

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Misc. Appeal No.96 of 2016**

- Darsu Ram S/o Late Amar Say Sahu, Aged About 60 Years R/o House No.A-944, Yamuna Vihar, Jamanipali, Tah. Katghora, Distt. Korba, Chhattisgarh(Plaintiff)

---- Appellant**Versus**

- Bali Ram Rajwade S/o Mohanlal Rajwade, Aged About 45 Years R/o House No. B/158, Phase-1, Deepanjali Nagar, N.T.P.C. Colony, Vishakha Pattanam, Distt. Vishakhapatnam (Andhra Pradesh)

---- Respondent

For appellant	: Shri Viprasen Agrawal, Advocate.
For respondent	: None present.

Hon'ble Shri Justice Chandra Bhushan Bajpai**Order On Board****27.10.2016**

Heard.

2. The appeal has been preferred under Order 43 Rule 1 of the Code of Civil Procedure, 1908, (for shorty, the Code') against the order dated 11.7.2016 passed by the trial Court in Civil MJC No.1/2016.

3. The instant appeal has been preferred within its limitation.

4. Learned counsel for the appellant prays that the matter may be disposed of finally at the motion stage itself without issuance of notice to the respondents as the Court below has not considered the paramount provisions as in Order 9 Rule 9 of the Code wherein the Court below has to examine whether there was any sufficient cause for the non-appearance of the concerned party when the suit was

called for hearing. The Court below without complying the essential ingredients of Order 9 Rule 9 of the Code dismissed the said MJC which is against the settled provision of law and the instant appeal is purely against the non compliance of legal provisions, hence, issuance of notice to the respondents is not necessary.

5. Perused the appeal and the documents annexed and heard the matter finally at the motion stage itself without issuing notice to the respondent/defendant.

6. Facts in brief are that the appellant/plaintiff has filed Civil Suit No.1B/2007 before the concerned trial court for recovery of 7 lakh from the respondent/defendant. The said suit was listed on 04.7.2014 for evidence of the plaintiff. The plaintiff on account of some ailment failed to give his appearance before the trial Court on that day, the trial Court there after closed the case and on the very next date passed the judgment and decree in the said civil suit. Against the said judgment and decree passed by the trial Court, the appellant under the relevant provisions of Article 123 of the Limitation Act, 1963 within 30 days, filed MJC under Order 9 Rule 9 of the Code praying that as there was sufficient cause for non appearance of the plaintiff on 04.7.2014, the judgment and decree passed may be set aside the he be given opportunity to take part in the proceedings of that suit. The Court below vide order dated 11.7.2016 in para 7 held that as the concerned civil suit is not dismissed for want of prosecution on the other hand, the suit is disposed of in absence of plaintiff on its merits, hence, the provisions

of order 9 Rule 9 of the Code is not applicable in the matter thereby dismissed the application as not maintainable.

7. Learned counsel for the appellant would submit that as per the essential ingredients, if the concerned party demonstrates sufficient cause of his non appearance on the date of hearing, the court is duty bound to set aside the judgment and decree. The order passed by the Court below in Civil MJC No.01/16 is against settled principles of law, hence the same may be set aside with a direction to the Court below to dispose of the said MJC on its merits in accordance with the provisions of Order 9 Rule 9 of the Code.

8. To appreciate the arguments advanced on behalf of the appellant, provisions of Order 9 Rule 9 of the Code is applicable which is reproduced as under:-

“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.”

9. A perusal of the facts shows that on 04.7.14, the appellant had not appeared before the court below nor there was any representation on his behalf in the hearing of the said civil suit and on the very next date the court below passed the judgment in

absence of the plaintiff/appellant. It is also apparent that the Court below while deciding the Civil MJC No.1/16 held that as the suit has been disposed of in absence of the plaintiff on its merits, the application under Order 9 Rule 9 of the Code is not applicable thereby dismissed the said application as not maintainable.

10. A perusal of the concerned provisions it appears that if the concerned party successfully demonstrates the sufficient cause for his non appearance when the suit was called for hearing, the Court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit. As the above legal provisions is crystal clear the court has to examine the existence of sufficient cause for non appearance, but in this case the Court below failed to examine such requirement. Hence, the order passed by the court below vide order dated 11.7.2016 is bad in law and against the provisions of law. Hence, it requires interference.

11. On due consideration, order dated 11.7.16 passed in Civil MJC No.01/16 (Darsu Ram Sahu vs. Baliram Rajvade) is hereby set aside. The court below is directed to restore the said MJC in its original number. The Court below is further directed to dispose of the same afresh after hearing both the parties and also after affording opportunity available under the law on the basis of provisions of order 9 Rule 9 of the Code.

12. Needless to mention that while passing such order, impugned order dated 11.7.16 shall not come in the way. The appellant is directed to remain present before the concerned court either in

person or through his counsel for further hearing on **30.11.2016**.

The Court below is further directed to make efforts as per law for the representation of the non applicant through issuance of notice as per law and dispose of the said MJC as directed.

13. The appellant may file a copy of the order before the concerned trial Court for compliance.

14. Registrar (Judl.) is also directed to send a copy of the order to the concerned court below through usual and fax mode immediately for compliance.

15. MAC allowed. No order as to cost.

**Sd/-
(Chandra Bhushan Bajpai)
JUDGE**