

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**W.P.(227) No. 194 of 2014**Judgment reserved on : 06.03.2018Judgment delivered on : 26.03.2018

1. Gopal Traders, 5, Civic Centre, Bhilai, Distt. Durg, Through the Partner
2. Satyananarayan Agrawal, S/o. Late Shri Kalyanmalji Agrawal, Aged About 52 Years, Partner Firm, M/s. Gopal Traders, 5 Civic Centre, Bhilai, P.S. Bhilai, Distt. Durg, Chhattisgarh
3. Gopal Agrawal, S/o. Late Shri Kalyanmalji Agrawal, Aged About 63 Years, Partner Firm, M/s Gopal Traders, 5 Civic Centre, Bhilai, P.S.Bhilai, Distt. Durg, Chhattisgarh

---- Petitioners**Versus**

1. Smt. Chandrika Bai, W/o. Late Arjun, Aged About 22 Years (Now 30 years).
2. Abhimanyu, S/o. Late Arjun, Aged About 2 Months (Now 8 Years), Minor Through Legal Guardian Mother Smt. Chandrika Bai, W/o. Late Arjun.
3. Ramaiyya, S/o. Nakul, Aged About 65 Years (Now 72 Years)
4. Sumitra Bai, D/o. Ramaiyya, Aged About 60 Years.
(No.1 to 4 all are Caste Bareth, R/o. Village Kotmi Sonar, Tahsil Janjgir, Distt Janjgir Champa, Chhattisgarh)
5. Vijay Kumar, S/o. Fandiram Dhobi, Aged About 27 Years (Now 35 Years) R/o. Village Nandini, Bhilai, Distt. Durg, Chhattisgarh
6. The Oriental Insurance Company Limited, Durg, Distt. Durg, Chhattisgarh

---- Respondents

For Petitioners : Ms. Sharmila Singhai, Advocate

For Respondent No.6 : Mr. N.K.Malviya, Advocate

Hon'ble Shri Justice Goutam Bhaduri**CAV ORDER****26/03/2018**

1. The instant petition is against the order dated 07.02.2005 passed in M.J.C. No.1/2004 by the learned Third Additional Motor Accident Claims Tribunal (F.T.C.) Janjgir. By such order, an application preferred by the petitioners

herein under Order 9 Rule 13 of C.P.C. to set aside the ex-parte award dated 03.05.1997 was dismissed.

2. Learned counsel for the petitioners would submit that a claim petition having been filed by the respondents No.1 to 4, an ex-parte award was passed by the learned Claims Tribunal. It is stated that for the accident occurred on 26.04.1994 by an offending vehicle i.e. Truck which was bearing No. M.P.24-C/1788 owned by Gopal Traders, two persons died. One of the dead was Hariram and another was Arjun. It is stated that two cases were filed by the legal heirs of the deceased. The claim case preferred by the legal heirs of Hariram was bearing No.23/1994 wherein an award was passed on 22.01.1999 and the insurance company was held liable to pay the compensation. It is further submitted that another claim petition was filed by the legal heirs of Arjun, which was numbered as 24/1994 which arises of the same accident and the insurance company was exonerated and the liability was fastened over the petitioners.
3. Learned counsel for the petitioners submits that the award in claim case No.24/1994 was of 03.05.1997 and it was an ex-parte award. It is submitted that inconsistency in the award is apparent. It is stated that in Claim Case No.23/1994 the petitioners appeared before the Claims Tribunal and contested wherein liability was fastened on insurance company while the second case was simultaneously going before the Court and there was no occasion or logical reason remained for non-appearance. It is submitted that no notice actually was served in respect of the Claim Case No.24/1994 and ex-parte award was passed. Further, it is submitted that when it came to knowledge of the petitioner that an ex-parte award was passed, an application under Order 9 Rule 13 of C.P.C. was filed to set aside such ex-parte award on the ground that no notice of claim petition was served.

Further, it is submitted that setting aside application was moved on 20.11.1997 and alongwith that an application to condone the delay was also filed. It is stated that in the facts of this case since two awards are existing on the face of record wherein in one case the insurance company is exonerated whereas in another case the insurance company is held liable, the same cannot be allowed to sustain and award is completely misconceived. It is stated under these circumstances, the Claims Tribunal should have given an opportunity to decide the case on merits by giving proper opportunity of hearing. It is contended that no prejudice would be caused to the parties if opportunity of hearing is given, therefore, the order of dismissing the application to set aside the ex-parte award is liable to be set aside.

4. Learned counsel for the respondent- insurance company opposes the argument.
5. Perused the documents and the original records of M.J.C. as also the claim case. The order dated 15.01.1996 of claim case records that despite service of summons no one appeared on behalf of the respondents No.1 to 3, the petitioners herein, i.e. Gopal Traders, Satyanarayan Agrawal & Gopal Agrawal, they were proceeded ex-parte and ex-parte award was eventually passed on 03.05.1997.
6. The original record of M.J.C. No.1/2004 i.e. the application under Order 9 Rule 13 of C.P.C. was also perused. The record would reveal that an application under Order 9 Rule 13 of C.P.C. was filed on 21.09.1997 along-with an application to condone the delay. In the application to condone the delay, it is stated that information in respect to the award dated 03.05.1997 was received by the petitioners on 17.11.1997 and thereafter on 18.11.1997 in the record room at Bilaspur inspection was carried out and subsequent to

it, an application to set aside the ex-parte award was filed. Perusal of the application under Order 9 Rule 13 read with Section 151 of C.P.C. would show that similar pleading has been made that on 18.11.1997 the petitioners came to know about the ex-parte award. The pleading is also to the effect that on 15.01.1996, the ex-parte proceedings were drawn but the acknowledgment of notice which is dated 29.11.1995 has wrongly been shown as the petitioners have not received the notice at any point of time.

7. The affidavit of Gopal Agrawal and one Chandraprakash Kashyap, Advocate is also on record. In the affidavit of Gopal Agrawal, it is stated that on 29.11.1995 though the petitioners have shown to have been served by registered post but the summons served by ordinary post has not been recorded. It led to inference as if the service by registered post was served but no service was made by usual method. In the cross examination of this witness, the acknowledgement of notice Ex.C-1 to C-4 has been marked. The acknowledgement of C-1 to C-4 however not found on record as on today. It is stated that the seal which was placed and marked on the acknowledgement was not of the petitioners. In the cross-examination, further when the acknowledgement of summons of 08.02.1995 was confronted with the signature of Assistant Manager of firm, he denied to recognize the same. The summons of the claim case were further exhibited as P-5, P-6 & P-7 and stated that he had not examined any Manager of his company thereby denied the existence and signature. It is admitted by this witness that if the communication is made in the address of Civil Centre in name of Gopal Traders or Satyanarayan Agrawal, he normally would receive the correspondence. So the inference can be drawn that summons were issued to the petitioners in an address wherein they normally receives the correspondence.

8. Most importantly one witness Chandraprakash Kashyap who is an Advocate was examined. This witness has stated that on the oral instructions of Gopal Traders, he used to monitor and follow up the case but since the Vakalatnama was not given, he could not enter his appearance. He further stated that after the award was passed on 03.05.1997, he had informed Gopal Traders by a post-card that award has been passed against him. In the cross-examination this witness stated that in the oral instructions of Gopal Traders, he used to follow up the case and after the award was passed, he had also called them on phone and also had written a letter on the same day. He stated that Gopal Traders have given a card and on that card, the phone number was inscribed wherein he had informed Gopal Traders about the award and had communicated by a post card.
9. Therefore, in the facts of this case, if the witness of the petitioners namely Chandraprakash Kashyap, Advocate, himself had stated that he was monitoring the case on the instructions of Gopal Traders, the petitioners, and had also informed about the award then in such eventuality it can always be presumed that the petitioners were following up the case through their representative and had all the knowledge about passing of the award. The witness of the petitioners himself has deposed against the petitioners even to the extent that after passing of the award on 03.05.1997, he had informed it by telephone and by letter to the petitioners on same day. This witness being a witness of petitioners, this Court finds no reason to disbelieve the statement of the witness of the petitioners. Therefore, the inference would be that petitioners had instructed the counsel to monitor the claim case and was also informed after the award was passed. The averments therefore as shown in the application under Order 9 Rule 13 of C.P.C. and Section 5 of Limitation Act appears to be wrong. The petitioners

therefore have to blame themselves for their own negligence.

10. In a result, the petition has no merit as appears that though two inconsistency award was passed but instead of filing of the appeal, an application to set aside the ex-parte award was filed wherein subsequently it was proved by evidence that notice was duly served and petitioners have knowledge of the date of award. In such case, the order dismissing the application under Order 9 Rule 13 of C.P.C. cannot be faulted as it confined to the fact whether proper notice was served to the petitioners before proceeding ex-parte or not ?
11. Consequently, the petition has no merit and accordingly it is dismissed.

Sd/-
Goutam Bhaduri
Judge