

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.18 of 2019

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1. Mahesh Kumar @ Mahesh Prasad S/o Late Ram Prasad Sah. R/o Mohalla- Goridas Ki Mandi, P.S. Malsalami, P.O.- Patna City, District Patna.
 2. Raju Prasad @ Raju Kumar, S/o Late Ram Prasad Sah, R/o Mohalla- Goridas Ki Mandi, P.S. Malsalami, P.O.- Patna City, District Patna.
 - 3.1. Ruby Gupta W/o Chunchun @ Sanjay Kumar R/o Mohalla- Goridas Ki Mandi, P.S. Malsalami, P.O.- Patna City, District Patna.
 - 3.2. Rishu Raj, S/o Chunchun @ Sanjay Kumar R/o Mohalla- Goridas Ki Mandi, P.S. Malsalami, P.O.- Patna City, District Patna.
 - 3.3. Ritvik Gupta S/o Chunchun @ Sanjay Kumar Under the graduation ship of his mother namely Ruby Gupta, R/o Mohalla- Goridas Ki Mandi, P.S. Malsalami, P.O.- Patna City, District Patna.
 4. Babloo @ Ajay Kumar, S/o Late Ram Prasad Sah, R/o Mohalla- Goridas Ki Mandi, P.S. Malsalami, P.O.- Patna City, District Patna.

... .. Petitioner/s

Versus

1. Smt. Meera Devi Wife of Sri Gopal Prasad. R/o Mohalla- Badi Nagala, P.S. Malsalami, P.O. Patna City, District- Patna.
2. Sri Gopal Prasad, S/o Late Amrit Narain Sah. R/o Mohalla- Badi Nagala, P.S. Malsalami, P.O. Patna City, District- Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Vishal Saurabh, Advocate
For the Respondent/s : Mr. Tilak Sao, Advocate

CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

CAV ORDER

25 03-12-2025

This civil revision application is filed against the judgment dated 28.11.2018, passed in the Title Suit no. 85 of 2007, by the Additional District and Session Judge-I, Patna City, Patna, in Misc. Appeal No. 50 of 2016, whereby and where under the learned Appellate Court without applying his judicial mind and without going into the facts of the case set aside the *ex-parte* decree dated 02.07.2016 on the ground that in the



above Title Suit proper service of summon on the defendant was not effected and irregularity has been found which is perverse, vindictive and against the law and hence fit to be set aside.

2. The case of the plaintiff, in brief, is that Title Suit No. 85 of 2007 was filed by the original plaintiff, Ram Prasad Sah, against defendant Meera Devi and another for specific performance of a contract concerning Schedule-I property. The plaintiff's case is that Meera Devi, the owner of the Schedule-I property, executed an agreement for sale on 07.01.2005 for ₹1,20,000/-, out of which ₹1,06,600/- was paid. Meera Devi endorsed the agreement, and Defendant No. 2, her husband, who manages her property, signed as a witness and was made a party accordingly. The parties agreed that the sale deed would be executed after obtaining permission from the competent authority under the Urban Land Ceiling Act, along with an updated rent receipt. The plaintiff repeatedly requested these documents, and the defendants extended the time for execution until 30.07.2006 through an endorsement on the agreement. Despite this, the defendants failed to perform their part, even though the plaintiff was ready to pay the balance of ₹13,400/-. A legal notice dated 02.09.2006 was sent but elicited no response. On 09.09.2006, when the plaintiff visited the



defendants' residence with her son, the defendants abused and assaulted them and refused to execute the sale deed, resulting in Complaint Case No. 771 of 2006 before the Judicial Magistrate, Patna City. With no reply to the legal notice, the plaintiff filed Title Suit No. 85 of 2007 for specific performance. Notices and summons were issued, and after the defendants failed to appear even after substituted service through newspaper publication, the case proceeded *ex-parte* on 04.10.2007. Although the defendants had full knowledge of the suit as reflected in ABP No. 5152 of 2007 filed in Complaint Case No. 771(C) of 2006, where they admitted the agreement and expressed willingness to execute the sale deed on payment of ₹13,400/-, they still did not appear in the civil suit. The suit was decreed *e- parte* on 03.05.2008 by the Sub-Judge-I, Patna City. During Execution Case No. 7/2008, the defendants appeared on 06.11.2008 and sought time. On 09.05.2009, the defendants filed Misc. Case No. 5 of 2009 under Order IX Rule 13 CPC seeking to set aside the *ex-parte* decree, claiming non-service of summons. After notice, the plaintiff appeared, and the trial court, upon hearing both sides and examining the record, dismissed the Misc. Case on 02.07.2016. The court held that the defendants had full knowledge of Title Suit No. 85 of 2007 and still chose not to



appear, and further relied on the second proviso to Order IX Rule 13, which bars setting aside an *ex-parte* decree merely for irregular service if the defendants had notice and sufficient time to contest. It therefore found no reason to set aside the decree. The defendants then filed Misc. Appeal No. 50 of 2016 before the ADJ-I, Patna City. However, the appellate court, without properly considering the trial court's findings or the record, set aside the order dated 02.07.2016 solely on the ground of alleged irregularities in the order sheet of Title Suit No. 85 of 2007 regarding service of summons.

3. Heard the Learned Counsel appearing on behalf for the petitioner and respondent.

4. Learned Counsel on behalf of the petitioner submitted that the defendant had full knowledge of the Title Suit No. 85 of 2007 and failed to fulfil their contractual obligations. Despite a legal notice dated 02.09.2006, they neither provided the required documents nor executed the sale deed, and when the plaintiff visited them on 09.09.2006 to complete execution, they assaulted her, leading to Complaint Case No. 771(C) of 2006. Summons in Title Suit No. 85 of 2007 were duly issued, and on their non-appearance, substituted service through newspaper publication in Dainik Jagaran was executed. The



defendants intentionally chose not to appear, resulting in the suit proceeding *ex-parte* on 10.04.2007 and being decreed on 03.05.2008.

4.i. He further submits that the defendants had full knowledge of the suit, as reflected in ABP No. 5152 of 2007, where on 28.09.2007 they admitted the agreement, acknowledged that only ₹13,400/- remained due, and expressed readiness to execute the sale deed. After the decree, the plaintiff filed Execution Case No. 7 of 2008, in which the defendants appeared and sought time but did not file any petition to set aside the *ex-parte* decree. Their later attempt Misc. Case No. 5 of 2009 filed on 09.05.2009, was dismissed on 07.02.2016, the trial court holding that they had full knowledge and that the second proviso to **Order IX Rule 13 CPC** barred interference.

4.ii. He also submitted that in Misc. Appeal No. 5 of 2016, the sole respondent, Ram Prasad Sah, died on 06.01.2017, and although his heirs filed a substitution petition on 31.05.2017, they neither sought the setting aside of the abatement nor the condonation of the delay. Despite objections, substitution was wrongly allowed on 12.10.2017. Thereafter, respondent No. 1(b), Sanjay Kumar @ Chunchun, also died, and although this was reported on 15.01.2018, no substitution was



filed. Consequently, the appeal, having proceeded against deceased persons, is a nullity and the impugned judgment is void.

5. Learned Counsel for the respondent submitted that the present revision application is devoid of merit and fit to be dismissed. He contended that Defendant No. 2 signed the baibeyana deed dated 07.01.2005 as a witness, acknowledging receipt of ₹1,06,600/- as earnest money against the total consideration of ₹1,20,000/-. He, on behalf of the respondent, submits that Defendant No. 1 failed to execute the registered sale deed within the stipulated time, and the original plaintiff, Late Ram Prasad Sah, filed Title Suit No. 85/2007 for specific performance. The trial court learned Sub-Judge, Patna City however, proceeded *ex-parte* on 04.10.2007 without examining the process server or verifying proper service of summons, contrary to the law laid down in ***Manik Chand Nandy v. Debdas Nandy*** reported in ***(1986 BBCJ SC 11)***, which requires the court to ensure valid service before fixing an *ex-parte* hearing. The learned trial court found no valid service report on record, yet proceeded *ex-parte* and passed judgment on 03.05.2008. Aggrieved, the defendants filed **Misc. Case No. 5 of 2009**, which was dismissed on 02.07.2016, leading them to



file Misc. Appeal No. 50 of 2016. The Court of A.D.J-I, Patna City, Patna in the appeal after hearing, rightly allowed the appeal and set aside the *ex-parte* judgment vide order dated 16.11.2018, holding the trial court's action illegal. It is further submitted that non-substitution of the legal heir of deceased Defendant No. 1(d), Sanjay Kumar @ Chunchun, affects only his share and does not vitiate the proceedings as other legal heirs are already on record; hence, the impugned order suffers from no infirmity.

6. On perusal of the judgment and decree dated 03.05.2008 and 09.05.2008 passed by Sub-Judge-1st, Patna City, in Title Suit no.85 of 2007, it appears that the service of the original summon suffered from some serious defects. Upon examination of the record, it transpires that the Order sheet of T.S.No.85 of 2007 has various irregularities. The Lower Court recorded contradictory orders in the margin and the main portion on 06.06.2007. The record presents a procedural impossibility as it indicates the issuance of summons on 28.05.2007, antedating the actual filing of requisites on 06.06.2007. Furthermore, the Order dated 06.06.2007 inexplicably adjourns the matter to await service for requisites filed that very day, while the margin fails to record any service



report. In the present case, it is evident that serious irregularity has been committed by the Trial Court in issuing the summon on 06.06.2007 and requiring the respondents to file their appearance on the same day (06.06.2007) which was not in accordance with law and seriously hampers their legal rights by not providing them sufficient time to appear before the concerned Court in violation of natural justice. The learned trial court failed to appreciate the material evidence on record.

7. The primary purpose of issuing a summons is not merely to fulfil a ritualistic formality but to ensure that the defendant has actual knowledge of the litigation against them, thereby satisfying the principles of natural justice. In the present case, the record reveals that the process of original service suffered from serious and incurable defects, particularly regarding the contradictory dates of issuance and the filing of requisites. These defects establish that the Court below failed to ensure that the process of the Court was correctly set in motion.

8. The law requires that, before resorting to substituted service, the Court must be satisfied that the defendant is evading a validly issued summons. In this case, since the original summons was procedurally defective, it cannot be said that the defendant evaded the process of law.



9. In the case of ***Sunil Poddar v. Union Bank of India*** reported in ***(2008) 2 SCC 326***, in para 19 it was observed by the Hon'ble Supreme Court –

“It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the plaintiff's claim. Once these two conditions are satisfied, an ex-parte decree cannot be set aside even if there has been some irregularity in service of summons.”

10. The legal maxim “*sublato fundamento cadit opus*” applies here, which states that once the foundation is removed, the superstructure falls. Because the initial attempt at service was legally fundamentally significantly defective, it vitiates all subsequent proceedings. The order directing substituted service, therefore, lacks legal sanctity. A substituted service cannot validate a process that was void at its inception. Accordingly, this Court determines that the appellant was never duly served, and the *ex-parte* proceedings were conducted in violation of the mandatory provisions of the Civil Procedure Code.



11. In the case of **Smt. Yallawwa v. Smt. Shantavva** reported in (1997) 11 SCC 159 it was stated by the Hon'ble Supreme Court –

*“The trial court could not have almost automatically granted the application for substituted service **without taking steps for serving the respondent by ordinary procedure as laid down by Order V Rules 12, 15 and 17 CPC.** It must be kept in view that substituted service has to be resorted as the last resort when the defendant cannot be served in the ordinary way and the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way.”*

12. In the case of **Sushil Kumar Sabharwal v. Gurpreet Singh** reported in (2002) 5 SCC 377 in para 11 and 12, it was stated by the Hon'ble Supreme Court –

*“The provision contained in Order 9 Rule 13 proviso... **cannot be construed as curing the defect in the service of summons where the service of summons is itself found to be non-existent or null and void.**”*

“We find several infirmities and lapses on the part of the process server... The tendering of the summons, its refusal and affixation... should have been witnessed by persons who identified the defendant... The endorsement made by the process server... does not support him, rather contradicts him.”

13. . Substituted service is not an independent



mode of service but an exception. If the report of the serving officer regarding the “original service” is absent and insufficient time was provided to them to appear before the court, the condition precedent for Order V Rule 20 is not met. Therefore, the subsequent substituted service, even if technically published or pasted, is *void ab initio*.

14. It was further submitted by the Counsel for the respondent that non-substitution of the legal heir of deceased Respondent No. 1(b), Sanjay Kumar @ Chunchun, affects only his share and does not vitiate the proceedings as other legal heirs are already on record; hence, the impugned order suffers from no infirmity. This submission by the learned Counsel is not legally tenable as the argument “other heirs already on record” is vitiated by the legal position that abatement is automatic by law, and the mere presence of heirs does not “revive” a suit that has already legally died. Reliance is placed on the decision of the Hon’ble Supreme Court in the case of ***Gurnam Singh (D) By LRs & Ors. vs. Gurbachan Kaur (D) By LRs*** reported in **(2017) 13 SCC 414**, wherein para 10 states –

“A bare perusal of the provisions under Order 22 Rule 4(3) of the Code would clearly show that where within the time limited by law no application is made



under sub-rule (1), the suit shall abate as against the deceased defendant. ... Therefore, on the death of the defendant, the suit automatically abates after the time prescribed to bring on record the heirs and legal representatives of the defendant expires.”

15. In the case of **Dwarka Prasad Singh vs. Harikant Prasad Singh** reported in (1973) 1 SCC 179 in para 7, the Hon’ble Supreme Court stated –

“In a suit for specific performance of a contract for sale... if one of the defendants dies and his legal representatives are not brought on record, the result would be that the suit would abate against him. The further result would be that the suit would abate as a whole because the Court cannot pass a decree for specific performance of a contract for sale of a share in the property, as the contract is indivisible. A decree for specific performance against the remaining defendants would result in two inconsistent decrees.”

16. Further, in the case of **Venigalla Koteswaramma vs. Malampati Suryamba** reported in (2021) 4 SCC 246 in para 15 the Hon’ble Apex Court stated –

“Where a decree is joint and inseverable or where the interest of the parties is defined and the shares are not



*distinct... and legal representatives of the deceased are not brought on record, **the appeal abates in toto.** The reason is that if the appeal is allowed against the surviving respondents, it would result in two inconsistent decrees with respect to the same subject matter.”*

17. The Respondent No.1(b), namely, Sanjay Kumar @ Chunchun in M.A. No.50 of 2016 also died before the pronouncement of the judgment and no substitution was filed before A.D.J-I, Patna City, Patna resulting in the learned Appellate Court to set aside the *ex-parte* judgment vide order dated 16.11.2018. It is a settled principle that judgment against a dead person is nullity by relying on the precedent set in *Gurnam Singh* (2017) 13 SCC 414 in para 21, where the Supreme Court observed –

“This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a Court for or against a dead person is a 'nullity'.”

18. In *Amba Bai and Others vs. Gopal and Others* reported in (2001) 5 SCC 570, also in para 6, it was observed –

*“As the judgment in the Second Appeal was passed without the knowledge that the appellant had died, **the same being a judgment passed against the dead person is a nullity.** ... When the second appellant*



Radhu Lal died on 14-12-1990, his legal representatives could have taken steps to get themselves impleaded in the Second Appeal proceedings and as it was not done, the Second Appeal should be taken to have abated by operation of law.”

19. In *Sushil Kumar Sabharwal v. Gurpreet Singh*, reported in **(2002) 5 SCC 377**, the Hon’ble Supreme Court reversed the order, holding that the service was legally flawed and ordered a retrial. The relevant paragraphs of this case are 11 and 12, wherein the Hon’ble Apex Court stated –

“11.The High Court has overlooked the second proviso to Rule 13 of Order IX CPC... The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex parte.”

“12.The provision contained in Order V Rule 6 of the CPC is pertinent... The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing...”

20. Upon a careful scrutiny of the record, it is



evident that the initial attempt to effect service upon the Defendant was in patent violation of the mandatory requirements of **Order V, Rule 17 of the CPC**. The defect in the original service was not a mere procedural irregularity which could perhaps be overlooked under the Second Proviso to **Order IX, Rule 13**, but a fundamental illegality that rendered the service null and void. The subsequent order for substituted service by way of newspaper publication under **Order V Rule 20** was passed mechanically, without the Trial Court recording its satisfaction that the Defendant was intentionally avoiding service. Substituted service is an exception, not a routine alternative, and it cannot be used to retrospectively validate a foundational defect in the original process. Since the foundation of the service was defective, the superstructure of the *ex-parte* decree must essentially collapse. Consequently, to uphold the principles of natural justice and ensure that no party is condemned unheard, the *ex parte* decree is set aside.

21. In light of the case of ***Pandurang Dhoni Chougule vs Maruti Hari Jadhav*** reported in **1966 AIR 153**, it was stated by the Hon'ble Supreme Court –

“As clauses (a), (b) and (c) of Section 115 CPC indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has



failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked.”

22. Further in the case of **Sushil Kumar Sabharwal v. Gurpreet Singh & Ors.** reported in (2002) 5 SCC 377 in para 12, it was stated by the Hon’ble Supreme Court –

“The provision contained in Order 9 Rule 6 of the C.P.C. is pertinent. It provides that if it is proved that the summons was served on the defendant but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court and shall direct notice of such day to be given to the defendant. ... The trial Court and the High Court have committed a serious error in applying it’s judicial power resulting in failure of justice by refusing to set aside the ex-parte decree.”

23. Henceforth, in light of the facts and circumstances of the case and the law laid down by the Hon’ble Supreme Court in different cases and procedural infirmities plaguing the inception of the suit, the impugned order passed in M.A. No. 50 of 2016 is hereby set aside to facilitate the Appellate Court to pass a fresh order and adopt appropriate procedure. The learned Appellate Court earlier set aside the decree against the dead person who was Respondent No.1(b),



Sanjay Kumar @ Chunchun which itself is a nullity in law.
Hence, the Appellate Court with due regard to the procedure and
by providing adequate opportunity of hearing to both the parties
and pass an appropriate order within a period of six months
from the date of receipt of a copy of this order.

24. Office is directed to send back the lower court
records and proceedings along with a copy of this judgment to
the learned Appellate Court, forthwith, for necessary
compliance, if any.

(Ramesh Chand Malviya, J)

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