

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.520 of 2006

1. Samai Lal, Son of late Devgir Sahu, aged about 40 years,
2. Hari Prasad, Son of late Raghuvir Sahu, aged about 47 years

Both are resident of Village : Tendua, Siwani Para, District : Korea, Chhattisgarh

---- Appellants

Versus

1. Sonamati, daughter of late Suresh Sahu, aged about 26 years,
2. Savita, widow of late Ramcharan, aged about 35 years
3. Usha Kumari, daughter of late Ramcharan, aged about 6 years
4. Rekha Kumari, daughter of late Ramcharan, aged about 3 years
Respondent No.3 & 4 are minors through its natural guardian (mother) Savita, Widow of late Ramcharan
5. Smt. Sukhman Bai, wife of Shiv Balak Sahu, aged about 48 years

All the Respondents No.1 to 5 are permanent resident of village : Tendua, Siwani Para, District: Korea, Chhattisgarh

6. State of Chhattisgarh through the Collector, Korea, Chhattisgarh

---- Respondents

For Appellants: Mr.V.K.Pandey, Advocate

For Respondents No. 1/Plaintiffs:

Mr.Prakash Tiwari, Advocate

For Respondents No.2 to 5: None present

For Respondent No.6: Mr.Salim Kazi, Dy.Advocate General

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

24/07/2019

1. The substantial question of law involved, formulated and to be answered in this plaintiff's second appeal is as under: -

“Whether the first appellate Court was justified in rejecting of the appeal on the ground that the limitation in spite of proper explanation being given ?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the plaint before the trial

Court.)

2. Suit filed by Plaintiff-Sonamati for declaration of title, partition and possession was decreed by the trial Court on 30.8.2002 after hearing the parties, against the said judgment and decree, legal representative/son of defendant No.2 and defendant No.3 preferred first appeal on 21.2.2004 along with an application for condonation of delay as appeal was filed with a delay of 17 months and 21 days, which the first appellate Court did not find favour with and dismissed the application for condonation of delay and consequently, first appeal was also dismissed. Against which, this second appeal under Section 100 of the Code of Civil Procedure, 1908 has been filed by the appellants/legal representative of defendant No.2 and defendant No.3, in which substantial question of law has been formulated and set-out in the opening paragraph of this judgment.
3. Mr.V.K.Pandey, learned counsel for the appellants/legal representative of defendant No.2 and defendant No.3, would submit that the first appellate Court is absolutely unjustified in rejecting the application for condonation of delay and thereby dismissing the appeal as there was no reason not to file the appeal within the time of limitation as the defendants have suffered the decree of declaration of title, partition and possession and when the proceeding for recovery of possession from the defendants was initiated, then they came to know and took steps for filing the appeal and ultimately filed the appeal on 21.2.2004, which has been rejected holding that no sufficient cause has been shown.

Therefore, the impugned judgment and decree passed by the first appellate Court deserves to be set aside.

4. Mr. Prakash Tiwari, learned counsel for respondent No.1/plaintiff would submit that the first appellate Court is absolutely justified in dismissing the appeal as barred by limitation. He relied upon the judgment of the Supreme Court in the matter of Estate Officer, Haryana Urban Development Authority and another v. Gopi Chand Aterja¹.
5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and went through the records with utmost circumspection.
6. Shri Devgir was defendant No.2 before the trial Court, who died during pendency of the suit on 9.5.2002. Appellant No.1-Samay Lal is son of Devgir, he was not impleaded as legal representative of Devgir and no permission under Order 22 Rule 4(4) of the CPC was granted in favour of the plaintiff holding that there was no necessity to bring legal representatives of Devgir on record as he was ex-parte before the trial Court and upon passing of the decree, son of Devgir i.e. appellant No.1 herein preferred first appeal under Section 96 of the CPC stating that he came to know about the passing of decree only when he was informed that possession of suit land has to be delivered, then he obtained certified copy of the judgment and decree of the trial Court on 12.11.2003 and preferred the appeal on 21.1.2004, as such, in my considered opinion, since appellant No.1 herein was not substituted during pendency of the

¹ (2019) 4 SCC 612

suit after death of his father and when he came to know about the passing of the judgment and decree, he applied for certified copy and filed first appeal before the first appellate Court, as such, the reasons assigned by the first appellate Court holding that no sufficient cause has been shown by appellant No.1 is contrary to record and perverse. Apart from that, the application for condonation of delay filed by appellant No.1 was duly supported by an affidavit, whereas reply to that application was filed by respondent No.1/plaintiff, but no affidavit in support of reply was filed by the plaintiff, as such, there is uncontroverted affidavit evidence on record in support of the reasons given by appellant No.1.

7. The first appellate Court has rightly held that no application for condonation of delay was preferred by legal representatives of defendant No.2 and appeal was preferred by legal representative of defendant No.2 and defendant No.3, in that event, the first appellate Court could have given liberty to file application for condonation of delay and could not have dismissed the appeal on that ground and further since delay in filing the appeal is being condoned and appeal is being restored for hearing and disposal on merits, in such a situation, it would be expedient to allow appellant No.2 also to be heard on merits. Delay in filing appeal by appellant No.2 would also be condoned.
8. Accordingly, the impugned judgment and decree passed by the first appellate Court is set aside. The appeal is restored for hearing and

disposal in accordance with law on its own merit. The first appellate Court is directed to decide the appeal within a period of three months from the date of receipt of records after hearing the parties. Records of the Courts below be sent forthwith

9. The second appeal is allowed to the extent indicated hereinabove.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-