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HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 558 of 2016**

Salim Memon, son of Late Yusuf Memon, aged about 32 years, resident of Moti Nagar, Police Station Tikrapara, Raipur, Tahsil & District Raipur (C.G.), Civil & Revenue District Raipur (C.G.) Judgment Debtor No. 6

---- PETITIONER**Versus**

1. Smt. Kanti Mishra, widow of Late Badri Prasad Mishra, aged about 58 years.
2. Sameer Mishra, aged about 28 years,
3. Durgesh Mishra, aged about 26 years.

Nos. 2 & 3 are sons of Late Badri Prasad Mishra

Nos. 1 to 3 are residents of Near Basant Lodge, Nayapara, Raipur, District Raipur (C.G.)

4. Smt. Seema Shukla, wife of Shri Neelkant Shukla, daughter of Late Badri Prasad Mishra, aged about 32 years, resident of Pandariya, Tahsil Mungeli, District Bilaspur (now 'Mungeli')

..... Decree holders

5. Smt. Laxmi Bai, widow of Late Govind, aged about 53 years.
6. Chandrakala, daughter of Late Govind, aged about 26 years.

No. 5 & 6 are residents of Near Parshad Deva Bhogal, Aspatal Ward, Behind Shastri Bazar, Raipur, Tahsil & District Raipur (C.G.)

7. Shankar, aged about 44 years, resident of Besides Lady Talab & Mangal Dhobi, Aspatal Ward, Raipur (C.G.)
8. Ramdas Chintal, son of C. Potaiya, aged about 53 years, resident of Besides Lady Talab & Mangal Dhobi, Aspatal Ward, Raipur (C.G.)

Decree Holders namely Nadaiya Chintal & Gopal Chintal (No. 7 & 9) have expired and therefore not made party.

.....Judgment debtors
---- Respondents

For Petitioner : Mr.B.P. Sharma, Advocate.

For respondents No. 1 to 4 : Mr. Amrito Das, Advocate.

For respondents No.5 to 7 : Mr. J.K. Gupta, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

19/10/2016

(1) Plaintiffs namely Smt. Kanti Mishra, Sameer Mishra, Durgesh Mishra and Smt. Seema Shukla instituted a suit for eviction against defendants before the trial Court, in which present defendant/judgment debtor No. 6 – Salim Memon appeared and engaged the counsel to contest the suit, the said counsel was regularly appearing before the trial Court on behalf of petitioner and on 26.11.2009 he failed to appear before the trial Court, thereafter, the ex parte judgment & decree was passed by the trial Court on 31.03.2010 in favour of the plaintiffs.

(2) Defendant No. 6-Salim Memon/petitioner came to know about the ex parte judgment & decree passed by the trial Court only on 18.02.2012 and immediately thereafter he engaged another counsel and as per his instructions and after obtaining certified copy of the relevant documents, he filed an application under Order 9 Rule 13 read with Section 151 CPC supported by affidavit along with application for setting aside *ex parte* order and also filed an application under Section 5 of the Limitation Act on 12.03.2012 for condoning the delay in filing the same.

(3) Respondents/plaintiffs opposed the said applications stating that notice of execution of ex parte decree was received by

defendant No. 6 on 05.08.2011 and he appeared through his counsel on 12.08.2011 and thereafter, application for setting aside ex parte judgment & decree alongwith application for condonation of delay of seven months in filing the said application has been filed on 12.03.2012, which is deliberate and intentional and malifide and it could not be condoned as no sufficient cause has been shown by defendant No.6/petitioner for delay in filing the application for setting aside ex parte order.

(4) The trial Court made an enquiry on the sufficiency of cause shown in the application for condonation of delay as well as application under Order 9 Rule 13 of the CPC and, thereafter, by its order dated 26.02.2016 reached to a conclusion that the counsel engaged by the defendant/petitioner failed to appear before the trial Court and he did not inform the defendant before deciding not to appear before the trial Court on behalf of defendant No.6/petitioner and also recorded a finding that delay of seven months has not been explained properly by defendant No. 6/petitioner as application for setting aside ex parte order ought to have been preferred within 30 days from the date of knowledge of the *ex parte* decree.

(5) Petitioner/defendant preferred Misc. Appeal under Order 43 Rule 1(d) of the CPC there-against before the First Appellate Court. The First Appellate Court by its impugned order dated 29.08.2016 affirmed the finding recorded by the trial Court and dismissed the appeal. Questioning that order, this writ petition has been filed by the petitioner/defendant No. 6.

(6) Mr. B.P. Sharma, learned counsel appearing for the petitioner would submit that both the courts below have committed legal error in rejecting the petitioner's application filed under Order 9 Rule 13 of the CPC along with application for condonation of delay after having held that counsel engaged by the petitioner/defendant did not inform him before deciding not to appear before the trial Court, by which, defendant was proceeded ex parte and ex parte order was passed against him. He would further submit that defendant came to the knowledge of the decree only on 18.2.2012 and within one month from the date of knowledge of *ex parte* decree i.e. on 12.03.2012, he preferred application under Order 9 Rule 13 of the CPC along with application for condonation of delay as provided in Article 123 of the Limitation Act, 1963. He placed reliance upon the judgment of Supreme Court in the matter of **Panna Lal Vs. Murari Lal (dead) by his legal representatives**¹ in support of his submission.

(7) On the other hand, Mr. Amrito Das, learned counsel appearing for respondents No. 1 to 4, while supporting the order of both the courts below, would vehemently submit that two courts below have concurrently held that defendant No. 6 had knowledge of the *ex parte* judgment & decree passed on 5.8.2011 but did not prefer requisite application right in time and, therefore, the writ petition filed by the petitioner/defendant No. 6 is liable to be and is hereby set aside.

(8) I have heard learned counsel appearing for the parties and considered the rival submissions made hereinabove and also perused the original records with utmost circumspection.

¹ AIR 1967 SC 1384

(9) It is not in dispute that defendant appeared before the trial Court regularly till 26.11.2009 through counsel duly engaged by him and thereafter, neither petitioner/defendant No. 6 nor his counsel appeared in the trial Court and he was proceeded ex parte and thus an *ex parte* order was passed on 31.03.2010.

(10) The trial Court made an enquiry on the application filed under Order 9 Rule 13 of the CPC and came to the specific conclusion that counsel engaged by defendant No.6/petitioner did not inform him that he will not appear before the trial Court after 26.11.2009, but trial Court simultaneously came to the conclusion that defendant No.6/petitioner has received notice of execution of *ex parte* decree on 5.8.2011 for his appearance on 12.08.2011 and appeared through his counsel on 12.08.2011 but claimed that he has received information on 18.02.2012, as such, explanation offered is not acceptable; and the application under Order 9 Rule 13 CPC has not been filed within the limitation prescribed under the law and rejected the same, which has also been affirmed in appeal.

(11) The *ex parte* judgment and decree was passed on 31.03.2010 in favour of plaintiff. For setting aside the same, limitation has been prescribed under Article 123 of the Limitation Act, which reads as below:-

Description of suit	Period of limitation	Time from which period begins to run
Article 123 – To set aside a decree passed ex parte or to re-hear an appeal decreed or	Thirty days	The date of the decree or where the summons or notice

heard <i>ex parte</i> . <i>Explanation</i> – for the purposes of this Article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908, shall not be deemed to be due service.		was not duly served, when the applicant had knowledge of the decree.
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(12) A careful perusal of the aforesaid provision would show that the limitation for presenting the application has been prescribed *i.e.* thirty days from the date of decree or where the summons or notice was not duly served when the applicant had knowledge of the decree. In the present case, the petitioner was duly served in the suit and it is his case that, he had no knowledge of passing of the decree whereas the trial court has held that he was served with the notice of execution of decree on 05.08.2011 and he appeared before executing court on 12.08.2011 and therefore the petitioner was having knowledge of *ex parte* decree passed against him on 05.08.2011. The question for consideration would be, whether petitioner can be said to have knowledge of the execution of decree as provided under Article 123 of the Limitation Act.

(13) Before coming into force the Act of 1963, the Limitation Act, 1908 was in force, and present Article 123 of the Limitation Act, 1963 corresponds to Article 164 of the old Limitation Act. The Apex Court, while dealing with a matter under Article 164 of the Limitation Act, 1908 in **Panna Lal v. Murari Lal (dead) by his legal representatives²**, observed as below:-

2 AIR 1967 SC 1384

“(A) *Limitation Act (1908)*, Art. 164 – “Knowledge of the decree”- meaning of.

The expression " Knowledge of the decree " in Art. 164 means knowledge of the particular decree which is sought to be set aside. When the summons was not duly served, limitation under Art. 164 does not start running against the defendant because he has received some vague information that some decree has been passed against him. It is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of Art. 164. The test of the sufficiency is not what the information would mean to a stranger, but what it meant to the defendant in the light of his previous dealing with the plaintiff and the facts and circumstances known to him. If from the information conveyed to him the defendant has knowledge of the decree sought to be set aside, time begins to run against him under Art. 164. It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree, so that he has a clear perception of the injury suffered by him and can take effective steps to set aside the decree.”

(14) The High Court of Madhya Pradesh, while dealing with the expression “knowledge of decree” in **Smt. Chhutbai and another v. Madanlal and another**³, observed as below:-

“7. Now coming to the question of application being barred by time, we are of the opinion that the appellate Court has completely misdirected itself in holding that the application was barred by time. The expression "knowledge of the decree" used in Art.123 of the Limitation Act, 1963, means the knowledge of a particular decree, which is sought to be set aside. It has been held that when the summons was not duly served on the petitioners, the limitation under Art.123 of the Limitation Act does not start running against the petitioners because they received some vague information that some decree has been passed against them (See AIR 1967 SC 1384), Pannalal v. Amarlal). No doubt in this case, it has been held that it is a question of fact in each case whether the information communicated to the defendant is sufficient to impute to him knowledge of the decree within the meaning of Art.164 of the old Limitation Act. In the present case, the appellate Court, itself has held that in the notice fix. P-4, it has not been mentioned that from which Court the decree was passed nor the date of the decree has been mentioned but as the case No. 1 has

been mentioned, the petitioner could have gathered the knowledge by inspecting the Register of Civil Suit maintained by the Courts. Admittedly in Mhow, there is not only one Civil Judge Class II, but there are two or three Civil Judges. Therefore, this type of information cannot be said to be the knowledge of the decree. There is no finding of the Appellate Court that from the notice Ex. A-4, the petitioners got the knowledge of the decree, but, on the other hand, the finding is different that the petitioners could have inspected the record and could have got the knowledge by finding out the particulars of the decree. In our opinion, on such a finding of the appellate Court, the order of the appellate Court holding that the application under O.9, R.13, C.P.C. was barred by time, cannot be sustained and deserves to be quashed.”

(15) Keeping in view, the aforesaid principles laid down hereinabove, if facts of the case are examined, it is clear that judgment has been passed which has been put to execution is not sufficient to satisfy the requirement of knowledge as stated in Article 123 of the Limitation Act. The petitioner/defendant has not been given information regarding name of the court, name of the parties and particulars of judgment and decree passed, therefore notice of execution while putting the *ex parte* decree for execution would not constitute knowledge within the meaning of Article 123 of the Limitation Act. On the other hand, it is the case of defendant No.6, petitioner herein that counsel duly engaged, did not inform him before deciding not to appear before the trial Court and without information, he remained absent and therefore, trial Court proceed *ex parte*. Therefore, I am of the considered opinion that petitioner/defendant No. 6 has preferred application within 30 days from the date of knowledge of the decree and sufficient cause has been shown for not appearing before the trial Court when the case was called up for hearing, therefore, application filed under Section 5

of the Limitation Act is allowed, consequently, application under Order 9 Rule 13 CPC is also allowed and thereby ex-parte order passed by the trial Court as affirmed by the appellate Court are hereby set aside. Misc. Civil Suit No.1/2012 (Saleem Memon Vs. Smt. Kanti Mishra & others) is restored to its original number for hearing and disposal in accordance with law subject to payment of cost of Rs.5,000/- payable to respondents No. 1 to 4 within a period of one month from today.

(16) Parties are directed to appear before the trial Court on **15th November, 2016**. The 14th Civil Judge, Class -II, Raipur is directed to decide the Civil Suit on merits expeditiously preferably within a period of three months as the Civil Suit was filed on 16.08.1984.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-