

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 508 of 2015

- Tilak Ram S/o Navratan, Aged about 46 Years, Occupation- Agriculture, R/o Village- Unchdih, Police Station & Tahsil- Surajpur, District- Surajpur, Civil District- Surajpur & Revenue District- Surajpur (Chhattisgarh)(Defendant)

---- Appellant

Versus

1. Mahrajo W/o Rooplal, Aged about 64 Years,
2. Dalgar S/o Rooplal, Aged About 37 Years,
3. Sukhan S/o Rooplal, Aged About 34 Years,
All Occupation - Agriculture, R/o Village- Unchdih, Police Station & Tahsil- Surajpur, District- Surajpur, Civil District- Surajpur & Revenue District- Surajpur (Chhattisgarh)(Plaintiffs)
4. The State Of Chhattisgarh, Through: The Collector, District – Surguja (Chhattisgarh)

---- Respondents

For Appellant/Defendant No.1	:	Shri A.K. Prasad, Advocate
For Respondents No.1 to 3	:	Shri Manoj Paranjpe, Advocate
For Respondent No.4/State	:	Smt. Ashta Shukla, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

14/09/2016

1. The substantial questions of law involved, formulated and to be answered in the appeal preferred by defendant No.1, are as under:

“(1) Whether the trial Court is justified in rejecting the application under Order 9 Rule 7 of the CPC by order dated 13-02-2002 by recording a perverse finding?

(2) Whether the trial Court further justified in granting application under Section 151 of the CPC on 17-03-2003 filed by the plaintiffs and thereby declined to take the written statement filed by the defendant on record?”

2. In order to answer the substantial questions of law, following facts are required to be noticed.

(I) The respondents/plaintiffs preferred a suit for declaration of title and declaration of sale deed dated 29-08-1996 to be null and void and for permanent injunction in respect of suit land. The present appellant/defendant No.1 and deceased defendant No.2 Roop Lal whose name was deleted from the plaint subsequently due to his death, both engaged their counsel jointly to put appearance before the trial Court on their behalf. The counsel engaged by defendant No.1 pleaded no instructions on 03-05-1997 and consequently, the trial Court declared *ex-parte* against him on the same day. Thereafter, he filed an application under Order 9 Rule 7 of the CPC for setting aside the *ex-parte* order which was rejected on 13-02-2002. However, the Trial Court directed that defendant No.1 can participate in further proceedings of the suit. Thereafter, defendant No.1 filed his written statement and counter claim on 11-04-2002 which was taken on record but the plaintiffs filed an application under Section 151 of the CPC that the written statement filed by defendant No.1 be excluded from consideration as he has already been proceeded *ex-parte*. That application filed under Section 151 of CPC was allowed by the trial Court on 17-03-2003 and it was held that written statement is excluded from consideration finding that defendant No.1 has already proceeded *ex-parte*.

Against the order dated 17-03-2003, the petitioner filed Writ Petition No.1502 of 2003 but before the writ petition could be decided, the Civil Suit was decreed on 15-01-2008 and thereafter, the writ petition was withdrawn on 14-01-2009. First Appeal preferred by defendant No.1 was also dismissed by the First Appellate Court by its judgement and decree dated 21-07-2015. Feeling aggrieved against the judgement and decree of the First Appellate Court affirming the decree granted by the trial Court, Second Appeal has been preferred in which substantial questions of law formulated have already been incorporated in the opening paragraph of this judgement.

3. Shri A.K. Prasad, learned counsel for the appellant/defendant No.1 would submit that the trial Court is absolutely unjustified in proceeding *ex-parte* on 03-05-1997 and further unjustified in rejecting his application filed under Order 9 Rule 7 of the CPC ignoring the fact that good cause was shown by defendant No.1 for not appearing on 03-05-1997, as on that date his counsel who was duly engaged by him pleaded no instructions without prior notice to the present appellant/defendant No.1 and as such the trial Court is absolutely unjustified in rejecting the application under Order 9 Rule 7 of the CPC. He would further submit that the trial Court by its order dated 17-03-2003 is also unjustified in excluding the written statement from consideration as proceeding *ex-parte* under Order 9 Rule 7 of the CPC would not bar him (defendant No.1) to file written statement and counter claim.

Therefore, the decree passed by the trial Court duly affirmed by the First Appellate Court deserves to be set aside and substantial questions of law be answered in plaintiff's favour.

4. Shri Manoj Paranjpe, learned counsel for respondents No.1 to 3 would submit that the trial Court is absolutely justified in proceeding defendant No.1 *ex-parte* and rejecting the application filed under Order 9 Rule 7 of CPC as no good cause was shown for non-appearance on 03-05-1997 and the trial Court is further justified in excluding the written statement filed by defendant No.1 from consideration as defendant No.1 had already proceeded *ex-parte*, therefore, the judgement and decree passed by the two Courts below deserve to be upheld.

5. I have heard learned counsel appearing for the parties and also considered the rival submissions made therein and gone through the record of the trial Court extensively.

6. In order to answer substantial questions of law formulated in this appeal, it would be appropriate to notice few facts apparent on the face of the record. Defendants No.1 & 2 jointly engaged Shri S.L. Gupta, Advocate to appear before the Court on their behalf and he entered appearance on 13-09-1996. On 03-05-1997, he pleaded no instructions to the trial Court and the trial Court proceeded *ex-parte* on the same day against the defendants. Defendant No.1 thereafter, filed an application for setting aside *ex-parte* order on 19-04-1999 on the ground that his counsel has pleaded no instructions and defendant No.2 had earlier promised to look after his interest also, therefore, the *ex-parte* order be

set aside. On 13-02-2002, the trial Court rejected the application filed under Order 9 Rule 7 of the CPC finding that no good cause has been shown for not appearing on 03-05-1997 when the suit was called out for hearing. however, allowed defendant No.1 to participate in further proceedings of the suit. It is apparent from the face of the record that the counsel engaged by defendant No.1 had pleaded no instructions on 03-05-1997 but there is no material on record to hold that he intimated defendant No.1 before pleading no instructions and it is nobody's case that the counsel informed defendant No.1 after he has reported no instructions to the Court.

7. In the matter of **Tahil Ram Issardas Sadarangani and others Vs. Ramchand Issardas Sadarangani and another**¹, the Supreme Court has held that where the counsel pleads no instructions without intimating the client then, fresh notice ought to have been sent to the party concerned and held in para 4 as under:

“4. It is not disputed in the present case that on March 15, 1974 when Mr. Adhia, advocate withdrew from the case, the petitioners were not present in court. There is nothing on the record to show as to whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when Mr. Adhia withdrew from the case, the interests of justice required, that a fresh notice for actual date hearing should have been sent to the parties. In any case in the facts and circumstances of this case we feel that the party in person was not at fault and as such should not be made to suffer.”

¹. 1993 Supp (3) SCC 256

8. The principle of law laid down in **Tahil Ram Issardas Sadrangani** (supra) has been followed and relied upon subsequently by the Supreme Court in the matter of **Malkiat Singh and another Vs. Joginder Singh and others**² in which counsel for the appellant therein pleaded no instructions and he was proceeded *ex-parte* by trial Court and *ex-parte* decree was passed without notice to appellant therein who were not present when counsel pleaded 'no instructions'. The Supreme Court did not approve the fact of passing *ex-parte* judgement without issuing fresh notice to the appellant therein and held as under:

“A perusal of the record also reveals that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial court, which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel pleaded no instructions. ”

9. In **Sushila Narahari and others Vs. Nandkumar and others**³, the Supreme Court has held that an advocate should not withdraw from the case without notice to his client while setting aside *ex-parte* decree the Supreme Court held as under:

². (1998) 2 SCC 206

³. (1996) 5 SCC 529

“A reading of the facts leaves us with no doubt that the advocate has derelicted his duty to inform the client by registered post if there was any non-cooperation on behalf of the appellants. Consequently, when the suit had come up for trial, he had withdrawn his vakalatnama without notice to the appellants. The trial court set the appellants ex parte and decreed the suit for specific performance. The application for condonation of delay of 40 days was filed. The Court refused to condone the delay. In view of the above, we find that she is well justified in filing the application with the delay. The delay is accordingly condoned. The ex parte decree is set aside. The trial court is directed to give opportunity to the appellants to cross-examine the witness examined by the respondents of the suit and also adduce evidence on her behalf. The trial court is further directed to dispose of the matter as expeditiously as possible, preferably within one year from the date of receipt of the copy of the order.”

10. In the present case also counsel for defendant No.1, did not inform defendant No.1 before pleading no instructions on his behalf before the trial Court on 03-05-1997 and trial Court also did not issue any fresh notice to defendant No.1 before proceeding ex-parte as such judgement of the Supreme Court in the matter of **Tahil Ram Issardas Sadrangani and Malkait Singh** (supra) squarely applies to the facts of the case and ex-parte order and subsequent decree deserve to be set aside.

11. At this stage, it would be appropriate to note Order 9 Rule 7 of the CPC which provides 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.

12. The Supreme Court in the matter of **Arjun Singh Vs. Mohindra Kumar and others**⁴ pointed out a distinction between good cause and sufficient cause and held as under in para 8 of the judgement.

“8. Before proceeding to deal with the arguments addressed to us by Mr. Setalvad, learned counsel for the appellant, it would be convenient to mention a point, not seriously pressed before us, but which at earlier stages was thought to have considerable significance for the decision of this question viz., the difference between the words “good cause” for non-appearance in O. IX, R. 7 and “sufficient cause” for the same purpose in O. IX R. 13 as pointing to different criteria of “goodness” or “sufficiency” for succeeding in the two proceedings; and as therefore furnishing a ground for the inapplicability of the rule of *res judicata*. As this ground was not seriously mentioned before us, we need not examine it in any detail, but we might observe that we do not see any material difference between the facts to be established for satisfying the two tests of “good cause” and “sufficient cause”. We are unable to conceive of a “good cause” which is not “sufficient” as affording an explanation

⁴. AIR 1964 SC 993

for non-appearance, nor conversely of a “sufficient cause” which is not a good one and we would add that either of these is not different from “good and sufficient cause” which is used in this context in other statutes. If, on the other hand, there is any difference between the two it can only be that the requirement of a “good cause” is complied with on a lesser degree of proof than that of “sufficient cause” and if so, this cannot help the appellant, since assuming the applicability of the principle of *res judicata* to the decisions in the two proceedings, if the Court finds in the first proceeding, the lighter burden not discharged, it must a fortiori bar the consideration of the same matter in the later where the standard of proof of that matter is, if anything, higher.”

13. If the facts of the case are examined in the light of good cause defined by the Supreme Court in the matter of **Arjun Singh** (supra), it is quite apparent that defendant No.1 has succeeded in showing good cause for his non-appearance on 03-05-1997 as his counsel has pleaded no instructions without informing defendant No.1. Therefore, the trial Court ought to have allowed the application filed under Order IX Rule 7 of the CPC. In the circumstances, the order passed by the trial Court on 03-05-1997 proceeding defendant No.1 *ex-parte* and the order rejecting his application under Order 9 Rule 7 of the CPC on 13-02-2002 both are set aside and consequently, the order dated 17-03-2003 excluding his written statement from consideration is also set aside and the judgement and decree passed by the trial Court as well as the First

Appellate Court are also set aside. The written statement filed by defendant No.1 on 11-04-2002 is taken on record.

14. Consequently, the Second Appeal is allowed and the judgement and decree passed by both the Courts below are hereby set aside. The matter is remanded to the trial Court for proceeding afresh as the written statement of defendant No.1 is not taken on record in accordance with law if no fresh issues in the light of written statement are involved. The suit was filed on 23-07-1996. Since the matter is being remanded, the trial Court would do well and decide the suit within three months from receipt of certified copy of this order along with the record. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)

JUDGE