

(1951) 08 PAT CK 0004
In the Patna High Court
Case No : Civil Revision No. 113 of 1951

Dulhin Suga Kuer and Another APPELLANT
Vs
Deorani Kuer and Others RESPONDENT

Date of Decision : 01-08-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 146, 96

Citation : AIR 1952 Patna 72

Hon'ble Judges : Chatterji, J

Bench : Single Bench

Advocate : Brahmadeb Narain, for the Appellant; K. Rai and B.K. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Chatterji, J.—This application in revision is directed against an order of the appellate Court setting aside an ex parte decree under Order IX, Rule 13 of the Code of Civil Procedure.

2. The suit was for declaration of title and confirmation of possession in respect of the lands mentioned in the plaint. The suit was decreed ex parte on the 25th of October 1949. On the 24th of November 1949, defendant No. 1, Mt. Deorani Kuer filed an application under Order IX, Rule 13 of the CPC for setting aside the ex parte decree on the ground that there was fraudulent suppression of summons.

3. The application was resisted by the plaintiffs who asserted that there was proper service of summons.

4. The learned Munsiff held that the summons's were duly served. He accordingly rejected the application on the 30th of March 1950. Against this order an appeal was preferred to the District Court by two persons to whom defendant No. 1, Mt. Deorani Kuer transferred the disputed lands, This transfer appears to have been effected subsequent to the ex parte decree but before the

filing of the application under Order IX, Rule 13, Civil Procedure Code.

5. An objection was taken in the Court below that the appeal by the transferees was not maintainable, but the learned Additional Subordinate Judge who heard the appeal overruled that objection. On the merits, he held that the summons was fraudulently suppressed and was not served upon defendant No. 1. He accordingly allowed the appeal and set aside the ex parte decree. The plaintiffs, therefore have presented this application in revision.

6. Mr. Brahmadeo Narain on behalf of the petitioners contends that the appeal in the Court below was not competent and the Court had, therefore, no jurisdiction to set aside the ex parte decree. The learned Additional Subordinate Judge held that u/s 146 of the CPC the transferees were competent to prefer the appeal. Section 146 provides:

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Mr. Brahmadeo Narain argues that Section 146 has no application because the transfer was effected prior to the initiation of the proceeding under Order IX, Rule 13. It is said that if the transfer had been made subsequent to the initiation of that proceeding the section might have been applicable. In support of his contention, reliance is placed on Beni Ram v. Rani D. R. Kunwar, 13 Luck 554, in which it was laid down that Section 146 of the CPC contemplates a change of title after the decree. In that case the transfer was effected before the date of the suit. The true test, in my opinion, is whether the transferee is affected by the order or decree in question. Here, the transfer was subsequent to the ex parte decree. Therefore, the transferees were certainly interested in setting aside the ex parte decree. Mr. Brahmadeo Narain argues that it was open to them to file an application under Order IX, Rule 13. But defendant No. 1, herself filed an application under Order IX, Rule 13 and the transferees could certainly take the benefit of her application and it was not necessary, for them to file a separate application. When the application was rejected, it was, of course, open to defendant No. 1 to file an appeal, but apparently she did not prefer any, because she had no longer any interest in the property. The transferees were vitally interested in setting aside the ex parte decree who were, in the circumstances, entitled to prefer an appeal.

7. The application is dismissed with costs: hearing fee one gold mohur.