

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.114 of 2015

1. Afzal Ahmad
2. Anwar Ahmad sons of Late Md. Qamruddin, Resident of Sheikhpatti, P.O. Bhuidharwa, Police Station- Thakraha, District- West Champaran. Heirs and Legal representatives of the decree holder Late Bibi Rabiya Khatoon.

... .. Petitioner/s

Versus

1. Sk. Shaifullah
2. Ghulam Moahmmad
3. Sk. Obaidullah All sons of Rabiya Khatoon, daughter of Late Sk. Suleman wife of Md. Qamruddin, Resident of Bhuidharwa, P.S. Thakraha, District West Champaran.
4. Abdul Wahab
5. Jamila Khatoon daughter of Late Abdul Qaiyum wife of Nisar Ahmad
6. Margina Khaton daughter of Late Abdul Qaiyum wife of Noor Bashir Resident of Village- Misrauli, Police Station Padrauna District West Champaran.
7. Shahbaj Alam son of Late Farooque Azam
8. Sk. Bhola minor son of Late Farooque Azam under the guardianship of Opposie Party No.7 Both resident of Bhuidharwa, P.S. Thakraha, District- West Champaran.
9. Amanullah son of Late Abdul Kayum Resident of Sheikhpatti, P.O. Bhuidharwa, Police Station- Thakraha, District- West Champaran.
10. Sarfaraz Ahmad
11. Gulzar Ahmad sons of Bibi Rabeya Khatoon Resident of Sheikhpatti, P.O. Bhuidharwa, Police Station- Thakraha, District- West Champaran. Heirs of Late Bibi Rabiya Khatoon.

... .. Opp. Party/s

Appearance :

For the Petitioner/s	:	Mr. Raghib Ahsan, Sr. Advocate Mr. Wasi Akhtar, Advocate
For the Opp. Parties	:	Mr. Baxi S.R.P. Sinha, Sr. Advocate Mr. Anand Kishore Chaudhary, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV ORDER

11 08-08-2024 Heard Mr. Raghib Ahsan, learned senior counsel for the petitioners and Mr. Bakshi S.R.P. Sinha, learned senior counsel for the opposite no. 4 to 8.



2. This Civil Revision Application has been filed against the order dated 25.07.2015 passed in Miscellaneous Case No. 13 of 2005 by the learned Sub Judge II, Bagaha whereby, application filed by the defendant- opposite party under Order 9 Rule 13 of the Code of Civil Procedure has been allowed and the Judgment and decree (ex-parte) dated 18.11.2003 passed in Title Suit No. 31 of 1997 has been set aside.

3. The original plaintiff namely, Bibi Rabeya Khatoon (mother of the petitioners) filed Title Suit No. 37 of 1997 against O.P. No. 1, 2 and 3 for declaration that the plaintiff has right, title and possession over the suit land and defendant Abdul Quiyum is not the son of Sk. Quasim as well as for restraining the defendants either from using the name of Md. Quasim or interfering or dispossessing the plaintiff and executing any deed of transfer in respect of Schedule 1 land.

4. The sole defendant Abdul Quiyum (father of O.P. No. 4, 5, 6 & 9) and grandfather of O.P. No. 7 and 8 appeared in the suit and filed written statement on 15.01.1998, however, original defendant (father and grandfather of applicant/ O.P. Nos. 4, 5, 6 & 9 and 7, 8 respectively) left pairvi and did not appear in the trial and the suit proceeded in their absence in the



light of the facts and evidences adduced by the plaintiff. The learned Sub Judge decreed the suit (ex-parte) against sole defendant on 17.11.2003. On 08.07.2005, sons, daughters and grandson of sole defendant namely, Abdul Quiyum filed an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside judgment and decree dated 18.11.2003. After hearing the parties, the learned court below set aside the ex-parte decree. Aggrieved by which, the present Civil Revision application has been filed by the plaintiffs.

5. Mr. Raghieb Ahsan, learned senior counsel for the petitioners submitted that an application under Order 9 Rule 13 of the Code of Civil Procedure was not maintainable. The said application was filed by a person who was never a party to the suit i.e. stranger to the suit and submitted that provisions of Order 9 Rule 13 of the Code of Civil Procedure was not applicable and the Court below erred in allowing the application and also pleaded that the application under Order 9 Rule 13 CPC was hopelessly time barred under Article 123 of the limitation Act. The limitation to file application was 30 days from the date of decree. The defendant had appeared on receiving summons and filed his written statement. Thereafter, he left pairvi. Consequently, the said suit was decreed ex parte



against the defendant.

6. On 08.07.2005, the descendants of the original defendant filed an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside judgment and decree dated 18.11.2003 stating therein that they lived outside from the home in connection with their services and business. Two daughters of late Abdul Quiyum live in their Sasural. Opposite Party No. 7 lives at Bombay for eking out his livelihood while O.P. No. 8 is a minor son of late Farooque Azam under the guardianship of O.P. No. 7. The applicants/O.P. Nos. 1 to 9 had no knowledge about the aforesaid suit at all. It is further contended that father of the applicants/grandfather of O.P. No. 1 to 9 had been suffering from old age ailments and as such he was unable to appear in court personally and physically due to his illness and advance age. Unfortunately, Abdul Quiyum (original defendant) died on 27.04.2005 leaving behind his 5 sons and 2 daughters. One of the sons namely, Farooque Azam died leaving behind his two sons namely, Shahbaj Alam and Sk. Bhola. Applicants/opposite parties are the heirs and legal representatives of late Abdul Quiyum.

7. On 30.06.2005, the applicants/opposite parties came to know that original plaintiff Bibi Rabeya Khatoon had



filed a suit against their father in which she has obtained an ex-parte decree. Thereafter, on 08.07.2005, the applicants went to the Civil Court and filed application for inspection through their lawyer and inspected the records of the case and then applicants/opposite parties got the full knowledge of the Title Suit No. 31 of 1997 and ex parte decree dated 18.11.2003.

8. On perusal of order sheet of Title Suit No. 31 of 1997, it transpired that pairvi on behalf of the defendant (father of the opposite parties) was left on 02.07.2002. The concerned lawyer did not inform the defendant at all and accordingly, the suit was posted for ex-parte hearing and thereafter ex-parte decree was passed. Accordingly, applicants/opposite parties filed Miscellaneous Case No. 13 of 2005 and also filed limitation petition along with this miscellaneous case.

9. The learned court below after considering the facts and evidences adduced by the parties and materials available on record, set aside the ex parte judgment and decree dated 18.11.2003, subject to the payment of Rs. 3500/- as cost.

10. So far objection raised by the petitioners that the opposite parties were not party to the Title Suit and therefore the provision of Order 9 Rule 13 is not applicable and the court cannot even in exercise of its inherent power grant such relief to



a stranger reliance has been placed in the case of **Ramji Gupta and ANR Vs. Gopi Krishan Agrawal (D) and Ors** reported in **AIR 2013 SC 3099**. This aspect has been considered by the Hon'ble Apex Court in the case **Jaswant Singh and Ors Vs. Parkash Kaur & Anr** reported in **2018(12) SCC 249** where it has been held that *when the application under Order 9 Rule 13 CPC which was filed by the deceased, Ranjit Singh was dismissed for non-appearance, an application to recall the said order after the death of said Ranjit Singh by his heirs to restore the application can very well be treated as an application under Order 9 Rule 9 CPC to restore a miscellaneous proceeding aking to suit and against the order rejecting such application an appeal is permissible under Order 43 Rule 1 (c) CPC*. The appeal filed by the heirs of deceased before the appellate court was maintainable. Analogy could be drawn that heirs of deceased-defendant could also file miscellaneous case for setting aside ex parte decree against their father.

11. The same sets of facts has already been considered and decided by this Court in **Civil Revision No. 147 of 2014 (Sk. Iftakhar Ahmad & Ors Vs. Syed Mozazir Ali & Ors)**, wherein, the court has held that O.P. No. 1 was not party in the title suit but being heir and legal representative of the deceased



sole defendant is entitled to file petition under Order 9 Rule 13 of the Code of Civil Procedure.

12. The Hon'ble Apex court in the case of **Bhagmal and Ors Vs. V. Kunwar Lal and Ors** reported in **AIR 2010 SC 2991** has held that for setting aside the ex parte decree, 30 days period is to be counted from the date of knowledge of passing of the ex parte decree.

13. So far objection with regard to limitation under Article 123 is concerned, the learned counsel submitted that application under Order 9 Rule 13 of the Code of Civil Procedure is to be filed within 30 days from the date of decree whereas the said application was filed after a lapse of about 1 year 5 months and no application of condonation of delay was filed. It is apparent from the records that the aforesaid application under Order 9 Rule 13 of the Code of Civil Procedure was filed along with application for condonation of delay under Section 5 of the Limitation Act. This statement has been given in paragraph 31 of the petition under Order 9 Rule 13 CPC and the said statement is never controverted by the petitioners. Even if, it is assumed that limitation for filing application was only 30 days, the applicants/opposite parties in their application itself have already given sufficient explanation



for filing the application under Order 9 Rule 13 CPC. They were not aware of the ex-parte decree against his predecessor in interest, who died on 27.04.2005; the death of Abdul Quiyum (original defendant) was due to his prolonged illness. The learned lower court having found sufficient cause for setting aside ex parte decree, it is just an equitable to conclude that there was sufficient cause for condonation of delay. The learned lower court has dealt in detail with the merit of the case finding sufficient reasons by which defendant was prevented from appearance when the case was taken up in court below and on being satisfied has allowed the petition filed by the opposite party. The applicants/opposite parties are the heirs of original defendant namely, Abdul Quiyum.

14. In view of the foregoing discussions, this Court therefore does not find that the learned Court below has committed error of jurisdiction and illegality in passing the impugned order.

15. The Civil Revision Application is accordingly dismissed.

(Khatim Reza, J)

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