

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Reserved on 25-6-2019**

**Delivered on 24-7-2019**

**SA No. 227 of 2018**

1. Netram Agarwal S/o Late Shri Manohar Lal Aged About 69 Years R/o 49 Motilal Nehru Nagar, Bhilai, Tehsil And District Durg, Chhattisgarh
2. Sandeep Agarwal S/o Shri Netram Agarwal Aged About 37 Years R/o 49 Motilal Nehru Nagar, Bhilai, Tehsil And District Durg, Chhattisgarh.
3. Arjun Lal Agarwal S/o Shri Lalaram Aged About 67 Years R/o New Khursipar, Near Sangam Chowk, Bhilai, Tehsil And District Durg, Chhattisgarh
4. Misa Finvest Pvt. Ltd. Kolkata Through Director Sandeep Agarwal, S/o Shri Netram Agarwal, R/o 49 Motilal Nehru Nagar, Bhilai, Tehsil And District Durg, Chhattisgarh
5. M/s Vedika Minerals Pvt. Ltd. Through Director Netram Agarwal, S/o Late Manoharlal Agarwal, R/o 49 Motilal Nehru Nagar, Bhilai, Tehsil And District Durg, Chhattisgarh.

**---- Appellants/defendants**

**Versus**

1. Sanjay Agarwal S/o Shri Netram Agarwal Aged About 45 Years R/o 67 Nehru Nagar (East), Bhilai, Tehsil And District Durg, Chhattisgarh (Plaintiff)
2. State Of Chhattisgarh Through Collector Durg, Office District Office Durg, District Durg, Chhattisgarh, District : Durg, Chhattisgarh
3. Municipal Corporation Bhilai Through Commissioner, Municipal Corporation Bhilai, Office Supela Bhilai, Tehsil And District Durg, Chhattisgarh (Defendants No. 6 And 7)

**---- Respondents**

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| For appellants      | : | Mr. Ravi Nandan Singh Sr. Advocate<br>with Mr. Arpan J. Pawar, Advocate.                              |
| For respondent No.1 | : | Mr. Ravish Agrawal, Sr. Advocate<br>with Mr. Kishore Bhaduri and Shri<br>Abhinav Kardekar, Advocates. |

For respondent No.2 : Mr. A.N. Bhakta, Deputy Advocate  
General

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**SB: Hon'ble Shri Justice Ram Prasanna Sharma**  
**CAV Judgment**

1. This second appeal is preferred against the judgment dated 16-3-2018 (Annexure A/1) passed by the Second Additional Judge to the Court of First Additional District Judge, Durg (CG) in Civil Appeal No. 28-A/2016 arising out judgment and decree dated 29-4-2015 (Annexure A/2) passed by the First Civil Judge, Class-II, Durg (CG) in Civil Suit No. 15-A/13 wherein the said First Appellate Court dismissed the appeal after dismissing the application filed by the appellants under Section 5 of the Limitation Act, 1963 (for short, "the Act, 1963") for condonation of delay in filing the appeal.

2. Respondent No.1/plaintiff filed a suit for declaration of title, possession and injunction against the appellants/defendants No.1 to 5. The subject matter of the suit was land situated at Tatiband, Patwari Halka No.103, Raipur, bearing Survey No.27/2 and 28/2 area 0.040 hectares and 0.162 hectares, Suvey No. 27/5, 30/4 and 35/3 total area 0.091 hectares, thus the total area 0.293 hectares, the land bearing survey No.28/4 area 2200 sq.ft situated at village Khapri, Patwari Halka No.11, Tahsil and District Durg, survey No.28/4 area 3300 sq.ft situated at village Khapri. Survey

No. 1463/1 area 0.82 hectares, survey No.1463/2 area 2.80 hectares total area 3.62 hectares situated at village Nanpatti, Patwari Halka No. 10, Tahsil and District Durg, Survey No.67 area 8000 sq.ft. Situated at Motilalnagar, Old Bhilai.

3. It is pleaded on behalf of the respondent No.1 that all the properties were granted to him in the family partition between the family members but when he tried to get his name mutated in revenue records as well as in the records of Registrar, Companies and Municipal Corporation, appellants started raising dispute and denied the factum of partition, that is why suit was filed.

4. As per the appellants, it is appalling to note that neither they were duly represented nor their interest was safeguarded by the so called counsel. The trial Court proceeded with the suit even though notices were not duly issued by the trial court nor summons were served upon them. The trial court registered the civil suit No.15-A/13 on 15-6-2013 and directed issuance of summons vide order dated 25-6-2013 and the matter was directed to be listed for appearance of the appellants on 18-7-2013. However, without issuance of notice to the appellants, Shri Avinash Chandra Tiwari, Advocate appeared before the trial Court on his own accord without any instructions from the appellants on 4-7-2013. The date of listing before the trial court was preponed by filing an application for urgent hearing and thereafter

proceedings were carried forward by the lawyers Shri Satish Das and Shri Avinash Chandra Tiwari in connivance with each other. Appellants did not receive any summons nor they had any knowledge regarding pendency of the suit. When appellant No.2 Sandeep Agrawal visited the court of Naib Tahsildar, Durg on 23-5-2016 for getting the revenue records of Khasra Nos. 1463/1 and 1463/2 which are in the ownership of appellant No.2, the clerk of the said court informed him regarding impugned judgment and decree dated 29-4-2015 which has been procured by respondent No.1 and he filed an application for mutation on the basis of said judgment/decree. Appellant No.2 being appalled by such gross fraud played by respondent No.1/plaintiff, immediately filed an application for procuring certified copy of the record along with impugned judgment/decree passed by the trial Court which was received on 28-5-2016 and thereafter he immediately filed an appeal before the lower appellate court. The said appeal was accompanied by an application filed under Section 5 of the Act, 1963. The lower appellate court dismissed the said application and consequently dismissed the appeal and has non-suited the appeal on hyper technical ground of limitation. Despite graphical explanation for delay in filing the appeal, the lower appellate court has adopted hyper technical view, therefore, judgment passed by both the courts below be quashed and suit be dismissed and in

alternate the matter be remitted back to the trial Court for adjudication of the suit on merit after granting due opportunity of hearing to the appellants.

5. The appeal is admitted for hearing on the following substantial questions of law.

“i) Whether the learned lower appellate court committed error of law in refusing condonation of delay despite sufficient reasons being assigned by the appellants?

ii) Whether the learned trial Court committed error of law even though misrepresentation/fraud is played by the parties?.

6. I have heard learned counsel for the parties and perused the record of the court below in which impugned judgment/decreed has been passed.

7. The order sheets of the trial court would go to show that no written statement was filed on behalf of the appellants and no evidence was adduced on their behalf. Though it is mentioned in the order sheets that counsel is appearing on behalf of the appellants, but written statement was not filed and evidence was not adduced on behalf of the appellants. The case is not really

contested and the matter was decided. An appeal was preferred before the lower appellate court which has not heard the matter on merit and decided the appeal on technical ground of limitation by dismissing the application filed under Section 5 of the Act, 1963.

8. A right of first appeal conferred under Section 96 of the Code of Civil Procedure 1908 is one of the most valuable rights given to a litigant. Condonation of delay is a matter of discretion of the court. Section 5 of the Act, 1963 does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criteria. In every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. Words "sufficient cause" should be interpreted liberally to advance 'substantial justice'. Procedural laws are laws meant for regulating the conduct of the litigants. Provisions of such laws are not to be used for punishing such defaulters. Sufficient cause ought to be considered in such a manner so to advance the cause of justice. The claimants in their application has stated clearly that no notice was served to them and they never appointed counsel for defending them. The order sheets of the trial court substantiated the application that it is not really a contested case, therefore, it

was not a case where lower appellate court could have converted a discretionary matter into rigid rule of law.

9. It is contended on behalf of the respondent No.1 that there is an allegation of fraud, therefore, it must be inquired into. Any such finding of fraud should be based on evidence and it is not a matter of mere presumption and conjecture. It is further submitted that if the trial of the suit was unsatisfactory, this court can decide the appeal on merit and it is not a case of remittance to the trial Court. Reliance has been placed on the decisions of Hon'ble Supreme Court in the matters of **Harjas Rai Makhija (dead) through Legal Representatives vs. Pushparani Jain and another<sup>1</sup>**, **Sunil vs. Sakshi alias Shweta and another<sup>2</sup>** and **Syeda Rahmunnisa vs. Malan Bi (dead) by Legal Representatives and another<sup>3</sup>**.

10. From the record it is clear that no written statement was filed on behalf of the appellants before the trial court and no evidence was adduced, therefore, it is clear that the appellants had no opportunity to submit their case before the trial court. It is further contended on behalf of the appellants that complaint has been made against the counsel Shri Avinash Chandra Tiwari before Bar Council which is proper forum for enquiring into conduct of the counsel, therefore, this court is not inclined to

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<sup>1</sup>(2017) 2 SCC 797

<sup>2</sup>(2015) 4 SCC 196

<sup>3</sup>(2016) 10 SCC 315

make parallel enquiry against the said counsel, but the fact remains that in the peculiar facts and circumstances of the case, the case should be re-heard by the trial court.

11. The point for consideration of this court is whether refusal of condonation of delay by the lower appellate court resulted in grave miscarriage of justice.

12. The expression 'sufficient cause' is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of the justice that being the life purpose for the existence of the institution of the courts. There should not be a pedantic approach when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. There is no presumption that delay is occasioned deliberately or on account of culpable negligence, or on account of mala fide.

13. Looking to the entire scenario, this court is of the considered view that the lower appellate court committed error of law in refusing the condonation of delay despite sufficient reasons being assigned by the appellants. Accordingly, first substantial question of law is answered in affirmative.

14. As complaint has already been made by the appellants against counsel in proper forum, this court is not inclined to answer the second substantial question of law.

15. In the trial court the appellants were not duly represented, therefore, re-trial is considered necessary as per Order 41 Rule 23-A of the Code of Civil Procedure 1908. As the First Appellate Court had opportunity to hear the case on merit, but the said court declined to hear the case on merit and there is no pleading and evidence of appellants in the record of trial Court, the matter requires re-trial.

16. Accordingly, the appeal is allowed. Order passed by the First Appellate Court and judgment/decreed passed by the trial Court is set aside. Now the trial Court ie. First Civil Judge, Class-II, Durg (CG) is directed to re-trial the case after providing opportunity of filing written statement and adduce evidence to the appellants and also to provide opportunity of hearing to respondents and decide the issues between the parties afresh, in accordance with law.

17. Both parties shall appear before the said court on 30-08-2019.

Sd/-

**(Ram Prasanna Sharma)**  
JUDGE

Raju