

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1286 of 2024

Shakuntala Devi D/o Late Mukur Chand Modi, Resident of village -
Moditola, P.S. and P.O. - Kasba, District- Purnea.

... .. Petitioner/s

Versus

Sri Sri 108 Mahabir Jee of Village - Dhankhanja, Karmat, P.S. Kasba District
Purnea through Sanichar Rishi, Son of Late Magan Rishi, resident of village -
Dhankhanja, P.S. - Kasba, District- Purnea.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Ganpati Trivedi, Sr. Advocate
		Mr. Vijay Anand, Advocate
For the Respondent/s	:	Md. Mumtaz Uddin, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date :22-07-2025

The instant civil miscellaneous petition has been filed by the petitioner to challenge the order dated 30.08.2023 passed by the learned Additional District Judge-I, Purnea in Misc. Case No. 59 of 2019 filed for restoration of Probate Case No. 09 of 1997/converted into Title Suit No. 02 of 2000, which has been allowed.

02. Briefly stated, the facts of the case are that the respondent -1st set filed a probate case bearing No. 09 of 1997 for probate of the Will of one Mukur Chand Modi. Mukur Chand Modi made and published his last will and testament appointing respondent- 1st set as sole executor. The testator died on 10.08.1997. The details of the property have been mentioned in Schedule-1 of the probate petition. After issuance of notice,



original defendants appeared on 10.07.1998 and filed their written statement. The petitioner is the daughter of testator-Mukur Chand Modi. The original defendants were the mother and the brothers of the petitioner. They admitted that the land in question in Probate Case No. 09 of 1997 was allotted in the share of Mukur Chand Modi after a partition took place between Mukur Chand Modi and his brothers. Thereafter on 07.04.1981 further partition took place for the entire property of Mukur Chand Modi between his two sons, Sukhdev Prasad Modi and Baldeo Prasad Modi. It has also been submitted by the defendants that the land of the probate case was allotted in the share of Mukur Chand Modi for his maintenance as well as maintenance of his wife and daughter but the testator failed to maintain the wife and started leading an immoral life with one Chameli Devi, mother of Sanichar Rishi who has filed the probate petition on behalf of Sri Sri 109 Mahabir Jee. When Mukur Chand Modi stopped to maintain his wife, his wife Bholiya Devi filed a maintenance case under Section 125 Cr.P.C. vide Case No.49(M) of 1989, which was contested by Mukur Chand Modi. However, he lost the case and was directed to pay maintenance allowance to his wife by the learned Judicial Magistrate, Purnea. The maintenance order was confirmed by



the court of the then learned Sessions Judge. Therefore, the testator-Mukur Chand Modi had been carrying a grudge against his sons and daughter that they did not persuade their mother to withdraw the maintenance case. Mukur Chand Modi died at the age of 85 years and had lost his capacity to understand anything. Yet, it is said that Mukur Chand Modi, in order to debar his sons, his daughter and wife, to claim his share in the property given for his maintenance created three deed on 23.09.1991, one such deed is the Will in which the probate petition has been filed and other two sale deeds are stated to be executed in favour of Chameli Devi. But Mukur Chand Modi has no right to transfer the land given for maintenance in terms of family arrangement. The defendant-petitioner claimed that these deeds are false and inoperative and Mukur Chand Modi never executed any of those deeds in own senses and after understanding the effect of the deeds. As there has been challenge to execution of the Will, the probate case was converted into a title suit, bearing Title Suit No. 02 of 2000 on 22.09.2000. In 1997, wife of Mukur Chand Modi, Bholiya Devi filed a title suit bearing No.455 of 1997 against Chameli Devi. The said suit was filed by the plaintiff seeking a relief that suit land belonged to the plaintiff and defendants first party and defendants 2nd party have not got



any right, title and interest over the entire suit land of Schedule-A, B and C. Further declaration has been sought that the sale deeds executed in 1991 were false, fraudulent and collusive and not binding upon the plaintiff. Vide judgment dated 28.03.2018 and decree dated 09.04.2018, the learned Sub Judge-III, Purnea dismissed the suit of the plaintiff. Thereafter, being aggrieved with the aforesaid judgment and decree, the present petitioner preferred Title Appeal No. 49 of 2018 before the court of learned District Judge, Purnea and the same is pending for final adjudication. During pendency of Title Suit No. 02 of 2000, three defendants, mother and brothers of the present petitioner, namely Bholiya Devi, Baldeo Prasad Modi and Sukhdev Prasad Modi died. Substitution petitions for Baldeo Prasad Modi who died on 14.01.2010 and Sukhdev Prasad Modi who died on 18.01.2015, have been filed on 27.04.2010 and 20.02.2015, respectively. However, during pendency of the aforesaid substitution petitions, Most. Kamli Devi W/o late Sukhdev Modi also died on 20.10.2015 and for her substitution, petition was filed on 19.12.2015. The aforesaid substitution petitions filed for bringing on record the heirs/legal representatives of aforesaid deceased-defendants, has been allowed on 13.10.2023. As the plaintiff failed to appear in Title Suit No. 02 of 2000



(Probate Case No. 09 of 1997) on three consecutive dates, i.e., on 22.02.2019, 18.04.2019 and 03.05.2019, then the learned Additional District Judge-I, Purnea dismissed the Probate Case No. 09 of 1997/T.S. No. 02 of 2000 for default vide its order dated 03.05.2019. Against the said order dated 03.05.2019, the plaintiff of T.S. No. 02 of 2000, filed Misc. Case No. 59 of 2019 on 30.05.2019 before the Court of learned Additional District Judge-I, Purnea for recalling/setting aside the order dated 03.05.2019 passed in Probate Case No. 09/1997, Title Suit No. 02/2000. The aforesaid Misc. Case No. 59 of 2019 was finally heard on 30.08.2023 by the learned Additional District Judge and without issuing any notice to the petitioner, the Misc. Case No. 59 of 2019 was allowed and Title Suit No. 02 of 2000 was restored to its original filed. The said order dated 30.08.2023 is under challenge before this Court.

03. Learned senior counsel appearing on behalf of the petitioner submitted that though the plaintiff/respondent no.1 failed to implead the substituted defendants/respondents as party in Misc. Case No. 59 of 2019, but the present petitioner made them party as respondent-2nd set as they are said to be the necessary party. Similarly, defendants/opposite parties of Misc. Case No. 59 of 19 have not been made party in the present



petition as they were already dead and their legal heirs have already been substituted. But the learned Additional District Judge ignored the fact about dead persons being made party in Misc. Case No. 59 of 2019. Further, most of the parties of Title Suit No. 02 of 2000 have not been made parties in Misc. Case No. 59 of 2019 and without hearing them, the order dated 30.08.2023 has been passed. Learned senior counsel further submitted that it is settled principles of law that in absence of parties and/or without providing sufficient chance to defend his case, no order could be passed and hence, the order dated 30.08.2023 is bad in the eye of law. Learned senior counsel reiterated that Misc. Case No. 59 of 2019 has been disposed of without giving any opportunity of hearing to the respondents. Learned senior counsel further submitted that, in this manner, the impugned order is against the principles of natural justice and law. Learned senior counsel further submitted that the Court was in undue haste and passed the final order in Misc. Case No. 59 of 2019 on 30.08.2023 merely on the ground that statement of Sanichar Rishi was recorded wherein he stated that he could not do *pairvi* on 22.02.2019 and 03.05.2019 as talks of compromise had been going on between the parties. Learned senior counsel further submitted that therefore, no sufficient



cause was shown for restoration of the Title Suit No. 02 of 2000. There was willful default on part of the petitioner of Misc. Case No. 59 of 2019. The learned Additional District Judge further committed error when it did not issue any notice to the petitioner of the present case or the opposite parties. The petitioner never appeared in Misc. Case No. 59 of 2019. So, the petitioner never got an opportunity to cross-examine the witness in miscellaneous case. Further, the order has been against the dead persons and such order is nullity. On the point of the present petitioner not getting any opportunity of cross-examination, learned senior counsel referred to the decision of Hon'ble Supreme Court in the case of *Ayaaubkhan Noorkhan Pathan v. State of Maharashtra & Ors*, reported in (2013) 4 SCC 465 wherein the Hon'ble Supreme Court held that not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. The Hon'ble Supreme Court further held that in the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice. Thus, learned senior counsel submitted that requirement of Order 9



Rule 4 of the Code of Civil Procedure has not been fulfilled.

04. Learned counsel senior counsel referred to the decision in the case of ***Bharat Singh & Ors. Vs. Sunil Kumar Tiwary & Ors.***, reported in ***1991 (1) PLJR 688***, in Para-19, the learned Single Judge of this Court has held as under:

“19. Re. Contention 2. There cannot any doubt that when an application under Section 5 of the Limitation Act for condonation of delay is filed by a party to the suit, the other side is entitled to an opportunity of being heard. The order dismissing a suit for default gives rise to a right upon the defendant.”

Learned senior counsel also referred to the decision of Hon’ble Supreme Court in the case of ***Ram Chandra Singh Vs. Savitri Devi & Ors.***, reported in ***(2003) 8 SCC 319*** on the point of fraud and suppression of material facts, wherein the Hon’ble Supreme Court in Paras-18 and 23 held as under:

“18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.”



Thus, the learned senior counsel submitted that the impugned order dated 30.08.2023 is not sustainable and the same requires interference of this Court.

05. Learned counsel appearing on behalf of respondent submitted that there is no illegality or infirmity in the impugned order. The learned trial court has rightly passed the impugned order allowing miscellaneous case and restoring the Title Suit No. 02 of 2000 to its original file. Learned counsel further submitted that Misc. Case No. 59 of 2019 had been filed under Order 9 Rule 4 of the Code and there was no need to issue notice to the opposite parties. On this aspect, the learned counsel referred to the decision of Orissa High court in the cases of *Ratnakar Ray & Ors. Vs. Kulamoni Roy & Ors*, reported in *AIR 1951 Orissa 266* and *Prahlad Pursty Vs. Sheokh Abdul Rahman*, reported in *AIR 1966 Orissa 232*. Learned counsel further submitted that the petitioner wants to linger on the matter and the learned subordinate court has rightly taken into consideration the evidence of the respondent no. 1 regarding *pairvi* not being made on account of compromise talk and there is no infirmity in the impugned order and the same needs no interference.

06. I have given my thoughtful consideration to the



rival submission of the parties and the relevant materials available on record.

07. Admittedly the Misc. Case No. 59 of 2019 has been filed for restoration of Title Suit No. 02 of 2000 and no notice was issued to the defendants of the title suit. It is also an admitted fact that some of the defendants (three in number) have died and substitution petitions of the deceased-defendants have been pending, but without giving an opportunity to the defendants, the learned subordinate court proceeded in the matter and allowed the miscellaneous case after recording the evidence of the petitioner of the miscellaneous case. The learned subordinate court failed to consider that after dismissal of Title Suit No. 02 of 2000, a valuable right has accrued to the defendants and if a miscellaneous case has been filed for restoration of Title Suit No. 02 of 2000, the same could not be heard in absence of defendants who have already appeared in title suit and have been contesting the suit. Since a valuable right has accrued to such defendants, they cannot be deprived of the same without being heard. No doubt, Order 9 Rule 4 of the Code does not make it necessary that notice is required on the other side if the suit has been dismissed under Order 9 Rule 3 of the Code. But notice can be dispensed with only if defendant



has not appeared or after putting appearance, has not filed any written statement and has not been contesting the suit. In these circumstances, notice to the defendant might not be necessary. But when the defendants has appeared and contesting the suit, it would be against the principles of natural justice to condemn such defendant unheard. Even the decision cited by the learned counsel for the respondent in the case of ***Prahlad Pursty (supra)*** is against the contention of the learned counsel that no notice was required on the other side. Paragraphs-4 and 5 of the decision in the case of ***Prahlad Pursty (supra)*** make the point amply clear and are extracted hereunder for making the position of law clear:

“4. Order 9, Rules 9 and 14 make it clear that service of notice on the opposite party is mandatory. Rule 14 says that no decree shall be set aside on an application under Order 9, Rule 13, unless notice thereof has been served on the opposite party. Order 9, Rule 4 does not make similar provision. Absence of corresponding provision in Order 9, Rule 4 does not necessarily mean that in no case service of notice is mandatory. It can, however, be said generally that notice on the opposite party need not be served in a proceeding under Order 9, Rule 4. In certain cases, service of such notice is essential. In ILR 1949-1 Cut 572: (AIR 1951 Orissa 266), Ratnakar Ray v. Kulamoni Ray, a Bench of this Court examined this question. Ray, C. J. observed as follows:

"If the suit had not been set down ex parte against them and if they were going to



be bound by the order of restoration that had been passed, I do not understand how any order affecting them could be passed in their absence. Some support is prayed in aid from the absence of a provision in the terms or the like of Sub-rule (2) of Rule (9) of the order from Rule 4. But that does not necessarily mean that in any default under Order IX, Rule 3, restoration can be had in the absence of the opposite parties. There can be a case in which defendant has not at all appeared or having appeared has not filed any defence. In such cases it is quite possible that the Court, in its discretion, may say that no notice is necessary to be served upon him in the matter of restoration, as he must be served again after the suit is restored to its file. But what about the case in which the defendant had entered into contest and had put the plaintiff to proof of his case? In these cases certainly the dismissal of the plaintiffs' suit, be it under whatever provision of the Code, gives rise to a valuable right in his favour. It is difficult to conceive that they can be deprived of that right without being heard. It may be said even without restoration the plaintiff has a right to fresh suit on the same cause of action. It may be-so, but that does not answer the defendants cause. It may be for the purpose of a fresh suit lot of money is necessary by way of payment of court-fees and the plaintiff may not be able to institute a fresh suit. There is always many a slip between cup and lip. Under the circumstances, the right to prevent restoration of the suit is no doubt a valuable right".

The aforesaid observation has my respectful concurrence. The position, therefore is that generally a notice to the opposite party is not essential in a proceeding under Order 9, Rule 4,



C. P. C. There may, however be cases where a valuable right of the defendant may be affected. In such cases service of notice is mandatory. It is not necessary to examine whether service of notice in this case was mandatory as in fact without service of notice the defendant appeared in the case and wanted to contest.

5. So far as the second question is concerned, there can be only one answer. The defendant must be permitted to contest. Even if the case could come within the class where service of notice is not essential, the defendant cannot be debarred from contesting plaintiff's application for restoration when he wants to contest even without service of notice. By dismissal of the suit a valuable right has accrued to the defendant. It would be against the principle of natural justice to debar him from exercising that right. Absence of a provision for service of notice does not necessarily lead to the conclusion that the party wanting to exercise a right even without service of notice would be debarred from the exercise thereof."

08. Reliance could be made on the decision of ***Ayaaubkhan Noorkhan Pathan*** (supra) wherein in paragraph-30, the Hon'ble Supreme Court has held as under:

"30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice."

09. Thus, it could be simply concluded that not giving



an opportunity of hearing to the defendant-petitioner and proceeding in the matter when substitution petition for deceased-defendants have been pending, makes the impugned order highly improper and bordering on illegality. There is manifest error of jurisdiction in passing the order dated 30.08.2023 by the learned Additional District Judge-I, Purnea.

10. Hence, the impugned order dated 30.08.2023 is set aside and the matter is remanded to the learned trial court for deciding it afresh after giving opportunity of hearing to the petitioner and other defendants of Title Suit No. 02 of 2000.

11. Accordingly, the present petition stands allowed.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	AFR
CAV DATE	26.06.2025
Uploading Date	23.07.2025
Transmission Date	NA

