

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 37 of 2016

- Smt. Krishna Devi Agrawal W/o Shri Suresh Kumar Agrawal (Bansal),
Aged About 58 Years Occupation- House Wife, R/o Vikas Nagar Gali,
Kotra Road, Raigarh, District Raigarh, Chhattisgarh

---- Appellant

Defendant

Versus

1. Sanjay Kumar Soni S/o Shri Leelaram Soni, Aged About 45 Years
Occupation- Chartered Accountancy, R/o Itwari Bazar, Raigarh,
District Raigarh, Chhattisgarh(Plaintiff)
2. State Of Chhattisgarh, Through: District Collector, Raigarh, District
Raigarh, Chhattisgarh(Defendant)

---- Respondent

For Appellant	:	Shri Sourabh Sharma, Advocate.
For Respondent No.1	:	Shri Sunil Otwani, Advocate.
For Respondent No.2/State	:	Shri Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

Order On Board

01/09/2016

With the consent of the parties the matter is heard finally.

02. Challenge in this appeal is to the order dated 12.4.2016 passed by First Additional District Judge, Raigarh in Misc. Civil Case No. 21/2007 whereby the application as filed by the appellant/defendant under Order 9 Rules 13 of CPC for setting aside the ex-parte judgment and decree dated 30.6.2007, has been rejected.

03. Brief facts of the case are that on 9.8.2001 respondent No.1/plaintiff filed a suit for specific performance of contract for sale and purchase of agricultural land. Unfortunately, the civil proceedings remained pending for quite long time and after recording evidence of the plaintiff on 10.1.2007, the suit was fixed for recording evidence of

the defendant. On 15.6.2007 the suit was fixed for cross-examination of one of the witnesses of the defendant, however, as no one appeared on behalf of the defendant, she was proceeded ex-parte and the next date was given as 21.6.2007 for final arguments. On 21.6.2007 arguments on behalf of the plaintiff were advanced and the case was closed for judgment and the date for pronouncement of the judgment was fixed as 30.6.2007. On the said date, the judgment and decree was passed against the appellant/defendant.

On 25.7.2007 the appellant/defendant moved an application under Order 9 Rule 13 of CPC, inter alia, pleading that she is contesting the case through her husband Suresh Kumar Agrawal in whose favour registered power of attorney was already executed on 7.9.1993. According to the defendant, on 13.6.2007 she had gone to Calcutta to meet her daughter as she was not well and the defendant requested her husband to attend the Court on 15.6.2007. The defendant stayed in Calcutta to attend some other functions and ultimately, she returned to Raigarh on 28.6.2007. In the meanwhile, on 14.6.2007 her husband, the holder of power of attorney, seriously fell ill and was confined to bed and therefore, he could not attend the Court on 15.6.2007 for his cross-examination. From 14.6.2007 till 22.6.2007 he was under treatment of Dr. R.K. Agrawal and on the advice of the doctor, he did not attend the Court nor could contact his counsel. In these circumstances, ex-parte proceedings were drawn on 15.6.2007 and ultimately, on 30.6.2007 ex-parte judgment and decree was passed against the defendant. Thus, it was prayed by the defendant that as there is sufficient cause for absence of the defendant, the ex-parte judgment and decree dated 30.6.2007 may be set aside.

04. This application was seriously opposed by the plaintiff and the said MCC remained pending till 12.4.2016 when the order impugned has been passed rejecting the application as filed by the defendant under Order 9 Rule 13 of CPC. It is this order which has been assailed by the defendant in this appeal.

05. Counsel for the appellant/defendant submits as under:

(i) that the trial Court has erred in law in rejecting the application as filed by the defendant under Order 9 Rule 13 of CPC.

(ii) that sufficient cause was assigned by the defendant for absence of the witness on 15.6.2007 and considering the illness of her husband/witness, the Court below ought to have set aside the impugned ex-parte judgment and decree.

(iii) that immediately after coming to know about the ex-parte judgment and decree, on 25.2.2007 an application under Order 9 Rule 13 of CPC was filed mentioning therein sufficient cause for non-appearance and had it been allowed expeditiously, MCC would not have remained pending for such a considerable period.

(iv) if the ex-parte judgment and decree dated 30.6.2007 is not set aside, the defendant may suffer an irreparable loss.

(v) that the Court below while considering the application under Order 9 Rule 13 of CPC, ought to have taken a liberal view to advance the cause of justice.

06. On the other hand, Shri Otwani, counsel appearing for respondent No.1/plaintiff submits that the plaintiff filed the suit on 9.8.2001, after much difficulty the suit could be decided and the judgment and decree was passed on 30.6.2007. Even the plaintiff succeeded in MCC which also remained pending for quite long time since 2007 and was ultimately decided by the impugned order on 12.4.2016. In the said MCC also the defendant sought adjournments on number of occasions unnecessarily with a view to delaying the execution proceedings. He submits that no reasonable cause has been assigned by the defendant for her absence between 22.6.2007 and 30.6.2007, that is the period when her husband had already recovered from illness and could have approached the Court promptly. He further submits that the defendant has also failed to explain as to why she did not contact her lawyer at Raigarh and most importantly, her lawyer has also not filed any affidavit before the Court stating therein as to why he did not appear in the case when on the earlier occasion he was attending the case regularly.

07. State counsel has duly assisted the Court.

08. Heard learned counsel for the respective parties and perused the material on record.

09. It is really unfortunate that the suit filed in the year 2001 was ultimately decided on 30.6.2007 and it is equally unfortunate that the application under Order 9 Rule 13 of CPC, which was filed in the year 2007, also remained pending for a considerable period and could be decided only on 12.4.2016. However, while rejecting the said application, the Court below has mainly considered three dates i.e. 15.6.2007 when the defendant was proceeded ex-parte; 21.6.2007 when the arguments were heard and the case was closed for judgment; and 30.6.2007 when ex-parte judgment and decree has been passed. The Court below has not considered any previous dates or previous adjournments during pendency of the suit and likewise, it has also not discussed or mentioned any dates or any adjournment sought in MCC. Keeping in view this aspect of the case, this Court also confines itself only to those considerations.

10. From the documents, it is evident that on 13.6.2007 the appellant/defendant had gone to Calcutta to meet her daughter and to attend some other functions there and returned to Raigarh on 28.6.2007. The defendant has also filed documents to show that her husband was sick on 15.6.2007 as he was suffering from malaria and therefore, he could not attend the Court. As per the documents filed, her husband recovered from his illness only on 22.6.2007 whereas by that time the case was already closed for judgment on 21.6.2007.

11. In the matters of ***Rasiklal Manikchand Dhariwal and another Vs. MSS Food Products***, reported in **(2012) 2 SCC 196**, the Apex Court observed in paras 41 & 42 as under:

“41. The contention, at the first blush, appears to be attractive but has no substance at all. In the first place, once the hearing of the suit is concluded, and the suit is closed for judgment, Order 9 Rule 7 of the Code has no application at all. The very language of Order 9 Rule 7 makes this clear. This provision presupposes the suit having been adjourned for

hearing. The courts, time out of number, have said that adjournment for the purposes of pronouncing judgment is no adjournment of the "hearing of the suit". On 17-3-2005, the trial court in the present case did four things, namely, (i) closed the evidence of the plaintiff as was requested by the plaintiff; (ii) ordered the suit to proceed ex parte as the defendants failed to appear on that date; (iii) heard the arguments of the advocate for the plaintiff; and (iv) kept the matter for pronouncement of judgment on 28-3-2005. In view of the above, Order 9 Rule 7 of the Code has no application at all and it is for this reason that the application made by the defendants under this provision was rejected by the trial court.

42. Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit. Merely because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order 9 Rule 7 of the Code and thereby entitling them to address the court on the merits of the case."

Further, in the case of ***G.P. Shrivastava Vs. R.K. Raizada and others***, reported in **2001 C.G.L.J. 34**, the Hon'ble Apex Court held in para-5 of the judgment as under:

"5. Under Order 9 Rule 13 C.P.C. an ex-parte decree 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 complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and

circumstances of each case. The 'sufficient cause' for non appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other 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 initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not malafide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

12. Though there is inordinate delay in deciding the suit and likewise, in deciding MCC, but considering the reasons mentioned in the impugned order rejecting the application under Order 9 Rule 13; the fact that in case ex-parte judgment and decree is allowed to stand, the defendant is likely to suffer an irreparable loss and further, considering the law laid down by the Apex Court in such matters, in my opinion, the order impugned is liable to be set aside. It is accordingly set aside, subject to payment of cost of Rs.25,000/- by the appellant/defendant to the respondent/plaintiff. Consequently, the application filed by the petitioner under Order 9 Rule 13 of CPC is granted. Civil Suit No.10A/2006 is restored to its original number.

Parties to appear before the concerned civil Court on 26th September, 2016. On the said date, the appellant/defendant shall make payment of cost of Rs.25,000/- to the respondent/plaintiff. The trial Court shall positively decide the suit within two months from 26th September, 2016.

Sd/

(Pritinker Diwaker)

Judge