

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.349 of 2018

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1. Parmeshwar Prasad Mandal, S/o Banarasi Mandal, R/o P.O. and P.S.- Munger, District - Munger.
 2. Sunil Prasad Mandal @ Sunil Prasad Kaushwaha, S/o Banarasi Mandal, R/o P.O. and P.S.- Munger, District - Munger.

... .. Appellant/s

Versus

Draupadi Devi, W/o Sarjug Prasad Yadav, R/o Village - Ram Nagar, Naya Tola, P.S.- Jamalpur, District - Munger.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. S.S. Dwivedi, Sr. Advocate Mr. Parth Gaurav, Advocate
For the Respondent/s	:	Mr.

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT

Date : 24-09-2024

This Misc. Appeal is directed against order dated 16.02.2018 passed by the learned 3rd Additional District & Sessions Judge, Bhagalpur in Misc. Case No. 08 of 2015 whereby and whereunder the application filed by the appellants under Order XLI Rule 19 of the Code of Civil Procedure, 1908 (hereinafter referred as “CPC”) has been rejected.

2. The case of the plaintiffs/ appellants is that they have filed Title Suit No. 47 of 1988 in the Court of learned Subordinate Judge, 1st, Bhagalpur for declaration of their right, title and interest over the suit property as detailed in schedule of the plaint and for declaration that the Survey entry with respect to the disputed land standing in the name of the defendant is



wrong. Despite the service of notice, defendant chose not to appear, hence the suit proceeded *ex-parte*. However, the suit was dismissed vide judgment dated 29.08.1998.

3. Being aggrieved and dissatisfied with the said judgment and decree dated 29.08.1998 passed in Title Suit No. 47 of 1998, the plaintiffs preferred title appeal No. 1999 of 1998 before the learned District Judge, Bhagalpur. The appeal was admitted and was fixed for hearing. The said appeal was dismissed by the learned Appellate Court on 05.11.2015 on the ground that no one appeared on behalf of appellants on call, although *hazri* had been given on their behalf. The appellants filed Misc. case No. 08 of 2015 before the court under Order XLI Rule 19 of CPC with a prayer to re-admit the appeal mentioning circumstances under which the appellants had not appeared on the said date. On notice, defendant appeared but she failed to file reply and not contested the miscellaneous case. The evidences were adduced on behalf of the appellants in support of their claim, however, vide the impugned order dated 16.02.2018, the learned Appellate Court rejected the said Misc. Appeal.

4. Heard learned senior counsel for the appellants. Despite the opportunity given to the respondent, no one



appeared on behalf of the respondent.

5. Learned senior counsel for the appellants submits that the learned Appellate Court failed to appreciate that the appellants were making *pairvi* in the appeal continuously for 17 years and they had entrusted their counsel to appear in the case to make *pairvi*. He further submits that the ground taken by the learned Appellate Court that the appellant failed to get the appeal disposed of within 17 years is not correct in the facts and circumstances of this case. He submits that the appellants are not responsible for pendency of appeal for 17 years, particularly, when the trial court records were itself called by the learned Appellate Court on 03.07.2015.

6. Learned senior counsel further submits that the litigants should not be punished for the fault of his counsel and in this case, appellants who are aged person, had entrusted the *pairvi* to his counsel as they were residents of Munger and they were assured by their counsel that they will be informed if any requirement occurs but the conducting lawyer failed to appear in the case on call despite filing the *hazri* and thus failed in his responsibilities imposed by the appellants. He further submits that the appellants have good case on merit and will suffer irreparable loss / injury which cannot be compensated in any



manner whatsoever.

7. In Misc. Case No. 08 of 2015, four witnesses have been examined on behalf of appellants deposing that they had entrusted the counsel for argument but due to engagement in another court the counsel was not present on call in the case.

8. In the leading case of Hon'ble Supreme Court in **Sangram Singh Vs. Election Tribunal, Kotah** reported in **AIR 1955 SC 425**; observed as under:

“ A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties, not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affects their lives and property should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever, that is reasonably possible, in the light of that principle.”

9. The law is well settled that the first appeal is a valuable right of the appellants and the appellants are entitled for an opportunity to prosecute their appeal on merit. The



Hon'ble Supreme Court in **The Commissioner Mysore Urban Vs. S.S. Sarvesh (2019) 5 SCC 144** in paragraph 19 observed as follows:

*“19. In our view, the courts below should have seen that the first appeal is a valuable right of the appellant and, therefore, the appellant Authority was entitled for an opportunity to prosecute their appeal on merits. If the appellant's advocate did not appear may be for myriad reasons, the Court could have imposed some costs on them for restoration of their appeal to compensate the respondent (plaintiff) instead of depriving them of their valuable right to prosecute the appeal on merits. This is what Vivian Bose, J. has reminded to the courts while dealing with the cases of this nature in **Sangram Singh** to do substantial justice to both the parties to the lis. Indeed, dismissal of the appeal in default and dismissal of the appeal on merits makes a difference. The former dismissal is behind the back of the litigant and latter dismissal is after hearing the litigant. The latter is always preferred than the former.”*

(Emphasis supplied)

10. Having heard the learned senior counsel for appellants and on perusal of the materials on record and keeping the aforementioned statement of law in consideration and applying the same in the facts of this case, in my considered opinion, the application made by appellants disclosed a 'sufficient cause' and thus the learned Appellate Court erred in dismissing the application/Misc. Case made under Order 41 Rule 19 CPC. The application, therefore, deserves to be **allowed.**



11. In view of the foregoing discussions, the appeal succeeds and is accordingly allowed. The impugned order is set aside. As a consequence, the application filed by appellants (Misc. Case No. 08 of 2015) is allowed. The Title Appeal No. 1999 of 1998 is, accordingly, restored to its original number for its hearing on merits in accordance with law. It is expected that the learned Appellate Court shall take steps for hearing and disposal of appeal expeditiously.

12. Appellants are directed to appear themselves or through their counsel before the concerned Appellate Court on 30.10.2024 to enable the learned Appellate Court to fix a date for hearing of the appeal on merits uninfluenced by any observation herein on merits because this court has not applied its mind to the merits of the controversy in the appeal.

13. Interlocutory application, if any, shall stand disposed of.

14. Let the Trial Court Record be returned back to the court concerned.

(Sunil Dutta Mishra, J)

khushbu/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	28.09.2024
Transmission Date	

