

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 119 of 2014

Reserved on : 29.08.2019

Delivered on : 18.09.2019

Bhukhau Ram, S/o Late Tangu Satnami, aged about 70 years, R/o Village-Lalpur, Tahsil- Lormi, District- Bilaspur (C.G.)

---- Appellant

Versus

Ramudas, S/o Bhukhu Satnami, aged about 45 years, R/o Sukhatal, Tahsil-Lormi, District- Mungeli (C.G.) Presently R/o Yadunandan Nagar, Bilaspur (C.G.)

---- Respondent

For Appellant	:	Mr. Praveen Das, Advocate.
For respondent	:	None.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV ORDER

1. This miscellaneous appeal is preferred under Order 43 Rule 1(d) of the Code of Civil Procedure, 1908 against order dated 03.11.2014 passed by Additional District Judge, Mungeli, District- Bilaspur (C.G.) in M.J.C. No. unregistered of 2012, whereby the application preferred by the appellant under Order 9 Rule 13 of the C.P.C. to set aside exparte decree dated 05.03.2010 passed by Second Additional District Judge (F.T.C.), Mungeli, District- Bilaspur (C.G.) in Civil Suit No. 2-A/2009, has been rejected.
2. As per the appellant, the respondent/ plaintiff preferred a civil suit for specific performance of contract which was registered as Civil Suit No.

2-A/2009 before the court of Second Additional District Judge (F.T.C.), Mungeli, District- Bilaspur (C.G.) regarding land bearing Survey No. 114/08 area admeasuring 0.67 acres situated at Village- Lalpur, Patwari Halka No. 14, Tahsil- Lormi, District- Bilaspur (C.G.). As per the suit filed by the respondent, an agreement to sell is entered into between both sides on 28.07.2007 and it is agreed that the respondent would purchase the land for a consideration of Rs. 98,500/-. The respondent paid Rs. 80,000/- as advance to the appellant. However, when sale-deed was not executed, a notice was sent by the respondent which was returned with endorsement 'refuse to receive'. The appellant was proceeded exparte and the court has made no effort to serve the notice upon the appellant and the suit was decreed against the appellant. The appellant came to know about the matter when he received the notice in execution proceeding. He preferred an application under Order 9 Rule 13 of the C.P.C., but the same was dismissed against legal norms.

3. Learned counsel for the appellant submits as under:-

- (i) The court of Additional District Judge ought to have verified and appreciated the averments made in the application because the appellant has been deprived of valuable opportunity to defend his case.
- (ii) Conduct of the appellant is natural that he filed the application after knowledge of the decree in execution proceeding, therefore, the case should be heard on merit by allowing the appeal.

4. I have heard learned counsel for the appellant and perused the record in which judgment and decree has been passed.
5. First question for consideration before this Court is whether the notice was served on the appellant as per legal provision in this regard. The suit was registered as Civil Suit No. 2-A/2009 which was filed on 16.09.2008. The court has ordered issuing of summon by general mode and postal mode, as per order-sheet dated 19.09.2008, the notice was returned with a note of refusal to take the said notice. Accordingly, the trial court proceeded ex parte. An amendment was allowed by the trial court on 08.04.2009 and after allowing the amendment again, ordered on 02.05.2009 that notice be served to the appellant through general and registered mode. The registered postal notice was returned with a note that the addressee has refused to take the said notice. Again, on 08.09.2009, the trial court proceeded ex parte. When the notice was served twice on the appellant, but it is returned on refusal, notice must be deemed to have been served as per Section 27 of the General Clauses Act, 1897. When the appellant did not appear before the trial court even after notice is served twice, the trial court is right in proceeding ex parte.
6. Second question for consideration before this Court is whether there is sufficient cause for not appearing before the court when the case was called on for hearing or summon was not duly served. It is clear from record that the summon was duly served to the appellant twice. There is nothing to say that there had been fraud or collusion between the appellant and postman. As per second proviso of Order 9 Rule 13 of

the C.P.C., no court shall set aside the decree passed exparte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff claim. As per law laid down in the matter of **Parimal Vs. Veena alias Bharti**, reported in **(2011) 3 SCC 545**, it is not permissible for the court to allow the application against second proviso of Order 9 Rule 13 of the C.P.C. The test to be applied is whether the non-appearing party sincerely intended to remain present when the suit was called on for hearing and did his best to do so.

7. In the present case, notice was served on the appellant twice and it cannot be said that the appellant sincerely intended to appear when the case was called on for hearing. As per article 123 of the Limitation Act, 1963, period of 30 days is provided for filing such an application to set aside the decree passed exparte. In the present case, summon is duly served, therefore, limitation begins from date of decree. The date of decree is 05.03.2010 and the application was filed to set aside the decree on 14.12.2012 i.e. after two years and nine months which is apparently time barred.
8. In view of the above, the instant miscellaneous appeal is liable to be and is hereby dismissed.

Sd/-
(Ram Prasanna Sharma)
Judge