

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.117 of 2012

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- 1.1. Himanshu Singh S/o Late Indra Pratap Singh @ Lalji Babu Resident of Village- Newaji Tola, P.S- Chhapra Muffasil, District Saran at present residing at Mohalla Dahiawan,Tola, Shrinandan Path, P.O.- Chhapra, P.S- Chhapra Nagar, District- Saran, Pin- 841301.
 - 1.2. Rita Singh W/o Late Anshu Kumar Singh Daughter- in- Law, respectively of Late Indra Pratap Singh @ Lalji Babu, Resident of Village- Newaji Tola, P.S- Chhapra Muffasil, District Saran at present residing at Mohalla Dahiawan,Tola, Shrinandan Path, P.O.- Chhapra, P.S- Chhapra Nagar, District- Saran, Pin- 841301.
 - 1.3. Ridhima Raj Singh D/o Late Anshu Kumar Singh Grand daughter, respectively of Late Indra Pratap Singh @ Lalji Babu, Resident of Village- Newaji Tola, P.S- Chhapra Muffasil, District Saran at present residing at Mohalla Dahiawan,Tola, Shrinandan Path, P.O.- Chhapra, P.S- Chhapra Nagar, District- Saran, Pin- 841301.
 - 1.4. Kartikay Raj Singh S/o Late Anshu Kumar Singh Grand son, respectively of Late Indra Pratap Singh @ Lalji Babu, Resident of Village- Newaji Tola, P.S- Chhapra Muffasil, District Saran at present residing at Mohalla Dahiawan,Tola, Shrinandan Path, P.O.- Chhapra, P.S- Chhapra Nagar, District- Saran, Pin- 841301.

... .. Petitioner/s

Versus

1. Smt. Rupa Sinha W/o None Gopal Sinha Mohalla- Yatindra Smriti Dham No. 147, Gowal Toli Lane, Near Vishalwi Tola, P.O- Huglee, District- Hooglee, West Bengal.
2. Parth Kumar Yadav S/o Late Ram Janam Rai Resident of Lodhipur Chirand, P.O- Chirand, P.S- Doriganj, District- Saran.
3. Dev Saran Rai S/O Late Chunni Lal Rai Resident of Village Pozhi Buzurg, P.O- Pozhi, P.S- Marhaura, District- Saran At Present Residing At Dahiyawan Tola, Shrinandan Path, P.O- Chapra, P.S- Chapra, District- Saran.
- 4.1. Bindu Devi, W/o Late Yaduvansi Rai, Resident of Village - Pozhi Buzurg, P.O. - Pozhi, P.S. - Marhaura, District - Saran at present residing at Dahiyawan Tola, Srinandan Path, P.O.- Chapra, P.S. - Chapra Nagar, District- Saran.
- 4.2. Dr. Himansu Rai, S/o Late Yaduvansi Rai, Resident of Village - Pozhi Buzurg, P.O. - Pozhi, P.S. - Marhaura, District - Saran at present residing at Dahiyawan Tola, Srinandan Path, P.O.- Chapra, P.S. - Chapra Nagar, District- Saran.
5. Jitendra Rai S/o Sri Yaduvasnhi Rai Resident of Village Pozhi Buzurg, P.O- Pozhi, P.S- Marhaura, District- Saran at Present Residing At Dahiyawan Tola, Shrinandan Path, P.O- Chapra, P.S- Chapra, District- Saran.



6. Yasi Lal Rai S/o Late Raghubir Rai Resident of Village- Madarpur At Present Village- Pozhi Buzurg, P.O- Pozhi, P.S- Marhaura, District- Saran.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Raj Kishore Prasad Singh
Mr. Bal Bhushan Choudhary
For the Respondent/s : Mr. Ankita Roy

CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

CAV JUDGMENT

Date : 07-01-2025

I have already heard the learned counsel for the petitioner/plaintiff as well as the learned counsel for the opposite parties/defendants.

2. This revision application is directed against the order dated 02.06.2012 passed in Title Suit No. 147 of 2012 by the 1st Sub-Ordinate Judge, Chapra, Saran.

3. The original petitioner/plaintiff filed an application under Order XXIII Rule 3 of the Code of Civil Procedure (for short 'the Code') for withdrawal of the suit with liberty to file a fresh suit which was rejected by the complex and composite order, which is impugned herein. It also appears that vide the same order, the leaned Sub- Ordinate Judge has disposed of the application filed by respondent no.2 under Order VII Rule 11 of the Code, praying therein to reject the plaint as it was barred under Order IX Rule 9 of the Code, but the



impugned order does not disclose explicitly whether that application was disposed of or not. The operative portion of the impugned order shows that the suit of the plaintiff was dismissed and at the same time the application of the plaintiff/petitioner under Order XXIII Rule 3 of the Code for withdrawal of the suit with liberty to file a fresh suit was rejected.

4. The original plaintiff/petitioner Indra Pratap Singh @ Lalji Babu filed Title Suit No. 147 of 2012 on the basis of a sale deed executed by late Harihar Chandra Ghosh in favour of the petitioner on 10.05.2006 in respect of the property in suit.

5. The case of the petitioner/plaintiff is that the original tenant of the disputed property late Umesh Chandra Ghosh had acquired several properties at Chapra from his own income and he was governed by Dayabhaga School of Hindu Law. He also acquired properties at Murshidabad, Giridih, Bhagalpur and Chapra. He acquired a piece of land, measuring 18 katha at Chapra which was situated by the southern side of the PWD road. The name of late Umesh Chandra Ghosh was recorded in the *Serista* of the Ex-landlord. He had two wives. He had two sons from the first wife and five sons from the



second wife. Umesh Chandra Ghosh died in December, 1944, leaving behind his above-mentioned seven sons, who inherited his entire properties. The names of the two sons from the first wife of Umesh Chandra Ghosh are Sharat Chandra Ghosh and Suresh Chandra Ghosh. Similarly, the five sons from his second wife were Shanti Chandra Ghosh, Subodh Chandra Ghosh, Sudhir Chandra Ghosh, Basant Chandra Ghosh and Dr. Harihar Chandra Ghosh (the vendor of the plaintiff/petitioner). Shanti Chandra Ghosh had two sons namely Prashant Kumar Ghosh and Bani Brat Ghosh and four daughters namely, Sushma Rai, Asima, Tripti Mitra (the mother of opposite party no.1) and Mamta Das. The wife of Prashant Kumar Ghosh is Enachi Ghosh. They have one son Sukant Ghosh and a daughter Arpita Ghosh. Bani Brat Ghosh has a son Babu Ghosh and a daughter Sapra Ghosh. Sushma Rai has two daughters Sutapa Ghosh and Sumidha. Asma died issueless. Tripti Mishra (also known as Tripti Mitra) had a daughter Rupa Sinha (opposite party no.1). Mamta Das has a son Babun. Subodh Chandra Ghosh executed a sale deed dated 25.03.1953 in favour of his brother Sudhir Chandra Ghosh and Subodh Chandra Ghosh settled in Murshidabad.

6. As such, 18 katha of land with two houses



thereon fell into the share of Shanti Chandra Ghosh, Sudhir Chandra Ghosh, Basant Chandra Ghosh and Dr Harihar Chandra Ghosh. Jamabandi in respect thereof was created in their names and Register-II was opened in their names. Shanti Chandra Ghosh being the elder brother was *karta* of the joint family. He was an advocate in Chapra. Sudhir Chandra Ghosh and Basant Chandra Ghosh were advocates at Patna High Court and Dr. Harihar Chandra Ghosh was in government service. These four brothers orally partitioned the said property of 18 katha of the land and two houses standing thereon and the western house with land under boundary measuring 4 katha 16 $\frac{1}{4}$ dhur bearing House No. 776 under Ward No. 18, Circle No. 16, Mohalla Dhahiawan Tola Chhapra Town, Thana 284 fell into share of Dr. Harihar Chandra Ghosh. After retirement, Dr. Harihar Chandra Ghosh returned to Chapra and started residing in the western house with four katha 16 $\frac{1}{4}$ dhur land and renovated the house for the purpose of his medical practice. On 25.05.1985, a memorandum of partition was executed by the surviving three brothers and elder son of Shanti Chandra Ghosh namely Prashant Kumar Ghosh, who became *karta* of his branch after the death of his father Shanti Chandra Ghosh. Dr. Harihar Chandra Ghosh applied for mutation in respect of the



aforesaid house on the basis of partition and the Mutation Case No. 49/86-88 was registered. Mr. Sudhir Chandra Ghosh sent his no objection in writing to the Vice Chairman, Chapra Municipality in the said mutation case. Basant Chandra Ghosh also sent his no objection. The mutation was allowed on 21.12.1987 in favour of Dr. Harihar Chandra Ghosh in respect of the house No. 776 and Dr. Harihar Chandra Ghosh began to pay the tax and the tax receipts were granted to him.

7. On 16.05.1995, Sudhir Chandra Ghosh, Basant Chandra Ghosh and Dr. Harihar Chandra Ghosh jointly filed T.S. No. 95 of 1995 in the court of Sub Judge-1, Chapra for injunction restraining the alienation of the suit property by the other heirs of their elder brother Shanti Chandra Ghosh. During the pendency of that suit, Dr. Harihar Chandra Ghosh sold the entire land i.e. 4 katha, 16 dhur and 5 dhuki of Holding No. 776 to the petitioner/original plaintiff. Subsequently, T.S. No. 95 of 1995 was dismissed in default vide order dated 08.01.2008. Thereafter, the opposite party no.1 filed Eviction Suit No. 04 of 2003 against Harihar Chandra Ghosh, Sukanta Kumar Ghosh, Enachi Ghosh, Kumari Arpita and Bani Brata Ghosh which was decreed on 31.01.2012. The judgment and decree dated 31.01.2012 passed in Eviction Suit No. 04 of 2003 was against



the dead person (Late Harihar Chandra Ghosh) as he had died on 30.11.2008, much prior to the judgment and decree of the Eviction Suit No. 04 of 2003.

8. The petitioner/plaintiff filed an application dated 02.06.2012 under Order XXIII Rule 3 of the Code for withdrawal of the suit with a liberty to file a fresh suit. As per the petitioner/plaintiff, the present suit was filed on 28.02.2012 in hot haste because the defendants with their criminal associates attacked the residential-cum-commercial house of the plaintiff which is the suit property. On 19.02.2012, with a view to loot away movables and belongings of the plaintiff's family, the defendants' side made forcible entry in the house to grab the same by ousting the family members of the plaintiff forcefully. The original plaintiff/petitioner was an old man of 71 years and very much perturbed and disturbed due to criminal offence committed by the defendants and other accused persons, regarding which a written FIR was lodged in the police station but the officer-in-charge of the town police station, Chapra (Saran), in collusion with the accused persons, did not lodge the case and due to intervention of the DIG, Chapra Range, the life, liberty and property of the plaintiff and his family members could be saved. Under the above-mentioned



compelling circumstances, the plaintiff/petitioner could not instruct his Advocate, Mr. Anand Bihari Srivastava, who drafted the plaint, nor he could collect and trace out the relevant documents concerning the suit properties, though most of the same were available in the house of the petitioner/ plaintiff and some documents were required to be produced from the registration office as well as the civil court, Chapra and as a consequence thereof, several relevant and important facts and documents could not be mentioned in the plaint. It has been mentioned that for getting police protection under the compelling situation, the plaintiff filed CWJC No. 4833 of 2012 in the High Court in which interim order was passed on 29.03.2012. Lastly, the petitioner /plaintiff made a prayer to withdraw the present suit with a liberty to file a fresh suit in respect of the present subject-matter of the suit, but that application was rejected by the impugned order dated 02.06.2012.

9. The learned counsel for the petitioners/plaintiffs, Mr. Raj Kishore Prasad Singh has submitted that the learned court below committed illegality in refusing the application for withdrawal of the suit with a liberty to file a fresh suit. The petitioner/plaintiff has described the entire facts which were



beyond his control that compelled him to withdraw the suit. It has also been submitted that opposite party no.2 who is a power of attorney holder of opposite party no.1, filed a petition under Order VII Rule 11 of the Code with a prayer to reject the plaint. Though that application has not been disposed of in clear words and operative portion of the impugned order shows that application of the plaintiff/petitioner for withdrawal of the suit was only disposed of but the recitals of the impugned order shows that the learned trial court while rejecting the application also dismissed the suit on merit holding that the suit was barred by the doctrine of *lis pendens*. It has been mentioned in the impugned order that the petitioner/plaintiff was aware of the T.S. No. 95 of 1995 and he also deposed as witness in that suit.

10. The circumstances which are disclosed by the petitioner/plaintiff in petition dated 02.06.2012 appears to be beyond the control of the petitioner/plaintiff. The petitioner/plaintiff has mentioned in that petition that the defendants with their criminal associates attacked the residential-cum-commercial house of the petitioner/plaintiff which is the suit property. They wanted to have an entry in that house forcibly after ousting the family members of the plaintiff and the High Court in CWJC No. 4833 of 2012 passed interim



order dated 29.03.2012. The suit was filed by the petitioner/plaintiff in hot haste and some material facts and documents were left to be mentioned in the plaint. The ground for withdrawal of the suit with a liberty to file a fresh suit appears to be genuine one.

11. The learned counsel for the opposite parties Mr. Binod Kumar Singh has submitted that this revision is not maintainable because by the impugned order not only the petition for withdrawal of the suit was rejected, but also the petition filed by the defendants for rejection of plaint under Order VII Rule 11 was allowed and as per Section 2(2) of the Code, the order rejecting the plaint is a decree against which the statutory remedy of appeal under Section 96 read with Order 41 of the Code, is available.

12. In reply, learned counsel for the petitioners/plaintiffs has submitted that the submission of the learned counsel for the opposite parties is not acceptable for the three reasons. First reason is that bare perusal of operative portion of the impugned order dated.02.06.2012 makes it clear that the petition under Order VII Rule 11 of the Code filed by the opposite party no. 2 was not disposed of but only the petition for withdrawal of the suit was rejected and the order



rejecting the application for withdrawal of the suit is revisable. As such, this revision is maintainable. The second reason is that an order passed by a court rejecting the plaint under Order VII Rule 11 of the Code is only a deemed decree, and not a decree in practical aspects. If the plaint is rejected under Order VII Rule 11 of the Code, no decree is prepared. So this revision rejecting the application for withdrawal of the suit under Order XXIII Rule 3 is maintainable. The third reason is that at the time of hearing on the point of admission of this revision petition, both the parties were heard. The point of maintainability was raised at that time. After hearing both the parties on the point of admission, a coordinate Bench of this Court admitted this revision application vide order no.17 dated 17.08.2015. So, the contention of the opposite parties stood overruled and they cannot be permitted to raise the question of maintainability of civil revision application at the final stage of hearing.

For the reasons enumerated above, the point of maintainability, in my view, cannot be raised at the later stage. From perusal of the order dated 17.08.2015, it appears that after hearing the learned counsel for the petitioners as well as the learned counsel for the opposite parties, the coordinate Bench of this Court admitted this revision application.



13. The learned counsel for opposite parties has also submitted that the suit filed by the petitioner/plaintiff was barred under Order IX Rule 9 of the CPC. Late Dr. Harihar Chandra Ghosh, who was the vendor of the petitioner/plaintiff, was the plaintiff in Title Suit No. 95 of 1995, which was filed against the lineal ascendants of opposite party no. 1 and that suit was dismissed in default on 08.01.2008 and the order dated 08.01.2008 became final as no restoration petition was filed against that order. The only remedy available against the order dismissing the suit in default is a restoration application, which may be filed under the provision of Order IX Rule 9 of the Code. No such application was filed by the plaintiff or any of the plaintiffs of Title Suit No. 95 of 1995. The order dated 08.01.2008 is not only binding on the plaintiff of that suit, but also on the persons who are claiming their rights and title under the original plaintiff. The present petitioners/plaintiffs claim themselves to be the vendee(s) of Late Dr. Harihar Chandra Ghosh, as such, they are equally bound by the order dated 08.01.2008. As per the provisions of Order IX Rule 9 of the Code, the fresh suit is barred if the earlier suit is dismissed in default. The learned counsel has further submitted that since the present suit is barred under Order IX Rule 9 of the Code, the



plaint should have been rejected under Order VII Rule 11(d) of the Code and the learned court below has rightly dismissed the suit. The learned counsel has submitted that the Hon'ble Supreme Court in case of *M/s Parasram Harnand Rao Vs. M/s Shanti Prasad Narinder Kumar Jain*, reported in (1980) 3 SCC 565 held that order IX Rule 9 of the Code operates also against persons claiming under the plaintiff and no fresh suit lies on the same cause of action.

14. On the other hand, learned counsel for the petitioners/plaintiffs has submitted that the petitioner/plaintiff was not a party to the Title Suit No. 95 of 1995. He submits further that bare perusal of order IX Rule 9 makes it clear that only the plaintiff is precluded from instituting the fresh suit if the earlier suit has been dismissed in default. He submitted that the legislative intent was to preclude only the plaintiff from bringing a fresh suit and not the persons claiming under the plaintiff.

Order IX Rule 9 of the Code is being extracted hereinbelow:-

“9. Decree against plaintiff by default bars fresh suit.-(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh



***suit** in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*

(2). No order shall be made under this rule unless notice of the application has been served on the opposite party.”

15. The learned counsel for the petitioners/plaintiffs has submitted that the expression **“the plaintiff shall be precluded from bringing a fresh suit”** reveals it explicitly that only plaintiff is precluded from bringing a fresh suit. The learned counsel has submitted that whenever and wherever the intent of legislature under the Code was to preclude/debar the plaintiff as well as the persons claiming under him, it has specifically been provided in the provision itself in clear words, debarring plaintiff as well as the person claiming under them. For example: under Sections 10 and 11 of the Code, not only the plaintiff but also the persons claiming under him have specifically been debarred in those Sections. Similar is the



position with Section 47 of the Code. The learned counsel has also relied upon the case of ***Gopi Ram Bhottica Vs. Jagarnath Singh and others*** reported in ***AIR 1929 Patna 685 (D.B.)*** and submitted that in that case the former suit was dismissed in default and the plaintiff sold the suit property and the petitioner applied for restoration under Order IX Rule 9 of the Code which was dismissed. The purchaser filed appeal in the High Court which was also dismissed. The said purchaser sold the same property to another purchaser who filed a fresh suit in which the plea raised by the defendants that the suit was barred under Order IX Rule 9 of the Code, was negated by the Hon'ble Division Bench of this Court.

He submitted further that the decision in case of ***M/s Parasram Harnand Rao (supra)*** relied upon by the opposite parties is not applicable in this case. In that case, respondent no.1 had filed a suit for declaration of his tenancy rights which was dismissed for default. He filed restoration application, which was also dismissed and the appeal was also dismissed. Subsequently, the same respondent no.1 filed an application under Section 25 of the Delhi Rent Control Act, 1958 and in that proceeding, a plea of bar of Order IX Rule 9 of the Code was taken. So, the proceeding in both the cases was



between the same plaintiff, but so far as the present case is concerned, the present plaintiff is the vendee of the plaintiff of earlier case.

The learned counsel for the plaintiffs/petitioners has submitted further that Title Suit No.95 of 1995 was filed for a relief of permanent injunction and not for title. So far as the present case is concerned, the plaintiff has claimed a declaration for his title and for this reason also, there shall not be applicability of bar of Order IX Rule 9 of the Code.

16. The expression **“the plaintiff shall be precluded from bringing a fresh suit”**, used in Order IX Rule 9 of the Code, makes it clear that the plaintiff is debarred from bringing a fresh suit if the earlier suit is dismissed in default and not any other person including the person claiming under the plaintiff is debarred. In this way, the present suit is not barred under Order IX Rule 9 of the Code.

17. As already discussed, the circumstances disclosed by the petitioner/plaintiff for withdrawal of the suit were beyond the control of the petitioner/plaintiff.

18. In my view, the impugned order dated 02.06.2012, whereby the petition under Order XXIII Rule 3 of the Code filed by the petitioner/plaintiff was rejected is not



sustainable in the eye of law.

19. Accordingly, the order dated dated 02.06.2012 passed in Title Suit No. 147 of 2012 by the 1st Sub-Ordinate Judge, Chapra, Saran is set aside. The petition filed by the petitioner/plaintiff under Order XXIII Rule 3 of the Code for withdrawal of the title suit with liberty to file a fresh suit is allowed.

20. Consequently, this civil revision application is allowed.

(Nawneet Kumar Pandey, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	04.03.2024
Uploading Date	08.01.2025
Transmission Date	

