

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (Art. 227) No.628 of 2019Order reserved on: 4-3-2020Order delivered on: 19-3-2020

Sardar Sujaan Singh, S/o Bhagat Singh, aged about 80 years,
Occupation Business, R/o Koshtapara, Raigarh, Tahsil and District
Raigarh (C.G.)

(Plaintiff)
---- Petitioner

Versus

1. Damrudhar Nai, S/o Trilochan Nai, aged about 58 years, Occupation
Agriculturist, R/o Village Tetla, Tahsil and District Raigarh (C.G.)

2. State of Chhattisgarh, through the Collector, Raigarh (C.G.)
(Defendants)
---- Respondents

For Petitioner: Mr. B.P. Sharma and Miss Anmol Sharma, Advocates.

For Respondent No.1: -

Mr. Ishwar Jaiswal, Advocate.

For Respondent No.2 / State: -

Mr. Aakash Pandey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. This writ petition under Article 227 of the Constitution of India is directed against the impugned order dated 25th June, 2019 passed by the District Judge, Raigarh in Civil MJC No.8/2018, by which the defendant's application under Section 5 of the Limitation Act, 1963 has been allowed and thereby the application under Order 9 Rule 13 read with Section 151 of the CrPC has also been allowed and consequently, the ex parte judgment & decree dated 17-2-2010 passed in Civil Suit No.14-A/2009 has been set aside and the suit filed by the petitioner /

plaintiff has been restored to its original number for hearing and disposal in accordance with law.

2. Mr. B.P. Sharma, learned counsel appearing for the petitioner herein / plaintiff, would submit that the trial Court is absolutely unjustified in holding that there is sufficient cause for condoning the delay in filing the application under Order 9 Rule 13 of the CPC, as the defendant was already served in the main civil suit and in the execution proceeding filed on 28-6-2010 by the plaintiff, the defendant was served with the notice of execution on 9-4-2013 and despite service, he remained absent and thereafter from time to time, he appeared through his counsel, but the application under Order 9 Rule 13 of the CPC was filed on 1-2-2018 in which it was mentioned that the suit was filed on 1-7-2009 and he came to know about the decree after obtaining the copy of the order sheet and for the first time he came to know about the execution proceeding on 4-12-2017 and on 4-1-2018, he came to know about the ex parte judgment & decree. Copies of the order sheets filed by the plaintiff would show that the defendant was duly served with the summons of the suit as such, there is inordinate delay in filing the application for condonation of delay which has not been condoned and therefore the impugned order passed by the learned executing court deserves to be set aside.
3. Mr. Ishwar Jaiswal, learned counsel appearing for respondent No.1 herein / defendant, would support the order impugned.
4. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

5. The plaintiff filed suit for specific performance of contract on 1-7-2009 in which defendant No.1 Damrudhar Nai was said to be served on 23-7-2009 through his wife i.e. adult member of the family. Copy of the service report has been filed. A careful perusal would show that the Process Server visited the house of the defendant and found that the defendant was not available on the date of service of summons and he has gone to Village Chikhli and it could not be informed to the Process Server as to when he will come back then the Process Server served the summons to his wife present therein and that has been accepted as a valid service of summons. Order 5 Rule 15 of the CPC states as under:

“15. Where service may be on an adult member of defendant’s family.—Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.

*Explanation.—*A servant is not a member of the family within the meaning of this rule.

6. The aforesaid provision would show that a service of the summons can be made on the adult member of the defendant family, provided (i) that the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence, (ii) that there is no likelihood of his being found at the residence within a reasonable time, and (iii) that he has no agent empowered to accept service of the summons his behalf.
7. The M.P. High Court in the matter of Suresh Kumar v. Smt.

Godaveribai¹ has held that the Process Server having failed to state that there is no likelihood of the defendant being found at his residence within reasonable time, service cannot be made on adult member of the family under Order 5 Rule 15 of the CPC.

8. In the matter of R.K. Sharma and others, etc. v. Ashok Nagar Welfare Association and Co.² it has been held by the Delhi High Court that Order 5 Rule 15 of the CPC would not be applicable in a case where the Process Server did not even bother to make repeated efforts to effect personal service on the defendant. It will also not be applicable in a case even where the Process Server did not bother to record on the summons that there was no agent available.
9. Reverting to the facts of the present case, it is true that the defendant was absent from his residence at the time when the service of summons was sought to be effected on him at his residence by the Process Server concerned and therefore the Process Server effected service on the wife of the defendant, but it has not been recorded in the summons that there is no likelihood of his (defendant) being found at the residence within a reasonable time, it has only been recorded that he has gone to Village Chikhli and it is uncertain as to when he will come back. It has also not been recorded that there is no agent empowered to accept the service of the summons on his (defendant) behalf. It is the case where the defendant was absent from his residence on the date when the service of summons was sought to be effected on him, however, straightway, the Process Server served the summons to his wife and did not record the other two conditions precedent for valid service of

1 AIR 1992 MP 205

2 AIR 2001 Delhi 272

summons under Order 5 Rule 15 of the CPC that there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, except recording a finding that it is not sure as to when he would come. Even it is not the case that the Process Server made repeated efforts to effect personal service on the defendant. As such, the Process Server has failed to observe the necessary requirements for effecting valid service of summons under Order 5 Rule 15 of the CPC to effect service on the adult member of the family by not recording that there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf. In absence of the above-stated requirement in the report of the Process Server, service could not be made on the adult member of the family / wife of the defendant. As such, in the light of the failure of the Process Server to observe the two of the essential ingredients for serving summons on the wife of the defendant, it cannot be said that Rule 15 of Order 5 of the CPC was complied with. Therefore, summons to the defendant was not duly served in the civil suit and he was proceeded ex parte and ex parte decree has been passed against him.

10. The next question is, whether, the defendant in his application pleaded that he was not duly served; and the ex parte decree was passed on 17-2-2010 and the defendant came to know about the judgment & decree on 4-1-2018 on appointment of counsel and therefore the delay up to 4-1-2018 deserves to be condoned?

11. The trial Court has clearly held that the defendant was not duly served in

the suit and he was ex parte and ex parte decree was passed on 17-2-2010. The trial Court has further recorded a finding that the earlier appointed counsel of the defendant namely Mr. Rajesh Sidar, Advocate, passed away and thereafter, Mr. C.P. Dansena, Advocate, appeared on his behalf and he applied for copy of the ex parte order etc. and then he filed application for setting aside the ex parte decree on 2-2-2018. The trial Court also held that there is sufficient cause for condoning the delay in filing the application under Order 9 Rule 13 of the CPC and condoned the delay.

12. The Supreme Court in the matter of N. Balakrishnan v. M. Krishnamurthy³ has held that once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse.
13. Reverting to the facts of the present case in the light of the aforesaid principle of law laid down by their Lordships of the Supreme Court in N. Balakrishnan (supra), it is quite vivid that the defendant was not duly served in the civil suit filed by the plaintiff as has been held by this Court in the foregoing paragraphs and further, once the trial Court has found that sufficient cause has been shown for condoning the delay normally the superior court should not disturb such finding following the principle of law laid down in N. Balakrishnan (supra), the trial Court has assigned valid reasons to condone the delay in filing the application under Order 9 Rule 13 of the CPC, which are neither perverse nor arbitrary, this

Court would not like to interfere with the order condoning the delay and thereby would not like to restore the ex parte decree passed against the defendant. As such, the trial Court is absolutely justified in setting aside the ex parte judgment & decree and also justified in restoring the civil suit for hearing and disposal in accordance with law. I do not find any merit in this writ petition and it is accordingly dismissed. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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