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IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G.)

Civil Revision No. 52 of 2003.

UNDER SECTION 115 OF THE CODE OF CIVIL PROCEDURE, 1908

PETITIONER
APPELLANT
PLAINTIFF

: Dhanraj S/o Laxman Das Chopeda
resident of 70 A Works Plots Kadma,
Jamshedpur (Jharkhand).

V E R S U S

RESPONDENTS
DEFENDANTS

S : (1) Tulsi Das S/o Shiromani Das
R Vaishnaw, aged about 40 years,
village Semipali, Tah. & Distt.
Korba (C.G.).

AS (2) State of Chhattisgarh
Through : Collector, Korba
(Chhattisgarh).

P. R. No. 310/03
Presented by Shri Ramakant Pandey
dated 01.02.03

Arising out of the order passed by the
Civil Judge, Class I, Korba (Presided
over by Smt. Amrita Sanjay Lal) in M.J.C.
No. 04/2001 Tulsi Das - vs - Dhanraj and
others on 10-1-2003 allowing the applica-
tion of the respondent No.1 filed under
Order 9 Rule 13 C.P.C., 1908 for setting
aside decree exparte against defendant No.1
filing the application.

Being aggrieved, the order detailed above (hereinafter
referred to as the impugned order) the petitioner
begs to make this petition for revision under the
following facts and on the grounds following thereafter

FACTS OF THE CASE

1 (a) That, in village Semipali, Tahsil and District
Korba, there is a house with eves droppers
situated on Khasra No. 68/2 measuring 0.68

....contd....

Pandey

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Civil Revision No. 52 of 2003

**Applicant/
Plaintiff** : Dhanraj

VERSUS

**Non-applicants/
Defendants** : Tulsi Das and another

Applicant by Shri Ramakant Pandey, Advocate.
Non-applicants by Smt. C.K.Nawrang, Advocate.
State by Shri J.D.Bajpai, Govt. Advocate with Shri Sanjeev Agrawal, Panel Lawyer.

ORDER

(Passed on 30-11-2005)

Dhirendra Mishra, J

The instant civil revision has been preferred by the applicant/plaintiff against the order dated 10.01.2003 passed by learned Civil Judge, Class-I, Korba in M.J.C.No. 04/01, Tulsi Das Vs. Dhanraj and others and by which application under Order 9 Rule 13 of the Code of Civil Procedure (for brevity 'the Code') has been allowed and judgment and decree dated 19.12.2001 passed in Civil Suit No. 12-A/97 has been set aside. (Parties hereinafter shall be described as per their description before the trial Court.)

2. Brief facts of the case are that the plaintiff filed a civil suit for declaration and possession and perpetual injunction against the defendants before the trial Court. In the above proceedings an order dated 03.02.1994 of temporary injunction was passed in favour of the plaintiff restraining the defendant No.1 from alienating the property during pendency of the suit. However, in contravention of the above order defendant No.1 sold the property, as a result of which the plaintiff moved an application for amendment in his plaint to incorporate a relief that the sale deed so

executed be declared void. The defendants opposed this application whereupon the trial Court directed the parties to file affidavits in support of their contentions and fixed the case on 30th August 2000 for filing of affidavits but on the date so fixed the defendant No.1 remained absent and he was proceeded ex-parte and the case was fixed for recording of ex-parte evidence. Thereafter, ex-parte decree dated 19.12.2000 was passed in favour of the plaintiff.

3. On 08.05.2001 the defendant No.1 moved an application for setting aside the ex-parte decree dated 19.12.2000 taking a ground that he had engaged his counsel to prosecute the case on his behalf, however, he was not aware of ex-parte proceedings drawn on 30th August 2000 and he learnt about the same on 04.05.2001 from his counsel and he was not aware of passing of decree on 04.05.2001. He also filed an affidavit in support of his application for setting aside the ex-parte decree.
4. The plaintiff in reply to the above application submitted that the defendant was participating in the original suit and as such he was aware of all the dates and even then he chose to remain absent on 30th August 2000 on the basis of which he was proceeded ex-parte as his advocate pleaded no instructions and accordingly, a decree was passed. However, the application for setting aside the ex-parte decree has been filed beyond the prescribed period of limitation.
5. The defendant examined himself and his witnesses A.R.Narange in support of his application whereas the plaintiff examined his attorney Rajendra Pandey in support of his reply.
6. The learned trial Court by the impugned order allowed the application for setting aside the ex-parte decree and restored the original suit by recording a finding that the defendant is an agriculturist and is not well educated person and he learnt about the ex-parte decree only on 04.05.2001 as he was not appearing regularly in the case as per directions of his advocate and that the reason assigned by the defendant for his non-appearance on 30th August 2000 was sufficient.

7. Learned counsel for the plaintiff submits that the findings of the learned trial Court is contrary to evidence available on record as from the statement of the defendant itself it would be evident that he was in regular touch with his advocate in this period and he had falsely stated that he came to know about the ex-parte decree for the first time on 04.05.2001. Pointing out towards the certified copy of the impugned order, learned counsel for the plaintiff submits that the defendant had applied for certified copy of the order on 04.04.2001 which is evident from the stamp of the Copying Section. He further submits that though the application for restoration was filed after four months of passing of ex-parte decree on 08.05.2001, however, no application for condonation of delay has been filed by the defendants and in the absence of such application, the application for restoration of the suit could not be allowed.
8. Learned counsel for the plaintiff places his reliance on the judgment of the M.P. High Court reported in AIR 1995 M.P.160 in the matter of Smt. Madhuribai Vs. Grasim Industries Ltd. Nagda and AIR 1978 Rajasthan 155 in the matter of Rawal Das Vs. Vasudevi and submits that where defendant puts in appearance and subsequently remains absent, the limitation for filing of application for setting aside ex-parte decree starts from the date of passing of decree and nor from the date of knowledge.
9. However, further relying upon the judgment of the Hon'ble Supreme Court reported in (2001) 9 S.C.C. 717 in the matter of Ragho Singh Vs. Mohan Singh and others, it is submitted by learned counsel for the plaintiff that application for setting aside ex-parte decree ought to have been dismissed as the same was barred by limitation and no application for condonation of delay was filed.
10. On the other hand, learned counsel for the defendants submits that the defendant No.1 did not appear before the trial Court as he was promised by his advocate that he will be intimating him with the progress of the case, however, the advocate did not apprise him about the progress of the case and he was proceeded ex-parte as he could not appear on each date as per advice of his advocate. It is further submitted that the defendant has examined his advocate as a witness and the Court below allowed his

application for setting aside ex-parte decree on the basis of the statement of the defendant and his witness.

11. I have heard learned counsel for the parties.
12. It is not disputed that the defendant was appearing through his counsel in the trial Court during pendency of the suit and as such he was represented by his advocate. That oral evidence adduced by the defendant also does not inspire confidence as it is contradictory in material particular and above all, from perusal of the certified copy of the judgment filed by the defendant it is evident that the application for certified copy of the impugned order was filed by the defendant on 04.04.2001 and thus he was aware of the ex-parte decree in any case on 04.04.2001. However, the application for setting aside ex-parte decree has been filed on 08.05.2001 and the same is not accompanied with an application for condonation of delay and in such circumstances, the Court below overlooked these material discrepancies available on record. The Court below has also ignored this fact that the suit was fixed for filing of affidavits of the respective parties on 30th August 2000 and from that date the defendant and his counsel did not appear before the trial Court.
13. Taking into consideration the totality of the circumstances and further considering the material available on record, I am of the opinion that the learned trial Court was not justified in allowing the application for setting aside ex-parte decree.
14. Thus on the basis of the aforesaid discussions, the revision is allowed, the impugned order is set aside and the application for setting aside ex-parte decree preferred by the defendants is rejected.

Sd/-
Dhirendra Mishra
Judge