

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.343 of 2004**

1. Lakhma s/o Mudaki Gond aged 40 years.
2. Navadi Bai w/o late Pandu Gond aged 60 years
3. Ankaloo S/o late Pandu Gond aged 40 years
4. Sonabai d/o Mangalu Gond, aged 45 yeas
5. Raini Bai d/o Mangalu Gond, aged 25 years

All cultivators and residents of village Deogaon Tahsil Narayanpur Distt. Bastar (CG)

---- Appellants/Defendants

Versus

1. Janki Bai Sahu w/o G.S. Sahu cultivator, resident of village Deogaon Tahsil Jagdalpur Distt. Bastar (CG)

---- Plaintiff

2. Recovery Officer, Cooperative Society, Kanker, District Kanker (CG)
3. State of Chhattisgarh through Collector, Bastar (CG)

---- Respondents/Defendants

For Appellants/Defendants	:	Mr.Ram Kumar Tiwari, Advocate
For Res.No.1/Plaintiff	:	Mr.B.P.Sharma, Advocate
For Respondent No.3	:	Mr.Ravi Kumar Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

19.08.2019

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the defendants is as under:-

“Whether both the Courts below were justified in decreeing the suit ex parte without providing opportunity of hearing to the appellants ?”

[For the sake of convenience, parties would be referred

hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. Suit filed by the plaintiff was dismissed ex-parte by the trial Court on 10.4.2000, against which, respondent No.1/plaintiff preferred first appeal along with application for condonation of delay. The first appellate Court by order dated 15.7.2003 condoned the delay in filing first appeal and fixed the case for final hearing on 23.8.2003 and on 23.8.2003 again the matter was fixed for 6.10.2003 and on that day, it was re-fixed for 3.11.2003. On 3.11.2003 the matter heard ex-parte and the first appellate Court delivered the judgment on 13.11.2003 by allowing the appeal, against which, the appellants/defendants preferred this second appeal under Section 100 of the CPC, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.
3. Mr.Ram Kumar Tiwari, learned counsel for the appellants/defendants, would submit that the first appellate Court has only issued notices on application for condonation of delay and after condoning delay, straightway allowed the appeal and neither fixed the case for hearing the appeal nor issued notice to the appellants/defendants, as such, the procedure adopted by the first appellate Court is unknown to law and is violative of Rule 12 and Rule 14 of Order 41 of the CPC, as such, the judgment and decree passed by the first appellate Court deserves to be set aside.
4. On the other hand, Mr.B.P.Sharma, learned counsel for respondent No.1/plaintiff, would support the impugned judgment and decree and submit that the first appellate Court has issued notices on merits of

appeal as well as on application for condonation of delay, therefore, sufficient notice was served to the appellants/defendants for hearing the appeal and as such, the first appellate Court is absolutely justified in hearing the appeal after condoning delay without further issuance of notice of appeal and therefore, the second appeal deserves to be dismissed.

5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumscription.
6. It appears from the record that the plaintiff's suit was dismissed ex-parte on 10.4.2000, against which, she preferred first appeal along with application for condonation of delay, in which notices were directed to be issued on 21.8.2000 and again on 19.12.2000. On 2.2.2001 notices were issued to the appellants/defendants, but despite service of notice, the appellants/defendants did not appear before the first appellate Court and ultimately, on 15.7.2003 the first appellate Court allowed the application for condonation of delay and fixed the case for final hearing and ultimately, on 3.11.2003 heard the appeal ex-parte and delivered the judgment on 13.11.2003.
7. Admittedly, application for condonation of delay was filed under Order 41 Rule 3A of the CPC. That application was considered and granted on 15.7.2003 by the first appellate Court and thereafter appeal was not dismissed summarily by the first appellate Court under Order 41 Rule 11 of the CPC.
8. At this stage, it would be appropriate to notice Order 41 Rule 12 and Rule 14 of the CPC which states as under:-

“12. Day for hearing appeal.”-(1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court.

14. Publication and service of notice of day for hearing appeal.-(1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) **Appellate Court may itself cause notice to be served-** Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

(3) The notice to be served on the respondent shall be accompanied by a copy of the memorandum of appeal.

(4) Notwithstanding anything to the contrary contained in sub-rule (1), it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal.

(5) Nothing in sub-rule (4) shall bar the respondent referred to in the appeal from defending it.”

Under Order 41 Rule 12 of the CPC, the first appellate Court is obliged to fix the case for hearing the appeal. Order 41 Rule 14 of the CPC provides for publication and service of notice of day for hearing the appeal. Sub-rule (3) of Rule 14 of Order 41 of the CPC provides that notice to be served on the respondent shall be accompanied by a copy of the memorandum of appeal. Order 41 Rule 14(1) CPC is mandatory.

9. Reverting to the facts of the present case, notice annexed with the appellate Court's record would show that notices were issued to the appellants/defendants along with copy of application for condonation of delay by registering MJC and after condoning the delay on 15.7.2003, the first appellate Court directed for registration of appeal on same day and thereafter appeal was registered as Civil Appeal No.15-A/2003. It appears from the record that no notice as required under Order 41 Rule 14(1) and 14(3) of the CPC was ever issued and served to the appellants/defendants and straightway the case was fixed for final hearing after condoning the delay. The first appellate Court was obliged to issue notices and serve to the appellants/defendants before hearing the appeal on merits, but that was not observed and as such, the appeal was allowed without notice to the appellants herein, which is contrary to the provision contained in Order 41 Rule 14 of the CPC and violative of principles of natural justice.

10. Submission of Mr.B.P.Sharma, learned counsel for respondent No.1/plaintiff, based on Order 41 Rule 14(4) of the CPC that since the defendants were ex-parte before the trial Court, notice was not necessary in view of Order 41 Rule 14(4) of the CPC.

11. A perusal of sub-rule (4) of the Order 41, Rule 14 of Code of Civil Procedure, referred to clearly indicates that dispensing with the service of the notice of the appeal on a respondent therein as contemplated under Order 41, Rule 14(1) of Code of Civil Procedure, shall not be necessary in a proceeding incidental to an appeal. Under sub-rule (4) of Rule 14 of Order 41 of the CPC it is provided that the

Court may dispense with the service of notice upon the respondent unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal. In the instant case, no such application was filed by the plaintiff for dispensing with the service of notice in light of the aforesaid provision, therefore, the provision contained in Order 41 Rule 14(4) of the CPC was not pressed into service before the first appellate Court.

- 12.** Concludingly, the first appellate Court is absolutely unjustified in granting the appeal without issuing and serving notice of appeal after condoning the delay in filing the appeal, which is violative and is in teeth of Order 41 Rule 14(1) and Rule 14(3) of the CPC. Accordingly, the impugned judgment and decree passed by the first appellate Court is set aside. The substantial question of law is answered in favour of the defendants and against the plaintiff. The matter is remitted to the first appellate Court for hearing both the parties in accordance with law. The first appellate Court is directed to hear and decide the appeal within three months from the date of receipt of records along with copy of this judgment. Records be sent to the first appellate Court forthwith. However, it is made clear that this Court has not expressed any opinion on merits of the case and the first appellate Court will be at liberty to decide the appeal strictly in accordance with law.
- 13.** The second appeal is allowed to the extent indicated hereinabove. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge