

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 112 of 2017

1. Smt. Sundariya Bai Widow Motiya, Aged About 65 Years
2. Smt. Jam Bai W/o Baruaa Father Late Motiya, Aged About 50 Years,
Both are R/o Village Mohda, Tah. Bilha, P.S. Hirri, District Bilaspur, Chhattisgarh
3. Mutana Bai D/o Late Motiya, Aged About 49 Years
4. Gotu S/o Late Motiya, Aged About 39 Years
5. Bhartlal Ratnakar S/o Late Motiya, Aged About 30 Years
6. Smt. Sohaga W/o Late Jagat Father Late Motiya, Aged About 40 Years
7. Satanand S/o Late Jagat, Aged About 18 Years
8. Gajanand S/o Late Jagat, Aged About 15 Years
9. Jabnand S/o Late Jagat, Aged About 13 Years
10. Ku. Chhotee S/o Late Jagat, Aged About 10 Years

the number of 8 , 9 and 10, the Guardian Mother Sohaga Bai W/o Late Jagat, all of Resident Village Chanadongari, Tahsil Takhatpur, P.S. Takhatpur, District Bilaspur, Chhattisgarh

---- Appellants

Versus

- Anjor Das S/o Aghunram, Aged About 37 Years R/o Village Araiband, Tahsil Takhatpur, District Bilaspur, ChhattisgarhDecree Holder,

---- Respondent

For Appellants	:	Shri Badruddin Khan, Advocate
For Respondent	:	Shri B.L. Sahu, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

11/12/2018

1. Heard.
2. The present appeal has been filed against the order dated 12.08.2016 whereby the application filed by the appellants under Order 9 Rule 13 read with Section 151 CPC along with the application under Section 5 of the Limitation Act, has been dismissed.
3. The perusal of the order would reveal that initially an ex-parte decree was passed on 13.08.2013 in a suit filed for specific performance, but the Court did not order for specific performance of the suit, but directed for return of the amount which was paid for sale of the subject land of Rs.2,52,000/-. Subsequently, when the execution was filed, the appellant appeared before the executing Court on 19.12.2014 and thereafter on 23.06.2015 an application under Order 9 Rule 13 read with Section 5 of the Limitation Act was filed to condone the delay, however, the said application was dismissed. Hence, this appeal.
4. Learned counsel for the appellants would submit that actually notice itself was not served and the appellants were illiterate and labours had gone out of the station to earn their livelihood, therefore, the bona fide delay had occurred. He further submits that the agreement itself was a forged as inconsistency exists in the statement and the decree if not set aside, the chances of fair disposal of the suit would be defeated, therefore, the ex-parte judgment and decree dated 13.08.2013 may be set aside.
5. Per contra, learned counsel for the respondent opposes the same.

6. Perused the original record of the case. Perusal of the record would show that a suit for specific performance was filed by the respondent Anjor Das on 04.09.2012. In the said suit, the summons were issued to the then defendant Motiyaram. The copy of the summon would show that the summon issued to Motiyaram was served to the wife of Motiyaram and the endorsement of the Bailiff is written that on 27.12.2012 Sundariya Bai, the wife was served and they were jointly residing. Subsequently on date of hearing no one appeared before the Court below and the Court on 23.01.2013 proceeded ex-parte against the defendants and thereafter ex-parte judgment and decree was passed on 13th of August, 2013, whereby though the suit for specific performance was not decreed, but the amount of Rs.2,52,000/- which was received as a sale consideration, was directed to be returned. Subsequently, it appears that the application under Order 9 Rule 13 read with Section 5 of the Limitation Act was filed by the legal heirs of the Motiyaram, the original defendant, on 23.06.2015.
7. The statement of Sundariya Bai, Wd/o Motiyaram, would show that she admitted the fact that they were residing jointly. The cross-examination shows that she admits the fact that she was served with the notice of the original suit on 07.01.2013, which bears her signature and when their sons came back, who had gone out, she showed the notice to them, therefore, it was within their knowledge that some suit is pending against them.
8. The perusal of the order dismissing the application filed under Order 9 Rule 13 CPC would show that when the execution was filed in the execution case, they appeared on 19.12.2014 and they were in know of the fact of execution of decree, thereafter the application for setting aside was filed on 23.06.2015,

therefore, the delay has been caused in recalling the ex-parte judgment and decree dated 13.08.2013.

9. Reading the statement of the appellant, wherein she admits that she was served with the notice of the original suit on 07.01.2013, the same cannot be sidelined despite the fact that on 19.12.2014 they again came to know the fact that the execution was filed in respect of the decree. Even thereafter no application was filed under Order 9 Rule 13 CPC and it was filed way back on 23.06.2015. Therefore, the statement of the witness and the conduct would show that initially the service of the original suit was made on 07.01.2013 even thereafter nobody turned up from the appellant. Thereafter, in the execution case they appeared in the month of December, 2014 despite that they did not take any action and lastly on 23.06.2015 the application under Order 9 Rule 13 CPC was filed for setting aside the ex-parte judgment and decree. There has to be some plausible explanation and reason must exist to condone the delay. The act of the appellants prima facie appears to be deliberate and the nature of the decree itself shows that instead of decreeing the suit for specific performance, the Court did not execute the decree for specific performance, but directed for return of the amount of sale consideration. Taking into the totality of the fact, the delay so caused cannot be said to be bona fide as it appears that the deliberate act was done. In view of this, I am not inclined to interfere with the impugned order. The appeal has no merit. It is accordingly dismissed.

Sd/-

Goutam Bhaduri
Judge

Ashu