

(2017) 10 MP CK 0014
In the Madhya Pradesh High Court
Case No : 1829 of 2009

Anil & another

APPELLANT

Vs

The State of M.P.;

RESPONDENT

Date of Decision : 10-10-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 9 Rule 13](#), [Order 9 Rule 13](#), [Order 7 Rule 14\(3\)](#), [Order 7 Rule 14\(3\)](#)

Citation : (2017) 10 MP CK 0014

Hon'ble Judges : Sujoy Paul

Bench : Division Bench

Advocate : R.P. Agrawal, A.M. Lal, Khalid Fakhruddin

Final Decision : Allowed

Judgement

1. These appeals filed under Order 41 Rule 1(r) of Code of Civil Procedure are directed against the similar orders passed by the Court below whereby the application preferred by present appellants under Order 9 Rule 13 CPC were disallowed by the Court below.
2. Regard being had to the similitude of the questions involved in these cases, on the joint request of the parties, the matters were analogously heard and decided by this common order.
3. Shri R.P. Agrawal, learned Senior Counsel for the appellants submits that civil suit for rendition of account were instituted by respondents/plaintiff on 09.10.2001. One Shri Vinod Rai, Advocate appeared on behalf of present appellants before the Trial Court in the said civil suits on 08.07.2004 and prayed for time to file his vakalatnama and written statement. Shri Vinod Rai, for the reasons best known to him, did not appear before the Court below on 15.09.2004 and, therefore, in all the

civil suits, the Court below proceeded *ex parte* against the present appellants. On 24.12.2005, the preliminary judgment and decree was passed by the Court below.

4. Learned Senior Counsel for the appellant submits that the official representative of the present appellants was on tour to Seoni and there he gathered knowledge about passing of aforesaid judgments and decrees. The said knowledge was gathered by him sometimes in last week of June, 2006. Thereafter, the certified copies of the judgments and decrees were obtained and necessary legal advice and sanction etc. from headquarter (Mumbai) were also obtained. The applications under Order 9 Rule 13 CPC alongwith applications under Section 5 of the Limitation Act were filed on 14.08.2006. The similar applications aforesaid were rejected by similar orders dated 22.01.2009. These order are called in question in present batch of appeals.

5. The learned Senior Counsel assailed these orders on procedural aspect and on merits. It is contended that the Court below in aforesaid three civil suits proceeded *ex parte* on 15.09.2004. Thereafter, on 09.09.2015, applications under Order 7 Rule 14(3) CPC for taking documents on record were filed by the plaintiffs in all civil suits. Yet another set of applications under Order 6 Rule 17 CPC were filed in the civil suits on 25.11.2005. These amendment applications were allowed by the Civil Court on 01.12.2005. The first point raised by learned Senior Counsel is that the amendment application and application for taking documents on record were allowed after proceeding *ex parte* against the present appellants on 15.09.2004. Before allowing amendment application and applications for taking documents on record, the Trial Court was obliged to issue fresh notices to the present appellants. Reliance is placed on a Special Bench judgment reported in AIR 1946 Nagpur 60 [Ganesh Prasad Ramprasad Vs. Damayanti w/o Ganesh Prasad]. For same preposition, reliance is placed on AIR 1969 Patna 228 [Messrs. Jharkhand Mines & Industries Ltd. & another vs. Nand Kishore Prasad & others], 2001 MPLJ 407 [Mahesh Singh and others Vs. Sewaram and others] and AIR 2004 SC 1084 [Ramnik Vallabhdas Madvani and Ors. Vs. Taraben Pravinlal MKadhvani]. In nutshell, the contention of learned Senior Counsel is that the preliminary judgment and decree based on an *ex parte* order cannot sustain judicial scrutiny and should have been set aside while considering the application under Order 9 Rule 13 CPC for the simple reason that the aforesaid applications were allowed after proceeding *ex parte* against the present appellants.

6. The next contention of learned Senior Counsel is that the Court below proceeded *ex parte* against the appellants because Shri Vinod Rai after appearing for few dates, stopped appearing in the matter. In that event, for the negligence of the counsel, the litigant should not be made to suffer. Moreso, when litigant is stationed at Bombay and trusted his counsel for the purpose of contesting the matter. If counsel has shown lethargy or negligence, the appellants cannot be made to suffer. Moreso, when the counsel did not appear only on one particular

date and on that date alone, the Court below proceeded exparte. The learned Senior Counsel contended that the earlier dates prior to 15.09.2004 were irrelevant and any absence of counsel on those dates could not have been a reason to proceed exparte against the appellants. He relied on 2006 (2) MPLJ NOC 1 [Pankaj Agarwal & another vs. Shakuntala Devi & others], 2008 (2) Weekly Notes 56 [Vaianti Bai (Smt.) vs. Jairam], in which the certain Supreme Court judgments were considered by this Court.

7. Shri Agrawal, learned Senior Counsel further submits that the appellants came to know about the exparte judgment in last week of June, 2006. After obtaining legal opinion and administrative sanction etc., the application under Order 9 Rule 13 was promptly filed on 14.08.2006. The delay was only of about one month which should have been leniently dealt with by the Court below by adopting a justice oriented approach. In support of this contention, learned Senior Counsel relied on AIR 1992 SC 1264 [Sarojini Tea Co. (P) Ltd. vs. Collector of Dibrugarh Assam & anr.], AIR 87 SC 1726 [Shankarrao vs. Chandrasenkumwar], AIR 2004 SC 267 [Apang Shu Mohanlodh vs. State of Tripura] and judgments of this Court reported in (2003) 1 MPHT 33 [Sobhraj Sindhi vs. Mohd. Jahoor], (2003) 3 MPHT 367 [State of M.P. vs. Ramesh Prasad Verma] and (2003) 4 MPHT 268 [Dr. Kunal Kantimajee vs. The Chancellor, Rani Durgawati]. It is further urged that at best, Court below could have imposed cost on the appellants for the inconvenience caused to the other side. The proper course was to permit the present appellants to participate in the proceedings by setting aside the preliminary judgment and decree. Shri Agrawal, learned Senior Counsel further contended that in addition to allowing amendment application and application to take documents on record, the plaintiffs were re-examined by the Trial Court. For these cumulative reasons, in the fitness of things and in order to do complete justice between the parties, the Court below should have allowed the application preferred under Order 9 Rule 13 CPC.

8. Per contra, Shri Khalid Fakhruddin, learned counsel for the respondents/plaintiff submits that appellant Company is not a rustic and ordinarily litigant. It has global business and having legal assistance at every level. They have their law department, law officers and counsel at every place. By taking this Court to the language used in Order 9 Rule 13 CPC (the Madhya Pradesh amendment), Shri Fakhruddin contends that the necessary ingredients for setting aside an exparte decree are not available in the case of the appellants. The appellants assigned singular reason in their application filed under Order 9 Rule 13 CPC i.e. the non appearance of the counsel which was beyond the control of appellants. Learned counsel submits that when summons are duly served, vakalatnama was filed for defendant No.1, it is clear that the appellants had received the summons and had knowledge about the dates of hearing of aforesaid civil suits. Shri Fakhruddin had taken pains to take this Court to various order sheets right from 17.10.2003 to 15.09.2004 to canvas his submission that Shri Vinod Rai, Advocate appeared for the appellants and prayed for time. On 09.08.2004, time was granted with imposition of cost of Rs.500/-. On 15.09.2004, Shri Rai filed

vakalatnama for defendant No.1. Date mentioned in the vakalatnama is 15.09.2004 which, as per Shri Fakhruddin shows that the appellants themselves were present at Seoni then alone they can engage an advocate by putting the same date.

9. Learned counsel for the other side further submits that in support of application under Order 9 Rule 13 CPC and Section 5 of the Limitation Act, nobody led evidence on behalf of the appellants before the Court below. The application under Section 5 of CPC is vague in nature. The name of person, who had allegedly gathered knowledge about preliminary decree is not mentioned. It is also not mentioned as to what was the mode of getting knowledge about such judgment. It is further argued that in addition to the summons issued by the Trial Court, the plaintiffs served the present appellants by "dasti" service. Affidavit of service were also placed on record. Shri Fakhruddin made an attempt to distinguish the judgments cited by learned Senior Counsel by contending that in the cases cited by Shri Agrawal, learned Senior Counsel, the amendment application which was allowed by the concerned Courts after proceeded exparte were pregnant with substantial pleadings whereas in the present case, the amendment applications were formal in nature. Same is the case with the application filed under Order 7 Rule 14 (3) CPC.

10. During the course of the arguments, Shri Fakhruddin relied upon an order passed in M.Cr.C. No. 9043/2004 wherein a finding is given that Civil Suit No.9-B/2005 was decided exparte and preliminary decree was

passed on 24.12.2005. The attempt of Shri Fakhruddin is to show that the said M.Cr.C. was filed in the year 2004 and, therefore, the present appellants who were petitioners in the said M.Cr.C. had knowledge about exparte order dated 24.12.2005 in the year 2004 itself.

11. The next contention of Shri Fakhruddin is that as a straight jacket formula this contention cannot be accepted that for mistake of counsel or non appearance of counsel in all the cases, the judgment and decree should be set aside. In support of said contention, he relied on (2009) 2 MPLJ 96 , [Anita @ Anis Kasve and another Vs. Dharmendra and others], (2004) 4 MPLJ 537 [Shri Sharda Prabandhak Samiti, Maihar and another Vs. Indrasen Jali], AIR 2008 SC 276 [Mahabir Singh Vs. Subhash and ors.], AIR 2011 SC 489 [Ramji Pandey and others Vs. Swaran Kali], M.Cr.C. No. 7232/2015 [Narmada Motors Vs. Sunil Kumar Lauvanshi], (2015) ILR MP 2155 [Rajendra Kumar Adhwaryu Vs. Parmanand] and (2013) 3 MPLJ 178 [Ramesh Chandra Jain Vs. State of M.P.].

12. Learned counsel for the other side also relied on, 2014 (3) MPLJ 265 [State of M.P. and another Vs. Abdul Gani s/o Kasam Kunjda (since deceased) through L.H. Jebunisha wd/o Abdul Gani and others], 2014(3) MPLJ 476 [State of U.P. And another Vs. Amar Nath Yadav], AIR 2012 SC 1506 [Office of the Chief Post Master General and ors. Vs. Living Media India Ltd. And anr.], AIR 2013 SC 1732 [Sushil K. Chakravarty (D) Thr. Lrs. Vs. M/s Tej Properties Pvt. Ltd.], 2014 (1)

MPLJ 665 [Brijesh Kumar Gupta Vs. Mahendra Kumar Jain (deceased) through Lrs.], AIR 2010 SC 3043 [Balwant Singh (Dead) Vs. Jagdish Singh and ors.], 2014 (4) MPLJ 1 [State of MP Vs. Ranjana Yogi], 2014 (4) MPLJ 7 [Nana Chudhaman Bhamkar Vs. Betul Nagrik Sahkari Bank Maryadit], 2015 (1) MPLJ 286 [State of MP Vs. Ramkalibai w/o Rambharosa Nai], 2015 (1) MPLJ 296 [Surendra Kaur Vs. Satinder Singh Chhabra], 2017 (2) MPLJ 232 [Mst. Shabana Anjum and others Vs. Mohd. Sulman and others] and 2017 (2) MPLJ 235 [Indian Overseas Bank Vs. Hari Shankar Sharma and another] and contended that Section 5 application of the appellants was rightly rejected by the Court below. Lastly, it is argued that the grounds taken in the appeal memo are factually incorrect and legally unsustainable. By taking this Court to each of the grounds, Shri Fakhruddin contended that the grounds are incorrect which is evident from the record itself.

13. No other point is pressed by learned counsel for the parties.

14. I have heard the parties at length and perused the record.

15. First of all, I deem it apposite to deal with the aspect whether the Court below was justified in disallowing the application filed under Section 5 of the Limitation Act. The Court below rejected it by assigning following reasons: (i) the record of civil suit shows that present appellants did not file Vakalatnama and written statement and, therefore, the Court below proceeded ex-parte; (ii) the application under Section 5 of the Limitation Act is filed after eight months" from the date of judgment i.e. 04.12.2005; (iii) if appellants had gathered knowledge about ex-parte judgment in the month of June, 2006 the application under Order 9 Rule 13 CPC should have been filed till July, 2006; (iv) on the basis of affidavit alone in support of application under Section 5 of the Limitation Act, the contention of applicants cannot be accepted.

16. It is noteworthy that Mr. Fakhruddin, learned counsel for the respondents, during the course of arguments placed heavy reliance on the order passed in M.Cr.C. No.9043/2004 [MS Banga & others vs. Bisham Singh & another], wherein a finding has been recorded that civil suit was decided ex-parte by judgment and decree dated 24.12.2005. It is canvased that since the said MCrC was filed in the year 2004, the present appellants were well aware about the judgment and decree dated 24.12.2005 at the time of presentation of said MCrC. During the course of hearing, Mr. Fakhruddin provided the photocopy of M.Cr.C. No.9044/2004 for perusal of this Court. In para 4 of this petition, it is pleaded that the said civil suit is still pending. Since MCrC was filed in 2004 itself and ex-parte judgment and decree was passed on 24.12.2005, the argument that the appellants were aware about the judgment and decree in 2004 is devoid of substance. The attempt of the other side is to establish that the stand of the appellants regarding date of knowledge of ex-parte judgment and decree is based on incorrect and falsified grounds. The judgment in the case of Sushil K Chakravarty, Brijesh K Gupta & Balwant Singh (supra) were relied upon in this regard. As notices, the respondents could not establish that the present

appellants had knowledge of ex-parte judgment and decree dated 24.12.2005 before filing of application under Order 9 Rule 13 CPC.

17. The word "sufficient cause" used in Section 5 of the Limitation Act were considered by Supreme Court and it was held that these words give discretion to the Court to advance "substantial justice". The courts should adopt a pragmatic approach. In the case of Sobhraj Sindhi (supra) this Court opined that even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigating as an irresponsible litigant. He should have been more vigilant but his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property.

18. Justice AM Sapre (as his Lordship then was) in 2003 (4) MPHT 268, [Chhogalal vs. Smt. Husain Bai], opined that it cannot be lost sight of the fact that condoning the delay advances a cause of justice whereas not condoning the delay takes away the valuable right of the appellant to prosecute a first appeal under Section 96 of the CPC. A right of the appeal conferred under Section 96 of the CPC is one of the most valuable rights

given to a litigant. It should not be lightly taken away from his hands unless the delay in filing the appeal is found to be grossly inadequate and/or unexplained. The recent view of the Supreme Court in the cases arising out of Section 5 of Limitation Act indicates that the approach of the Courts in condoning the delay should be liberal and the litigant can not be expected to explain each and every day's delay as was the view earlier.

19. In the case of Ram Prasad Verma (supra) this Court opined that length of delay is not material, acceptability of explanation is the only criteria. The words "sufficient cause" used in Section 5 of Limitation Act must receive liberal construction so as to advance substantial justice.

20. If the finding of Court below is examined on the anvil of aforesaid principles, it will be clear that the Courts have taken a very rigid view of the matter. Since the application under Section 5 of the Limitation Act was supported by an affidavit mentioning that the present appellants gathered knowledge about passing of ex-parte judgment and decree in June, 2006 there was no justification in not believing the same. Merely because the appellants did not mention as to when they preferred the application for obtaining copy of judgment and decree, their version that they came to know about the judgment and decree in June, 2006 cannot be disbelieved. From the date of knowledge of judgment i.e., last week of June, 2006 the applications for setting aside the ex-parte judgment were promptly filed on 14.08.2006. From the date of knowledge, the delay in filing the said applications is less than one month. From the date of original judgment i.e., 24.12.2005 also the delay is not inordinate. Thus, I find substance in the argument of learned Senior Counsel for the appellants that the Court below as erroneously rejected the applications filed under Section 5 of the Limitation Act.

21. So far the judgment cited by Mr. Fakhruddin, in the cases of Abdul Gani, Amar Nath Yadav, Office of Chief Post Master General, Ranjana Yogi, Ramkali Bai & Mohd. Sulman (supra) are concerned, it is noteworthy that in those cases, the amount of delay was huge and no plausible explanation was given for such delay. In Abdul Gani's case the delay was of 516 days, in Amar Nath Yadav's case the delay was 481 days, in Office of Chief Post Master General's case the delay was 427 days, in Ranjana Yogi's case the delay was 695 days, in Ramkali Bai's case the delay was of 952 days and in Mohd. Sulman's case the delay was of 1579 days. At the cost of repetition, in my view, the cause shown for delay cannot be said to be untrustworthy and, therefore, the Court below has rejected the application for condonation of delay on erroneous grounds.

22. The parties are also at loggerheads on the decision taken on applications filed under Order 9 Rule 13 CPC. The learned counsel for the appellants placed reliance on certain judgments to bolster his submission that if amendment applications and application to take documents on record are filed and allowed subsequently, the decision to proceed ex-parte i.e. 15.09.2004, the Court below should have issued fresh notices to the appellants. This point requires serious consideration.

23. Justice Vivian Bose speaking for three Judges Special Bench in Ganesh Prasad Ramprasad (supra) opined as under:

"That apart. Even if this had been an ordinary civil case resting on a plaint, no relief could have been given on averments essential to the claim which were not included in the plaint unless amendment were allowed; and it is patent that no amendment would be allowed without fresh notices to the other side. Parties are entitled to assume that matters will be litigated on the strength of the averments contained in the petition of plaint and that fresh statements of fact material to the issue not be introduced without affording the other side an opportunity of meeting, and if need be contesting the new face."

24. The Division Bench of Patna High Court in the case of Messrs. Jharkhand Mines & Industries Ltd. (Supra) held as under:

"The Code of Civil Procedure, in my opinion, casts a duty on the court to see that the defendants are made aware of any amendment in the plaint, whether the amendment be in regard to the addition of parties or in regard to the contents thereof. Unfortunately, the learned Subordinate Judge, who passed the ex parte decree, did not direct any notices to be issued to the defendants with a view to make them aware about the amendment of the plaint. He should have issued such notices and awaited the service report, and, if the defendants so desired, granted them an opportunity to file a written statement before putting up the suit for hearing and disposal, whether ex parte or otherwise. On this ground alone, I am of the opinion that the ex parte decree is vitiated and must be set aside." [Emphasis Supplied]

25. The Apex Court in AIR 2004 SC 1084, [Ramnik Vallabhdas Madhvani &

others vs. Taraben Pravinlal Madhvani], poignantly held as under: "On amendment of pleadings being allowed, the opposite party has to be given a chance to respond to the amended pleading and if the plea is contested the Court has to give its decision thereon. Not affording an opportunity to the contesting party to contest a plea, which has been allowed to be amended, is negation of justice."

26. Similarly, in AIR 1993 SC 1182, [Tahil Ram Issardas Sadarangani & others vs. Ramchand Issardas Sadarangani & another], the Apex Court held that in cases of withdrawal of power of Advocate when client is present and not aware of the date of hearing, dismissal of petition for want of prosecution is improper.

27. Justice Fakhruddin in the case of Mahesh Singh (supra) followed the principles laid down in the case of Ganesh Prasad Ramprasad (supra) and opined as under:

"9. Having considered the rival contentions advanced by the parties and having gone through the record, it is borne out from the record that though the counsel pleaded no instructions on 10- 11-1986, but the notices were not issued to the parties. In view of the decisions reported in 1993 Supp (3) SCC 256 : AIR 1993 SC 1182Tahil Ram Issardas Sadarangani v. Ramchand Issardas Sadarangani and (1998) 2 SCC 206, Malkiat Singh v. Joginder Singh and in view of the facts and circumstances of the case discussed elaborately in earlier paras especially that of 3 to 6, in the opinion of this Court, the appellants deserve opportunity to contest the suit, on merits in the ends of justice. It is specifically so as the respondents/plaintiffs filed the application on 24-11- 1990 changing cause of action from 28-8-1984 to 28-8-1974, which was allowed without notice to the other side. It is pertinent to mention here that where defendant is absent, no amendment should be allowed as has been done in this case. In view of the decision reported in 1946 NLJ 81 : AIR (33) 1946 Nagpur 60, Ganesh Prasad Ram Prasad v. Damayanti w/o Ganesh Prasad, the Court ought to have issued notice, before allowing amendment. In view of the discussion aforesaid, the first substantial question of law is answered in favour of the appellants and the ex parte judgment and decree passed are set aside. "

28. To counter, the said argument of learned counsel for the appellants that the stand of Mr. Fakhruddin was that although amendment application and application to take documents on record were allowed subsequently to the date of proceedings ex-parte, the said applications were formal in nature.

29. Suffice it to say, that the Division Bench of Patna High Court in no uncertain terms held that a duty is cast on the Court to ensure that the defendants are made aware of any amendment in the plaint. In the considered opinion of this Court, only after receiving the copy of amendment application and application to take documents on record, the other party can examine and decide whether they need to contest the suit in view of amendment proposed and documents proposed to be filed. Thus, I find substance in the argument of appellants that

common string/principles

in the said judgments is that the Court below should put the other side to notice before putting the suit for hearing and disposal. For this reason alone, in my judgment, the impugned orders dated 09.04.2009 & 22.01.2009 cannot sustain judicial scrutiny.

30. This Court will be failing in its duty if the other judgments cited by Mr. Fakhruddin are not considered. Mr. Fakhruddin, relied on the cases of Indresen Jali, Swaran Kali, Narmada Motors, Parmanand & Ramesh Chandra Jain (Supra). In these cases, the Courts considered the meaning of words "liberal approach". The Courts also held that the litigant even after engaging the counsel cannot be permitted to sleep over his duty. Litigant should be vigilant and contact his counsel in order to gather knowledge regarding progress of litigation. The said principle cannot be applied in the facts and circumstances of the present cases because in the present cases, admittedly, no fresh notices were issued to the present appellants/defendants after filing of applications under Order 6 Rule 17 and Order 7 Rule 14(3) of CPC. As analyzed in catena of judgments, it was held that it is the duty of the trial Court to put the parties to a fresh notice when such amendments were filed. Pertinently, in the said judgments cited by Mr. Fakhruddin this point was absent and, therefore, the said judgments cannot be mechanically pressed into service in the present case. It is apposite to remember the judgment of Apex Court reported in 2011 (3) SCC 545, [Parimal vs. Veena alias Bharti], wherein it was held as under:

"To determine the applicant under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its direction in the varied and special circumstances in the case at hand. There cannot be a straijacket formula of universal application. "

31. This is equally settled that precedent is what is actually decided by the Courts and not what is logically flowing from it. The single different fact may change the precedential value of the judgment (See: 2003(2) SCC 111, [Bhavnagar University vs. Palitana Sugar Mill (P) Ltd .]).

32. As discussed above, the Court below has erred in disallowing the applications filed under Section 5 of the Limitation Act and applications filed under Order 9 Rule 13 CPC. The rejection orders dated 22.01.2009 cannot sustain judicial scrutiny. However, it is noteworthy that plaintiffs were put to serious inconvenience by the present appellants. The delay is also caused for no fault on the part of the plaintiffs. Thus, this Court deems it proper to allow the present appeals subject to payment of Rs.50,000/- as cost in each of the cases which shall be payable to the plaintiffs by the present appellants. The applications under Section 5 of the Limitation Act and applications under Order 9

Rule 13 CPC are allowed. Subject to aforesaid, civil suits are restored to their original numbers. Appeals are allowed.