

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order reserved on 29.11.2019****Order delivered on 02.12.2019****Second Appeal No. 66 of 2006**

Ramendra Nath Sarkhel (Dead) through LRs.

1. Smt. Aruna Sarkhel, Wd/o. Ramendra Nath Sarkhel, aged about 72 years
2. Udayan Sarkhel, son of Ramendra Nath Sarkhel, aged 46 years
3. Diganto Sarkhel, son of Ramendra Nath Sarkhel, aged 46 years.

All are residents of House No. 5, Akbar Khan Ki Chaal, Juni Line, Bilaspur, Tahsil & District Bilaspur (Chhattisgarh).

(Plaintiffs)

---Appellants***Versus***

1. Rafique Ahmed Khan (Dead) through LRs.

1(a). Smt. Suraiya Begum, Wd/o Rafik Ahmed Khan, aged 72 years.

1(b). Zuber Ahmed Khan, son of Rafik Ahmed Khan, aged 58 years.

1(c). Sameer Ahmed Khan, son of Rafik Ahmed Khan, aged 45 years.

All are residents of Flat No. 113, Utkarsh Nirman, Mangalpara, Sadar, Nagpur (Maharashtra).

2. Nitendra Nath Sarkhel (died and deleted)

(Defendants)

---Respondents

For Appellants : Mr. Ashish Shrivastava, Advocate.

For respondents : Mr. H. S. Patel, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Heard on admission and formulation of substantial question of law in this second appeal preferred by the appellants/plaintiffs against the impugned judgment and decree passed by the first appellate Court affirming the judgment and decree of the trial court dismissing the suit.
2. Mr. Ashish Shrivastava learned counsel for the appellants/legal representatives of original plaintiff, would submit that both the Courts below have concurrently erred in dismissing the suit filed by the original plaintiff for setting aside the judgment and decree dated 05.03.1981 passed by 4th Civil Judge, Class-II, Bilaspur in Civil Suit No. 76A/1978 filed by defendant No.1 and in which decree for eviction of defendant No.2 was granted as the same is not binding on original plaintiff for not impleading him as necessary party in that suit by recording a finding which is perverse and contrary to record and as such, appeal deserves to be admitted by formulating the substantial question of law.
3. The defendant No.1/landlord file Civil Suit No. 76A/1978 titled as Rafique Ahmed Khan v. Nitindra

Nath in the court of 4th Civil Judge, Class-II, Bilaspur in which *ex parte* decree of eviction was passed on 05.03.1981 against defendant No.2, against which Nitindra Nath filed an application under Order 9 Rule 13 CPC for setting aside *ex parte* decree, which was rejected by the trial Court on 22.02.1984 and affirmed in Miscellaneous Civil Appeal No. 15/1984 by the Miscellaneous Appellate Court on 10.12.1986, thereafter the original plaintiff along with Nitindra Nath and his two brothers jointly filed M. P. No. 79/1987 before the High Court of Madhya Pradesh challenging the order rejecting application under Order 9 Rule 13 CPC and appellate order dated 10.12.1986. The said writ petition was dismissed by the High Court of Madhya Pradesh on 04.01.1999 with liberty to raise ground that arrears of income tax of landlord was paid by the plaintiff to the Income Tax Department, thereafter miscellaneous civil case filed being MCC No. 148 of 1999 was also dismissed on 07.01.2000 with some modification. Thereafter the instant suit was filed by the original plaintiff on 07.02.2000 stating inter-alia that he was necessary party in Civil Suit No. 76A/1978 and he being tenant in possession, the earlier suit could not have been decreed by the trial Court and therefore *ex parte*

decree so passed in Civil Suit No. 76A/1978 deserves to be set aside. The said civil suit has been dismissed and the first appeal has also been dismissed, thereafter this second appeal has been preferred.

4. The question for consideration would be, whether regular civil suit so filed by the plaintiff would lie to set aside the *ex parte* decree mainly on the ground of non-joinder of necessary party?
5. A defendant against whom an *ex-parte* decree has been passed under Rule 6 for default of appearance at the hearing has following courses open to him as remedies:
 - (i) he may appeal from the *ex parte* decree under Section 96 CPC.
 - (ii) he may apply for a review of judgment under Order 47, Rule 1 or file a suit for setting aside the *ex parte* decree on the ground of fraud.
 - (iii) he may apply under Rule 13 for an order to set aside the *ex parte* decree, provided the application is made, within 30 days from the date of the decree, or where the summons were not duly served, when he had knowledge of the decree, the relevant provision now would be Article 123 of the Limitation Act, 1963.
6. The Supreme Court in the matter of Bhanu Kumar Jain v. Archana Kumar and another¹ has indicated the

1 (2005) 1 SCC 787

remedies open to the party against whom *ex parte* decree has been passed and held as under:-

"26. When an *ex parte* decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the *ex parte* decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the *ex parte* decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

7. Similarly, the principle of law laid down in **Bhanu Kumar Jain** (supra) has been followed with approval by the Supreme Court in the matter of **Rabindra Singh v. Financial Commissioner Cooperation, Punjab and others**².

8. Reverting to the facts of the case in light of principles of law laid down by the Supreme Court in above-stated judgments (supra), it is quite vivid that defendant No.1 challenged the *ex parte* decree under Order 9 Rule 13 CPC and after rejection of his application (defendant No.2) under Order 9 Rule 13 CPC and after dismissal of miscellaneous appeal,

2 (2008) 7 SCC 663

he and his three brothers including original appellant herein preferred writ petition before the High Court of Madhya Pradesh questioning the aforesaid order rejecting application under Order 9 Rule 13 CPC and appellate order, but writ petition was dismissed on merit, thereafter fresh suit has been filed for setting aside *ex parte* decree on the ground that though he was necessary party in the earlier suit being in possession of suit accommodation and he was not impleaded as a party defendant in that suit, therefore, decree be set aside. The suit for setting aside *ex parte* decree is not based on fraud on the part of defendant No.1 stating that decree was obtained by playing fraud.

9. In view of the aforesaid judgments of the Supreme Court in Bhanu Kumar Jain (supra) and Rabindra Singh (supra), regular suit would lie to set aside *ex parte* decree on the ground of fraud. Where a new trial is sought on the ground of fraud, fraud must be alleged and pleaded in the suit to set aside *ex parte* decree. Since, the plea of fraud is not set up by the plaintiff in the instant suit as framed and filed for setting aside *ex parte* decree, the instant suit filed on the ground that in earlier suit though he was necessary party, he was not

impleaded, is not maintainable. It is pertinent to mention that original appellant/plaintiff allowed his brother to contest the suit and therefore, application under Order 9 Rule 13 CPC came to be rejected by the trial Court and the appellate Court, thereafter defendant No.2, the plaintiff and his three brothers filed the writ petition challenging the order rejecting the application under Order 9 Rule 13 CPC, that writ petition was dismissed by the Madhya Pradesh High Court, then only the plaintiff, one of the brother, has filed this civil suit. This is nothing but a device brought out by the original appellant/plaintiff to defeat a legal and valid decree passed in the year 1981. It has rightly been dismissed by both the Courts below. I do not find any illegality or perversity in the judgment and decree of both the Courts below. Even I do not find any substantial question of determination of this second appeal.

10. Accordingly, the second appeal being without substance is liable to be and is hereby dismissed at the admission stage. No cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge