

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.537 of 2018**

Aruna Devi, W/o Jay Prakash Singh, D/o Late Bachchoo Narayan Singh,
R/o Gandhar, P.S. Goshi, District- Jehanabad and also R/o Village-Amhara,
P.O.- Amhara, P.S.- Bihta, District- Patna.

... .. Petitioner/s

Versus

1. Binod Singh @ Bonod Manjhi, S/o Late Ram Balak Manjhi, (But wrongly say S/o Late Bachoo Narayan Singh)
2. Hiran Singh @ Hiran Majhi, S/o Late Ram Balak Manjhi, (But wrongly say S/o Bachoo Narayan Singh)
3. Meghiya Devi, W/o Late Arjun Singh @ Late Arjun Manjhi
4. Ajiet Kumar, S/o Late Arjun Singh @ Late Arjun Manjhi
5. Abhimanu Kumar, S/o Late Arjun Singh @ Late Arjun Manjhi.
All 1 to 5 are R/o Village- Dhamapur, P.S. - Ghosi, P.O. - Bandhuganj,
District- Jehanabad.
6. Mungiya Devi, W/o Satendra Singh @ Satendra Manjhi, D/o Late Ram Balak Manjhi, (But wrongly say S/o Late Bachoo Narayan Singh), R/o Village- Babhandiha, P.S. - Hilsa, District- Nalanda.
7. Ram Pravesh Yadav, S/o Late Jagdeo Yadav
8. Mahendra Prasad, S/o Sudama Prasad, Both 7 and 8 are R/o Village- Dhamapur, Nirpur, P.S.- Ghosi, P.O.-Bandhuganj, District- Jehanabad.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Niraj Kumar, Advocate
For the Respondent/s	:	Mr. Mukund Jee, Advocate
		Mr. Shyamal Krishna Sinha, Advocate

**CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT**

Date : 25-07-2023

Heard learned counsel for the parties.

2. This Civil Miscellaneous Application has been filed under Article 227 of the Constitution of India against the order dated 16.11.2017 passed by the learned Sub-Judge- IV, Jehanabad, in Miscellaneous Case No. 07 of 2015, whereby the learned Court below allowed the said Miscellaneous Case after setting aside the order dated 20.06.2014 passed in Title Partition Suit No. 55 of 2005 and thereby restored the said partition suit



to its original file.

3. Brief facts of the case are that respondent nos. 1 to 6 who are plaintiffs in the learned court below have filed Title Partition Suit No. 55 of 2005 for partition of the suit property and claimed that they are sons and grand-sons of the late Bachchoo Narayan Singh. The issues were framed and the case was fixed for evidence on behalf of plaintiffs but despite taking many adjournments not produced any witness before the Court. On 20.06.2014 time petition was filed on the ground of illness of Hiran Manjhi plaintiff no. 2 and pairvikar on behalf of plaintiffs but on call no one appeared before the Trial Court to move the said petition. Therefore, the time petition was rejected and the partition suit was dismissed vide order dated 20.06.2014. The plaintiffs filed the Miscellaneous Case being Miscellaneous Case No. 07 of 2015, which was allowed by the learned court below vide impugned order dated 16.11.2017.

4. Learned counsel for the petitioner has submitted that the cause of action to claim a partition is a recurring right available to the plaintiffs and the bar of Order IX Rule 9 CPC does not arise in filing fresh suit for partition by the plaintiffs. He further submits that Order IX Rule CPC in the present case is not applicable. He has further submitted that plaintiffs on the



relevant date were present in the Court premises but intentionally did not appear after repeated call, then the court dismissed the suit. He has further submitted that the learned Court below without considering the evidence of the petitioner has allowed the Miscellaneous Case which is liable to be set aside.

5. On the other hand, learned counsel for the respondents submits that the learned Court below considering the oral and documentary evidence on record found that Hiran Manjhi, plaintiff no. 2 who was doing *pairvi* in the said case on behalf of plaintiffs was seriously ill and due to his prolong illness and ongoing treatment he was unable to appear on the relevant date and evidence was not produced on behalf of the plaintiffs. Further, it is submitted that the learned court below is rightly allowed the same with cost in its reasoned order considering the material on record and it is not liable for interference by this Court in its supervisory jurisdiction.

6. It is to be noted herein that on perusal of order dated 20.06.2014 passed by the trial court, it appears that in order it is stated that suit is dismissed for want of evidence but both the party conceded that it was dismissed for default under Order IX Rule 8 CPC as the plaintiffs were not present on that



day and the suit was not dismissed on merit and, accordingly, the Miscellaneous Case was filed, proceeded and contested under Order IX Rule 9 CPC.

7. It is not in dispute that provisions of Order IX, Rule 9 of CPC specifically bars a fresh suit in respect of the same cause of action but in the suit for partition it does not arise as the partition is a continuous cause of action because partition suit arise by refusal of the other side to partition the joint family property.

8. Under Order IX Rule 13 CPC, the scope of challenge would be whether there was sufficient cause which prevented him from appearing when the proceedings were taken up or whether there were serious infirmity in service of summons upon him.

9. It has been held in various judgment of Hon'ble Supreme Court including in **Parimal Vs. Veena @ Bharti (2011 (3) SCC 545)** that a liberal and elastic approach should be applied instead of narrow and pedantic. However, in case the matter does not fall within the four corners of Order IX Rule 13 CPC, the Court has no jurisdiction to set aside *ex-parte* decree.

10. Under Order 17 of CPC if a party was absent it would proceed as per Order IX of the CPC or if a party was



present but it did not produce evidence, it would proceed to decide the suit forthwith without benefit of evidence. The Court can decide a suit on merit under Order 17 Rule 3 CPC if there is some material for deciding on merit. If there are no such materials on record the only order that could be passed would be under Order 17 Rule 2 CPC.

11. In the present case, no witness for the plaintiffs had been examined and there was no evidence of the parties on record. The order passed could only be deemed to have been passed under Order 17 Rule 2 CPC and it is obvious that the only remedy which could be available to the plaintiffs was an application for restoration under Order IX Rule 9 CPC.

12. Having heard the learned counsel for the parties and on perusal of the material on record and the impugned order, it appears that on 20.06.2014, no one was present on behalf of the plaintiffs and the time petition filed by them has not been moved before the Court and the learned court below dismissed the suit.

13. The Miscellaneous case under Order IX Rule 9 read with Section 151 CPC was filed on behalf of plaintiffs which was contested by the petitioner and both the parties produced their evidence to support their claim and by the



detailed order learned Court below allowed the Miscellaneous Case and the order dated 20.06.2014 was set aside and partition suit was restored to its original file. The Court held that the claim of the plaintiffs that one *Hiran Kumar* was doing *pairvi* in the said case and he was ill for considerable period which has been supported by the documentary evidence. The Court considered the evidence on record produced by both parties.

14. In view of the aforesaid discussion, this Court finds no jurisdictional error or illegality in the impugned order for interference by this Court in its supervisory jurisdiction under Article 227 of the Constitution of India.

15. This Civil Miscellaneous Application is, accordingly, dismissed.

(Sunil Dutta Mishra, J)

khushbu/-

AFR/NAFR	AFR
CAV DATE	09.05.2023
Uploading Date	25.07.2023
Transmission Date	

