

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 72 of 2017

1. Smt. Meena Sharma Wd/o Late Shivram Prasad Sharma, Aged About 64 Years,
2. Rohit Sharma, S/o Late Shivram Prasad Sharma, Aged About 43 Years,

Both above R/o Pratapdev Ward Besides Nirmal Medical, In Front Of Maharani Hospital, Jagdalpur District Bastar Chhattisgarh.

---- Appellants

Versus

Smt. Rajkumari Sharma Wd/o Late Narayan Sharma, Aged About 55 Years R/o Pratapdev Ward Besides New Narendra Talkies, Near Sharad Watch House, Jagdalpur District Bastar Chhattisgarh.

---- Respondent

For appellants- Shri Manoj Paranjpe and Shri Vikram Dixit, Advocates.
For respondent-Shri Rahul Tamaskar, Advocate.

Hon'ble Shri Justice Goutam Bhaduri

Order

5/09/2018

Heard.

1. Instant appeal is against the order dated 21/07/2017 whereby an application under Order 9 Rule 13 read with section 151 of CPC was dismissed claiming setting aside of judgement and decree passed in Civil Suit No.27-A/2004 on 30/08/2012.

2. Learned counsel for the appellants would submit that the application under Order 9 Rule 13 read with section 151 of CPC was filed on the ground that there has been some compromise talks were going on in between the parties and they were under the bonafide impression that suit will not be prosecuted by the plaintiff and further it is contended that the dismissal is on the ground that application under Section 5 of the Indian Limitation Act has not been preferred, therefore one opportunity should have been given by the court to file the application under section 5 of the Indian Limitation Act to show that there was sufficient reasons existed to condone the delay and as

such appeal may be allowed.

3. Learned counsel for the respondent vehemently opposes the argument and would submit that suit was itself in very casual manner, appellants proceeded ex-parte in civil suit in 2011 itself. Subsequently, they did not bother to check the status and when execution was pressed in all of a sudden appellants came out with an application under Order 9 Rule 13 read with section 151 of CPC. Therefore, order dismissing the application to set aside the decree is well merited.

4. Perused the order dated 21/07/2017 whereby an application under Order 9 Rule 13 read with section 151 of CPC was dismissed. Also perused the application under Order 9 Rule 13 read with section 151 of CPC. Prima facie it appears that judgement and decree is dated 30/08/2012 whereas application under Order 9 Rule 13 read with section 151 of CPC was preferred on 16/08/2016 as it appears from the affidavit sworn in support of the application under Order 9 Rule 13 read with section 151 of CPC. Reason assigned in application was that since compromise talks were going on in between the parties as such appellants/defendants did not appear which resulted in ex-parte proceeding. The application to compromise the suit was preferred, however no compromise since was effected and in the meanwhile counsel C.S. Acharya had died, therefore appellants did not appear. Perusal of the copy of the order sheet of the civil suit shows that on behalf of the appellants one Jagdishwar Das Advocate was appearing and last appearance was made on 29/09/2011. Thereafter, when case was fixed for 5/11/2011 no one appeared and court proceeded ex-parte and fixed the case for 26/11/2011. The statement of the plaintiff was recorded on 6/08/2012. In the meanwhile, so many dates passed and eventually ex-parte decree was passed on 30/08/2012.

5. The application under Order 9 Rule 13 of CPC read with section 151 of CPC was filed on 16/08/2016 i.e. almost about 4 years. No application was preferred to condone the delay assigning any reason thereof. Only reason

which is assigned in application under Order 9 Rule 13 read with 151 of CPC it was stated that since compromise talks were going on in between the parties and on 23/10/2008 an application was filed to get the suit compromised. Consequently, the appellants were under misconception that the suit will not be prosecuted. Order sheet of the court below which is also placed shows that case before the court below was pending for compromise and on behalf of the appellants/respondents one Jagdishwar Das, Advocate was appearing. Order sheet which have been placed on record from 21/09/2010 it shows that on all the dates uptill 29/09/2011 the appellants were represented through their counsel. Reason assigned in application under Order 9 Rule 13 read with section 151 of CPC that after 23/10/2008 the appellants since were under the impression that case would be compromised did not appear but such statement are negated by the order sheet. It would be too much stretching of liberty to accept contention that of the appellants that after 2008 they did not care to appear till ex-parte proceeding was drawn uptill 2011 only on the basis of presumption that compromise would be affected whereas order sheet shows that regular representation was made on behalf of the appellants through their advocate. As such it appears that reasons assigned in application under Order 9 Rule 13 read with section 151 of CPC were after thought and facts do not support it on the face of it.

6. Further judgement and decree is dated 30/08/2012 and no reasons have been assigned by the appellants to condone the delay when application under Order 9 rule 13 read with section 151 of CPC was filed in year 2016 i.e. after almost 4 years. If the appellants were conscious of the fact that compromise has not been effected then such idea they are not required to prosecute the civil suit fault can only be attributed to the appellants. Affidavit filed in support of the application under Order 9 Rule 13 read with 151 of CPC only disclosure is made that the appellants came to know about judgement and decree only on 22/07/2016 how they came in notice of such decree what were the facts existing and delay occurred is also not been shown. Normally

the courts leans in favour of setting aside to decide the case on merits but it cannot be at the sweet will of the appellants. Further no reasons have been assigned it cannot be as a matter of course to defeat a lawfull decree after exorbitant delay of 5 years in absence of any application under Section 5 of the Indian Limitation Act facts cannot be presumed.

7. In the result, petition has no merit and it is dismissed.

Sd/-

(Goutam Bhaduri)

JUDGE

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