

MST. BHABIA DEVI
v.
PERMANAND PD. YADAV

FEBRUARY 24, 1997

[K. RAMASWAMY AND G.T. NANAVATI, JJ.]

Code of Civil Procedure, 1908 :

Order IX Rule 13—Ex parte decree—Application for setting aside—In a suit for specific performance defendant did not appear—Ex parte decree granted—Defendant filed application for setting it aside on the ground that notice was not served on her—Finding recorded by Courts below after appreciating evidence on record that defendant refused to sign or put thumb impression on the notice and refused to acknowledge the registered cover—Besides, High Court noticed another mode of service by way of Gazette publication—Held, it is clear that defendant has refused to accept the notice—She was rightly set ex parte—Special leave petition of defendant dismissed.

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C)
No. 3559 of 1997.

From the Judgment and Order dated 24.9.96 of the Patna High Court in Appeal from Original Order No. 406 of 1986.

S.R. Yadav and J.D. Jain for the Petitioner.

The following Order of the Court was delivered :

This special leave petition arises from the order of the High Court of Patna, made in Appeal from the Original Order No. 406/89 on July 24, 1996.

The respondent had filed a suit for specific performance on the foot of an agreement alleged to have been executed by the petitioner. The petitioner was served notice but since she did not contest the suit, *ex-parte* decree was granted. Subsequently, the petitioner filed an application under Order IX, Rule 13, C.P.C. seeking setting aside of the *ex-parte* decree. Therein, her specific case was that she was not residing at Garhia village

A and, therefore, the notice could not be deemed to have been served on her. The endorsement is not correct. The question was gone into by the courts below after recording the evidence of one Laxuman Yadav, Mahendra Yadav and process server. It is their case that on January 15, 1985 when the summons were handed over to Mst. Bhabia Devi and when she was acquainted with the facts, she refused to sign or put thumb impression on the notice. When the process server had gone to serve it on her personally on April 2, 1984 to the village and also on April 9, 1984 when the registered card acknowledgement was sent, she refused to acknowledge it. Under those circumstances, the courts below have concluded and the High Court has recorded as under :

C "Apart from the aforementioned two modes for service of notice, as I have already noticed, there was yet another mode by way of Gazette publication. An attempt has been made on behalf of the appellant to say that she being illiterate lady could not learn about the Gazette publication."

D This is a finding of fact on appreciation of the evidence. Thereby, it is clear that petitioner had refused to accept the notice. Consequently, she was rightly set *ex-parte*. The learned counsel for the petitioner seeks to contest the case on merits. We cannot go into the merits since the appeal was not subject matter in any of the appeals filed either under Section 96 or Section 100, C.P.C.

E The special leave petition is dismissed.

R.P.

Petition dismissed.