

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Misc.Appeal No. 77 of 2019****Reserved on 02/09/2021****Pronounced on 08/09/2021**

- Pawan Kumar Agrawal S/o - Late Bisan Swaroop Agrawal Aged About 61 Years R/o - Juni Line, In Front Of Saraswati Press Bilaspur, Tahsil And District Bilaspur Chhattisgarh

---- Appellant/Plaintiff**Versus**

1. Sushil Kumar Sarthi S/o - Late Manohar Lal Sarthi,
2. Smt. Radhabai W/o - Late Manohar Lal Sarthi,
3. Jawahar Lal Sarthi S/o - Late Manohar Lal Sarthi,
4. Hira Lal Sarthi S/o - Late Manohar Lal Sarthi,
5. Satroopa Sarthi D/o - Late Manohar Lal Sarthi,
6. Sarita Sarthi D/o - Late Manohar Lal Sarthi,

Res. 01 to 06 R/o - Village Bodari, Near Bodari School, Post Office-Chakarbhatha, Tahsil-Bilha, District Bilaspur Chhattisgarh.

7. Mahavir Prasad Ojha S/o Shri Shivnath Ojha, Aged About 40 Years Occupation-Business R/o Balram Talkies Road Bilaspur, Tahsil And District Bilaspur Chhattisgarh

---- Respondents/Defendants

For Appellant	:	Shri Devesh G. Kela, Advocate
For Respondent Nos.1 to 6	:	None, though served
For Respondent No.7	:	Shri Ali Asgar, Advocate

Single Bench : Hon'ble Shri Justice Sanjay S. Agrawal**C A V Order**

1. This Miscellaneous Appeal has been preferred by the Plaintiff/Appellant under Order 43 Rule 1(c) of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') questioning the legality and

propriety of the order dated 11.7.2019 passed in Misc. Civil Suit No.471/2017, whereby the learned Court below has refused to restore the suit to its original number while rejecting his application filed under Order 9 Rule 9 read with Section 151 of the CPC. Parties to this appeal shall be referred hereinafter as per their description before the Court below.

2. From perusal of the record, it appears that the Plaintiff's suit for specific performance of contract based upon an agreement to sale dated 30.7.2004 purported to have been executed in his favour by one Manohar Lal Sarthi, was dismissed for non-prosecution on 15.11.2017. An application for its restoration was made by him under Order 9 Rule 9 read with Section 151 of CPC by submitting, *inter alia*, that his health was not well since 13.11.2017, and therefore, he could not appear on 15.11.2017 when the matter was fixed for his evidence, nor he could have informed his counsel for his inability to attend the Court. In support, he has submitted a medical certificate issued by Dr. Prashant Kumar Tiwari on 13.11.2017, who advised him to take bed rest upto 18.11.2017.
3. The reasons assigned in the aforesaid application have, however, been denied by the Defendants saying that the reasons as assigned for his non-appearance on the said date are false one, and therefore, the application deserves to be rejected.
4. The Court below, after considering the aforesaid contention of the parties, observed that although the Plaintiff was suffering from viral fever and was advised to take bed rest upto 18.11.2017, but, nevertheless, since he was not seriously ill, as such, it cannot be said that he was not in a position to inform his counsel or was unable to

move and thereby observed further while referring to the earlier order sheets that despite providing sufficient and last opportunity being given for recording his evidence, the Plaintiff has failed to appear on 15.11.2017. In view of that, the reasons assigned for his non-appearance on the said date, cannot be said to be a genuine one and accordingly refused to restore the suit to its original number. This is the order which has been impugned by way of this appeal.

5. Learned counsel for the Appellant/Plaintiff submits that the Court below has committed an illegality in rejecting the said application on finding that the reasons assigned by the Plaintiff for his non-appearance on 15.11.2017 were not the sufficient. While inviting attention towards the medical certificate issued on 13.11.2017, it is contended that since the Plaintiff was suffering from viral fever and was advised to take bed rest with effect from 13.11.2017 upto 18.11.2017, therefore, in such circumstances, the Court below ought to have observed that due to the alleged cause, he could not appear on the said date as there was no deliberate and malafide intention behind it and by applying liberal view ought to have restored the suit to its original number in order to provide substantial justice to the parties.
6. On the other hand, learned counsel for Defendant/Respondent No.7 has supported the order impugned as passed by the Court below.
7. I have heard learned counsel for the parties and perused the entire record carefully.
8. It appears from perusal of the order impugned that the hyper-technical view has been adopted by the Court below while refusing to restore the suit to its original number. It was stated by the Plaintiff in his said

application that owing to his ill-health on 13.11.2017, he could not attend the Court nor he could have informed his counsel and has placed the medical certificate issued by his Doctor on 13.11.2017 in support of it. A bare perusal of the said certificate would show that he was not only suffering from viral fever, but was advised to take bed rest upto 18.11.2017. It, thus, appears that owing to his illness, he could not appear before the Court below for recording his statement and it appears further that despite observing the said fact that the Plaintiff is suffering from viral fever and has been advised bed rest upto 18.11.2017, yet the Court below while referring to his previous conduct, which has already been condoned, rejected the said application filed under Order 9 Rule 9 read with Section 151 of the CPC.

9. Order 9 Rule 9 of the CPC is relevant for the purpose, which reads as under :

Order IX : Appearance Of Parties And Consequence Of Non-Appearance

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9. Decree against plaintiff by default bars fresh suit.- (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule

unless notice of the application has been served on the opposite party.

10. According to the aforesaid provision, if the Plaintiff satisfies the Court that when there was sufficient cause for his non-appearance on the date when the suit was called on for hearing, the Court may set-aside the order of dismissal. Expression “sufficient cause” as provided therein is an elastic expression, for which, no hard and fast guidelines have been provided and the Court has wide discretion in deciding the sufficient cause keeping in view the facts and circumstances of the case and a party should not be deprived of hearing unless and until there has been something equivalent to misconduct or gross negligence on his part. The material and relevant date for deciding the “sufficient cause” for his non-appearance is the date on which non-appearance was made and it cannot be stretched to cover the circumstances prior to that as observed herein by the Court below while rejecting the said application, as he cannot be penalised for his previous negligence or past defaults in the light of the principles laid down by the Supreme Court in the matter of **G.P. Srivastava Versus R.K. Raizada and Others**, reported in **(2000) 3 SCC 54**, wherein it has been observed at para 7 as under :

“7.....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.....”

11. Applying the aforesaid principles to the case in hand, where I found, based upon the reasons assigned in the said application which is duly supported by the medical certificate issued on 13.11.2017, that the Plaintiff/Appellant was not only suffering from viral fever, but was advised to take bed rest upto 18.11.2017. The Plaintiff has, thus, shown sufficient cause for his non-appearance on the said date i.e. 15.11.2017, when the suit was dismissed for non-prosecution and his said application cannot be rejected while considering his past conduct as the same has already been condoned earlier.

12. Consequently, the appeal is allowed and the order impugned dated 11.7.2019 passed in Misc. Civil Suit No.471/2017 is hereby set-aside and the matter is remitted to the concerned Court below with a direction to restore the suit to its original file and/or in its original number and decide the same in accordance with law.

13. No order as to cost(s).

Sd/-

(Sanjay S. Agrawal)
JUDGE