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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 50 of 2016**

1. Kadamiya Bai D/o Kashiram Gond, Aged About 50 Years R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Defendant No.4
2. Janiya Bai, W/o Late Kashiram Gond, Aged About 65 Years R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Defendant No.5

---- Petitioners**versus**

1. Dawan Singh S/o Late Dharam Singh, Aged About 42 Years Caste Gond, Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Plaintiff
2. Sunil Kumar, S/o Late Guman Singh, Aged About 18 Years Caste Gond, Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Plaintiff
3. Premnarayan, S/o Late Guman Singh, Aged About 10 Years Caste Gond, Minor, Represented Through Mother Gyanwati Wife Of Guman Singh, Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Plaintiff
4. Gyanwati, W/o Late Guman Singh, Aged About 42 Years Caste Gond, Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Plaintiff
5. Gyan Singh, S/o Kalyan Singh, Aged About 26 Years Cultivator, Caste Gond, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Plaintiff
6. Janki Bai @ Jankunwar, W/o Late Rambhajan, Aged About 80 Years Caste Gond, Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Defendant
7. Kamal Singh, S/o Babua Gond, Aged About 20 Years Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Defendant
8. Sukhdev Sigh, S/o Babua Gond, Aged About 18 Years Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Defendant
9. Sarodhan Singh, S/o Kailash Singh, Aged About 50 Years Cultivator, R/o Village Ghaghra, Police Station & Tahsil Pendra, District Bilaspur (Chhattisgarh).....Defendant
10. State Of Chhattisgarh, Through The Collector, Bilaspur (Chhattisgarh)

---- Respondents

For Petitioners	:	Shri Dharendra Prasad Mishra, Advocate.
For Respondent No.10	:	Shri S.C. Khakhariya, Deputy Advocate General on advance copy.
For Other Respondents	:	Not noticed.

Hon'ble Shri Justice Chandra Bhushan Bajpai

Order on Board

18/02/2016

1. Heard on I.A. No. 2 of 2016, an application for taking documents on record.
2. On due consideration, I.A. No. 2 of 2016 is hereby allowed and the documents annexed alongwith the application are taken on record subject to their admissibility.
3. Also heard on I.A. No.3 of 2016, an application for not pressing the relief sought against order dated 28.10.2015.
4. Learned counsel for the Petitioners submits that as the Court below committed error of law on the face of record hence the matter has to be heard and appreciated on merits. He prays that both the orders dated 24.3.2015 and 28.10.2015 may be examined and appreciated as per the relief sought and the grounds taken in the instant petition that both the orders are without jurisdiction and erroneous. Hence, he prays that I.A. No. 3 of 2016 may kindly be permitted to be withdrawn.
5. On due consideration, I.A. No. 3 of 2016 is hereby disposed of as withdrawn. Hence, the instant petition would be heard against both the orders passed by the trial Court on 24.3.2015 and 28.10.2015. It is submitted on behalf of the Petitioners that the matter involves a pure question of law as there is apparent violation of law in passing both the

orders and therefore as per settled law the matter could be disposed of without even noticing Respondents No.1 to 9.

6. On due consideration, the matter is heard finally at the motion stage itself without noticing Respondents No.1 to 9.

7. Brief facts required for adjudication of the instant petition are that before the trial Court i.e. Civil Judge, Class I, Pendra Road, District Bilaspur, Chhattisgarh, a civil suit initially numbered as 12A of 2014 (no knowledge regarding the exact number of the civil suit either before transfer or after transfer but the number mentioned in the certified copies is that Civil Suit is numbered as 12A of 2014) between Dawan Singh and 4 Others and Janki Bai and 6 Others is pending before the Civil Judge, Class-II, Pendra Road, District Bilaspur, Chhattisgarh. Thereafter, the said civil suit has been transferred to Civil Judge, Class-I, Pendra Road as per order sheet dated 10.11.2014. On 3.9.2014, Defendants No.4 – Kadamiya Bai, No.5 Janiya Bai and No.6 Sarodhan Singh remained absent. There was no representation on their behalf before the Court. In view of this, Civil Judge, Class II, Pendra Road proceeded *ex parte* against all those three defendants and listed the matter for appearance and written statement. On 10.11.2014, the Court below ordered for issuance of notice to Defendant No.7 – Government of Chhattisgarh for its appearance and listed the matter for appearance on 9.2.2015. In the meanwhile, before the date so fixed, on 17.11.2014 on behalf of Defendants No.4 and 5 an application has been filed under Order IX Rule 7 of the Code of Civil Procedure, 1908 (for short 'the Code') alongwith an affidavit and power to set aside the *ex parte* proceedings fixed for hearing on 9.2.2015. Thereafter, finally the Court below heard the said application under Order IX Rule 7 of the Code on

24.3.2015 and held that the limitation provided under Article 123 of the Limitation Act, 1963 is for 30 days and Defendants No.4 and 5 have not mentioned on which date they became aware of the *ex parte* proceedings against them. The Court below further held that the application was filed after the prescribed limitation and hence it dismissed the said application under Order IX Rule 7 of the Code as there was no application filed in support thereof to condone the delay. Thereafter, Defendants No.4 and 5/ the Petitioners filed an application under Order XLVII Rule 1 of the Code alongwith an application under Section 5 of the Limitation Act, 1963 for reviewing the order dated 24.3.2015. The Court below registered the same as MJC No. 11 of 2015. After hearing the MJC, vide order dated 28.10.2015, it dismissed the application filed under Section 5 of the Limitation Act, 1963 as there was no reason shown for filing the review application belatedly and accordingly the Court below also dismissed the application under Order XLVII Rule 1 of the Code.

8. Against both the orders, the Petitioners have approached the jurisdiction of this Court available under Article 227 of the Constitution of India and urged that both the orders are bad in law, perverse, erroneous and therefore the same are liable to be set aside. It is further submitted that the trial Court erred in dismissing the application under Section 5 of the Limitation Act, 1963 for condonation of delay. The trial Court also failed to appreciate the fact that the Petitioners are rustic and illiterate, they have no knowledge about the process of law as well as limitation for filing an application for setting aside the *ex parte* proceedings on account of their inability to understand the procedure that they have filed an application to set aside the *ex parte* decree belatedly and the same ought to have been filed along with an application for condonation of delay. A party/litigant

should not be punished for the fault on the part of a counsel. In the present case, since the counsel engaged by them did not appear before the Court, the Petitioners should not be made to suffer and deprived of justice. The Court below ought to have afforded an opportunity to the Petitioners to defend themselves and it would be in the interest of justice to dispose of the matter on its merits. Hence, it is prayed that both the aforementioned orders may be set aside and the Petitioners may be allowed to take part in the proceedings of the civil suit.

9. Heard Learned counsel for the Petitioners, who, in turn supported the grounds taken in the instant writ petition and submitted that both the orders passed by the Court below may be set aside and the Petitioners may be afforded an opportunity to participate in the proceedings of the civil suit.

10. For the purposes of the appreciation of the pleadings, facts and the arguments advanced on behalf of the Petitioners, perused both the orders passed by the Court below and the documents annexed thereto.

11. The provisions of the Code relevant for adjudication of the issue involved in the instant petition read thus:

Order IX Rule 7 of the Code is as under:

7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance. — Where the Court has adjourned the hearing of the suit ex-parte and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day, fixed for his appearance.

Order XLVII Rule 1 of the Code is as under:

1. Application for review of judgment— (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Order XLIII Rule 1 (c) and (d) of the Code is as under:

1 . Appeal from orders— An appeal shall lie from the following orders under the provisions of section 104, namely:—

(c) an order under rule 9 of Order IX rejecting an

application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;

Order XLI Rule 1 of the Code is as under:

1 . Form of appeal. What to accompany memorandum— (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded:

[Provided that where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the Appellate Court dispense with the filing of more than one copy of the judgment.]

Order XLII Rule 1 of the Code is as under:

1 . Procedure— The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

Rule 372 of the Chhattisgarh Civil Court Rules, 1961 does not say anything regarding registration of MJC under the provisions of Order XLVII Rule 1 of the Code.

12. From perusal of the order sheets dated 3.9.2014, 10.11.2014 and 17.11.2014, it appears that on 3.9.2014, both the Petitioners/Defendants No.4 and 5 and Defendant No.6 remained absent and their counsel also did not represent them before the Court below. As such, the Court below proceeded *ex parte* and fixed the matter for appearance of other defendants and also for written statement. Before the appearance of Defendant No.7 in the case, as there was no any order of closure of the opportunity of Defendants No.4 and 5, the application for setting aside the *ex parte* proceedings was filed by the Petitioners/Defendants No.4 and 5. On examination of the provisions of Order IX Rule 7 of the Code, it reveals that on showing good cause for previous non-appearance, the Court may, upon such terms as it directs as to costs or otherwise, set aside the order for hearing of the suit *ex parte* and hear the defendant in answer to the suit as if he had appeared on the date fixed for his appearance. Meaning thereby, if any stage of proceedings is crossed and the matter is fixed for next stage of proceedings and under this circumstance if the defendant appears and shows good cause for previous non-appearance, the Court may afford him an opportunity and allow him to appear as if he had appeared on the date fixed for his appearance. The principle “as if he had appeared on the date fixed for his appearance” is the core issue in the facts of the present case. Defendant No.7 was still required to be appeared. Notice was issued. Opportunity of Defendants No.4 and 5 to file a written statement was not closed and the Defendant No.7 has also to file written statement as per settled law. Under this circumstance, since the stage of filing the written statement by the Defendants was not completed and the matter was not listed for further hearing, as per settled law, Defendants No.4 and 5 were not even required to file any application under Order IX Rule 7 of the Code.

13. On the other hand, the Petitioners/Defendants No.4 and 5 had, under the law, authority to appear on 17.11.2014 and file their written statement. The trial Court was dutiful to accept their appearance and grant them an opportunity to file written statement as the matter was already listed for appearance of Defendant No.7 and filing his written statement if he so desires.

14. In the considered view of this Court, the trial Court committed a grave error of law by not allowing Defendants No.4 and 5 to continue with the proceedings of the case. The order passed by the trial Court dated 24.3.2015 is against the settled provisions of law. No appreciation of calculation of delay in filing the application was required as there was no requirement of law to file even any application under Order IX Rule 7 of the Code and also any application under the Limitation Act since the stage to file written statement was not over at the time of appearance of Defendants No.4 and 5 on 17.11.2014.

15. In view of the above, the order dated 24.3.2015 is held patently illegal and requires interference.

16. So far as appreciation of the order dated 28.10.2015 passed by the trial Court in M.J.C. No.11 of 2015 is concerned, a perusal of Rule 372 of the Chhattisgarh Civil Court Rules, 1961 reveals that there is no provision to register an MJC in an application under Order XLVII Rule 1 of the Code. Again the Learned trial Court committed a grave error by registering the said MJC without even going through the relevant provisions and to satisfy itself whether Rule 372 of the Chhattisgarh Civil Court Rules says for the registration of MJC in an application under Order XLVII Rule 1 of the Code or not.

17. In the considered view of this Court, the trial Court by registering the said MJC committed an error of law.

18. From perusal of Order XLVII Rule 1 of the Code, it reveals that as there is no decree in the matter, the provision of Order XLVII Rule 1 of the Code may attract when any person considering himself aggrieved by an order from which an appeal is allowed, but from which no appeal has been preferred or an order from which no appeal is allowed. The instant matter falls within the category of Order XLVII Rule 1(b) as from the perusal of the Order XLI, Order XLII and Order XLIII of the Code, it is apparent that the order passed by the Court dated 24.3.2015 is not an appealable order. While considering an application the Court ought to have considered the category of the application in which category the application has been filed.

19. From a bare perusal of the order dated 28.10.2015, it reveals that the trial Court failed to appreciate the category in which the order passed by the trial Court dated 24.3.2015 falls for review. It appears that the Learned trial Court did not apply its mind at the time of disposing of the said MJC. Needless to mention that registration of the said MJC was without authority of law and was not provided under Rule 272 of the Chhattisgarh Civil Court Rules, 1961. The trial Court also utterly failed to appreciate the relevant provisions of the Limitation Act, 1963 for the period of limitation. The trial Court simplicitor, without disclosing the limitation period, dismissed the application under Section 5 of the Limitation Act. It is expected of the trial Court to first ascertain the period of limitation, the Article in which the matter falls and then to appreciate regarding condonation of delay.

20. Upon perusal of the entire order dated 28.10.2015, it appears that the trial Court, without appreciating the law as applicable, passed a snapshot,

vague and illegal order without proper application of its mind.

21. On due consideration, the instant writ petition deserves to be and is hereby allowed. The trial Court is directed to afford an opportunity to the Petitioners to file their written statement and to take part in further proceedings of the suit in accordance with law.

22. The Petitioners are directed to file their written statement on 6.4.2016. The Petitioners are also directed to remain present before the said trial Court either in person or through their counsel on **6.4.2016**. The orders passed by the trial Court on 24.3.2015 and 28.10.2015 are hereby set aside. The trial Court is directed to remain cautious in future during hearing and disposing of any such matter and the orders passed in those matters must be in accordance with law.

23. The Registrar (Judicial) is directed to circulate a copy of this order to all the Judges of the Subordinate Judiciary having jurisdiction to hear and decide such matters, for future guidance and make them aware regarding the relevant provisions of law.

24. The Petitioners may also submit a copy of this order before the Court below for compliance.

25. The Registrar (Judicial) is also directed to send a copy of this order to the concerned trial Court through usual and fax modes for compliance and future guidance.

Sd/-
Chandra Bhushan Bajpai
Judge