

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No. 107/2011

Virendra Kumar Jaiswal s/o Late Ganesh Prasad Jaiswal, aged about 41 years, R/o Village Premnagar, PS & Tahsil Premnagar, District Sarguja (CG)

---- Appellant

Versus

1. Achal Kumar Jaiswal s/o Late Ganesh Prasad Jaiswal, aged 46 years,
2. Smt. Sushila Jaiswal W/o Suraji Lal Jaiswal aged about 47 years,
Both R/o Vill.- Premanagar, P.S. And Tah.- Premnagar, Distt. Sarguja, C.G.
3. The State Of Chhattisgarh Through - The Collector Sarguja, Ambikapur,
District Sarguja C.G.

---- Respondents

For Appellants	:	Shri A.K. Prasad, Advocate.
For Respondents 1 & 2	:	Shri D.N. Prajapati, Advocates
For Respondent 3/State	:	Shri Rajendra Tripathi, Panel Lawyer

SB: Hon'ble Shri Justice Ram Prasanna Sharma

Judgment on Board

16.02.2018

1. This Misc. Appeal is preferred against the judgment dated 21.10.2011 passed by the 1st Additional District Judge, Surajpur, Civil District Sarguja (CG) in Civil Appeal No. 85-A/2011 wherein the said first appellate court reversed the judgment and decree passed by the 2nd Civil Judge, Class-II, Surajpur, Civil District Sarguja dated 29.3.2011 in Civil Suit No. 28A/2010 and remanded the matter for hearing the parties and decide it afresh.
2. In the present case, suit was filed by the appellant against the respondents for declaration of title, permanent injunction and declaring the sale deed void dated 21.11.2001 executed by respondent No.1 in favour of respondent No.2. The suit was filed before the Court of 2nd Civil Judge,

Class-II, Surajpur, who proceeded ex-parte against respondent No.2 on 26.8.2010. After passing the decree, an appeal was preferred and the first appellate court found that no notice was served for 26.8.2010 and therefore, passing ex-parte decree is not in the fitness of procedure and remanded the matter to the trial Court for re-hearing and deciding it afresh.

3. Learned counsel for the appellant submits as under :

I. Notice was issued to respondent No.2 for his appearance on 29.7.2010 and summons were returned with a note that he has refused to accept the summons. When he refused to accept the summons, the trial Court is right in proceeding ex-parte against him.

II. Respondent No.2 has not taken any step for setting aside ex-parte decree and the first appellate court is not right in remanding the case because there is a provision under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (hereinafter for short the 'Code') to get set aside the ex-parte decree.

He placed reliance on Parimal Vs. Veena Alias Bharti, reported in (2011) 3 SCC 545, in which, it is held that second proviso of Order 9 Rule 13 is mandatory in nature.

4. On the other hand, learned counsel for the respondents submits that the first appellate court has power to remand the case for re-trial, especially, when the case is heard ex-parte and one party was not allowed to participate in the proceeding when the service of notice to him is not proved.

He placed reliance on J.Balaji Singh Vs. Diwakar Cole And Others, (2017) 14 SCC 207.

5. I have heard learned counsel for the parties at length and perused the judgments of the Courts below.

6. The core issue in this appeal for consideration of this Court is whether the trial Court was right in proceeding ex-parte against respondent No.2 on 26.8.2010.

7. Plain reading of the order sheet of the trial Court dated 26.8.2010, goes to show that no notice was returned served or unserved on that date. Notice annexure A/2 which was issued on 23.7.2010 for the date of hearing on 29.7.2010. That notice was not brought into notice of the Court on 29.7.2010 because there is no mention of the said notice in the order sheet dated 29.7.2010.

8. The Court can proceed ex-parte only when any party is willfully absent even after service of notice. But as earlier stated no notice was served to respondent No.2 for 26.8.2010 and therefore, the trial Court was not right in proceeding ex-parte against respondent No.2. The first appellate court remanded the matter for re-hearing the parties and decide the issues after hearing the parties afresh and that cannot be termed as unreasonable.

9. It is made clear that now the trial Court shall hear the matter afresh and provide opportunity to both the parties for adducing oral and documentary evidence and for filing written statement and other interlocutory applications as provided in the Code.

10. Though the first appellate court allowed the application under Order 41 Rule 27 of the Code for taking additional evidence, but when the parties are directed to appear before the trial Court for fresh hearing, both the parties will start from initial stage, and all the evidence adduced by them shall be initial evidence and not the additional evidence.

11. With these observations, the Misc. Appeal is liable to be and is hereby dismissed.

12. No order as to cost.

Sd/

(Ram Prasanna Sharma)
JUDGE