

(1998) 09 PAT CK 0009
In the Patna High Court
Case No : Civil Revision No. 570 of 1996

Maheshwar Prasad Sinha and Others	APPELLANT
Vs	
Awadh Prasad Sinha (since deceased) through his Heir and Others	RESPONDENT

Date of Decision : 24-09-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 19A, Order 9 Rule 13

Citation : (1998) 3 BLJR 1815 : (1998) 3 PLJR 599

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.Y. Eqbal, J.—This Civil Revision application is directed against the order dated 16.2.1996 passed by the 2nd Additional District Judge, Muzaffarpur, whereby he has affirmed the order dated 21.3.1995 passed by the Munsif, Muzaffarpur West, refusing to set aside the ex-parte order dated 17.2.1990 passed in Title Suit No. 45 of 1989.

2. The plaintiffs instituted Title Suit No. 45 of 1989 against the defendants (now deceased) namely, Inderashan Kuer and Sabuj Kuer, for declaration that the deed of gift dated 8.9.1978 said to be executed by Rampukari Kuer is forged, fabricated, illegal document and the defendant-1st party never acquired any right, title and interest of possession on the basis of the said deed of gift. Further declaration was sought for that the defendant 1st party had no right to execute the gift deed in favour of the defendant-second party. The trial Court after issuing summons of the suit passed ex-parte decree on 17.2.1990. The original defendant filed an application under Order IX, Rule 13 of the CPC for setting aside the ex-parte decree which was registered as Misc. Case No. 4 of 1990. In the said Misc. case, evidence was led by both the parties and the learned Munsif disposed of the Misc. case in terms of the order dated 21.3.1995 and refused to set aside the decree on the ground that summons of the suit was validly served

on the defendants. At this stage it is worth to State here that during the pendency of the Miscellaneous proceeding the defendant-opposite party No. 1 died and the present petitioners were substituted in their place. After Misc. case was dismissed, the petitioners being aggrieved by the said order preferred a Misc. appeal before the District Judge, Muzaffarpur being Misc. Appeal No. 14 of 1995. The said appeal was eventually transferred to the Court of 2nd Addl. District Judge. The appellate Court after hearing the parties dismissed the appeal and confirmed the order passed by the Munsif. Hence this Civil revision application.

3. Mr. Arun Bihari Mathur, learned Sr. Advocate appearing for the petitioners assailed the impugned order as being illegal and contrary to the facts and evidence on record. Learned counsel submitted that no personal service was ever effected on the deceased defendants of the suit and the service of notice was accepted as validly served under the provision of Order V, Rule 19-A of the Code of Civil Procedure. Learned counsel further submitted that in absence of valid service of summons on the defendants, the ex-parte decree passed by the Munsif is liable to be set aside.

4. On the other hand, Mr. Brijendra Mishra, learned counsel appearing for the opposite parties firstly submitted that both the trial Court and the appellate Court have gone into evidence in detail adduced by the parties and came to a concurrent finding that summons of the suit was duly served on the defendants and they had knowledge about the suit. This Court, therefore, should not interfere with the order and reverse the findings in exercise of revisional jurisdiction. Learned counsel brought to my notice the relevant portion of the impugned order and also the order-sheet and submitted that it was specific case of the plaintiffs in the Misc. proceeding that summons and notices of the suit was received by petitioner No. 1 Maheshwar Prasad who is none-else but the son of defendant No. 1 Indarashan Kuer. Learned counsel submitted that in support of service of summons not only the process server of the Civil Court but also the postal peon was examined and various documents were called for from the post office and those documents were proved in support of the fact that summons sent by Registered post was received by Maheshwar Prasad on behalf of Defendant No. 1 his mother. Learned counsel further submitted that during the pendency of the Misc. proceeding both the defendants died and the present petitioners including Maheshwar Prasad were substituted. Learned counsel further submitted that Maheshwar Prasad did not examine himself as a witness to rebut the evidence of the service of summons.

5. I have minutely examined the evidence adduced by the parties in the Misc. proceeding and also perused the impugned order passed by the Court below. Admittedly the suit was filed against the defendants who were ladies. It appears that summons issued to them by the Court below by registered cover was received by Maheshwar Prasad son of the defendant. The postman of Saraiya Post Office has been examined as OPW 4 who deposed that registered cover in

the name of Indrashan Kuer and Sabuj Kuer were delivered to Maheshwar Prasad who received the summons on behalf of his mother. The said witness has identified the signature of Maheshwar Prasad. Similarly the process server has also been examined who stated about service of summons. From perusal of the record it appears that during the pendency of the Misc. proceeding, the defendant-petitioner died on 26.11.1991 and thereafter her son Maheshwar Prasad and others were substituted in the said Misc. proceeding. After substitution of Maheshwar Prasad and others in places of the deceased defendants the Court below fixed the Misc. case of the evidence. Curiously enough Maheshwar Prasad did not examine himself as witness to deny the service of summons on him by registered post. The trial Court after considering the evidence adduced by the parties in detail found that summons of the suit was duly served on the defendants, through his son Maheshwar Prasad Singh. As noticed above, although after the death of the original defendants her heirs including Maheshwar Prasad were substituted and they continued the proceeding to set aside the ex-parte decree but Maheshwar Prasad did not examine himself as a witness. Admittedly the fact that the postal peon met Maheshwar Prasad Singh and delivered the summons issued to the defendants to him on his request was in the knowledge of Maheshwar Prasad Singh who could have denied the service of summons on him by deposing in the case. It is well settled that when the facts are within the special knowledge of the party the burden of proof is on such party to disclose the fact by leading evidence. It is equally settled that presumption of service of notice is not rebutted merely by denying the fact in the pleadings. Admittedly Maheshwar Prasad Singh kept himself away from the Court did not examine himself as a witness to deny the allegation of service of summons on him. No explanation whatsoever has been given for his non-examination as a witness in the Misc. proceeding. In this circumstances, adverse inference must be drawn against him. Both the Courts below rightly come to the conclusion that summons of the suit was duly served on the defendants and the defendants including their sons have noticed and knowledge about the institution of the suit and passing of the ex-parte decree.

6. Having regard to the facts and circumstances of the case and the discussions made above, I do not find any reason to interfere with the impugned order. There is no merit in this Civil Revision application which is, accordingly, dismissed.