

(2019) 09 CHH CK 0110

Chhattisgarh High Court

Case No: MA No. 78 Of 2018

Jogilal Yadav

APPELLANT

Vs

Abdul Kareem And Ors

RESPONDENT

Date of Decision: Sept. 18, 2019

Acts Referred:

- Limitation Act, 1963 - Section 5
- Code Of Civil Procedure 1908 - Order 9 Rule 13

Hon'ble Judges: Ram Prasanna Sharma, J

Bench: Single Bench

Advocate: Shaleen Singh Baghel, Raja Sharma, Narendra Mishra, Smita Jha

Final Decision: Dismissed

Judgement

Ram Prasanna Sharma, J

1. This appeal is preferred against the order dated 23-7- 2018 passed by 8th Additional District Judge, Raipur, (CG) in Misc. Civil Suit No.3 of 2017,

wherein the said court dismissed the application filed under Section 5 of the Limitation Act, 1963 and application filed under Order 9 Rule 13 of the

Code of Civil Procedure, 1908 for setting aside the ex parte decree passed vide judgment dated 24-2-2016 in civil Suit No.41-A/2014.

2. Respondent No.1 /plaintiff filed a suit for specific performance of contract for sale/purchase of land bearing Survey No.247/2 area 0.202 hectares

situated at Patwari Halka No. 105/47 and Revenue Circle Raipur, Tahsil and District, Raipur,CG. The property was to be sold for cash consideration

of Rs.26,00,000/- out of which Rs.1,00,000/- was paid by the respondent No.1 to appellant and remaining amount was to be paid at the time of

execution of sale deed. As the appellant did not appear before the trial Court that is why the trial court proceeded ex parte and passed decree after

recording evidence. As per appellant, earlier the case was pending before the court of 7th Additional District Judge, Raipur and it is transferred to the

Court of 8th Additional District Judge, Raipur by the order of the District Judge. The appellant went to the court of 8th Additional District Judge,

Raipur and verified the case listed in the notice board where he did not find his case on the date fixed for hearing and even in the diary also case was

not mentioned. The said court proceeded ex parte. As per the appellant, the said application is filed on 28-1-2017 with an application under Section 5 of

the Limitation Act, 1963 for condonation of delay but same was dismissed by the trial Court contrary to law.

3. Learned counsel for the appellant submits as under.

i) Sufficient reason was assigned in the application but same was not appreciated by the trial court and there was some confusion about the date of hearing as the case was transferred from one court to another.

ii) The mistake was bona fide and looking to the age of the appellant who is about 86 years, the trial court ought to have considered his application, therefore, finding of the trial court is liable to be set aside.

4. On the other hand, learned counsel appearing for the respondent No.1 would submit that sufficient cause was not shown before the trial court to set aside the ex parte decree and the application was time barred, therefore, order of the trial court is just and proper which is not liable to be interfered with while invoking jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused the record of court below including the order.

6. The question for consideration of this court is whether the appellant has shown sufficient cause to set aside the ex parte decree. The test which is applied is whether the applicant honestly and sincerely intended to prosecute the appeal. Counsel Mr. Yudisthir Chandrakar and appellant Jogilal

Yadav adduced their evidence to establish sufficient cause. Counsel Mr. Yudisthir Chandrakar admitted in his cross examination (para 7) that case was listed in Board diary of the court of 8th Additional District Judge, Raipur and he never made any complaint to the said court that record of the

case is not traceable. From his evidence it is not established that record of the case was not available in the court and contrary it is established that

record of the case was listed in the Board diary. The appellant admitted in his cross examination (para 4) that he received summons twice in the

present case but he did not appear before the court. The decree was passed on 24-2-2016 and the application for setting aside the ex parte decree

was filed on 23-1-2017 i.e., after 11 months. From the record, it is clear that the appellant had knowledge regarding institution of suit but he did not act

diligently and remained inactive for a long. It can be said that the appellant has acted in negligent manner and there was want of bona fide on his part.

It is not the case where appellant sincerely intended to contest the case and did its best to do so, therefore, it is the appellant who could be blamed for

non- prosecution of the case. The appellant had knowledge of all the proceeding of the court and even counsel had knowledge of hearing of the case.

Therefore, after assessing the evidence, the trial court recorded finding that no sufficient cause is shown to set aside the ex parte decree. After re-

assessing the entire evidence this court has no reason to take a contrary view.

7. This court, in the facts and circumstances of the case, cannot ignore the period of limitation because no court shall have jurisdiction to entertain any

application if the same has been filed after expiry of the period of the limitation. The application is evidently time barred and looking to the gross

negligence of the appellant this Court has no reason to reverse the finding recorded by the trial court which passed the ex parte decree.

8. Accordingly, the instant appeal is liable to be and is hereby dismissed, leaving the parties to bear their own costs.