

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.312 of 2005**

1. Rajesh Kashyap (died) through legal representatives.
- 1a. Smt. Nirmala Kashyap, widow of late Rajesh Kashyap, aged about 30 years.
- 1b. Ku. Jyoti, daughter of late Rajesh Kashyap, aged about 10 years.
- 1c. Deepu, son of late Rajesh Kashyap, aged about 8 years.
- 1d. Ku. Laxmi, daughter of late Rajesh Kashyap, aged about 6 years.
- 1e. Ku. Saraswati, daughter of late Rajesh Kashyap, aged about 4 years.

Appellants No.(b) to (e) are minor through natural guardian their mother Smt. Nirmala Kashyap.

All are resident of Village Namnakala, Ring Road, Ambikapur, P.S. & Tahsil Ambikapur, District Surguja (CG).
---- Appellants

Versus

1. Sukhana (died) through legal representatives.
- 1a. Rajmaniya, wife of late Sukhna, aged about 55 years.
- 1b. Savitri, daughter of late Sukhna, aged about 35 years.
- 1c. Leelavati, daughter of late Sukhna, aged about 24 years.
- 1d. Bajrant, son of late Sukhna, aged about 22 years.

All are resident of near Pani Tanki, Namnakala, Ambikapur, P.S. & Tahsil Ambikapur, District Surguja (CG).

2. Fodor, S/o Thuru, aged about 70 years, By Occupation Agriculture, R/o. Village Namanakala, Ambikapur, District Surguja (CG).
---- Respondents

For Appellants : Ms. Hamida Siddiqui and Mr.
 Raghvendra Verma, Advocates
 For Respondents: Shri Shakti Raj Sinha, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

16/09/2016

(1) The substantial question of law involved, formulated and to be answered in the second appeal preferred by appellant/defendant No.1, is as under:-

“Whether the first appellate Court was justified in reversing the judgment and decree of the trial Court without issuing and giving notice to the appellant/defendants, which is contrary to the provisions contained in Order 41 Rule 14 sub-rule (4) of Code of Civil Procedure, 1908?”

(2) In order to answer the above-stated substantial question of law, following facts are required to be noticed.

(I) Plaintiff-Sukhana filed a suit against defendant No.1-Shivpatiya, defendant No.2-Fodor & defendant No.3-Kavla but defendant No.3 Kavla died during the pendency of the suit and his name was deleted from the array of cause title by order of trial Court dated 20.07.1998. The plaintiff's suit was dismissed by judgment and decree dated 16th February, 2000 passed in Civil Suit No.41-A/1999 by the Additional Civil Judge, Class-I, Ambikapur.

(II) Plaintiff-Sukhana preferred an appeal before the first appellate Court being Civil Appeal No.18-A/2002 (*Sukhana vs. Shivpatiya & Others*), the said Court on 01.05.2002 held

that since defendants No.1 & 2 remained *ex-parte* before the trial Court, issuance of notice is not necessary to them and fixed the date for hearing and in the meanwhile, defendant No.1- Shivpatiya Bai has died on 04.12.2001. Ultimately, first appeal was allowed by the first appellate Court on 23.09.2003 and the plaintiff's suit was decreed.

(3) Feeling dissatisfied with the judgment and decree of the first appellate Court, the legal representatives of defendant No.1- Shivpatiya Bai have filed second appeal under Section 100 of the Code of Civil Procedure (for short 'the CPC') in which, substantial question of law has been framed and incorporated in opening paragraph of the judgment.

(4) Ms. Hamida Siddiqui, learned counsel appearing for the legal representatives of appellant/defendant No.1, would submit that the first appellate Court has committed grave legal error in decreeing the suit of the plaintiff dispensing with the notice to the present appellant/defendant No.1 as defendant No.1 has already filed written statement on 13.07.1990 and she has already filed registered address before the trial Court, therefore, the provision contained in Order 41 Rule 14(4) of CPC would not be applicable. She would further submit that the appellant/defendant No.1-Shivpatiya Bai died during the pendency of the first appeal on 04.12.2001, yet the legal representatives of defendant No.1-Shivpatiya Bai were not

brought on record and the appeal was allowed decreeing the suit of the plaintiff, therefore, the judgment and decree of the first appellate Court be set-aside and the matter be remanded back to the first appellate Court for hearing and disposal of appeal on merits.

(5) Mr. Shakti Raj Sinha, learned counsel appearing for the respondents would support the impugned judgment and decree of the first appellate Court.

(6) I have heard learned counsel appearing for the parties and also considered the rival submissions made therein and gone through the records with utmost circumspection.

(7) The question for consideration would be whether the first appellate Court was justified in dispensing with the notice of the appeal to the appellant/defendant No.1 holding that she has not appeared before the trial Court.

(8) At this stage, it would be appropriate to notice Order 41 Rule 14(4) of CPC as under:-

“14. Publication and service of notice of day for hearing appeal-(1) x x x x x.

(2) x x x x x

(3) x x x x x

(4) Notwithstanding anything to the contrary contained in sub-rule (1), it shall not be necessary to

serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal”.

(9) A careful perusal of the above-stated provision would show that the issuance of notice is not necessary upon respondents/defendants on any proceeding incidental to an appeal on any respondents other than impleaded for first time in the Appellate Court, unless he/she has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal.

(10) The Full Bench of the High Court of Madhya Pradesh has considered the provisions contained in Order 41 Rule 14(4) of the CPC in the matter of ***Jamuna Bai and others vs. Chhote Singh and others*** and held in paras 7, 8, 9, 15 & 16 of the report as under:-

7. Sub-rule(4) of Order XLI, Rule 14 has been introduced by amendment in Code of Civil Procedure (Amendment) Act, 1976. Objects and reasons for such amendment is provided under Clause 90-Sub-clause (vii) as under:

“With a view to avoiding the delay in the disposal of appeal, it is felt that the service of the memorandum of appeal on those parties who has not appeared in the Court of first instance and who had not filed any address for service may be dispensed with. Sub-

rules (3),(4) and (5) are being inserted in Rule 14 to achieve this object.”

8. Thus, it is clear that in order to avoid delay in the disposal of appeal, it was felt that service of memorandum of appeal on those parties, who had not appeared in the Court of first instance and who had not filed any address for service may be dispensed with. Sub-rules (3), (4) and (5) are being inserted in Rule 14 to achieve this object. Thus, powers are conferred upon the Court to dispense with service of notice upon the respondents, who have not appeared before the Court of first instance or have failed to file address for the service in the Court of first instance. Order 6, Rule 14-A provides for furnishing an address for service in a prescribed form in the Court of first instance.

9. We are unable to agree with the reasonings in the case of Sushila and Others (supra) that sub-rule (4) of Rule 14 of Order XLI is applicable to incidental proceedings in appeal. On the contrary the Legislature has used specific words i.e. “proceedings incidental to an appeal”, which shows that as and when appeal is filed and admitted for hearing, after admission the next incident in the appeal is of issuing notice to respondents. Thus, issuance of notice to respondents will be a “proceeding incidental to an appeal”. While interpreting the provisions in the light of objects and reasons for introducing the amendment it is apparent that in order to avoid delay in deciding the appeal discretion is conferred upon the Appellate Court to dispense with service upon the parties, who were proceeded ex parte in the Court of

first instance. Once discretion is exercised by the Court, then appeal cannot be thrown out on the ground that owner and driver are going to be affected by modification of award in the appeal and on mere assumption appeal cannot be dismissed. It may be mentioned that once discretion is exercised by the Court the order will not be nullified, unless that order is reversed or modified. Bench hearing the appeal finally cannot throw out the appeal merely on the ground that the service of notice upon the respondents, who were ex parte before the Court of first instance has been dispensed with. The effect of dispensing with service is that the respondent remains a party in the appeal but service of notice is dispensed with. Dispensing with notice cannot be termed as deleting the name of unserved respondents, on the contrary they continue to remain party in the appeal. Therefore dismissal of appeal treating that they have not been impleaded as a party is not correct. In the case *A. Robert vs. United Insurance Company Limited*, AIR 1999 SC 2977 Apex Court has considered the scope of appeal under section 110 of Motor Vehicles Act (4 of 1939) and it is held that the question of negligence of the lorry driver is no longer open for consideration in this appeal by the claimant and the Insurance Company also cannot have anything to say on this aspect. Therefore, proceedings on the basis that the accident was caused by rash and negligent driving of the driver of the offending motor lorry, only thing is to be considered is the appropriate compensation. Division Bench of this Court in M.A. 1239/02 decided on 5.3.2003 has heard on the application, which was

allowed and service of notice on the driver of the offending vehicle, who was ex parte before the Tribunal was dispensed with and thereafter proceeded to decide the appeal on its merits and enhanced the quantum of compensation. However, the question whether appeal shall fail on the ground of non-service was not considered.

15. Thus, it is clear that there is no inconsistency in the M.P. Amendment and sub-rule (4) of Rule 14 of Order XLI and the notice can be dispensed with upon the parties, who are proceeded ex parte before the Court of first instance. Language of sub-rule (4) of Rule 14 of Order XLI is clear where it provides that it shall not be necessary to serve notice of any “proceeding incidental to an appeal”. So the Legislature has made it mandatory that it is not necessary to service notice and when Legislature has provided that it is not necessary to serve notice upon the party, who has not appeared in the Court of first instance or failed to file address for service of notice, the appeal cannot be dismissed after notice upon the respondents are dispensed with by the Court.

16. We, therefore, hold that Division Bench judgments delivered in the cases of Sushila (supra), Raghvendra Naik (supra) and Kalabai Choubey (supra) do not lay down the correct law. We answer the question that the appeal shall not fail on account of dispensing with notice upon the respondents, who were ex parte before the Court of first instance and they have not submitted the address of service for notice. Since respondents have chosen not to appear

before the Court of first instance, they cannot claim right to be heard at the appellate stage. No benefit can be claimed by the party against the exercise of discretion of the Court in dispensing with notice. When notices have been dispensed with appeal cannot be dismissed and Appellate Court has power to modify or enhance the quantum of compensation. Reference is answered accordingly. File be placed before the Bench for decision of appeal on merits.

(11) Thus it has clearly been held by the Full Bench of the High Court of Madhya Pradesh that issuance of notice to the respondents in an appeal will be a “proceeding incidental to an appeal”.

(12) If the facts of the present case are examined in the light of the provisions contained in Order 41 Rule 14(4) of CPC as well as the decision rendered by Full Bench of the High Court of Madhya Pradesh in the case of *Jamuna Bai* (supra), I find that defendant No.1-Shivpatiya Bai appeared before the trial Court and filed her registered address on 04.07.1989 and also filed her written statement on 13.07.1990 before the trial Court. Therefore, the provisions contained in Order 41 Rule 14 (4) of the CPC would not be applicable as defendant No.1 has already appeared and filed address for service in the court of first instance before the trial Court, therefore, first appellate Court is absolutely unjustified in holding that since defendant No.1-Shivpatiya Bai has proceeded ex-parte, subsequent notice of appeal is not necessary.

(13) Since defendant No.1 had appeared before the trial court and filed her address for service of notice and also filed her written statement, the provisions contained under Order 41 Rule 14(4) of the CPC could not have been pressed into service by the first appellate Court.

(14) In the result, second appeal is allowed and the judgment and decree passed by the first appellate Court is hereby set-aside. The matter is remanded back to the first appellate Court for deciding afresh on merits in accordance with law after noticing to the parties concerned, within a period of four months from the date of receipt of certified copy of this order. Records of both the Courts below be sent to the first appellate Court forthwith. Since the appeal was filed by the legal representatives of the appellant/defendant No.1, on appearance the legal representatives of the plaintiff will bring the legal representatives of defendant No.1 on record within 30 days from the date of appearance and thereafter, first appeal be decided within four months from the date of substitution. No order as to cost(s). A decree be drawn accordingly. The parties are directed to appear before the first appellate Court on 20.10.2016.

Sd/-

(Sanjay K. Agrawal)
Judge

L/-