

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 3rd OF FEBRUARY, 2023

MISCELLANEOUS APPEAL No. 571 of 2015

Between:-

- HARI SHANKAR PATEL, SON OF SHRI SUKHCHAIN SINGH AGED ABOUT 50 YEARS, RESIDENCE OF VILLAGE GADAR PIPARIYA, TAHSIL & DISTRICT:**

.....APPELLANT

(SHRI ASHOK LALWANI, ADVOCATE)

AND

- ASHUTOSH PATEL, AGED ABOUT 26 YEARS, SON OF SHRI HIMMAT SINGH RESIDENCE OF PATEL MOHALLA, NEAR POST OFFICE, RAMPUR POLICE-STATION: GORAKHPUR TAHSIL AND DISTRICT JABALPUR (M.P.)**

.....RESPONDENT

(BY SHRI PREMNARAYAN VERMA, ADVOCATE)

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This appeal coming on for orders/admission this day, Court passed the following:

ORDER

This miscellaneous appeal has been preferred by appellant/defendant challenging the order dated 13.01.2015 passed by learned 18th Additional District Judge, Jabalpur in MJC No.100/2014 whereby application under Section 5 of the Limitation Act filed in

support of an application under Order 9 Rule 13 CPC has been dismissed and consequently application under Order 9 Rule 13 CPC registered as MJC, has also been dismissed.

2. Learned counsel for the appellant/defendant submits that in the suit for specific performance filed by the respondent/plaintiff, no notice was served upon the defendant and vide order dated 21.09.2010, the defendant was proceeded ex parte. Learned counsel submits that after proceeding ex parte against the defendant and after filing affidavits of chief examination under Order 18 Rule 4 CPC of the plaintiff's witnesses, the plaintiff filed certain documents/original agreement of sale on the next date i.e. on 12.01.2011, which being improperly stamped was impounded and duty and penalty was imposed and collected even without giving opportunity to the defendant and thereafter again ex parte evidence of all the witnesses was recorded on 08.08.2011. Later on, the plaintiff himself moved applications under Order 6 rule 17 CPC and under Order 1 Rule 10 CPC on 23.08.2011 in respect of joinder of State Govt. and both the applications were allowed by learned trial Court even without issuing further summons to the defendant. He submits that in fact no notice was served upon the defendant and ultimately in these circumstances ex parte judgment and decree was passed on 28.09.2011. Upon service of summons of execution proceeding along with copy of ex parte judgment and decree dtd. 28.09.2011, the defendant got knowledge and immediately moved applications under Order 9 Rule 13 CPC and under Section 5 of the Limitation Act duly supported by affidavits with the prayer of setting aside ex parte judgement and decree and for condonation of delay of about 130 days.

3. After service of notice on the respondent/plaintiff, he filed reply to the application and contended that the defendant was duly served with the

summons in the original suit but did not appear deliberately and was proceeded ex parte. The defendant did not appear even after service of notice issued by the Collector of stamps in the proceeding of impounding the agreement of sale. It is also contended that the application being barred by limitation, is not entertainable and deserves to be dismissed.

4. Thereafter, learned Court recorded evidence of the defendant but the plaintiff refused to give any evidence in rebuttal. Then on the basis of available evidence and just contrary to law, learned Court by making comparison of defendant's signature available on summons dtd. 6.2.2012 from the *photocopy* of summons dtd. 21.9.2010, dismissed the application vide its order dtd.13.1.2015.

5. Learned counsel for the appellant submits that learned Court in the o9r13cpc proceeding, fixed the case for evidence and in pursuance of the order passed by learned Court, the defendant/appellant filed affidavit of chief examination under Order 18 Rule 4 CPC of defendant-Harishankar Patel, who was cross examined on behalf of the plaintiff on 24.09.2013 and after closure of evidence of the defendant on 13.03.2014, the case was fixed for evidence of the plaintiff/respondent for 27.03.2014 but on 13.03.2014 itself, learned counsel appearing for the respondent/plaintiff refused to give any evidence in rebuttal to the evidence adduced by the defendant/appellant and thereafter case was fixed for final arguments and despite there being sufficient cause for condonation of delay in filing of the application under Order 9 Rule 13 CPC and further despite there being no rebuttal evidence of the plaintiff, learned Court below vide impugned order dated 13.01.2015 dismissed the application under Section 5 of the Limitation Act and consequently dismissed the application under Order 9 Rule 13 CPC also. He submits that in the aforesaid circumstances, the application under Section 5 of the Limitation Act as

well as the application under order 9 rule 13 CPC ought to have been allowed by taking liberal view.

6. Learned counsel for the respondent/plaintiff submits that despite service of summons in the original suit, the defendant did not appear deliberately and after proceeding ex parte against the defendant, the plaintiff was free to file documents and to file any other application including application under Order 1 Rule 10 CPC or Order 6 Rule 17 CPC and that does not create further right in favour of the defendant to issue fresh summons in the pending suit. He further submits that the defendant was well aware of the proceedings as well as the ex parte judgment & decree but he did not file the application for setting aside the ex parte decree under Order 9 Rule 13 CPC within prescribed period of 30 days. Although he concedes that no evidence in rebuttal was adduced by the plaintiff/respondent in the proceeding under Order 9 Rule 13 CPC. With these submissions learned Counsel for the respondent/plaintiff supports the impugned order and prays for dismissal of the misc. appeal.

7. Heard learned counsel for the parties and perused the record.

8. In the present case, record of civil suit shows that after proceeding ex parte against the defendant, learned trial Court recorded ex parte evidence of the plaintiff by way of affidavits under Order 18 Rule 4 CPC and thereafter took certain documents on record/original agreement of sale on the next date i.e. on 12.01.2011, which being improperly stamped was impounded and duty and penalty was imposed and collected even without giving opportunity to the defendant and thereafter, again ex parte evidence of all the witnesses was recorded on 08.08.2011.

9. The plaintiff thereafter moved applications under Order 1 Rule 10 CPC for impleadment of the State Government as party and for

amendment under Order 6 Rule 17 CPC, which were allowed by learned trial Court without taking care to issue fresh summons in the suit to the defendant, which was necessary in the existing facts and circumstances of the case.

10. The record of MJC under Order 9 Rule 13 CPC also shows that in support of the application under Section 5 of the Limitation Act, the defendant/appellant adduced evidence, who was cross examined on behalf of the plaintiff/respondent but despite affording opportunity, the counsel appearing for the respondent/plaintiff refused to adduce evidence in rebuttal, which is clear from the order sheet dated 13.03.2014.

11. Although there is delay of about 130 days but the appellant/defendant by filing affidavits in support of the application under Order 9 Rule 13 CPC and under Section 5 of the Limitation Act and further by adducing oral evidence has explained the delay but despite availability of opportunity to the plaintiff/respondent, he did not adduce evidence and even refused to give the evidence also, therefore, in my considered opinion there being no rebuttal to the evidence adduced by the defendant/appellant in support of his application under Section 5 of the Limitation Act/under Order 9 Rule 13 CPC, it cannot be said that there was no sufficient cause for condoning the delay in moving the application under Order 9 Rule 13 CPC. Resultantly, in absence of any rebuttal evidence, both the applications deserve to be and are hereby allowed.

12. As such, in the overall circumstances of the case, the miscellaneous appeal deserves to be and is hereby allowed with cost of Rs. 10,000/- payable to the plaintiff and by setting aside the impugned order dated 13.01.2015, the ex parte judgment and decree dated 28.09.2011 is also set aside and the suit filed by the respondent/plaintiff is restored to its

original number with the further liberty to the appellant/defendant to file written statement within a further period of 30 days from the date of passing of order by this Court today, failing which, appellant/defendant's right to file written statement shall stand closed. Parties are directed to appear before the trial Court on 14.02.2023.

13. With the aforesaid observations, this miscellaneous appeal is **allowed and disposed off.**

14. Interim application(s), if any, shall stand disposed off.

(DWARKA DHISH BANSAL)

JUDGE

Pallavi