure.

9. In the present case, the learned Trial Court had fixed the suit for ex-parte hearing against defendant nos. 1 to 6, meaning thereby that the learned Trial Court followed the procedure under Order XVII Rule 2 read with Order IX Rule 6 (1) (a) of the Code of Civil Procedure and accordingly petitioner under Order IX Rule 13 of the Code of Civil Procedure is maintainable.

10. In support of his argument, learned Counsel for the petitioner has placed reliance, in the cases of **Prakash Chander Manchanda and Another v. Smt. Janki Manchanda (AIR 1987 SC 42)**, **G. Ratna Raj (D) by L.Rs. v. Sri Muthukumarasamy Permanent Fund Ltd. And Another**, reported in **2019 (1) PLJR (SC) 596**, and **Ahmadi Khatoon and Another v. Md. Taslim and Others**, reported in **2004 (4) PLJR 193**.

11. Learned Counsel for the petitioners further argued that Misc. Case No. 02 of 2017 was taken up on the point of admission and was dismissed as not maintainable and was not



dismissed on the point of failure of the petitioners to show sufficient cause.

12. On the other hand, learned Senior Counsel for the respondents argued that the impugned orders passed by learned Sub Judge-I, Gopalganj and learned Additional District Judge-V, Gopalganj, are on merit for the simple reason that both Courts have considered and referred to the fact and records which clearly reflect that summonses were validly served upon the defendant nos. 1 to 6, pursuant to which, they appeared by filing vakalatnama, took time for filing written statement, for which they were granted time. Subsequently, they were debarred from filing written statement and they left pairvi in the case, as such, it cannot be submitted by the petitioners that no summonses were served upon them. This is clearly a false and misleading statement made by them apparently to invoke the provision of Order IX Rule 13 of the Code of Civil Procedure, which provides that if the defendant satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, an order for setting aside the decree can be passed.

13. He further argued that there are two provisos in Order IX Rule 13 of the Code of Civil Procedure, and the second proviso



is important, which says that any irregularity in the service of summons cannot be a ground for setting aside ex parte decree. It is clear that the defendants chose the ground of non-service of summons and not the second one of being prevented by sufficient cause from appearing. He next submits that had the second ground been there, the Court could have definitely gone into testing and verifying it, but the defendants chose, insisted and proceeded on the first ground of non-service of summons, which is patently false and it is found so by both the learned Courts below and, accordingly, miscellaneous case and miscellaneous appeal were rightly rejected inasmuch as a false and misleading statement would not make the ground taken by the defendants to be acceptable.

14. He then submits that on account of such admitted and quite visible false statement by the defendants, the question of limitation will arise, as prescribed under Article 123 of the Limitation Act, which provides for 30 days in making application for setting aside decree from the date of decree or where summonses/notices were not served, when the applicant had knowledge about the decree. In other words, when service of summons is well proved from the records, it will run from the date of decree. In this case, the decree is dated 24.08.2006, but the



petition, under Order IX Rule 13 of the Code of Civil Procedure, has been filed on 03.01.2007, i.e. after more than ten years and there is absolutely no explanation for such delay and it is, therefore, apparent that a false stand and ground has been taken by the petitioners. In this regard, he relied on a Division Bench decision of this Court, in the case of **Firoz Khan and Others v. Bibi Hasina Khanam and others (AIR 1994 PATNA 103)**.

15. Learned Senior Counsel further argued that Order V Rule 1 and Order VIII Rule 1 of the Code of Civil Procedure prescribes for summons and filing of written statement, which have been fulfilled in the present case. He further submits that Order VIII Rule 10 of the Code of Civil Procedure provides that if a party from whom a written statement is required under within the time permitted, if not filed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit. Here, the Court did not pronounce the judgment immediately because of non-filing of the written statement; rather, it proceeded for framing issues, taking and recording of evidence and of hearing arguments, then passed the judgment on the basis of which a decree was prepared. Furthermore, Order IX Rule 1 of the Code of Civil Procedure provides about the appearance of parties and further course of action, which have also been fulfilled in the



present case. Order IX Rule 11 of the Code of Civil Procedure provides that when there are more than one defendants, and one or more does not appear, the Court shall proceed with the suit and make order as it thinks fit with respect to the non-appearing defendants who do not appear, and as such, no illegality has been shown in this regard by the petitioners. He relied upon a decision of the Supreme Court, in the case of **Kamlesh Kohli (SMT) and Another v. Escotrac Finance and Investment Ltd. And Others**, reported in **(2000) 1 SCC 324**.

16. Learned Senior Counsel next argued that insofar as Order XVII of the Code of Civil Procedure is concerned, Rule 1 thereof provides for grant of time to any party with a note that not more than three adjournments shall be granted to a party, but nothing has been shown from it. Rule 2 of it provides that if any party fails to appear on the day fixed, the Court may proceed in accordance with the provisions of Order IX, which also contains Order IX Rule 11 of the Code of Civil Procedure, as stated herein above. Lastly Rule 3 of it provides that if a party to whom time has been granted, fails to produce his evidence, the Court may proceed to decide the suit forthwith or may proceed as under Rule 2 of Order XVII. Firstly, the defendants never prayed for adducing any evidence and secondly, the Court did not decide the suit forthwith;



rather, it proceeded for taking evidence and for hearing the arguments and then decided the suit.

17. In support of his argument, learned Senior Counsel for the respondents has placed reliance on the decision of the Supreme Court, in the cases of **Bharat Petroleum Corporation Limited and Another v. N. R. Vairamani and Another (AIR 2004 SC 4778)** and **Sunil Poddar and Others v. Union Bank of India**, reported in **(2008) 2 SCC 326**.

18. I have heard Mr. Chandra Kant, learned Counsel for the petitioners and Mr. Rajendra Narayan, learned Senior Counsel appearing on behalf of the respondents and have gone through the materials available on record.

19. The decision relied upon by the petitioners in the case of **Prakash Chander Manchanda** (supra), the Supreme Court has held that in the absence of the defendant, the Court had no option, but to proceed under Order XVII Rule 2 of the Code of Civil Procedure. The language of Rule 2 clearly lays down that if any of the parties fail to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order IX of the Code of Civil Procedure. If on the day fixed, one of the parties remained absent and for that period, no evidence has been examined up to that date, the Court had no option, but to proceed



in the matter in accordance with Order XVII Rule 2 of the Code of Civil Procedure by adopting any of the modes prescribed under Order IX of the Code of Civil Procedure.

20. Similar view has been taken by the Supreme Court, in the case of **G. Ratna Raj (D) by L.Rs.** (supra), wherein it has been held that since the defendants were proceeded ex-parte and were found not to have led any evidence in the suit, the Court could only proceed under Order 17 Rule 3 (b) read with Order 17 Rule 2 of the Code of Civil Procedure for disposal of the suit by taking recourse to one of the modes directed in that behalf by Order IX of the Code of Civil Procedure.

21. The Supreme Court, in paragraph 29 of **G. Ratna Raj (D) by L.Rs.** (supra), held as under:-

“**29.** As mentioned above, the trial court did proceed to hear the suit ex parte by taking recourse to Order 9 Rule 6(a) in terms of Order 17 Rule 2 of the Code because on that day, the plaintiff was present when the suit was called on for hearing whereas the defendants were absent despite service of summons and accordingly the trial court passed the preliminary decree. Such decree, in our opinion, was an “ex parte decree” within the meaning of Order 9 Rule 6(a) read with Order 9 Rule 13 of the Code and, therefore, could be set aside under Order 9 Rule 13 on making out a sufficient ground by the defendants.”



22. Relying upon the case of **Prakash Chander Manchanda** (supra), a Single Bench of this Court, in the case of **Ahmadi Khatoon** (supra), has held that mere appearance of the defendants in the suit up to some extent before taking up the suit for hearing cannot be a ground to hold that the suit was decreed on contest and such decree can safely be termed as ex-parte decree.

23. Order IX Rule 6 (1) (a) of the Code of Civil Procedure is as follows:

“6. Procedure when only plaintiff appears.

— (1) 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;”

24. Order XVII Rules 2 and 3 of the Code of Civil Procedure prescribes as under:

“2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation.—Where the evidence or a substantial portion of the evidence of any party has



already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.—Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule 2.”

25. In the present case, from paragraph 3 of the judgment, dated 24.08.2006, passed in Title Suit No. 557 of 2004, it transpires that defendant nos. 1 to 6 were debarred from filing their written statement and the suit was fixed for ex-parte hearing. It is the admitted position that the suit has been decreed on contest against defendant nos. 7 to 9 and ex-parte against the petitioners-defendants. Defendant No. 7 filed his written statement, in which he supported the case of the plaintiff.

26. It is the specific case of the petitioners that summonses were not served upon them and they have not executed vakalatnama in favour of the Advocate, namely, Vijay Kumar



Prasad. It is also clear that the evidence of the defendants-petitioners were not recorded till the learned Trial Court passed the decree in Title Suit No. 557 of 2004.

27. In the aforesaid situation, therefore, the Explanation to Order XVII Rule 2 of the Code of Civil Procedure was not applicable.

28. The defendant nos. 1 to 6 were proceeded ex-parte and since the defendant nos. 1 to 6 have not led any evidence in the suit, the Court could only proceed under Order 17 Rule 2 read with Order 17 Rule 3 (b) of the Code of Civil Procedure for disposal of the suit by taking recourse to one of the modes provided under Order IX of the Code of Civil Procedure. The learned Trial Court proceeded to hear the suit ex-parte apparently by taking recourse to Order IX Rule 6 (1) (a) in terms of Order 17 Rule 2 of the Code of Civil Procedure because the plaintiff was present when the suit was called for hearing, but the defendant nos. 1 to 6 were absent despite service of summonses and, accordingly, the learned Trial Court passed the ex-parte decree against defendant nos. 1 to 6. This decree was within the meaning of Order IX Rule 6 (1) (a) of the Code of Civil Procedure inasmuch as mere appearance of the defendants in the suit upto some extent before taking up the suit for hearing cannot be a



ground to hold that the suit was decreed on contest. The provision under Order IX Rule 11 of the Code of Civil Procedure also prescribes that a decree can be passed against the defendant who has not filed the written statement or who remains absent or who is not at issue with the plaintiff on any question of law or of fact and admittedly in the present case, the learned Trial Court put the case on ex-parte hearing against defendant nos. 1 to 6 and passed the ex-parte decree against them. If the decree is ex-parte, then the petition under Order IX Rule 13 of the Code of Civil Procedure is maintainable in view of the law laid down by the Supreme Court, in the cases of **Prakash Chander Manchanda** (supra) and **G. Ratna Raj (D) by L.Rs.** (supra).

29. The decisions relied upon by learned Senior Counsel for the respondents are not applicable in the facts of the present case and the point of limitation raised by learned Senior Counsel is also not acceptable at this stage inasmuch as it is apparent from the impugned orders that both the Courts have not considered the petitions filed by the petitioners on merits, but have rejected the same at the stage of admission itself, as not maintainable.

30. In Misc. Case No. 02 of 2017, the petitioners have taken both the points as prescribed under Order IX Rule 13 of the Code of Civil Procedure that summonses were not served upon



them and that they were prevented by sufficient cause from appearing in the suit. According to them, they came to know about the suit and ex-parte decree after they received summonses in the Execution Case No. 26 of 2016 filed by the respondents-plaintiff for execution of ex-parte decree. It is also their case that if at all, some Advocate has filed vakalatnama on their behalf in the suit, the same was not executed by them and the concerned Advocate was not the Advocate appointed by the petitioners. The sufficient cause of non-appearance of the petitioners and non-service of notices in the present matter is a pure question of fact, which requires enquiry and verification by the Court under Order IX Rule 13 of the Code of Civil Procedure by adopting the procedure prescribed in the Code of Civil Procedure. It transpires that the learned Trial Court has not considered Misc. Case No. 02 of 2017 filed by the petitioners on merits, but has rejected the same as not maintainable.

31. In view of the aforesaid discussion, I am of the opinion that the impugned orders require interference by this Court and the orders rejecting the miscellaneous petitions, as not maintainable, are fit to be set aside.

32. Accordingly, the order, dated 18.12.2017, passed in Misc. Appeal No. 02 of 2017, by learned Additional District



Judge-V, Gopalganj, as well as the order, dated 13.01.2017, passed in Misc. Case No. 02 of 2017, by learned Sub Judge-I, Gopalganj, are set aside and the matter is remanded back to learned Sub Judge-I, Gopalganj, with a direction to consider the application under Order IX Rule 13 of the Code of Civil Procedure filed by the petitioners on its merit and to dispose the same in accordance with Section 141 of the Code of Civil Procedure.

33. It goes without saying that while deciding the miscellaneous case filed by the petitioners, the learned Sub Judge-I, Gopalganj, shall also consider and examine the objection(s) that may be raised by the respondents herein.

34. In the result, this application is allowed.

35. However, there shall be no order as to costs.

36. Let the L.C.R. be returned forthwith.

(Anil Kumar Sinha, J.)

Prabhakar Anand/-

AFR/NAFR	AFR
CAV DATE	11-10-2022
Uploading Date	24-11-2022
Transmission Date	N/A

