

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.839 of 2022

1. Surendra Sah son of Late Bhalan Sah @ Bhuneshwar Sah, Resident of Village- Jadopur, P.O. Matiyari, P.S. Baikanthpur, District- Gopalganj.
2. Romendra Sah son of Late Bhalan Sah @ Bhuneshwar Sah, Resident of Village- Jadopur, P.O. Matiyari, P.S. Baikanthpur, District- Gopalganj.

... .. Petitioner/s

Versus

1. Smt. Sushila Devi wife of Late Vijay Bahadur Singh, Resident of Village- Faijulahpur, P.S. Baikunthpur, District- Gopalganj.
2. Sunil Singh son of Late Vijay Bahadur Singh, Resident of Village- Faijulahpur, P.S. Baikunthpur, District- Gopalganj.
3. Rajesh Singh son of Late Vijay Bahadur Singh, Resident of Village- Faijulahpur, P.S. Baikunthpur, District- Gopalganj.
4. Lalbabu Sah son of Late Bhalan Sah, @ Bhuneshwar Sah, Resident of Village- Jadopur, P.O. Matiyari, P.S. Baikanthpur, District- Gopalganj.
5. Laxman Sah son of Late Bhalan Sah @ Bhuneshwar Sah, Resident of Village- Jadopur, P.O. Matiyari, P.S. Baikanthpur, District- Gopalganj.
6. Bharat Sah son of Late Bhalan Sah @ Bhuneshwar Sah, Resident of Village- Jadopur, P.O. Matiyari, P.S. Baikanthpur, District- Gopalganj.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Shakti Suman Kumar
For the Respondent/s : Mr.Nagendra Rai

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL ORDER

4 11-09-2023 Heard the parties.

2. The petitioners seek quashing of the order dated 03/02/2022 as contained in Annexure- 5 passed by the Additional District Judge-V, Gopalganj in Misc. Case no.06/2016 /272/2016 whereby Misc. Case no.272/2016 which was dismissed for non-prosecution by order dated 09.07.16 was restored. The petitioners also pray for quashing of another order



passed on the same day i.e on 03/02/2022 as contained in annexure-6 whereby the Additional District Judge after allowing the aforesaid Misc. Case No. 06/2016 / 272/2016 restored Title Appeal no.243 of 2006 which was earlier dismissed for non prosecution by order dated 18/07/16.

3. The learned counsel for the petitioners submits that the mother of the petitioners namely Phuljhari Devi filed Title Suit No. 118/1991 for declaration of title and confirmation of possession and also for permanent injunction restraining the defendants from interfering or dispossessing her. The said suit was partly decreed on contest by judgment and decree dated 04/06/1997 / 12/06/1997 whereby the title of the plaintiff was confirmed and it was held that since she has been dispossessed, she was entitled to recover the possession of the suit land. He further submits that the Respondent No.1 and her husband namely, Vijay Bahadur Singh, who was defendant No. 2 in the said Suit filed Title Appeal No.243/06. After the death of the said Vijay Bahadur Singh his legal heirs were brought on record who are Respondents No. 2 and 3 in the present case.

4. The said Title Appeal No. 243/06 was dismissed for non-prosecution by order dated 18/07/16 passed by the Additional District Judge-V, Gopalganj under the provision of



Order 41 Rule 17 of the Code of Civil Procedure. Subsequently, Misc. Case no.06/2016 / 272/2016 was filed for the restoration of the said Title Appeal no.243/06. However, the same was also dismissed for non-prosecution by order dated 09/07/2019 passed by the Additional District Judge-V, Gopalganj. Subsequent to the dismissal of the Misc. Case no. 06/2016 / 272/2016, the plaintiff/respondent Phuljhari Devi i.e the mother of the petitioners died on 22/01/2022.

5. The learned counsel for the petitioners submits that no petition was filed to restore the Misc case no. 06/2016 / 272/16 which stood dismissed for non prosecution on 09.07.16. However, the Additional Sessions Judge *suo motu* called for the records of the case and by order dated 03/02/22 first restored the Misc. Case no.06/2016 / 272/2016 and on the same day allowed the said Misc. Case no.06/2016 / 272/2016 and restored the Title Appeal No.243/2006.

6. It is submitted on behalf of the petitioners that the Appellate court has completely ignored the provision as contained in Order 43 Rule 1(t) which specifically provides that the order of refusal of the court to readmit the appeal which was dismissed for default under Order 41 Rule 17 can only be set aside in an appeal filed under order 43 rule 1(t) of the Code of



Civil Procedure and such appeal would lie before the High court. The learned counsel for the petitioners submits that in this view of the matter the order dated 03.02.22 whereby the Misc. Case no. 06/2016 / 272/16 was restored is wholly without jurisdiction and fit to be set aside. It is further submitted that once the order restoring the Misc. Case no. 06/2016 / 272/2016 is set aside the other order passed on the same day i.e on 03/02/2022 whereby the Misc. Case no. 06/2016 / 272/2016 was allowed and Title Appeal no.243/2006 was restored is also liable to be set aside. It was also submitted that the observation made by the appellate court while restoring the Misc. case no. 06/2016 / 272/16 that it was dismissed due to non payment of cost of Rs.700/- is absolutely baseless and an error apparent on the face of record which is evident from the perusal of the order dated 09/07/2019. The learned counsel for the petitioners further submitted that the when the Misc. Case no.06/2016 / 272/2016 was restored and also allowed and the Title Appeal No.243/2006 was restored by two separate orders both passed on 03/02/2022, the sole respondent in the said appeal namely Phuljhari Devi was already dead and her legal heirs were not substituted in the Misc. Case no.06/2016 / 272/16. Therefore, both the orders were passed against a dead person.



7. It has been submitted by learned counsel for the petitioner that the Additional District Judge, V, had no power to pass the impugned order as he has passed the order *suo motu*.

8. Learned counsel for the defendants has submitted that the order has been passed in connection with the Miscellaneous Case No. 6 of 2016.

9. I have considered the submission of the parties.

10. Even the court below could not have passed an order in Miscellaneous Case No. 6 of 2016, the same could have only been passed after hearing both the parties and considering the evidence led in the miscellaneous case.

11. It is an admitted position that the impugned order of restoration has been passed without adopting the due procedure for passing any order in a miscellaneous case and in view of the same, this application is allowed.

12. Accordingly, the order dated 03.02.2022 passed by the Additional District Judge-V, Gopalganj in Misc. Case No. 6 of 2016 and also the order dated 03/02/2022 as contained in Annexure- 5 passed by the Additional District Judge-V, Gopalganj in Misc. Case no.06/2016 /272/2016 and 03/02/2022 as contained in annexure-6 passed in Misc. Case No. 6 of 2016/272 of 2016 are hereby quashed.



13. Learned counsel for the defendants wants an order from this Court for filing an application in accordance with law for restoration of the appeal.

14. The defendants do not require any observation from this Court if any right is available to them in accordance with law.

15. The present application is, thus, allowed.

(Sandeep Kumar, J)

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