

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

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 18TH OF OCTOBER 2023

CIVIL REVISION No.292 of 2019

BETWEEN:-

**1. BABULAL, S/O LATE PARTAPI
KALAR, AGED ABOUT 45 YEARS,
OCCUPATION: PRIVATE WORK
VILLAGE BHAROLI, P.S. INDWAR,
TEHSIL MANPUR, DISTRICT-UMARIYA
(MADHYA PRADESH)**

**2. VANSHDHARI AGED ABOUT 55 YEARS
S/O LATE PARTAPI KALAR,
OCCUPATION: LABOUR, RESIDENT OF
VILLAGE BHAROLI, P.S. INDWAR,
TEHSIL MANPUR, DISTRICT- UMARIYA
(MADHYA PRADESH)**

**3. RAMFAL AGED ABOUT 47 YEARS S/O
LATE PARTAPI KALAR, (LRS OF
ORIGINAL DEFENDANT NO.2)
RESIDENT OF VILLAGE BHAROLI PS
INDWAR TEHSIL MANPUR DISTRICT-
UMARIYA (MADHYA PRADESH)**

**4. JAGDISH ALIAS BUDDHI AGED
ABOUT 65 YEARS S/O JHUALLA KALAR,
OCCUPATION: LABOUR (ORIGINAL
LABOUR) RESIDENT OF VILLAGE
BHAROLI P.S. INDWAR, TEHSIL
MANPUR, DISTRICT- UMARIYA
(MADHYA PRADESH)**

.....APPLICANTS

(SHRI ASHISH VISHWAKARMA - ADVOCATE)

AND

- 1. HIRA KALAR, S/O HARCHHATIYA KALAR, VILLAGE PANPATHA P.S. INDWAR (MADHYA PRADESH)**
- 2. BHOORA (DIED) SON OF JHALLA KALAR, THROUGH LEGHAL HEIRS SMT GOLI BAI D/O BHOORA KALAR, AGED ABOUT 40 YEARS, RESIDENT OF VILLAGE BAMHANGAONVA PS INDWAR DISTRICT- UMARIYA (MADHYA PRADESH)**
- 3. SMT FULIYA BAI W/O BHOORA KALAR, AGED ABOUT 65 YEARS, RESIDENT OF VILLAGE PANPATHA PS INDWAR DISTT UMARIA (MADHYA PRADESH)**
- 4. BUDDHEKAL KALAR, S/O BHOORA KALAR, AGED ABOUT 48 YEARS, RESIDENT OF VILLAGE PANPATHA PS INDWAR DISTT UMARIA (MADHYA PRADESH)**
- 5. GENDLAL KALAR, S/O BHOORA KALAR, AGED ABOUT 46 YEARS, RESIDENT OF VILLAGE PANPATHA PS**

**INDWAR DISTRICT- UMARIA
(MADHYA PRADESH)**

**6. STATE OF MP THROUGH COLLECTOR,
DISTRICT- UMARIA (MADHYA
PRADESH)**

.....RESPONDENTS

**(BY SHRI GYANENDRA SINGH BAGHEL – ADVOCATE FOR THE
RESPONDENT 1 AND BY SHRI ANUPAM CHATURVEDI – PANEL
LAWYER FOR THE RESPONDENT 6/STATE)**

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*This revision coming on for admission this day, Court passed the
following:*

ORDER

This civil revision has been preferred by the applicants/defendants challenging the order dated 07.03.2019 passed by 3rd Additional District Judge, Umariya in miscellaneous civil appeal No.05/2014 affirming the order dated 29.09.2012 passed by 1st Additional Civil Judge Class-II, Umariya in MJC No.08/2010.

2. As narrated by learned counsels appearing for the parties, the short facts of the case are that a civil suit was filed by the respondents 1-5 for declaration of title and permanent injunction, which was decreed ex-parte on 26.09.1995 and for setting aside the ex-parte judgment and decree, an application under Order 9 Rule 13 CPC by the defendants/applicants was filed on 29.07.1997 which was dismissed in default on 25.08.2005. For restoration of the aforesaid application under Order 9 Rule 13 CPC, an application under Order 9 Rule 9 CPC was filed on 05.10.2005 with delay of about 10-12 days, which was dismissed

on 29.09.2012 for want of application under Section 5 of the limitation Act. Consequently, the defendants filed miscellaneous appeal against the order dated 29.09.2012, which has been dismissed by the impugned order dated 07.03.2019 holding it to be not maintainable.

3. Learned counsel for the applicants/defendants submits that although application under Order 9 Rule 9 CPC was barred by limitation of about 10-12 days but before dismissing the application under Order 9 Rule 9 CPC on the ground of delay, learned Court below ought to have granted one more opportunity to cure the default of non filing the application under Section 5 of the limitation Act and in favour of his submissions, he placed reliance on the decision of the Supreme Court in the case of Sesh Nath Singh and Another Vs. Baidyabati Sheoraphuli Co-operative Bank Limited and another **(2021) 7 SCC 313** and submits that although explanation was required to be given but in fact, no formal application is required. He further submits that learned appellate Court has also affirmed the order dated 05.10.2005 and in addition, just contrary to law laid down by Supreme Court in the case of Jaswant Singh & others Vs. Parkash Kaur & Another **(2018) 12 SCC 249**; Full Bench of this Court in the case of Nathu Prasad vs. Singhai Kapurchand **AIR 1976 MP 136** and Division Bench of this Court in the case of Pooranchan Mulchand Jain Vs. Komalchand Beniprasad Jain **AIR 1962 MP 64**, held the misc. appeal to be not maintainable.

4. Learned counsel appearing for the respondent 1 supports the impugned order and prays for dismissal of this civil revision with

the contentions that learned appellate Court has not committed any illegality in dismissing the misc. appeal as not maintainable because the application under Order 9 Rule 9 CPC was also barred by limitation and he placed reliance on the decision in the case of Gaja Vs. Mohd. Farukh and others **AIR 1961 All 561**.

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

6. Evidently, the application under Order 9 Rule 9 CPC was dismissed after recording evidence of the parties but it was dismissed on 29.09.2012 holding it to be barred by limitation also. The application u/O 9 R 9 CPC was filed on 05.10.2005 for restoration of MJC (regd. on an application under Order 9 Rule 13 CPC) which was dismissed on 25.08.2005. As such there is delay of about 10 days. In the case of Sesh Nath Singh (**supra**) it has been held as under:-

“63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.

64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the Court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making an application.”

7. In the case of Gaja Vs. Mohd. Farukh and others **AIR 1961 All 561**, a coordinate Bench of Allahabad High Court had held as under:-

"9. With all respect I am in agreement with the decisions of this Court. An appeal is a substantive right and not a mere matter of procedure and unless it is conferred by Order 43, Civil P. C., it cannot be inferred by implication from Section 141 of the Code. Order 43 does not provide for an appeal from an order dismissing for default an application for restoration of an application under Order 9, Rules 9 and 13, Civil P. C. No appeal therefore lay from the order of the Munsiff dismissing the application dated 3rd September, 1956."

8. For the purpose of convenience, provision contained in section 141 CPC is reproduced as under :

"141. Miscellaneous proceedings.-The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

[**Explanation.**-In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.]"

9. Bare perusal of section 141 CPC makes it clear that Explanation to section 141 CPC was added by Act 104 of 1976 (w.e.f. 1-2-1977), so it is clear that the explanation appended to section 141 CPC was not taken into consideration in the decision given by Allahabad High Court in the case of Gaja (**supra**). Similarly, the decisions in the case of Nathu Prasad (**supra**) and Pooranchan Mulchand Jain (**supra**) were given by Full Bench and Division Bench of this Court prior to addition of said Explanation. As such, in the light of explanation to section 141 CPC, the decision in the case of Gaja (**supra**) is not applicable at all to the case in hand, on which the impugned order is based.

10. In the case of Jaswant Singh & others Vs. Parkash Kaur & Another (**2018**) **12 SCC 249**, the Supreme Court after taking into

consideration the Explanation added to section 141 CPC, has held as under:-

“58. There cannot be any dispute to the view taken by the different High Courts in various judgments as noticed above that an appeal is a substantive right and not a mere matter of procedure and unless the right to appeal is specifically conferred it cannot be inferred under Section 141 of the C.P.C. The present is not a case where we are reading the right of appeal from Section 141 CPC. Section 141 now expressly provides that Order IX is applicable to all proceedings in civil jurisdiction. When Order IX is made applicable to the proceedings in the nature of application seeking recall of the order dismissing the application under Order IX Rule 13 C.P.C. the order passed by the civil court rejecting such application is clearly referable to Order IX Rule 9 C.P.C. and an order which is clearly referable to Order IX Rule 9 C.P.C. shall also be appealable by virtue of Order XLIII Rule 1(c) C.P.C. Rejection of application for restoration which is referable to Order IX, we cannot refuse to treat an order rejecting application under Order IX Rule 9 C.P.C. for the purposes of Order XLIII Rule 1(c) C.P.C. The Full Bench judgment of Madhya Pradesh High Court in so far as it answered question No.1 as framed in paragraph 1 of the judgment lays down the correct law. However, the view of the Full Bench that when application under Order IX Rule 9 C.P.C. for restoration of suit is rejected, the second application for restoration of the original application although falls under the purview of the Order IX Rule 9 C.P.C. read with Section 141, rejection of the application does not fall under Order XLIII Rule 1(c) C.P.C., to the above extent, the view of the Full Bench cannot be approved. When the second application as held by Full Bench falls under Order IX Rule 9 C.P.C., hence the right of appeal shall also accrue when such application is rejected. In view of the above discussion, we are of the considered opinion that the appeal filed by the appellants against order dated 23.12.2005 was clearly maintainable and the High Court erred in holding that such appeal was not maintainable.”

11. In the light of aforesaid legal position, there is no doubt that against dismissal of an application under Order 9 Rule 9 CPC, which was filed for restoration of MJC/application under Order 9 Rule 13 CPC, misc. appeal under Order 43 Rule 1(c) CPC is maintainable and learned appellate Court has committed illegality in holding it to be not maintainable. Impugned order further shows that before holding so, learned appellate Court did not spare any time even to peruse the provision contained in section 141 CPC.

12. In the case of *Jaswant Singh & others Vs. Parkash Kaur & Another* (2018) 12 SCC 249, the Supreme Court has also

considered the question of limitation in filing of the application under Order 9 Rule 9 CPC and held as under:-

“61. The High court in its judgment also touched the question of limitation. The High Court held that application for restoration could be under Order IX and the limitation for restoration is 30 days from the date of dismissal as per Article 122. For the purposes of this case, it is not necessary for us to enter into the question as to whether limitation for application filed by the appellants on 21.08.2002 was 30 days or 3 years. Even if it is assumed that limitation for filing application was only 30 days, the appellants in their application itself have already given sufficient explanation for filing the application on 21.08.2002. They were not aware of the application dated 20.07.1999 filed by Ranjit Singh deceased who could not recover from illness and died on 20.11.2001. The Trial Court has held that reasons given by the appellants were not sufficient which finding has been reversed by the Appellate Court. In paragraphs 25 and 26 of the judgment of the Appellate Court following has been held:

"25. Keeping in view all these facts and circumstances, I am of the opinion that the statement of Jaswant Singh In the given facts and circumstances should be given due weight age. The death of Ranjit Singh within a short span when his application was dismissed give credibility to the statement of Jaswant Singh. The parties are villagers and it is not supposed that they will keep the medical record and even take the patient for proper medical treatment to a qualified doctor or a hospital.

26. In view of these facts and circumstances, I am of the considered opinion that the Ld. Trial Court has erred in holding that there was no sufficient ground for restoration of application. It is correct that evidence in the main application was not produced despite granting of several opportunity, but the Ld. Trial Court has not gone for concluding the evidence of the applicant by order rather dismissed the same as the counsel for the applicant pleaded 'no instructions'."

62. Section 5 of the Limitation Act was attracted in application filed for restoration. The Appellate Court having found sufficient cause for restoration, it is just and equitable to conclude that there was sufficient cause for condonation of delay, if any. Thus, the rejection of the application of the appellants on the above ground also cannot be sustained.”

13. As the sufficient material explaining the delay of 10 days is available on record which has also been considered by learned Court below but for want of application under section 5 of the Limitation Act, learned Court dismissed the application under Order 9 Rule 9 CPC. The reason of non-appearance of applicants in the MJC proceedings (i.e. application under Order 9 Rule 13 CPC) and reason of non-filing of the application under Order 9 Rule 9 CPC within time, is almost on same averments, therefore,

it could have been considered even in absence of application under Section 5 of the Limitation Act. The reason which has been shown by the applicants is that the applicants were not informed by their duly engaged Counsel and that they could not get the certified copy of the order on 24.09.2005 itself and could get it only on 03.10.2005. As such, in my considered opinion, the reason shown about non-appearance is acceptable and delay occurred in filing of the application under Order 9 Rule 9 CPC also deserves to be condoned.

14. Resultantly, both the impugned orders dtd. 07.03.2019 and 29.09.2012 deserve to be and are hereby set aside and the MJC /application under order 9 rule 13 CPC is hereby directed to be restored to its original number with the further direction to learned trial Court to decide the same afresh after giving due opportunity of hearing to the parties, on its own merits.

15. Parties are directed to appear before learned trial Court on 22.11.2023.

(DWARKA DHISH BANSAL)

JUDGE