

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.881 of 2017

1. Bechani Devi, W/o- Ram Pravesh Rai,
2. Laxmi Rai, S/o Hardeo Rai
Both residents of Village- Hulukpur, P.S.- Phulwari, District- Patna.

... .. Petitioner/s

Versus

- 1.1. Gopi Rai, S/o Late Kanshi Rai, Resident of Mohalla- Saristabag, P.S.- Phulwari, Dist.- Patna.
- 1.2. Ranjit Rai, S/o Late Kanshi Rai, Resident of Mohalla- Saristabag, P.S.- Phulwari, Dist.- Patna.
- 1.3. Guddu Rai, S/o Late Kanshi Rai, Resident of Mohalla- Saristabag, P.S.- Phulwari, Dist.- Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr.Ajay Kumar Singh, Advocate
For the Respondent/s	:	Mr. Jitendra Kumar Roy-1, Advocate Mrs.Usha Kumari Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date : 07-01-2025

The present petition has been filed by the petitioners under Article 227 of the Constitution of India for quashing the order dated 01.09.2016 passed by the learned Additional District Judge-X, Patna in Misc. Appeal No.100/2011 whereby and whereunder the learned first appellate court allowed the appeal and set aside the order dated 14.09.2011 passed by the learned Sub Judge-IV, Patna in Misc. Case No. 19 of 2001/23 of 2008.

2. The conspectus of the case, as it emerges from the records, is that the petitioners filed Title Suit No. 367/1997 in



the court of learned Sub Judge-1, Patna seeking relief for grant of decree for specific performance of contract for sale in respect of the suit land on the basis of an agreement of sale (*Baibeyana*) dated 01.04.1997 executed by the original defendant/respondent- Kashi Rai. The present respondents are the sons of original respondent. It further transpires that the agreement of sale (*Baibeyana*) dated 01.04.1997 was executed by Kanshi Rai as he was in urgent need of money and he offered to sale the suit land and the plaintiffs came forward to purchase the suit land for consideration of Rs.58,000/-. The earnest money of Rs. 41,000/- was paid. Thereafter, further payment of Rs.17,000/- was made to Kanshi Rai. The petitioners approached the father of the respondents to execute and register the sale deed. But, it appears, the sale deed was never executed. Legal notice was also issued, but the same was refused and, thereafter, Title Suit No. 367/1997 was filed for specific performance of contract for sale. It further appears notices were issued on the original defendant, but he refused to accept the notice. It also appears the petitioners filed their affidavit in support of service of summons and the matter was fixed for *ex-parte* hearing and the suit was decreed *ex-parte* on 05.08.1999. Pursuant to the decree passed in Title Suit No. 367/1997, the petitioners filed Execution Case



No. 24/1999 in which again summons were issued and served upon defendant/respondent, but he did not appear and his son Gopi Chand Rai appeared on 29.05.2001 and filed some application and, thereafter, left *pairvi* in the case. It further transpires that on 26.06.2001, the original defendant/respondent filed a petition under Order IX Rule 13 of the Code of Civil Procedure seeking relief to set aside the *ex-parte* decree dated 05.08.1999 and, for the said purpose, Misc. Case No. 19/2007 was registered. It further transpires that the miscellaneous case proceeded and evidence of both sides was recorded and the learned Sub Judge-IV, Patna vide order dated 14.09.2011 dismissed the miscellaneous case holding that the defendant was aware about pendency of Title Suit No. 367/1997 and Execution Case No. 24/1999 and has deliberately avoided appearance in that case. The original defendant/respondent, being aggrieved by the aforesaid order of the learned Sub Judge, preferred Misc. Appeal No. 100/2011 before the learned District Judge, Patna. The aforesaid appeal was heard by the learned Additional Sessions Judge-X, Patna and vide order dated 01.09.2016, the appeal was allowed and the order dated 14.09.2011 was set aside. The said order is under challenge before this Court.

3. The learned counsel for the petitioners submitted



that the order impugned is not sustainable. The learned appellate court did not consider the fact that it is the admitted case of the respondents that the original defendant was having knowledge of the decree passed on 05.08.1999 and he filed a petition on 21.06.2001. The learned appellate court committed patent illegality in considering the question with regard to service of notice upon defendant/respondent since the same stood proved with the evidence of the process server as well as *Nazir* of the Civil Court. The learned appellate court shifted the burden of establishing the service of notice upon plaintiffs/petitioner in the miscellaneous case filed by the defendant, whereas it was incumbent upon the respondents to prove their case showing service was not made or effected upon them. The learned trial court further committed illegality in discarding evidence of OPW No. 6 who deposed in clear terms that he met the original defendant on 20.12.1997, who received the summons, but refused to give receipt. Even *Nazir* of the Civil Court, who has been examined as OPW No. 7, deposed on the point of delivery of possession in favour of the plaintiffs/petitioners in execution case. It is admitted fact that pursuant to the *ex-parte* decree, Execution Case No. 24/1999 was instituted and on behalf of the original defendant/respondent, one of his sons Gopi Chand Rai



appeared and contested the execution case, who is one of the respondents in the present case. Subsequently, he left *pairvi* and sale deed was executed and registered on 18.01.2003 and possession was delivered through the process of court on 12.03.2004, but these facts were not taken into consideration. The learned counsel further submitted that the learned appellate court discarded the evidence of the court officer and merely went by the evidence of the respondent made in miscellaneous case and observation with regard to non-mentioning of service in the evidence of the witnesses of the petitioners in miscellaneous case is completely erroneous. Once service was made through the process of the court and it was found to be satisfactory, there was no requirement of substituted service of notice through publication and the finding of the learned appellate court on this point is completely improper and incorrect. Thus, learned counsel submitted that the impugned order is not sustainable and the same needs to be set aside.

4. On the other hand, learned counsel for the respondents vehemently contended that there is no infirmity in the impugned order and the same does not need any interference and the present civil miscellaneous case is not maintainable. The learned counsel further submitted that the learned appellate



court has rightly examined the evidence of process server and other evidence on record and has come to the right conclusion that summons were not served on the original defendant/respondent. It has rightly held that persons, who were named in the service report as the person in whose presence summons were served, were not examined by the petitioners to prove the correctness of service of notice upon defendant/respondent. The learned counsel further submitted that no satisfaction has been recorded that the defendant was avoiding service of summons. Further no substituted service was made and there was no postal receipt to show that notice was sent to the defendant through registered post. The learned counsel further submitted that the learned appellate court has also discussed the fact regarding the witnesses neither signing nor getting examined by the petitioners to prove the correctness of service and the service was not proper. The learned counsel further submitted that the claim of appearance of Gopi Chand Rai, the son of original defendant/respondent Kanshi Rai, is wrong and denied. The learned counsel further submitted that no delivery of possession has taken place and the land is still in possession of the respondents. The learned counsel further submitted that the petitioners have failed to establish that respondents had



knowledge of title suit and execution case. Moreover, it is settled principle of law that in the matter of setting aside *ex-parte* decree, the court should take liberal view and make every effort to decide the case between the parties on merit. Thus, learned counsel submitted that there is no merit in the instant civil miscellaneous petition and the same is fit to be dismissed.

5. I have given my thoughtful consideration to the rival submission of the parties and have perused the record.

6. The main contention of the petitioners is that though proper service of summons was made upon the original defendant/respondent, but the learned appellate court did not consider this fact and allowed the appeal.

7. Order V Rule 17 of the Code of Civil Procedure is the provision which deals with such eventualities. It reads as under :

“17. Procedure when defendant refuses to accept service, or cannot be found.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable



time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed”.

8. Perusal of the impugned order as well as order of the learned Sub Judge in Misc. Case No. 19 of 2001/ 23 of 2008 shows some interesting facts. As is quite natural the witnesses of both sides stuck to respective version of their cases. The official witnesses, however, recorded their evidence showing that the summons were served upon the original defendant and even with regard to delivery of possession, the evidence has come in the deposition of Nazir of the Civil Court which was disbelieved by the learned appellate court. But the evidence of court official should not have been lightly discarded by the learned appellate



court. The learned Single Judge of this Court in the case of ***Pabitri Devi and Ors. vs. Rash Bihari Gope and Ors.*** reported in ***2010 (2) PLJR 942*** has held that the order-sheets, whether in judicial or *quasi* judicial proceedings, are to be considered sacrosanct. If an order-sheet is questioned and the author of the order is not in a position to defend himself, the order recorded in order sheet will prevail.

9. Unless some malafide could be imputed, the judicial record ought not to be disbelieved. The learned appellate court missed this point and entirely went on the point of no evidence regarding service of notice in the evidence of the opposite parties of miscellaneous case, who are the petitioners herein. When there is specific statement in the deposition of the process server that he went and met the original defendant and further specific statement was made that on his refusal, the summon was hanged in the eastern door of the house in presence of the witnesses Chinta Yadav and Munna Yadav, the learned appellate court should not have treated the service of summons to be no service as service report has not been witnessed by any person. If the witnesses refused to sign as witnesses, service would not become bad in the eyes of law. It further appears from the order of the learned Sub Judge that the



respondent Gopi Chand appeared during the proceeding of execution case and thereafter, left *pairvi*, the learned Sub Judge has specifically observed that there has been no evidence that Gopi Chand has been living separate from the original defendant or the defendant was not having knowledge about these facts. There is vague description about the person from whom the original defendant came to know about passing of decree against him as it was claimed the same came to the knowledge of the original defendant through his elder brother, who got this knowledge from another person, but the said person was not examined.

10. Moreover, Order V Rule 17 of the Code does not make it mandatory that in every case, there should be mentioning of name and address of the person by whom house was identified and whose presence copy was affixed. Therefore, it is not proper to brush aside the evidence of official witness when there is no allegation of malafide against effecting notice in this manner. Service of notice through the ordinary process of court showing proper service obviates the need for service through other modes.

11. In the light of discussion made so far, I am of the considered opinion that the learned first appellate court



committed an error of jurisdiction in disbelieving the service of notice upon the original defendant/respondent and passed an erroneous order which could not be sustained. Hence, the impugned order dated 01.09.2016 passed in Misc. Appeal No. 100/2011 by the learned Additional District Judge-X, Patna is set aside.

12. As a result, the instant petition stands allowed.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	03.12.2024
Uploading Date	07.01.2025
Transmission Date	NA

