

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1400 of 2017**

1. Indra Mohan Prasad S/o late Govind Prasad Sah
2. Krishna Mohan Prasad S/o late Govind Prasad Sah
3. Gautam Prasad Gupta S/o chandra Mohan Prasad
4. Gaurav Kumar Gupta Son of Chandra Mohan Prasad All Resident of Village- Jhing Nagar, P.S. Bihar, Distt- Nalanda.

... .. Petitioner/s

Versus

1. Sri Shailendra Kumar S/o Krishnandan Prasad resident of Village- Dosut, P.S. Wena, Distt- Nalanda.
2. Smt. Sarita Sinha W/o Sri Biresh Kumar Pintu Resident of Village- Ajaypur, P.S.- Noor Sarai, Distt- Nalanda.
3. Kumar Ashawani Sinha W/o Sri Rajeev Kumr Ranjan Resident of Village- Gaibi, P.S.- Rahui, District Nalanda.
4. Sri Jamun Mahto S/o late Lakhan Mahto Resident of Village- Mohanpur, P.S. Nalanda , Distt- Nalanda.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Anil Kumar No.1, Advocate Ms. Sonam Kumari, Advocate
For the Respondent/s	:	Mr. Pramod Kumar Sinha, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT**

Date : 21-01-2025

Heard learned counsel for the petitioners as well as
learned counsel for the respondents.

2. The petitioners are aggrieved by the order dated 14.06.2017 passed by the learned Sub Judge-III, Nalanda at Bihar Sharif in Title Suit No. 217 of 2012 whereby and whereunder the application filed by respondent no.4 under Order IX Rule 7 of the Code of Civil Procedure (for short 'the Code') has been allowed setting aside the *ex-parte* proceeding



against respondent no.4 at the cost of Rs. 2,000/- and thereafter respondent no.4 was permitted to file the written statement.

3. Learned counsel for the petitioners submits that the petitioners as plaintiffs have filed title suit for declaration of their title over suit land and also for declaring the sale deeds executed by defendant no.4 in favour of defendant nos. 1, 2 and 3, who are respondent nos. 1, 2 and 3, respectively herein, to be forged and *void ab initio*. Learned counsel further submits that summons were issued on the defendants/respondents but they did not appear till the matter was fixed for judgment after completion of hearing. The defendants were properly served. However, defendant no.4 filed an application under Order IX Rule 7 of the Code and the learned trial court without considering the fact that the defendant no.4 was properly served and the matter was fixed for judgment on 08.09.2016 ordered for setting aside the *ex parte* proceeding and allowed the defendant no.4 to file his written statement. Learned counsel further submits that as the defendant no.4 was duly served, the averment made on his behalf that he heard about the proceeding before the learned trial court is not correct. Learned counsel further submits that moreover, when the matter has been fixed for judgment, the proceeding cannot be set aside under Order IX



Rule 7 of the Code. Thus, learned counsel submits that the impugned order is not sustainable and the same be set aside.

4. Learned counsel appearing on behalf of respondent no.4 submits that there is no infirmity in the impugned order and the same does not need any interference. Learned counsel further submits that respondent no.4 is defendant no.4 before the learned trial court and he never received any summons or notice of the proceedings of the Title Suit No. 217 of 2012. The summons were never served upon defendant no.4/respondent no.4. Learned counsel further submits that substituted served by way of publication was done in newspaper 'Aaj' which has a negligible circulation in the area of respondent no.4. Moreover, the respondent no.4 being an agriculturist has no interest in reading the newspapers and for this reason, he could not come to know about the notice and could not appear earlier in the case. Learned counsel further submits that though other defendants, after publication, appeared but did not file their written statements and the order for *ex parte* hearing was passed against all the defendants. Learned counsel reiterates that the answering defendant has no knowledge about the proceeding and for this reason, he could not appear in the case and contest the suit. Learned counsel further submits that the application



was filed for setting aside the *ex parte* proceeding while the matter has been fixed for argument on the legal points at the instance of the plaintiffs/petitioners and the submission of the learned counsel for the petitioners that the matter was fixed for judgment is not entirely correct. Moreover, every party should have got an opportunity to contest the suit and the learned trial court has rightly observed that before passing any order in a civil suit, both sides must be heard. Therefore, there is no infirmity in the impugned order and the same needs to be sustained.

5. I have given my thoughtful consideration to the rival submission of the parties and perused the record. The contention of the learned counsel for the petitioners that the matter was fixed for judgment and at this stage the *ex parte* proceeding was ordered to be set aside, would have been a valid point to challenge the impugned order if the matter was not taken back from the stage of judgment to the stage of argument at the instance of the plaintiffs. So the submission that the order could not have been passed under Order IX Rule 7 of the Code is not tenable. So far as service of summons and respondent no.4 having knowledge are concerned, the learned trial court has considered the fact and allowed the application in broader



interest of justice subject to payment of cost of Rs. 2,000/-. I am of the view that the discretion of the learned trial court in this matter does not need any interference by this Court except to the extent that higher cost needs to be imposed instead of merely Rs. 2,000/- which was allowed by the learned trial court while allowing the application filed for setting aside the *ex parte* proceeding. To that extent the order needs modification. Therefore, the order dated 14.06.2017 is modified and the application 19.12.2016 of the respondent no.4 is allowed subject to the payment of cost of Rs. 10,000/- to be paid to the plaintiffs/petitioners on the first date of hearing before the learned trial court and thereafter the written statement would be taken on record.

6. With the aforesaid modification in the impugned order, the present petition stands disposed of.

(Arun Kumar Jha, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	23.01.2025
Transmission Date	NA

