

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 99 of 2019****Reserved on 04.10.2021****Pronounced on 25.10.2021**

- Sati Bai Nishad Wd/o Late Bhikham Prasad Aged About 34 Years
R/o House No. 330, Ward No. 15, Banbarad Ahiwara, Tahsil
Dhamdha, District Durg Chhattisgarh.

---- Appellant**Versus**

1. Santosh Kesari S/o Late Sarjoo Prasad Gupta Aged About 38 Years
R/o Shadapara, Kishan Chowk, Infront Of Durga Mandir, Camp-2,
Bhilai, Tahsil And District Durg Chhattisgarh.
2. State Of Chhattisgarh Through The Collector, Durg District Durg
Chhattisgarh.

---- Respondents

For Appellant:	Shri Ganesh Burman, Advocate.
For Respondent No.1:	Smt. Aditi Singhvi Agrawal, Advocate.
For State/Respondent No.2:	Shri Sanjeev Kumar Agrawal, P. L.

Single Bench: Hon'ble Shri Sanjay S. Agrawal, J**CAV Judgment / Order**

1. This appeal has been preferred by the Applicant, who is the widow of the original Defendant No.1 – Bhikham Prasad, under Order 43 Rule 1(d) of Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') questioning the legality and propriety of the order dated 16.08.2019 passed by Fourth Additional District Judge, Durg (C.G.) in M.J.C. No.167/2019, whereby the learned Court below has refused to set aside the *ex parte* judgment and decree dated 31.03.2016 passed in Civil Suit No.56-A/2014, while rejecting the application filed under Order 9 Rule 13 of CPC. The parties to this appeal shall be referred hereinafter as per their description before the Court below.

2. According to the learned counsel for the Applicant, the finding of the

Court below rejecting the application filed under Order 9 Rule 13 of CPC by holding that the Applicant has failed to assign any reason for non appearance of her husband on 05.11.2015 is apparently contrary to law. It is contended further that the Applicant's husband was not aware regarding the institution of the said suit as the summons of it was neither served upon him nor any counsel was engaged by him. Further contention of him is that since the reasons assigned in the application was not controverted by the Plaintiff/Non-applicant No.1, therefore, under such circumstances, the Court below ought not to have rejected the said application for setting aside the *ex parte* judgment and decree dated 31.03.2016 passed in C.S. No.56-A/2014.

3. On the other hand, learned counsel appearing for Non-applicant No.1/Plaintiff has supported the order impugned as passed by the Court below.

4. I have heard learned Counsel for the parties and perused the entire record carefully.

5. From perusal of the record, it appears that an *ex parte* judgment and decree dated 31.03.2016 was passed in a suit for specific performance of contract instituted by the Plaintiff against the husband of the Applicant, namely, Bhikham Prasad. In the said suit, the Applicant's husband was proceeded *ex parte* on 05.11.2015 and *ex parte* judgment and decree was accordingly delivered on 31.03.2016.

6. For setting aside the aforesaid judgment and decree, an application was made under Order 9 Rule 13 of CPC, wherein it has been alleged by the Applicant that her husband was informed by the *Kotwar* of the concerned village regarding initiation of mutation proceedings which was

pending before the Court of Nayab Tehsildar, Ahiwara with regard to the property in question bearing Khasra No.1206, 1207/3, 1207/6, 1207/7 and 1207/9 admeasuring 0.40, 0.40, 0.10, 0.18 and 0.19 hectare respectively owned by him. It is contended further that upon knowing the said fact, her husband had applied for obtaining the certified copy of the relevant papers on 15.10.2018 and, in pursuance thereof, it was delivered to her on 22.11.2018 as her husband was died in the mean time in a road accident on 20.10.2018. Further contention of the Applicant was that since her husband had never received any notice from the concerned Court nor had ever engaged any of his counsel to contest the said suit on his behalf, therefore, the *ex parte* judgment and decree delivered on 31.03.2016 in Civil Suit No.56-A/2014 is liable to be set aside.

7. Perusal of the record of the said suit would show that the concerned trial Court vide its order dated 27.11.2014 had directed to serve the summons of the suit upon Defendant-Bhikham Prasad through Special Process Server, while fixing the case for 20.01.2015. However, no service report as such was found to be placed on record, though was required to be returned by the Process Server by virtue of the provision prescribed under Rules known as MP/CG Civil Court Rules, 1961 framed under Section 23 of the M.P./C.G. Civil Courts Act, 1958. Rule 72 of it is relevant for the purpose which provides as under:-

72. (1) Every process-server must immediately after service or non-service writes clearly with his own hand at the place of service and in the presence of witnesses (if any), his report of service or non-service and must also state the date, hour and exact place of service or non-service.

(2) All returns of service or non-service shall be made in form (No.II-4) immediately after service or non-service. The space on the back of the form may

be utilised, where necessary, for continuation of the entry in column 4. The process-server shall sign at the foot of each return before making the same over with the process to the Nazir or Naib-Nazir.

8. According to the aforesaid provision, the report was required to be placed on record by the Process Server in order to ascertain as to whether said defendant Bhikham Prasad was served with the summons of the suit or not as directed by the trial Court vide order dated 27.11.2014. In absence thereof, it cannot be said that the summons of the suit was duly served upon him, yet he was proceeded *ex parte* by the trial Court vide its order dated 05.11.2015. No doubt, the Court shall always be justified in proceeding *ex parte* if it is convinced that the defendant or the opposite party despite service of the summons and knowledge of the pendency of the proceedings had chosen to remain absent, but before proceeding *ex parte*, the Court must advert itself to the legal requirements as provided under Order 5 of the CPC which is the complete code regarding service of the summons on the opposite party. It is, therefore, the bounden duty of every Court to verify personally that the summons were served in accordance with law and the party despite service of the summons had chosen to remain absent, which is, however, found to be completely missing in the instant matter as observed herein above

9. It appears further that although a duly signed Vakalatnama has been filed on 06.04.2015 but, the same has, however, found to be filed without disclosing the number of the said suit. In view thereof, it cannot be said that the counsel, who has submitted the alleged Vakalatnama, was authorized by him to contest the suit on his behalf.

10. Be that as it may, the *ex parte* judgment and decree could be set

aside under Order IX Rule 13 of CPC, if the ingredients provided therein are fulfilled. The said provision is relevant for the purpose reads as under:-

ORDER IX – Appearance of parties and consequence of non-appearance

XXXX XXXX XXXX XXXX XXXX XXXX

Rule 13. Setting aside decree *ex parte* against defendants.- In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]

[*Explanation.-* Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the *ex parte* decree.]

11. According to the aforesaid provision, the Court can set aside an *ex parte* decree only on two grounds, firstly, when the summons of the suit was not duly served and secondly, when he was prevented by sufficient cause from appearing when the suit was called out. As observed hererin above, the summons of the suit was neither duly served upon the Applicant's husband-Bhikham Prasad nor had he authorized any of his counsel to contest the suit on his behalf.

12. That apart, Defendants No.1 & 2, who were found to be proceeded

ex parte by the trial Court vide its order dated 05.11.2015, but irrespective of their absence, it reflects from the order sheets commencing with effect from 05.03.2016 upto 31.03.2016, the matter was being adjourned from time to time as per the request of both the parties. Not only this, the matter was found to be fixed for the pronouncement of the judgment after hearing of oral submissions of the parties. It is, therefore, surprising for me that how the matter could be dealt with in such a manner when the defendants were already proceeded *ex parte* on 05.11.2015. The matter was, thus, found to be conducted by the concerned Presiding Officer (Shri Narayan Singh) extremely in a casual manner.

13. Be that as it may, despite service of notice of the proceedings initiated by the Applicant under Order IX Rule 13 of CPC, the Non-applicants have failed to appear and, therefore, the reasons assigned in the application, which are duly supported by an affidavit, have, thus, not been controverted by the Non-applicant. In view thereof, there were no reasons to disbelieve the contention made by the Applicant.

14. In view of the aforesaid background, the Court below has, therefore, committed an illegality in dismissing the said application while refusing to set aside the *ex parte* judgment and decree dated 31.03.2016.

15. Consequently, the appeal is allowed and the *ex parte* judgment and decree delivered on 31.03.2016 in Civil Suit No.56-A/14 is hereby set aside. No order as to costs.

Sd/-

(Sanjay S. Agrawal)
JUDGE