

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 34 of 2018**

Bloom Dekor Limited, 267 Oran N.H.-8 Pranties, District Sabar Kantha
Gujrat, Corporate Office 2/F, Sumel S.G. Highway Thatlej, Ahmadabad,
Gujrat 380059

---- Appellant**Versus**

Smt. Basanti Devi, W/o. Lunkaran Jain, Proprietor M/s. L.K.Jain And
Company, R/o. Janakbada, Maudahapara, Raipur, Chhattisgarh, Through
Power Of Attorney Shanti Kumar, S/o. Lunkaran Jain, Address Janakbada,
Maudahapara, Raipur, Chhattisgarh

---- Respondent

For Appellant : Mr. Dharendra Prasad Mishra, Advocate

For Respondent : Mr. Hari Agrawal, Advocate

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****19.11.2018**

Heard

1. The instant appeal is against the order dated 11.12.2017 passed in Misc. Civil Case No.138/2016 by the learned Second Additional District Judge, Raipur whereby an application under Order 9 Rule 13 read with Section 151 of C.P.C. to set aside the exparte judgment & decree dated 02.02.2016 passed in Civil Suit No.04-B/2015 was dismissed.
2. The civil suit was filed by the respondent/plaintiff for recovery of an amount of Rs.7,15,158/-. It is contended that when the summons were issued, despite service of summons, though the defendant/appellant did not appear before the Court, however, some Advocate appeared on his behalf and file the memo. Subsequently, he did not appear on 14.12.2015, therefore, the

exparte proceedings were drawn and eventually it culminated in to exparte decree.

3. Learned counsel for the appellant would submit that the summons were not duly served, which would be evident from the record of the Court below. It is further contended that the examination of the power of attorney holder was made before the Court below, which cannot be accepted and one opportunity should have been given to contest the case on merits.
4. Per contra, learned counsel for the respondent vehemently opposes the argument and submits according to the order sheets, it would reveal that the summons were served to the respondent and counsel also appeared on his behalf and unless & until under Order 9 Rule 13 of C.P.C. summons are duly served, the exparte proceedings could not have been drawn. He further submits that from the record, the summons are shown to be served, therefore, the exparte proceeding cannot be drawn.
5. Perused the record of the Court below. Perusal of the record of the Court below would show that on 07.05.2015 a memo was filed by an Advocate on behalf of the appellant/defendant and prayer was made to file the Vakalatnama. The said proceedings continued to subsequent dates on 29.06.2015, 28.07.2015, 13.08.2015, 28.08.2015 & 05.10.2015. Subsequently, the order sheet would show that the case was transferred to the Court of Second Additional District Judge from the Court of Sixth Additional District Judge wherein it was taken up on 26.11.2015 wherein on the next date on 14.12.2015 exparte proceedings were drawn. The first date of appearance by the counsel was on 07.05.2015 by filing a memo on behalf of the appellant/defendant.

6. Perusal of the record would show that the summons which was issued came back with an endorsement of the Nazir, Ahamdabad, Mirzapur giving a reason that the bailiff has been transferred, therefore, the notice could not be served and request was made to extend the date of hearing and resend the summons so that the summons could be served. According to such endorsement, the summons appears to have not been served as the date itself has expired. One acknowledgment which is attached wherein the date was shown as 07.05.2015 and further date was shown as 29.06.2015. It was from the Court of Sixth Additional District Judge. As per the order sheet, case stood transferred to the another Court i.e. Second Additional District Judge, Raipur on 26.11.2015 and on 14.12.2015 the Court of Second Additional District Judge has proceeded exparte.
7. Admittedly, the record shows that no power was filed on behalf of the respondent and two memos were filed. Therefore, prima facie the fault cannot be attributed to such counsel as without any instructions, memo would not have been filed. The order sheet of 07.05.2015 & 29.06.2015 both shows that the memo was filed by an Advocate and he prayed time to file the power. The acknowledgment of the postal department shows two dates i.e. 07.05.2015 & 29.06.2015. The copy of summons is also not enclosed with the original case file to show that the fresh summons were issued again on 29.06.2015 as per the order sheet and the record, as it appears that on 07.05.2015, it is not clear as to whether the summons was served for appearance on 07.05.2015. The ambiguity looms large. Prima facie, it appears that there might have been some communication for which the

counsel may have been instructed, however, in order to proceed ex parte there has to be clear case before the Court below that summons were duly served. The copy of summons therefore would have been of much importance. It is always the decision on the merit which is appreciated. Under the circumstances, taking into different dates and the copy of the summons is also not on record to show as to on what date the actual summons were made to make the appearance accepting the fact of memo filed by a counsel. In the interest of justice, in facts of case the benefit of doubt leans in favour of appellant, it will be always better to decide the lis on merits.

8. Taking into the facts of the case and further taking into fact a memo was filed by an advocate at behest of appellant for the reasons expressed in foregoing para, it is directed that on payment of an amount of Rs.15,000/- as cost to the respondent by 20.12.2018 the ex parte proceeding would be set aside. The parties shall appear before the Court on 15.01.2019. Thereafter, the Court shall be obliged to decide the case on merits. It is made clear that the payment of cost to the plaintiff shall be condition precedent to set aside the ex parte.
9. Registry is directed to send back the record of the Court below forthwith.
10. With such observation, the appeal stands allowed.

Sd/-
(Goutam Bhaduri)
Judge