

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.212 of 2005**

- a. Bhagwat Prasad S/o Late Kunna, Aged about 69 years,
- b. Gendlal S/o Bhagwat Prasad, Aged about 38 years,
- c. Foolchand S/o Bhagwat Prasad, Aged about 34 years,
- d. Harish Chandra S/o Bhagwat Prasad, Aged about 32 years,

From a to d are R/o Village-Ghaghra, Tahsil-Bharatpur, Distt. Korea (CG)

e. Kusum Kumari D/o Bhagwat Prasad, aged about 30 years, W/o Shyam Narayan, R/o Kunwarpur, Tahsil Bharatpur, Distt., Korea (CG)

f. Rajkumari D/o Bhagwat Prasad, Aged about 25 years, W/o Ballu, R/o Singrauli, Tahsil-Bharatpur, Distt. Korea (CG)

---- Appellants

Versus

- 1. Subhadri Bai W/o Amar Singh Panika, aged about 57 years, R/o village Kolmi, (Badi), Post Khartora, Tah. Janakpur, Distt. Shahdol (M.P.)
- 2. Nan Bai W/o Mangaldeen Panika, aged about 55 years, resident of village Bharatpur, Distt. Korla (CG)
- 3. State of Chhattisgarh, through Collector, District Korla (CG)

---- Respondents

For Appellants	:	Mr.Rakesh Pandey, Advocate
For Respondents No.1 and 2	:	Mr.B.P.Gupta, Advocate
For Respondent No.3	:	Mr.Akash Pandey, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

03.07.2019

- 1. The substantial question of law involved, formulated and to be answered in the second appeal preferred by the defendant is as under:-

“Whether the judgment and decree suffers from proper

representation of appellant ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The suit property originally belonged to Jangi. He had three daughters namely, Subhadribai (plaintiff No.1), Nanbai (plaintiff No.2) and Kailasiya Bai (defendant No.1). Two sisters namely, Subhadribai and Nanbai brought a suit for declaring the order of Tahsildar, Bharatpur dated 24.9.96 that mutation order passed in favour of defendant No.1 is null and void as the property has already partitioned vide Ex.P/1 between three sisters and it be declared null and void.
3. Defendant No.1 appeared before the trial Court and filed her written statement on 21.1.1998 and thereafter she was regularly appearing through her counsel till 4.4.2002 and on the next date i.e. 8.5.2002 neither she nor her counsel appeared to prosecute the suit and thereafter, evidence of the plaintiffs was recorded and ex-parte judgment and decree was passed on 10.1.2003. In appeal preferred by the defendant, she remained unsuccessful. Feeling aggrieved against the judgment and decree passed by the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the defendant, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.
4. Mr.Rakesh Pandey, learned counsel for the appellants/defendant,

would submit that the defendant was not given proper representation in the suit and she was not afforded due opportunity of hearing, therefore, the judgment and decree passed by the trial Court as affirmed by the first appellate Court deserves to be set aside. He would also submit that on 8.5.2002 or thereafter, the trial Court did not declare and record the fact that the Court intends to proceed ex-parte in terms of Order 9 Rule 6(1)(a) of the CPC, therefore, it is liable to be set aside.

5. On the other hand, Mr.B.P.Gupta, learned counsel for respondents No.1 and 2/plaintiffs, would support the impugned judgment and decree.
6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumscription.
7. It is not in dispute that defendant was duly served and after service of summons of the suit, she appeared and filed her written statement before the trial Court on 21.1.1998, she was represented through her counsel till 4.4.2002 and on the first time i.e. 8.5.2002 she did not appear either in person or through her counsel and thereafter the Court proceeded in absence of the present defendant and passed ex-parte judgment and decree dated 10.1.2003, as such, it is not the case that summons was not duly served and she was not allowed to file written statement. She was duly represented and filed her written statement, therefore, grievance with regard to not affording due opportunity of hearing of the suit cannot be

competently made by the defendant before this Court, which is not supportable from the record.

8. Submission by learned counsel for the appellants that the trial Court has not passed an order proceeding ex-parte in the order-sheet and passed ex-parte decree deserves to be rejected in view of following the judgment of the Supreme Court.

9. The Supreme Court in the matter of Sangram Singh v. Election Tribunal Kotah and another¹ has considered the question *qua* Order 9 Rule 6(1)(a) of the CPC and held that when the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, the Court is not required to make an 'ex parte' order.

It was observed as under:-

“26.....Of course the fact that it is proceeding 'ex parte' will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an 'ex parte' decree or other 'ex parte' order which the Court is authorised to make. All that R. 6 (1) (a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties. The contrast in language between R. 7 and R. 13 emphasis this.

27.....No order is contemplated by the Code and therefore no order to set aside the order is contemplated either. But a decree is a command or order of the Court and so can only be set aside by another order made and recorded with due formality.”

Their Lordships finally concluded as under:-

“30.....Therefore, if a party does appear on “the day to which the hearing of the suit is adjourned”, he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other

¹ AIR 1955 SC 425

hearing.”

10. In view of the aforesaid legal position, though the trial Court was not required to pass formal order proceeding ex-parte against defendant No.1 and defendant No.1 was entitled to participate in the further proceeding which she did not choose and allowed to suit to proceed and further allowed to pass ex-parte decree, therefore, she cannot be allowed to complaint before this Court that she was not afforded due opportunity of hearing during the trial of suit. The substantial question of law is answered in favour of the plaintiffs and against the defendant.
11. Accordingly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).
12. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-