

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 73 of 2018**

- Baldev Singh Malwa, S/o Late Sardar Pritam Singh, Aged About 78 Years, R/o Malwa Market, G.E. Road, Durg Chhattishgarh,

---- Appellant/Defendant No.1**Versus**

1. Nyas Sri Laxmi Narayan Maharaj Killa Mandir, Durg Through Pradhan Nyasi Shri Tarun Kumar Agarwal Tahsil Durg District - Durg R/o Industrial Estate Dhamdha Road Durg Chhattisgarh. (Plaintiff)
2. M/s Bharat Engg. And Foundry Works Through Partners Sardar Charan Singh And Sardar Darshan Singh S/o Late Sardar Pritam Singh R/o Industrial Estate Dhamdha Road Durg Chhattisgarh. (Defendant No. 2)

---- Respondents

For Appellant	:	Shri P.R.Patankar, Advocate.
For Respondent No.1	:	Shri Malay Shrivastava, Advocate.
For Respondent No.2	:	Shri Anurag Jha, Advocate.

Hon'ble Shri Justice Sanjay Agrawal**Order On Board****27.02.2019**

1. This Miscellaneous Appeal has been preferred by defendant No.1 under Order 43 Rule 1(d) of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) questioning the legality and propriety of the order dated 29.06.2018 whereby the Court below has refused to set aside the judgment and decree passed ex parte on 30.04.2003 by rejecting the application filed under Section 5 of the Indian Limitation Act, 1963 (henceforth, the Act of 1963) for condonation of delay in filing the application under Order 9 Rule 13 of CPC.

2. Shri P. R. Patankar, learned counsel for the appellant submits that the order impugned as passed by the Court below without considering the medical documents in its proper perspective as submitted by the appellant/defendant

No.1 in support of his case is apparently contrary to law. According to him, the Court below has erred in refusing to condone the delay in filing the application under Order 9 Rule 13 of CPC, however it ought to have adopted liberal view in order to provide substantial justice to the parties. Having failed so, the Court below has erred in rejecting the said application seeking for setting aside the said ex parte judgment and decree. In support, he placed his reliance upon a decision rendered by the Supreme Court in the matter of ***M.K.Prasad*** vs. ***P. Arumugam*** reported in (2001) 6 SCC 176.

3. On the other hand, Shri Malay Shrivastava, learned counsel for respondent No.1, while supporting the order impugned, submits that the ex parte judgment and decree has been passed on 30.04.2003 and the application for its setting aside has been made on 01.07.2013, i.e., after passing of more than 10 years without explaining the delay in its proper manner. According to him, the medical certificates, which were submitted by the appellant, were only for the year 1999 upto 2009. However, no medical certificates have been placed on record after 2009 till the filing of the application under Order 9 Rule 13 of CPC. He submits further that even in an application filed under Order 9 Rule 13 of CPC on 01.07.2013, the appellant has deliberately suppressed the material fact that when he received the notice from the Executing Court. He submits further that the appellant was duly served with the summons of the suit and has contested the same, therefore, as per the provisions prescribed under Article 123 of the Indian Limitation Act, 1963, the application ought to have been filed within the period of 30 days from the date of passing of the said decree. Lastly, he submits that the case law as relied upon by the counsel for the appellant is entirely distinguishable from the facts and circumstances involved in the present case.

4. I have heard learned counsel for the parties and perused the record of

the Court below carefully.

5. A decree for eviction was passed by the 7th Additional District Judge, Durg in Civil Suit No.19-A/2002 on 30.04.2003 after proceeding ex parte against defendant No.1 on 30.10.2001. For setting aside the said ex parte judgment and decree, an application enumerated under Order 9 Rule 13 of CPC along with an application for its condonation of delay was made on 01.07.2013 by submitting, inter alia, that the appellant was suffering from serious ailments from the month of April, 1999 and was declared permanently disabled by the District Medical Board on 23.09.2006 and since he came to know about the said ex parte judgment and decree only when he received the notice from the Executing Court, therefore, he filed the instant applications for setting aside the said ex parte judgment and decree. However, perusal of the averments made in the application under Order 9 Rule 13 of CPC would show that although it has been mentioned that the appellant was suffering from serious ailments from the month of April, 1999, however, the medical certificates, which were submitted by the appellant, were only upto 2009. No medical certificates or documents after 2009 in order to explain the delay after 2009 till the filing of the application were filed by him. As such, the explanations assigned in this regard cannot be held to be acceptable. That apart, it has not been mentioned in the application that what was the date when he received the notice from the Executing Court. It, therefore, appears that the said material fact has deliberately been suppressed by the appellant and has not approached the Court with clean hands. Besides, the concerned Process Server has submitted its report showing that when he tried to get the notice of the Executing Court served upon the appellant for 15.01.2009, he not only misbehaved but has threatened to kill him. As a consequence of it, he has been constrained to submit the report before the Executing Court. In view of these facts, it is difficult to accept the explanation

offered by him.

6. As far as the reliance of the appellant in the matter of **M.K.Prasad vs. P. Arumugam** (supra) is concerned, is noted to be distinguishable from the facts involved in the present case as in the said matter it was mentioned specifically that the appellant came to know regarding the pronouncement of judgment and decree passed on 05.03.1996, in the year 1997, and therefore, the delay of 554 days was considered liberally. However, in the present case, while filing the application under Order 9 Rule 13 of CPC along with an application for its condonation of delay after passing of almost more than 10 years, the appellant has deliberately not mentioned the specific date as to when he received the notice from the Executing Court. The principles laid down in the said matter are, therefore, not applicable in the present case.

7. Considering the facts and circumstances of the case and considering further the fact that no medical certificates/documents were submitted by the appellant after 2009 till the filing of the said applications, vis-a-vis, the report of the concerned Process Server showing that the appellant was aware regarding delivery of the ex parte judgment and decree on 17.12.2008, I am not inclined to interfere in the order impugned as passed by the Court below.

8. In view of the foregoing discussions, I do not find any substance in this appeal. The appeal being devoid of merit is accordingly dismissed. No order as to costs.

Sd/-
(Sanjay Agrawal)
Judge