

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 268 of 2018**

Roopsingh, S/o Sukhram Teli, aged about 32 years, R/o Village- Dharashiva, Tehsil – Bhilaigarh, District – Baloda Bazar- Bhatapara, C.G.)

----Petitioner/Defendant

Versus

Sakundram, S/o Hiralal Teli, aged about 42 years, R/o Village – Dharashiva, Tehsil – Bhilaigarh, District – Baloda Bazar – Bhatapara (C.G.)

----Respondent/plaintiff

For Petitioner	:	Mr. Shobhit Kosta, Advocate.
For Respondent	:	Mr. Rajkumar Pali, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

25/01/2019

(1) Smt. Budhwara Bai was defendant before the trial Court, in which the trial Court, passed an *ex parte* decree in Civil Suit No. 42-A/2010 on 5.11.2011,

(2) Thereafter, original defendant - Budhwara Bai filed an application under Order 9 Rule 13 of the Code of Civil Procedure (henceforth “CPC”) for setting aside the *ex parte* decree on the ground that she is old and illiterate lady; she never received summon/notice of civil suit filed by the respondent/plaintiff; she has never served with summons of the aforesaid suit and she has never authorized any advocate to appear on her behalf and in fact, someone by forging her thumb impression, the vakalatnama on her behalf was filed and thereafter said counsel did not appear in the suit and *ex parte* decree was passed, which is liable to be set aside.

(3) The trial Court, by its order dated 4.12.2012, dismissed the application under Order 9 Rule 13 of the CPC finding no merit. Against which, miscellaneous appeal was filed by Budhwara Bai. During pendency of the appeal she died and present petitioner -Roopsai was substituted in her place. By the impugned order dated 26.02.2018, appeal was also dismissed finding no sufficient cause for allowing the application under Order 9 Rule 13 of the CPC, against which instant writ petition has been filed questioning the same.

(4) Learned Counsel for the petitioner would submit that the trial Court, while deciding the application under Order 9 Rule 13 of the CPC, ought to have held enquiry regarding service of summon/notice upon defendant Budhwara Bai and for want of that, the impugned order is liable to be set aside.

(5) Per contra, counsel for the respondent/plaintiff would support the impugned order.

(6) I have heard learned counsel appearing for the parties and perused the impugned order with utmost circumspection.

(7) It is the case of the petitioner that original defendant – Budhwara Bai was never served with the summons of civil suit filed by the plaintiff and, therefore, she could not appear before the trial Court well in time and the ex parte decree was passed. It is also case of the defendant that someone has forged her thumb impression in vakalatnama and two different advocates appeared on her behalf on two different dates i.e. 20.10.2012 & 9.12.2010 on strength of forged vakalatnama and after their non-appearance *ex parte* decree was passed by the trial Court.

(8) The Supreme Court in the matter of **Naresh Chandra Agarwal Vs. Bank of**

Baroda and others¹ has held that before deciding the application under Order 9 Rule 13 of the CPC, enquiry with regard to service of notice is necessary.

(9) Applying the ratio of law laid down by the Supreme Court in afore-cited case and considering the plea raised in application under Order 9 Rule 13 of the Code of Civil Procedure, it is apparent that enquiry ought to have been held by the trial Court before deciding the application under Order 9 Rule 13 of the CPC, which has not been held thereby defendant has suffered prejudice and could establish that she was never served with summon/notice of trial Court and that has vitiated the order passed by the trial Court, duly affirmed by the Misc. Appellate Court rejecting the application under Order 9 Rule 13 of the CPC.

(10) Accordingly, the impugned order as well order rejecting application under Order 9 Rule 13 of the CPC is set aside. The matter is remitted to the trial Court for deciding the application under Order 9 Rule 13 of the CPC for setting aside ex parte order afresh after conducting an enquiry and after affording due opportunity of hearing to both the parties expeditiously preferably within a period of four months from the date of receipt of certified copy of this order.

(11) The writ petition is allowed to the extent indicated hereinabove. No order as to costs.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

¹ AIR 2001 SC 1253

