

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 14 of 2017**

- Vishwanath Prasad Kaushik S/o Late Hemdutt Kaushik, Aged About 65 Years R/o Village Paand, Tahsil & District Bilaspur, Chhattisgarh, Civil & Revenue District Bilaspur, Chhattisgarh

---- Appellant**Versus**

- Prahlad Prasad Suryavanshi S/o Late Bhangiram Suryavanshi, Aged About 57 Years R/o Village Paand, Tahsil & District Bilaspur, Chhattisgarh

---- Respondent

For Appellant:

Shri Ravish Verma, Advocate.

For Respondent:

Shri Bharat Rajput, Advocate.

Single Bench: Hon'ble Shri Sanjay Agrawal, J**Order On Board****22.11.2017**

1. Heard on admission.
2. This miscellaneous appeal has been preferred by the defendant under Order 43 Rule 1(d) of the Code of Civil Procedure (hereinafter referred to as the CPC) against the order dated 09.01.2017 passed by the Additional District Judge, Bilaspur in MJC No. 380/15 by which, the appellant's application filed under Section 5 of the Indian Limitation Act, 1963 (hereinafter referred to as the Act of 1963) for condonation of delay in filing the application under Order 9 Rule 13 of the CPC, 1908 has been rejected.
3. The undisputed facts of the case are that the non-applicant Prahlad Prasad Suryavanshi instituted a suit claiming specific performance of

contract on the basis of an agreement to sale dated 03.09.2005 purported to have been executed in his favour by the defendant. Notices were issued in the said suit and ultimately by order dated 05.07.2007, the defendant/appellant was treated ex-parte and accordingly, ex-parte judgment and decree was delivered on 28.07.2007 in Civil Suit No. 4-A/2007.

4. The defendant/appellant has submitted an application under order 9 Rule 13 of the CPC along with an application for its condonation of delay as provided under Section 5 of the Act of 1963 by questioning the aforesaid ex-parte judgment and decree dated 28.7.2007 by submitting *inter alia* that he was not aware with regard to the delivery of the said ex-parte judgment and decree and stated further that the non-applicant Prahlad Prasad Suryavanshi has approached him on 23.07.2015 and said that he has filed a suit/application before the Court for registration of the sale deed with regard to the suit property. Upon knowing the said fact, the appellant/defendant has come to the Court for ascertaining the whereabouts of the said proceedings, however, he did not get any information. He, therefore, requested a counsel for knowing the whereabouts of the same. The said counsel, in turn, has obtained the certified copy of the relevant paper and informed him on telephone on 20.08.2015 that the necessary copy has been delivered to him. Immediately thereafter the appellant has approached his counsel for the same and then only he came to know that ex-parte judgment and decree was delivered against him on 28.07.2007. It is submitted further in the application that he has never received any notice from the Court nor has engaged any counsel to defend the case on his behalf. While assigning all

these reasons, the application enumerated under Order 9 rule 13 of the CPC alongwith an application for condonation of its delay for setting aside of the said ex-parte judgment and decree has been filed, registered as MJC No. 380/2015.

5. The aforesaid application was contested by the non-applicant/plaintiff Prahlad Prasad Suryavanshi and denied very specifically that the appellant/defendant was not aware with regard to the filing of the said suit. It is submitted in the application that the appellant was not only aware with regard to the filing of the said suit but had engaged the counsel and continuously contested the suit and was proceeded ex-parte when he was absent in the Court on 05.07.2007. It is, therefore, contested the said application on the ground that the defendant/appellant himself was negligent and therefore, the application as made after 8 years from the delivery of the said ex-parte judgment and decree is hopelessly time barred and deserves to be rejected.

6. After considering the submissions of the parties, the trial Court vide its order impugned has observed that by virtue of Section 5 of the Act of 1963, the applicant should show a sufficient cause for not filing the application for setting aside the said ex-parte decree in time and his mere contention that he came to know about it only on 27.07.2015 can not be held to be believable, particularly when the parties are the residents of the same village. It observed further while referring to para 3 of the ex-parte judgment and decree dated 28.07.2007 that the applicant was appeared in the suit and was proceeded ex-parte thereafter and in consequence, the applicant has failed to explain the delay of 8 years in filing the application for setting aside the said ex-parte decree. Consequently, while refusing to

condone the delay has rejected the application filed under Order 9 Rule 13 of the CPC.

7. Being aggrieved, the appellant/defendant has preferred this miscellaneous Appeal. Shri Ravish Verma, learned Counsel for the Appellant submits that the order impugned as passed by the trial Court while refusing to condone the delay in filing the application under Order 9 rule 13 of the CPC is apparently contrary to law. He submits further that appellant/defendant was not at all aware with regard to the filing of the said suit nor had authorized any of the counsel to pursue the matter on his behalf and came to know with regard to the said ex-parte judgment and decree only when the copy of the same was delivered to him as per the telephonic information from his counsel on 20.08.2015. He, therefore, submits that under such circumstances, the trial Court ought to have adopted a liberal view while entertaining the application for condonation of delay, particularly, when a decree for specific performance of contract which is a discretionary in nature was passed. The trial Court has thus committed an illegality in passing the order impugned while rejecting his application for condonation of delay in filing the application for setting aside the said ex-parte judgment and decree dated 28.07.2007. In support, he placed his reliance upon the decision rendered in N. Balakrishnan Vs. M. Krishna Murthy reported in 1998 Vol. 7 Supreme Court Cases 123.

8. Shri Bharat Rajput, learned Counsel for the non-applicant on the other hand, has opposed the said contention and stated that the huge delay of 8 years was not explained satisfactorily by the appellant who was not only aware with regard to the filing of the suit but appeared and was

proceeded ex-parte on his non appearance on 05.07.2007 and, therefore, he himself was negligent. He submits further that the defendant was aware with regard to passing of said ex-parte judgment and decree and despite knowing of it, no prompt steps were ever taken by the defendant/appellant in time and 8 years thereafter the instant application under order 9 Rule 13 of the CPC along with an application for its condonation of delay has been made which itself shows his malafide intention. Therefore, under such circumstances, the application was rightly rejected by the trial Court.

9. I have heard learned Counsel for the parties and perused the entire relevant papers annexed with this memo of appeal carefully.

10. Undisputedely, a suit for specific performance of contract was filed on the basis of an agreement to sale dated 03.09.2005 on 21.03.2006. The said suit was registered as Civil Suit No. 4-A/2007 and was ultimately decreed ex-parte on 28.07.2007. For setting aside the said ex-parte decree, an application as required under Order 9 Rule 13 of the CPC has been made on 20.08.2015 along with an application for its condonation of delay as required under Section 5 of the Act of 1963. Perusal of the record would show that the defendant has submitted the statement of his two witnesses namely, Gouri Shankar and Vishwanath as required under Order 18 Rule 4 of the CPC and the copy of the same was delivered to the counsel for the plaintiff on 04.10.2016. The counsel for the plaintiff has however sought time to cross examine the said witnesses. The time was accordingly granted while fixing the case on 27.10.2016. On 27.10.2016, the said witnesses were present, however, counsel for the plaintiff has not cross examined the said witnesses and again sought time for their cross-examination. The time was again granted to him while fixing the case on

17.11.2016. The witnesses were thereafter not present and with the consent of the parties, the arguments were heard on an application for condonation of delay on 09.01.2017 and accordingly the order impugned dated 09.01.2017 has been passed by observing aforesaid while rejecting the application for condonation of delay in filing the application for setting aside the said ex-parte judgment and decree dated 28.07.2007.

11. It is true that an application for setting aside the ex-parte judgment and decree was made on 20.08.2015, but the reasons assigned by the appellant/defendant under Section 5 of the Act of 1963 for condonation of delay in filing the application under Order 9 Rule 13 of the CPC was required to be examined liberally in order to provide substantial justice to the parties. However, while adopting the higher technical view, the trial Court has refused to condone the delay in filing the application for setting aside the ex-parte judgment and decree dated 28.07.2007. It is settled principle of law that rules of limitation are not meant to destroy the rights of the parties as held in the case of N. Balakrishnan Vs. M. Krishnamurthy (supra) wherein the Supreme Court has observed in para 11 & 12 as under:-

“11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus

founded on public policy. It is enshrined in the maxim *interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words “sufficient cause” under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain V. Kuntal Kumari and State of W. B. v. Administrator, Howrah Municipality.*”

12. In view of the facts and circumstances of the case and in the light of the aforesaid principle of law, I am inclined to condone the delay in filing the application for setting aside the ex-parte judgment and decree dated 28.07.2007 filed under Order 9 Rule 13 of the CPC subject to cost of Rs. 5000/- (Five Thousand only) payable to the respondent through his counsel within a period of two months from today.

13. In view of the aforesaid direction, the appeal is allowed and the order impugned dated 09.01.2017 passed by the Additional District Judge, Bilaspur in MJC No. 380/2015 is set aside and matter is remitted to the concerned Additional District Judge, Bilaspur to decide the application filed under Order 9 Rule 13 of the CPC in accordance with law. The parties are directed to appear before the said concerned Court on 14.12.2017.

Sd/-

(Sanjay Agrawal)
JUDGE