

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 912 of 2015**

1. Ajay Kumar Sharma S/o Late B. C. Sharma, Aged About 51 Years R/o Sadar Ward, Bhatapara, District Balodabazar Bhatapara (Chhattisgarh).....Appellant/ Defendant
2. Raj Kumar Sharma S/o Late B. C. Sharma, Aged About 56 Years R/o Sadar Ward, Bhatapara, District Balodabazar Bhatapara (Chhattisgarh).....Respondent/ Defendant

---- Petitioners**Versus**

1. Suresh Chand S/o Late Ghanshyam Sharma, Aged About 65 Years R/o In Front Of Government Hospital, Mandi Road, Gandhi Mandir Ward, Tahsil Bhatapara District Balodabazar (Chhattisgarh).....Respondent/ Plaintiff
2. Rakesh Kumar Sharma S/o Late Ghanshyam Sharma, Aged About 60 Years R/o In Front Of Government Hospital, Mandi Road, Gandhi Mandir Ward, Tahsil Bhatapara District Balodabazar (Chhattisgarh).....Respondent/ Plaintiff

---- Respondents

For Petitioners:	Mr. S.S. Agrawal along with Mr. Aman Kesharwani, Advocates
For Respondents:	Mr. B.L. Dembra, Advocate

Hon'ble Shri Justice P. Sam Koshy**Order on Board****22.04.2016**

1. The present Writ Petition has been filed challenging order dated 13.07.2015 passed by Additional District Judge, Bhatapara in Misc. Civil Appeal No. 4/12 whereby the Additional District Judge has affirmed the

order dated 30.06.2012 passed in Misc. Civil Suit No. 19/11 rejecting the prayer for setting aside ex-parte judgment and decree dated 14.03.2011.

2. The contention of the Petitioners is that they were defendants before the Court below in suit initiated for declaration of title and permanent injunction. The suit is of the year 1994 and since 1994 the parties are contesting the case without any lapse on either side except on 15.02.2011 on which date the matter was listed for cross examination of the defendants after 03.01.2011.

3. On 03.01.2011 the matter was adjourned at the instance of the plaintiff who had taken time for cross examination of the defendants and the case was next fixed for further hearing on 15.02.2011. According to the Petitioner-defendants the same date was inadvertently noted in the case diary of the lawyer concerned as 15.03.2011 instead of 15.02.2011. The matter when was taken up on 15.02.2011, the Court below proceeded ex-parte against the defendants and soon thereafter on 14.03.2011 the impugned judgment and decree was also passed.

4. Learned Counsel for the Petitioners submits that there is substantial prejudice caused to the interest of the Petitioner while proceeding exparte particularly not realising that the defendants were continuously contesting the case since 1994 i.e. from the year the suit was instituted. He prays that both the orders passed that is the order of the Additional District Judge, Bhatapara and the Civil Judge Class II,

Bhatapara be set aside and the matter be remanded back to the trial Court to proceed in the case from the stage that it was fixed for on 15.02.2011.

5. Per contra, Learned Counsel for the Respondents however opposes the Writ Petition on the ground that on 03.01.2011 defendants' Counsel had entered his appearance before the Court below and also put his initial on the order sheet taking note of the next date of hearing to be 15.02.2011 and as such they were well aware of the next date of hearing. Therefore, they can not take plea of wrong noting down of the date. He further submits that it is also a case that the Petitioners did appear during the final hearing of case but rather immediately applied for obtaining the certified copy of the proceedings of 15.02.2011 which shows that Petitioners herein were acting with malafides and were not interested in finalization of the suit at an early date.

6. Having considered rival contentions put forth by the either parties and perusing the proceeding of the Court below, admittedly the suit is of the year 1994 and the parties have been contesting the case more than 20 years and that it was first time a lapse took place on the part of the defendants on the hearing date that was fixed on 15.02.2011. The aspect that the defendants had knowledge of date of hearing on 15.02.2011 also does not arise as immediately after they came to know that the case has been decided ex-parte on 14.03.2011 without any delay they moved an application under Order 9 Rule 13 for setting

aside the ex-parte decree. Thus, bona fides on part of the Petitioners is prima facie reflected. Another ground for setting aside the two orders by the Court below is taking into consideration the past conduct of the parties, seniority of case and that the dispute between the parties is between the family members and interest of justice would also be met if the Petitioners would have been given an opportunity of being cross examined, they would have got the opportunity of addressing the Court and on its merits.

7. The Supreme Court in one of its judgment reported in **(2009) 2 SCC 692, Raj Kishore Pandey v. State of Uttar pradesh and Others**, in Para 8 held as under;

“8. In our opinion, whether the applicant has made out sufficient cause or not, in the application filed, the Court is required to look at all the facts pleaded in the application. No doubt, the consideration of the existence of sufficient cause is the discretionary power with the court, but such discretion has to be exercised on sound principles and not on mere technicalities. The approach of the Court in such matters should be to advance the cause of justice and not the cause of technicalities. A case, as far as possible, should be decided on merits.”

8. Similar view has also been taken by the Supreme Court in its earlier decision reported in **(2000) 3 SCC 54 (G.P. Srivastava v. R.K. Raizada and Others** in Para 7 as under

“7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set

aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do inaction is imputable to the erring party. Sufficient cause for the purpose of hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon the circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in this favour, provided the absence was not mala fide or intentional."

9. For the foregoing reasons the orders passed by the two Courts below are not proper, legal or justified firstly while rejection of application under Order 9 Rule 13 by the Civil Judge Class II, Bhatapara on 30.06.2012, and secondly affirmation of the same by the Additional District Judge on 13.07.2015.

10. Consequently, both the orders are set aside. The matter is sent back to the Court of Civil Judge Class I, Bhatapara so that the matter

may be proceeded from the stage the Petitioners have been proceeded ex-parte i.e. the proceedings for which it was fixed on 15.02.2011.

11. Since both the parties are present in the Court here with the joint agreement of the Parties it is directed that they shall make themselves available before the Court below on 15.06.2016 without further requirement of issuance of notice to be sent on either side.

12. It is also directed that the Court below shall try to dispose of the suit as expeditiously as possible preferably within an outer limit of six months.

13. With the aforesaid observations the Writ Petition is allowed.

Sd/-
(P. Sam Koshy)
JUDGE