

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 02/08/2018****Judgment delivered on 09/08/2018****M. A. No. 54 OF 2008**

Inder Lal Agrawal, aged about 47 years, S/o Shri Gayarsi Lal Agrawal, Prop. M/s. Bansal Dal Udyog, Mova, Tahsil & Distt. Raipur (C.G.).

---- Appellant**Versus**

Shankar Lal Agrawal S/o Suraj Mal, aged about 76 years R/o Ramsagarpara, Raipur (C.G.).

---- Respondent

For Appellant	:	Mr. L. C. Dash, Advocate
For Respondent	:	Mr. Raja Sharma, Advocate

Hon'ble Shri Justice Parth Prateem Sahu**C A V JUDGMENT**

1. By this instant appeal, appellant has challenged the legality and propriety of impugned order dated 15/02/2008 passed by learned First Additional District Judge, Raipur (C.G.) in Miscellaneous Civil Suit No. 04/2006, whereby learned Trial Court dismissed the application under Order 9 Rule 13 of the Civil Procedure Code, 1908 (hereinafter referred to as 'CPC').
2. Brief facts of the case, are that, respondent/plaintiff filed a civil suit for recovery of Rs.98,500/- from appellant/defendant on the ground that respondent/plaintiff being father advanced loan of Rs.70,000/- to the appellant/defendant @ 18% per annum. Appellant/defendant when not paid outstanding amount of loan as calculated in plaint, then respondent/plaintiff issued legal notice on 05/03/1998, which was replied by appellant/defendant and denied contents of notice with respect to outstanding loan amount. Thereafter, the suit was filed on 30/04/1998.

3. Appellant/defendant submitted his written statement to the suit and denied all the adverse pleadings made in suit and stated that respondent/plaintiff has already taken grains for more than the amount of loan from his *Dal* Mill. The learned Trial Court, on the basis of pleadings, framed five issues and proceeded for trial. The learned Trial Court fixed the case for recording of evidence of respondent/plaintiff on 21/02/2006, but on said date, appellant/defendant not appeared in person and his counsel pleaded no instruction. Thereafter, *ex parte* proceeding was drawn and *ex parte* judgment and decree dated 22/02/2006 was passed against the appellant/defendant.
4. Appellant/defendant filed an application under Order 9 Rule 13 of CPC for setting aside *ex parte* judgment and decree passed against him, on 05/04/2006 mentioning therein that on 21/02/2006, case was fixed for recording of evidence of plaintiff's witnesses and on that day, when the learned Trial Court proceeded *ex parte* against him, he was suffering from medical ailment and also produced medical certificate issued by Dr. C. N. Sur, in which, it has been mentioned that he was suffering from Acute Bronchitis with Fever and Hypoglycemia, therefore, he could not appear on the date of hearing fixed on 21/02/2006. He further pleaded that on 23/02/2006, when he came to Court for inquiring about his case, at that time, it revealed that learned Trial Court has passed *ex parte* judgment and decree against him. He lastly pleaded that he was contesting the case diligently from 1998 to 21/02/2006 and therefore, prayed for setting aside the *ex parte* judgment and decree dated 22/02/2006.
5. Respondent/plaintiff after notice made his appearance and submitted his reply to the application under Order 9 Rule 13 of CPC and denied the ground taken by appellant/defendant in his application. He further stated that application under Order 9 Rule 13 of CPC was barred by limitation.

6. Learned Trial Court on the basis of pleadings made by respective parties, fixed the case for recording of evidence, in which, appellant/defendant got himself examined as witness and supported his case and also relied on the medical certificate issued by doctor submitted with his application. No evidence was led by respondent/plaintiff and learned Trial Court vide impugned order dismissed the application under Order 9 Rule 13 of CPC holding that appellant/defendant failed to show sufficient cause for his non-appearance on 21/02/2006 and the application under Order 9 Rule 13 of CPC was barred by limitation.
7. Learned counsel appearing for appellant/defendant submitted that learned Trial Court has committed illegality while holding the application to be barred by limitation and gave erroneous finding on it. He further submitted that from perusal of the judgment and decree dated 22/02/2006, which he obtained and filed along with an application under Order 9 Rule 13 of CPC, shows that appellant applied for certified copy of the judgment and decree on 04/03/2006, which was delivered to him on 21/03/2006 by mentioning that copy was prepared on 20/03/2006 and therefore, there was no delay in filing of application under Order 9 Rule 13 of CPC. He further submitted that learned Trial Court has taken a very hyper technical view in not considering medical certificate and also earlier order-sheets of the civil suit, which shows that appellant/defendant was continuously appearing before the Trial Court through his counsel and on some dates, as required, he also appeared before the Trial Court along with his counsel, therefore, learned Trial Court has committed grave illegality in dismissing the application under Order 9 Rule 13 of CPC.
8. Per contra, learned counsel appearing for the respondent/plaintiff submitted that there was inordinate delay in filing application under Order 9 Rule 13 of CPC and without there being any application for condoning the delay, learned Trial Court was justified in dismissing the application under Order 9 Rule 13 of CPC on the ground that the application is barred by limitation.

9. I have heard learned counsel appearing for respective parties and perused records carefully.
10. From bare perusal of judgment and decree dated 22/02/2006, enclosed along with records of application under Order 9 Rule 13 of CPC, it is apparent that judgment and decree was passed on 22/02/2006 and appellant/defendant made an application for certified copy on 04/03/2006 for the judgment and decree dated 22/02/2006, which was prepared by the Copying Section on 20/03/2006 and delivered to him on 21/03/2006. On calculating the days mentioned on the slip attached behind the judgment and decree dated 22/02/2006 filed along with application under Order 9 Rule 13 of CPC, it is evident that Copying Section took about 16 days to deliver the copy of judgment and decree dated 22/02/2006 to appellant/defendant.
11. The application under Order 9 Rule 13 of CPC was filed on 05/04/2006. From calculating period since passing of the judgment and decree i.e. 22/02/2006 till filing of application under Order 9 Rule 13 of CPC, total period comes to 41 days and after deducting the period taken for obtaining certified copy, the total time taken by appellant/defendant for filing an application under Order 9 Rule 13 of CPC comes to only 26 days. The period prescribed under Article 123 of Indian Limitation Act for filing of application under Order 9 Rule 13 of CPC is 30 days from the date of passing of judgment and decree, but at the same time, the provisions of Section 14(2) of Indian Limitation Act also provides that the period of copying days is to be deducted while calculating the period of limitation at the time of filing of any application, appeal etc. Therefore, learned Trial Court committed an error in not considering the provisions of Indian Limitation Act providing deduction of period for preparing the certified copy from total period taken for filing application under Order 9 Rule 13 of CPC from the date of passing of judgment and decree and arrived at a wrong finding. The finding

arrived at by learned Trial Court with regard to limitation is not sustainable in the eyes of law and is liable to be set aside and is hereby set aside.

12. The learned Trial Court further committed an error in not considering the fact that prior to 21/02/2006, the appellant/defendant was continuously represented through his counsel and on 21/02/2006, the counsel appearing on his behalf made statement behind his back that he/she was not having any instructions. The statement made by counsel appearing on his behalf that he/she is not having any instructions behind back could not be said that the said statement was made by counsel on instructions of appellant nor the order-sheet says so. Even otherwise, from perusal of the records of the civil suit, it reveals that the case was continuously fixed for recording of evidence of respondent/plaintiff. On 25/11/2004, respondent/plaintiff was examined, but as there was some interim applications, his examination could not be completed and thereafter, continuously case was fixed for recording of evidence of plaintiff's witnesses till 21/02/2006.
13. The order-sheets would show that on number of dates, the case has been adjourned as the plaintiff's witnesses could not appear before the Court for their examination and on 21/02/2006, the case was fixed for recording of evidence of plaintiff's witnesses, on which date, the counsel appearing for appellant/defendant has pleaded no instructions. The learned Trial Court ought to have granted one opportunity to appellant/defendant and could have adjourned the case for further date, particularly, in the facts and circumstances of the case when counsel representing the appellant/defendant pleads no instructions. The learned Trial Court immediately on the same day i.e. 21/02/2006 proceeded *ex parte* against appellant and after taking *ex parte* evidence of witness No. 2 of plaintiff, also heard final arguments and on the very next day, *ex parte* judgment and decree was passed against appellant/defendant.

14. From perusal of the records of Civil Suit No. 49-B/2002 and grounds taken by appellant/defendant in his application under Order 9 Rule 13 of CPC supported by medical certificate of the doctor, it appears that there was sufficient cause for appellant/defendant for non-appearing on 21/02/2006, which learned Trial Court has not considered and also not adopted pragmatic approach to the case. The Learned Trial Court should have taken into consideration over all facts and circumstances of the case before proceeding *exparte* and passing *exparte* judgment and decree as it curtails valuable right of parties to the suit to make his defence or to contest the case on merit for his legal right.
15. Considering the facts and circumstances of the case and discussions made herein above, the impugned order dated 15/02/2008 passed by learned First Additional District Judge, Raipur (C.G.) is liable to be and is hereby set aside. The application filed by appellant/defendant under Order 9 Rule 13 of CPC is hereby allowed. Consequently, the *exparte* judgment and decree dated 22/02/2006 is also set aside.
16. Both the parties are represented through their respective Advocates and therefore, they are directed to appear before the learned Trial Court on 20/09/2018. The appellant shall be afforded opportunity of contesting the suit bearing Civil Suit No. 49-B/2002 in accordance with law.
17. Records be sent forthwith.
18. In the result, the appeal is allowed. No order as to costs.

Sd/-
(Parth Prateem Sahu)
Judge