

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No. 20 of 2017

Chhagan Nayak, S/o. Late M.R.Nayak, Aged 46 Years (Approx),
Residence- Himanshu Nayak Electrical & Repairs Shop No. 74/3-A,
Maitrinagar, P.O. Risali Sector, P.S. Navai, City Bhilai, Tah. & District-
Durg, Chhattisgarh 490006

---- Appellant

Versus

R.K. Gupta, S/o. Late B.L.Gupta, Aged 65 Years (Approx), Residence-
Plot No.-07, Phase-03, Street No.1/ A, Maitri Nagar, P.O. Risali Sector,
P.S. Navai, City- Bhilai, Tahsil & District- Durg, Chhattisgarh 490006

---- Respondent

For Appellant : Mr. K.R.Loniya, Advocate

For Respondent : Mr. Vikram Dixit, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

20.09.2018

1. The present appeal is against the order dated 18.01.2017 whereby an application filed under Order 9 Rule 13 read with Section 5 of the Limitation Act seeking to set aside the judgment and decree dated 30.11.2010 was dismissed.
2. Learned counsel for the appellant would submit that he has two fold prayer (i) he should be given an opportunity of hearing in original case by imposing cost and (ii) there should not be any grievance of the trial Court to allow the application under Order 9 Rule 13 of C.P.C. He further submits that decree is shown to be by-parte but actually the decree should have been shown as ex-parte and the ex-parte is against the natural justice; therefore, the judgment & decree should be set aside.
3. Learned counsel for the respondent vehemently opposes the same and submits that the application under Section 5 of the

Limitation Act is so vague as nothing can be assumed and the reasons have not been assigned to condone the delay.

4. Perused the record and the documents connected to this appeal. The document would show that the judgment and decree was passed on 30.11.2010. To set aside such judgment and decree initially an application was filed under Order 9 Rule 13 of C.P.C. before the First Additional District Judge, Durg in Misc. Case No.7/2011. The Court below by an order dated 05.09.2012 has dismissed the application moved under Order 9 Rule 13 of C.P.C. Perusal of the order would show that on the initial stage, the Court observed the proceeding and reproduced the proceeding of the civil suit as per the order dated 12.04.2010. The case was fixed for defendant witness i.e. appellant herein. On 12.04.2010 no evidence was produced. Subsequently on 13.05.2010, 07.07.2010 date was obtained to adduce the evidence and subsequently on 06.08.2010 the defendant produced his statement by way of affidavit under Order 18 Rule 4 of C.P.C. and two statement of appellant and witness Ishwar Sahu was produced for which a next date was given on 28.08.2010.
5. However, the appellant and defendant did not appear on that date and on his request further date of evidence was given. The Court observed though the defendant contended that he was not well and it was informed to the counsel on 22.11.2010 but no evidence was adduced to this fact and to whom the disclosure was made is also not clear. The Court further observed that on 23.11.2010 an information was given that the defendant is not well but nothing was reflected from the order sheets and though the counsel harps upon the fact that medical certificate was produced on that date,

the Court observed that nothing on such sort is on record. Whereas the Court observed in the Civil Suit No.8-B/2009 the application under Order 9 Rule 7 of C.P.C. when was produced, no such medical document was attached and the order sheet is silent.

6. The Court further observed that the certificate which was on record shows that from 18.11.2010 to 23.11.2010 the defendant was getting some treatment at District Hospital, however, it does not show that because of his ailment, he was not able to move or was advised for bed rest. The Court in such application observed that the Court while dismissing the application under Order 9 Rule 13 of C.P.C. observed that no application was attached under Section 5 of the Limitation Act, therefore, the delay could not be condoned *sue moto*. The said order was subject of misc appeal before this High Court in M.A. No.65/2013. This Court by an order dated 09.09.2013 gave liberty to move an application under Section 5 of the Limitation Act by holding that since the application under Order 9 Rule 13 of C.P.C. has not been decided on merits and only because of the fact that the application under Section 5 of the Limitation Act was not attached, the dismissal was affected. Thereafter, the application under Section 5 of the Limitation Act was preferred and case under Order 9 Rule 13 of C.P.C. to set aside the judgment and decree was reopened.
7. The subsequent application under Section 5 of the Limitation Act read with Section 151 of C.P.C. is perused. Perusal of the application would show that no reasons have been assigned to condone the delay instead the para of the order of the High Court dated 09.09.2013 is reproduced. The appellant was obliged to

inform to the Court as to what was the reason for delay so as to consider the same on merit. The Court cannot draw any presumption of fact to evaluate the contention, it is for the appellant or the party who has approached the Court to explain what was the reason existing for not filing the application under Section 5 of the Limitation Act. Simply placing the application under Section 5 of the Limitation Act will not *ipso facto* condone the delay if the delay has not been explained.

8. Under the circumstances, the Seventh Additional District Judge by a subsequent order dated 18.11.2017 again dismissed the application under Order 9 Rule 13 of C.P.C. by holding the fact that no reasons have been assigned. Taking into considering and the totality of the facts and circumstances of the case, I am of the opinion that no merit exists in this appeal so as to reconsider, as the appellant himself has miserably failed to show any reason to condone the delay. The application under Section 5 of the Limitation Act is too cryptic as it could be, therefore, I do not find any merit warranting interference with the order of the Court below.
9. In view of the above, the appeal has no merit and accordingly it is dismissed.

Sd/-
(Goutam Bhaduri)
Judge