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HIGH COURT OF CHHATTISGARH, BILASPUR**Miscellaneous Appeal No. 65 of 2016**

Kamlesh Kumar Agrawal (Wrongly Mentioned Kailash Kumar Agrawal), S/o Shri Hariram Agrawal, Aged About 57 Years, R/o- House No. 138, Shyam Mandir Road, Samta Colony, Raipur, Civil And Revenue District Raipur, Chhattisgarh.

---- Appellant**Versus**

Anup Kumar Martin, S/o Shri H. Martin, Prop. M/s D.C. Traders, Transport Nagar Raipur, Civil And Revenue District Raipur, Chhattisgarh.

---- Respondent

For Appellant	: Shri Rakesh Kumar Thakur, Advocate.
For Respondent	: Shri Raj Bahadur Singh along with Shri Vivek Tripathi, Advocate.

Hon'ble Shri Justice Sanjay Agrawal**Order/Judgment On Board****30.01.2019**

1. This Miscellaneous Appeal has been preferred by the Appellant/Defendant under Order 43 Rule 1(d) of the Code of Civil Procedure 1908 (hereinafter referred to as the 'CPC') questioning the legality and validity of the order dated 30.03.2016 passed by 3rd Additional District Judge, Raipur (C.G.) in Miscellaneous Judicial Case No.05/2013, by which, the applications filed by the appellant under Section 5 of the Indian Limitation Act, 1963 (henceforth, the Act of 1963) as well as under Order 9 Rule 13 of the CPC have been rejected.
2. Briefly stated the facts of the case are that the plaintiff/respondent instituted a suit claiming recovery of amount of

Rs.4,02,833.08/- against the appellant, which was registered as Civil Suit No.33-B/2011. The appellant/defendant was proceeded ex parte in the said suit on 09.01.2012 as despite substituted service, he did not appear and after recording plaintiff's evidence, the trial Court decreed the suit ex parte on 15.02.2012.

3. Being aggrieved with the aforesaid ex parte judgment and decree, the appellant/defendant moved an application on 23.09.2012 under Order 9 Rule 13 of the CPC along with an application for its condonation of delay as provided under Section 5 of the Act of 1963 by submitting inter alia, that the appellant was neither aware regarding the filing of the said suit nor the said ex parte decree passed therein and came to know about the delivery of the said decree for the first time only on 18.09.2012, when he received the notice from the executing court. The plaintiff/respondent in his reply has denied the said fact.

4. The appellant/defendant examined himself in order to establish the fact that he was not aware regarding the delivery of the aforesaid ex parte decree and deposed the facts as pleaded in his applications, while no evidence was produced by the Plaintiff.

5. After considering the evidence of the Appellant/Defendant, the trial Court has rejected both of his applications by observing inter alia, that the applications for setting aside the said ex parte judgment and decree have been made beyond the prescribed period of limitation and the reasons assigned therein are not sufficient, as it could not be established by the Appellant by way of cogent and reliable evidence in this regard. As a consequence, the trial Court has rejected both the said applications. This is the order, which has been questioned by the appellant in this appeal.

6. Shri Thakur, learned counsel for the appellant/defendant submits that the order impugned as passed by the Court below while observing that the appellant has failed to establish the fact that he was not aware regarding the delivery of the said decree is apparently contrary to law. According to him, the appellant Kamlesh Kumar entered into the witness box and has stated very specifically that he came to know regarding the said ex parte decree only on 18.09.2012, when he received the notice from the executing Court and this statement was not controverted by the plaintiff/respondent. Yet, the Court below has rejected both the said applications, however, it ought to have seen that defendant who was served through paper publication was not aware regarding the delivery of the said ex parte decree. The court below has, thus, committed an illegality in rejecting the applications holding it to be barred by time.

7. On the other hand, Shri Singh, learned counsel for the respondent/plaintiff, while supporting the order impugned, submits that the trial Court after considering the reasons assigned in those applications and also by considering the statement of appellant, Kamlesh Kumar, has rightly rejected the said applications. As such, the order impugned does not require to be interfered.

8. I have heard learned counsel for the parties and perused the entire record carefully.

9. A suit for recovery of sum of Rs.4,02,833.08/- was instituted by the plaintiff/respondent registered as Civil Suit No.33-B/2011. In the said suit, the appellant was served through paper publication after allowing the plaintiff's application under Order 5 Rule 20 of the CPC. The record would show further that the appellant was proceeded

ex parte on 09.01.2012, when he did not appear despite the said substituted service and that by considering the statement of plaintiff, the trial Court decreed the suit ex parte on 15.02.2012. The said ex parte judgment and decree has been questioned by the appellant/defendant by filing an application under Order 9 Rule 13 of the CPC on 23.09.2012 alongwith an application for its condonation of delay, duly supported by an affidavit by submitting inter alia, that he came to know about the delivery of the said ex parte judgment and decree on 18.09.2012, when he received the notice from the executing Court. The burden of proof under such circumstances is upon the defendant to establish the fact that he came to know about the delivery of said decree on 18.09.2012.

10. In order to establish the aforesaid fact, the Appellant Kamlesh Kumar examined himself and deposed very specifically that he came to know about this fact only on 18.09.2012, when he received the notice from the executing Court. The statement of the Appellant in this regard could not have been rebutted by the plaintiff, as he failed to enter into the witness box in order to disprove the said fact. As a consequence, the defendant has succeeded to establish the fact that he came to know about the said ex parte decree only on 18.09.2012 when he received the notice from the executing court.

11. Now, what would be the starting point of limitation when defendant, who came to know about the said ex-parte decree on 18.09.2012 and was served through paper publication "Deshbandhu" after allowing the plaintiff's application under Order 5 Rule 20 of the CPC? In order to ascertain the same, it is necessary to examine Article 123 of the Act of 1963, which reads as under:-

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| <p>123. To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte.</p> <p>Explanation.- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service.</p> | <p>Thirty days</p> <p>The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.</p> |
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12. In terms of aforesaid provision, an application for setting aside the ex parte decree can be filed within 30 days from the date of the decree, but where the summons or notice was not duly served, it can be filed within 30 days from the date of knowledge of the decree. The Explanation inserted in the first column of the aforesaid Article laying down clearly that for the purpose of this Article substituted service under Order 5 Rule 20 of the CPC shall not be deemed to be the due service.

13. Reverting back to the case in hand while keeping the aforesaid Explanation in mind and examination of order sheets of the trial Court would reveal that while allowing the plaintiff's application under Order 5 Rule 20 of the CPC on 09.11.2011, the trial Court had directed the Plaintiff to get the notice published in local newspaper "Deshbandhu" while fixing the case for 09.01.2012 and, thereafter on the said day i.e. on 09.01.2012 proceeded ex parte against Defendant when he did not turn up despite the said publication. In such circumstances, particularly, when defendant was served through substituted service under the said provision, it cannot be held based upon the said Explanation that defendant was duly served in the said suit so as to calculate the period of 30 days from the date of said ex parte decree.

14. The aforesaid observations of mine is fortified by the principles laid down by the Supreme Court in the matter of ***C.K. Lokesh*** Versus ***P.E. Panduranga Naidu***, reported in (1996) 11 SCC 353, wherein in a similar situation, it has been observed at para 5 as under:-

5. "It is contended by Shri Sampath, learned counsel for the respondent, that the respondent had taken all the steps available under Order 5 CPC including of effecting service through substitute service under Rule 20-A, Order 5 CPC. Therefore, the Court was right in setting the appellant ex parte and passing the ex parte decree. The learned District Judge after going through the entire material on record came to the above conclusion that the appellant had not been served with a notice and, therefore, he was entitled to file the application under Article 123 of the Schedule of Limitation Act, which is 30 days from the date of knowledge. Accordingly, the application came to be filed, though belated by 2015 days. Under these circumstances, the learned District Judge was right in holding that the appellant had filed the application to set aside the ex parte appeal within 30 days from the date of knowledge."

15. It is, thus, clear based upon the aforesaid observation vis-a-vis, the Explanation provided to Article 123 that the period of limitation would commence from the date of knowledge of the decree when defendant is served under Order 5 Rule 20 of the CPC. The applications for setting aside the ex parte judgment and decree were made by the defendant on 23.09.2012 immediately upon knowing the said fact on 18.09.2012. The applications have, thus, rightly been made within a period of 30 days for setting aside the said ex parte decree from the date of knowledge of the decree as provided under Article 123 of the Act of 1963. In such an eventuality, the application

filed within 30 days from the date of knowledge of the decree cannot be held to be barred by limitation.

16. In view of the foregoing discussion, the Court below has committed an illegality in rejecting the said application holding to be barred by time and thereby erred in refusing to set aside the said ex parte decree. The order impugned is, therefore, liable to be and is hereby set aside.

17. The appeal is, accordingly, allowed and the ex parte judgment and decree dated 15.02.2012 passed in Civil Suit No.33-B/2011 by 6th Additional District Judge, Raipur is hereby quashed and the matter is remanded back to the 3rd Additional District Judge, Raipur (C.G.)/concerned trial Court for deciding the suit afresh, in accordance with law. The parties are directed to appear before the concerned trial Court on 16.04.2019.

18. The Registry is directed to send back the entire record of the Court below. No order as to costs.

Sd/-
(Sanjay Agrawal)
Judge