

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Miscellaneous Appeal No. 5 of 2018****Reserved on 6-2-2020****Order delivered on 10-2-2020**

Niwas Ram S/o Hari Ram, Aged About 58 Years R/o Village Hirri, Tahsil
 Bilha, Distt. Bilaspur, Chhattisgarh**Defendent**

---- Appellant**Versus**

Pawan Kumar Singhania S/o Shri Prabhu Lal, Aged About 44 Years R/o
 Banki Mongra, Tahsil Katghora, Distt. Korba, Chhattisgarh**Plaintiff,**

---- Respondent

For Appellant	: Mr. Ravindra Agrawal, Adv.
For Respondent	: Mr. Avinash Mishra, Adv. on behalf of Mr. Anand Shukla, Adv.

Hon'ble Shri Sharad Kumar Gupta, Judge**CAV ORDER**

1. Appellant has preferred this Miscellaneous Civil Appeal against the impugned order dated 16.12.2015 passed by I Additional District Judge, Bilaspur in Civil MJC No.52/2013 whereby and whereunder she rejected an application filed under Order 9 Rule 13 r/w 151 of the Civil Procedure Code (in Short "CPC") for setting aside ex-parte judgment and decree dated 16.01.2013.
2. Respondent had filed a Civil Suit No.18-A/2010 for recovery of Rs.6,00,000/- from appellant. During trial on 06.11.2012 in the absence of appellant ex-parte proceeding was initiated against him. On 16.01.2013 the First Additional District Judge, Bilaspur passed ex-parte judgment and decree against him. He preferred an application under Order 9 Rule 13 of CPC for setting aside the said ex-parte judgment and decree which was rejected on 16.12.2015.
3. Being aggrieved appellant preferred this Miscellaneous Civil Appeal.
4. In brief, appellant's case regarding Miscellaneous Appeal is that he was under the assurance given by his counsel that he will take care of his case and he would appear as and when informed by him. On 06.11.2012 his counsel did not appear before the trial Court, for the reason best known to

him. He never informed him about initiation of ex-parte proceeding and ex-parte judgment and decree. He cannot be punished for the fault of his counsel. When he received notice of execution then he came to know about the ex-parte judgment and decree. Trial Court did not consider that no prejudice would be caused to the respondent if opportunity of hearing is given to him. Trial Court did not adopt liberal approach.

5. In brief, respondent's case is that after 06.11.2012 neither appellant nor his counsel appeared before the trial Court till passing of the judgment and decree. Appellant himself was a wrong doer.

6. Counsel for the appellant placed reliance on the judgment of Hon'ble Supreme Court in the matter of **Rafiq and another Vs. Munshi Lal and another** [(1981) 2 SCC 788] para 3 of which is relevant and extracted herebelow:-

“3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power expected of him would suffer

because of the default of his advocate. If we reject this appeal, as Mr A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs 200 should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr A.K. Sanghi.”

7. Counsel for the appellant placed reliance on the judgment of Hon'ble Supreme Court in the matter of **G.P. Srivastava Vs. R.K. Raizada and Others** [(2000) 3 SCC 54] para 7 of which is relevant and extracted below:-

“7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any “sufficient cause” from appearing when the suit was called on for hearing. Unless “sufficient cause” is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to

be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The “sufficient cause” for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.

8. In aforesaid Civil Suit ex-parte proceeding was initiated against appellant on 06.11.2012 when his counsel did not appear. Prima facie it appears that his counsel never informed him about ex-parte proceeding and passing of ex-parte judgment and decree. Appellant was under the impression that his advocate will look after his case. Normally personal appearance of the party is not required. A party should not suffer for the inaction, deliberate omission or misdemeanour of his advocate. Word “sufficient cause” must be liberally construed. Aforesaid judicial precedents laid down by Hon’ble Supreme Court in the matter of **Rafiq and another** (supra) and **G.P. Srivastava** (supra) are applicable in favour of appellant.

9. Looking to the above mentioned facts and circumstances of the case, this Court finds that appellant has succeeded to prove that on 06.11.2012 when the said Civil Suit was called for hearing he was prevented from appearing by sufficient cause.

10. Consequently, the instant appeal is allowed, impugned order dated 16.12.2015 passed in MJC No.52/2013 by First Additional District Judge, Bilaspur and the aforesaid judgment and decree dated 16.01.2013 passed in Civil Suit No.18-A/2010 by Additional District Judge, Bilaspur are hereby set aside, order of initiation of ex-parte proceeding dated 06.11.2012 passed in said Civil Suit is also set aside, subject to condition that appellant shall

pay Rs.2,000/- (Two Thousand Rupees) to respondent as cost. The Trial Court is directed to give an opportunity to appellant to prove his case, proceed according to law and procedure and dispose of the case.

11. No order as to costs.

Sd/-
(Sharad Kumar Gupta)
Judge