

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.24 of 2009

Bisahin Bai, D/o Late Dulari Ram Kenwat, Aged about 30 years, R/o Jabrapara, New Sarkanda, Tahsil and Distt. Bilaspur (C.G.)

(Plaintiff)
---- Appellant

Versus

Smt. Laxmi Kaushik, W/o Late Shri Dwarika Kaushik, Aged about 30 years, Occupation Home wife, R/o Jabrapara, Near Rai Hostel, Bilaspur, Tahil and Distt. Bilaspur (C.G.)

(Defendant)

Dulari Ram, S/o Late Shri Jetha Ram Kenwat (dead)

(Original Plaintiff before Trial Court)
---- Respondent

For Appellant / Plaintiff: -

Mr. Sushil Dubey, Advocate.

For Respondent / Defendant: -

None present, though served.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

19/08/2020

1. Proceedings of this matter have been taken-up for final hearing through video conferencing.
2. This second appeal preferred by the plaintiff / appellant has been admitted for hearing on the following substantial question of law: -

“Whether the first appellate Court was justified in proceedings ex-parte against the appellant/plaintiff as in the first Appellate Court appellant/plaintiff remained absent after 19.08.2008 and without informing the appellant/plaintiff by registered post thereby the first Appellate Court committed illegality in granting the appeal, by recording a finding which is perverse to the record?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

3. The civil suit filed by the appellant/plaintiff was decreed by the trial Court decreeing the suit for declaration of title and restoration of possession against which the respondent / defendant preferred appeal in which the plaintiff / appellant was noticed and her counsel Mr. Prashant Ganorkar filed Vakalatnama on behalf of the appellant / plaintiff on 18-7-2008, but thereafter, since 19-7-2008, he failed to appear and the first appellate Court declared the appellant / plaintiff ex parte on 26-9-2008 and ultimately, judgment & decree of the trial Court was reversed by the first appellate Court on 1-10-2008 in absence of the plaintiff / appellant against which this second appeal has been preferred by the appellant / plaintiff and substantial question of law has been framed which has been set-out in the opening paragraph of this judgment for the sake of completeness.
4. Mr. Sushil Dubey, learned counsel appearing for the plaintiff / appellant herein, would submit that the first appellate Court is absolutely unjustified in proceeding ex parte against the plaintiff as the plaintiff's counsel before the first appellate Court did not give her notice / inform her that he will not be appearing after 19-7-2008 and she bona fide believed that her counsel will attend the hearing of the case before the first appellate Court and defend her interest. He would rely upon the decision of the Supreme Court in the matter of Secretary, Department of Horticulture, Chandigarh and another v. Raghu Raj¹ to buttress his submission.

1 (2008) 13 SCC 395

5. None appeared for the respondent / defendant though notice of the second appeal along with substantial question of law has been served to her.
6. I have heard learned counsel for the appellant / plaintiff and considered the submission made herein-above and also went through the record with utmost circumspection.
7. The fact remains that though the appellant herein / plaintiff engaged counsel Mr. Prashant Ganorkar to appear on her behalf and Mr. Ganorkar has also filed Vakalatnama, but neither he withdrew his Vakalatnama nor informed either orally or in writing to the appellant that he will not be appearing after 19-7-2008, but did not appear before the court to protect her and ultimately, the appellant / plaintiff was declared ex parte by the first appellate Court on 26-9-2008 and ultimately, the defendant's appeal was allowed and the suit was dismissed. As such, the plaintiff / appellant has suffered prejudice on account of not being heard before the first appellate Court which, in turn, is due to non-appearance of her duly engaged counsel to defend her interest.
8. In Raghu Raj's case (supra), the Supreme Court relying upon its earlier decisions has clearly held that an advocate has no right to remain absent from court when the case of his client comes up for hearing. He is duty-bound to attend the case in court or to make an alternative arrangement. Non-appearance in court without "sufficient cause" cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and discourteous to the court and can never be countenanced. Their Lordships further held that when a party engages

an advocate who is expected to appear at the time of hearing but fails to so appear, normally, a party should not suffer on account of default or non-appearance of the advocate. Their Lordships observed in paragraphs 28 and 29 of the report as under: -

“28. From the case law referred to above, it is clear that this Court has always insisted on advocates to appear and argue the case as and when it is called out for hearing. Failure to do so would be unfair to the client and discourteous to the court and must be severely discountenanced. At the same time, the Court has also emphasised doing justice to the cause wherein it is appropriate that both the parties are present before the court and they are heard. It has been noted by the Court that once a party engages a counsel, he thinks that his advocate will appear when the case will be taken up for hearing and the court calls upon the counsel to make submissions. It is keeping in view these principles that the Court does not proceed to hear the matter in absence of the counsel.

29. In the circumstances, in our opinion, the submission of the learned counsel for the appellants has substance that the High Court ought not to have decided the appeal in absence of the appellants' counsel.”

9. Reverting to the facts of the case in the light of the principles of law laid down by the Supreme Court in Raghu Raj's case (supra), it is quite vivid that the duly engaged and instructed counsel on behalf of the appellant / plaintiff omitted to appear before the first appellate court from 19-7-2008 on-wards and on his non-appearance, the court proceeded ex parte against the appellant / plaintiff and without hearing the appellant / plaintiff's side, the appeal was allowed by which great prejudice has been caused to the appellant / plaintiff as the decree granted in her favour has been reversed by the first appellate Court. As held by the Supreme Court, for default of counsel, party cannot be made to suffer particularly, when he has decided what he legitimately expects to be

done, then by engaging counsel, instructing him and handing over the file to him to appear on his behalf. Omission of counsel without sufficient cause cannot be excused, as it causes serious prejudice to the party which deserves to be set aside in the light of the principles of law laid down by their Lordships of the Supreme Court in Raghu Raj's case (supra). As it has already been held, failure to appear by counsel without sufficient cause is not excusable, it is also equally unfair and discourteous to the Court. As such, the impugned judgment & decree of the first appellate Court is set aside and the case is remanded to the first appellate Court to decide the same on merits after hearing the parties. The appellant / plaintiff is at liberty to engage counsel and appear before the first appellate Court and the first appellate Court will do well to consider and dispose of the matter within 3 months after noticing the parties. If physical hearing is not possible then the first appellate Court would do well to hear the matter through video conference and conclude it within three months from the date of appearance of the parties. The plaintiff will also appear before the first appellate Court.

10. The substantial question of law is answered accordingly and the second appeal is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge