

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 248 of 2009****Order reserved on 10/07/2020****Order delivered on 15/07/2020**

Ram Lal S/o Rafail, Aged about 41 years, R/o Dabnipani (Pakripath), Tahsil and Distt. Jashpur, Chhattisgarh.

---Appellant/Plaintiff

Versus

1. Mastu S/o Sudhu, Aged 58 years, Caste Uraon.
2. Laxman S/o Rafail, Aged 52 years, Caste Uraon.

Both are R/o Village Dabnipani (Pakripath), Tahsil and Distt. Jashpur, Chhattisgarh.

--- Respondents/Defendants

For Appellant :- Mr. A.N. Bhakta, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Proceedings of this matter have been taken up through video conferencing.
2. Heard on admission and formulation of substantial question of law in this second appeal preferred by the appellant/plaintiff.
3. By the impugned judgment and decree, the first Appellate Court has dismissed the First Appeal preferred by appellant/plaintiff affirming the judgment and decree of the Trial Court dismissing

the suit and refusing to set aside the *ex parte* decree passed in Civil Suit No.1-A of 1993 (*Ramlal vs. Mastu and others*).

4. Mr. A.N. Bhakta, learned counsel for the appellant/ plaintiff would submit that the *ex parte* decree passed in Civil Suit No. 1-A of 1993 was without jurisdiction and without authority of law as the suit property was the joint family property of plaintiff and defendant No. 2 Laxman, therefore, defendant No. 2 alone was not entitled to enter into the agreement to sale dated 12.05.1988 to alienate the suit property without impleading him as party defendant in that suit. He would also submit that plaintiff herein preferred First Appeal against that judgment and decree, being Civil Appeal No. 25-A/1996, but that too was dismissed. As such, the appeal involves substantial question of law for determination and it be admitted for hearing by formulating substantial question of law.

5. It appears from the record that with respect to suit property defendant No. 2 Laxman entered into agreement to sale with defendant no. 1 Masturam, which led to filing of the suit by Masturam for specific performance of contract against Laxman on the basis of the said agreement dated 12.05.1988 and ultimately, *ex parte* decree for specific

performance of contract was passed in Civil Suit No. 1-A/1993 in his favour.

6. The plaintiff/appellant herein very well questioned the judgment and decree passed in Civil Suit No. 1-A/1993 before the First Appellate Court under section 96 of the CPC in Civil Appeal no. 25-A of 1996. But, that was dismissed by on 07.01.1997 affirming the ex parte decree passed by the Trial Court. Thereafter, the present appellant/plaintiff instituted a civil suit for declaring the agreement dated 12.05.1988 as null and void and also sought the relief of confirmation of his possession, which was dismissed by the Trial Court on 11.05.2006 and on appeal being preferred by the appellant/plaintiff, the First Appellate Court dismissed the appeal by the impugned judgment and decree.

7. A defendant against whom an ex parte decree has been passed under Rule 6 for default of appearance at the stage of hearing has following courses open to him as remedies:-

i) He may appeal from the ex parte decree under Section 96 of Code of Civil Procedure, 1908.

ii) He may apply for 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.

8. The Supreme Court in the matter of **Bhanu Kumar Jain vs. Archana Kumar and another**¹ has indicated the 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

1(2005) 1 SCC 787

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."

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

10. Reverting to the facts of the case after noticing the principle of law laid down by their Lordships of the Supreme Court in the above-stated judgments, it is quite vivid that the plaintiff herein (who was not a party to said civil suit) questioned the ex parte decree passed in Civil Suit No. 1-A/1993 dated 21.07.1994 by way of First Appeal under Section 96 of the CPC, which was ultimately dismissed on 07.01.1997, and as such, the decree of the trial Court has merged into the appellate decree in Civil Appeal No. 25-A/1996 passed by the First Appellate Court and the only operative decree which was available was the Appellate decree dated 07.01.1997 which plaintiff did not call in question in the civil suit and only filed the suit for declaring the agreement to sale dated 12.05.1988 as

2(2008) 7 SCC 663

null and void. Once the decree of the Trial Court has merged into the Appellate decree by principle of merger, plaintiff ought to have questioned the Appellate decree by seeking declaration, if any. But the plaintiff did not seek any declaration in the said suit filed by him.

11. The plaintiff herein questioned the ex parte decree by way of appeal and the appeal having been dismissed on merits on 07.01.1997 and in view of the aforesaid judgment rendered by the Supreme Court in the matter of Bhanu Kumar (supra) regular civil suit would lie to set aside the ex parte decree on the ground of fraud. Where the new trial is sought to set aside the ex parte decree on the ground of fraud, the fraud must be alleged and pleaded in the suit to set aside the ex parte decree. A careful perusal of the plaint would show that the plaintiff only assailed the agreement dated 12.05.1988 executed by defendant no. 2 in favour of Defendant no. 1 which has already been culminated into the ex parte decree dated 21.07.1994 passed in Civil Suit No. 1-A/1993 and the plaintiff did not even bother to lay any challenge either to the ex parte decree passed in Civil Suit No. 1-A/1993 dated 21.07.1994 or the Appellate decree passed in Civil Appeal No. 25-

A/1996 dated 07.01.1997 and allowed both the decree to become final as the plaintiff's suit was liable to be dismissed for laying no challenge to the ex parte decree passed in the Civil Suit or the Appellate decree which was passed at his instance affirming the ex parte decree, as such, in absence of challenge to that decree, both the courts below have rightly dismissed the suit filed by the plaintiff. I do not find any illegality or perversity in the impugned judgment and decree warranting any interference in Appellate jurisdiction under Section 100 of Code of Civil Procedure, 1908.

12. Accordingly, the second appeal deserves to be and is accordingly dismissed *in limine* without notice to the other side. No cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet