

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 97 OF 1996
WITH
CIVIL APPLICATION NO. 5320 OF 1996

- 1 M/s. Regal Talkies,
Partnership Firm,
C/o. Sk. Saleem s/o Sk. Chand,
R/o. H. No.1-15-65, Deodi Bazar,
Aurangabad
 - 2 Sk. Saleem s/o Sk. Chand,
Age 28 years, Occ. Business,
Partner Regal/Roxy Talkies,
R/o. H. No.1-15-65, Deodi Bazar,
Aurangabad
 - 3 Smt. Hasinabai w/o Sk. Chand,
Age major, Occ. And R/o. As above
 - 4 Smt. Umraobi w/o Sk. Rahim
Age major, Occ. And R/o. As above
 - 5 Sk. Jawed s/o SK. Chand,
Age 12 years, Occ. Minor
u/g Smt. Hasinabi w/o S. Chand
Appellant No.3
R/o. As above
- ...Appellants

Versus

State Bank of India,
A corporation constituted under the
State Bank of India Act, 1955,
having one of its Branches at Aurangabad
Through its Branch Manager,
Shri Nandlal G. Khandelwal,
at Kranti Chowk, Aurangabad

...Respondent

.....
Mr. K.S. Naik, advocate for the appellant
Mr. V. D. Patnoorkar, advocate for respondent
.....

CORAM: S. S. SHINDE, J.

DATED : 23RD SEPTEMBER, 2010

ORAL JUDGMENT:-

1 This appeal From Order is filed being aggrieved by the judgment and order dated 30.9.1996 passed by the learned Jt. C.J.S.D. Aurangabad in MARJI No. 21 of 1995 in Special Civil Suit No. 181 of 1992, thereby rejecting the application of the appellant for cancellation of exparte decree passed in the said suit.

2 The respondent herein filed Special Civil suit No. 181 of 1992 in the Court of learned C.J.S.D. Aurangabad, against the appellants herein. The appellants did not file written statement in the said suit. The suit was posted for hearing on 13.12.1994. Shaikh Omarbi w/o Sk. Rahim, grand-mother of the appellant No.2 herein Shaikh Salim was ill and the appellant No.2 and other members had to look after her health. The advocate for the appellants, who are original defendants moved an application before the Court contending his inability to conduct the case on 13.12.1994 because has was to go out of station on personal ground. After filing application for adjournment, the suit was taken up for hearing and was decreed on the same day. Adjournment application was rejected and without passing exparte

order, the judgment and decree came to be passed in the said suit. On the adjournment application, the Court observed that the defendants have not put their written statement and they were absent when called. According to the appellants, the decree passed by the court below is *ex parte* decree. The said decree came to be passed on 13.12.1994.

3 The appellants herein filed MARJI No. 21 of 1995 under Oder IX Rule 13 of C.P.C. for cancellation of *ex parte* decree. It is stated in the said application in para 2 that written statement was not filed on behalf of the original defendants since there was talk of compromise in oder to finalize the same, the negotiations were going on between the parties but those negotiations could not be materialized. It is further stated in the application that on the date of hearing i.e. on 13.12.1994, case was posted for hearing. Apart from the fact that grand mother of the appellant No.2 was ill and the appellant No.2 and other members had to look after her health as she was a quite old lady. It was mentioned in the application that medical certificate in support thereof would be filed afterwards. In para 4, it is further stated that there was urgent message from native place of the advocate for the appellant, therefore, it was not feasible for him to conduct the case on 13.12.1994, and an application was filed by him before IInd Joint C.J.S.D. Aurangabad that he would not be in a position to remain

present at the time when the case would be taken up for hearing. It was specifically stated that he is leaving Aurangabad and going out of station on personal ground.

In para 5 of the application, it is further stated that after departure of the advocate for the appellants and after filing application for adjournment, case was taken up for hearing before the court and decree came to be passed *exparte*. It is further stated in para 6 that the decree passed by the court below is in absence of the defendants and their advocate, therefore, the said decree was *exparte*, however, the court did not mention in its judgment and order that it is *exparte* decree. Therefore, the *exparte* decree is not maintainable on several grounds and hence, the appellants prayed that *exparte* decree may be quashed and set aside. Affidavit was filed in support of the said application by the appellants. There was prayer in the application that judgment and *exparte* decree passed against the defendants may be ordered to be set aside and the appellants-defendants may be permitted to conduct the case before the IInd Joint C.J.S.D. Aurangabad.

4 On the said application, the respondents herein filed their say and denied the contentions raised in the application filed by the appellants. According to the respondents, the defendants failed to file

written statement in spite of taking number of adjournments to file the same. The matter was posted for evidence without written statement with due notice and knowledge of the defendants as well as their advocate. The defendants failed to take part in the proceedings and did not examine the witnesses. The matter was decided on merits taking into consideration the documentary and oral evidence led by the parties. Therefore, decree passed by the court below is not exparte but the same is passed on merits.

5 Learned Jnd Joint C.J.S.D. Aurangabad finally decided MARJI No. 21 of 1995 by his judgment and order dated 30.9.1996 mainly on two grounds. Firstly, on the ground of non filing of written statement by the appellants i.e. original defendants and secondly, decree is not an exparte decree and as such application to set aside such judgment does not lie under Order IX Rule 13 of C.P.C. therefore, application filed on behalf of the appellants came to be rejected.

6 Learned counsel appearing for the appellants submitted that decree passed by the court below was in fact in absence of written statement filed on behalf of the defendants. It is further submitted that the matter was posted for hearing when defendants themselves or their advocate was not present on the date of hearing and therefore, decree passed by the Court below was exparte decree and therefore,

the application filed by the original defendants for setting aside the decree under Order IV Rule 13 was maintainable. Learned counsel invited my attention to the grounds taken in the appeal memo and submitted that the lower court should not have rejected the application on the ground that the said application is not maintainable under Order IX Rule 13 of C.P.C.

7 Learned counsel appearing for the respondents invited my attention to the findings recorded by the court below while rejecting the application. Learned counsel for the respondents placed reliance on the judgment of this Court in the case of ***Laxman Jhingraji Adhav Vs. Sushila Jhingraji reported in 1996 B.H.C.C. 124*** and submitted that if the court has passed decree against the defendants on their failure to file written statement it is not an *ex parte* decree. Learned counsel further submitted that after all decree passed by the court below is a money decree. The loan amount was borrowed by the appellants from the respondent Bank and even principal amount is not repaid by the appellants. Therefore, if this appeal is allowed, which would cause great hardship to the respondent. It is further submitted that the because of absence of the appellants i.e. original defendants and their advocate on the date of hearing, the decree came to be passed and the respondents are unnecessarily being dragged in the litigation by the appellants, therefore, they are entitled at least for

some costs.

8 I have given due consideration to the submissions advanced on behalf of the appellants as well as the respondent. It is not in dispute that on the date of hearing, counsel for the defendants or the defendants themselves were not present before the court. It is also admitted position that an application for adjournment was filed by the advocate for original defendants. It has also come on record that advocate for defendants left the court due to his personal difficulty before the case was taken up for hearing. On reading the impugned order, it clearly emerges that the application for setting aside the judgment and decree passed by the court below in MARJI No. 21 of 1995 is rejected by IInd Joint C.J.S.D. Aurangabad holding that since the decree passed in Special Civil Suit No. 281 of 1992 is not *ex parte* decree and as such the application to set aside the said judgment and decree does not lie under Order IX Rule 13 of C.P.C.

9 I have given due consideration to the rival submissions advanced on behalf of the parties. I have also carefully perused the provisions of Order IX Rule 13 of C.P.C. In case of ***Prakash Chander Manchandan and another, reported in AIR 1987 SC 42*** is held that if on the date fixed, one of the parties to the suit remain absent and for that party no evidence has been led up to that date, the Court has no

option but to proceed to dispose of the matter in accordance with Order XVII Rule 2 in any one of the modes prescribed under Order IX of C.P.C. After the Amendment by Act 104 of 1976 to Order XVII Rr. 2 and 3 in cases where a party is absent only course is as mentioned in Order XVII Rule 3(b) to proceed under Rule 2. Therefore, in absence of the defendant, the Court had no option but to proceed under R. 2. Similarly, the language of Rule 2, as now stands, also clearly lays down that if any one of the parties fails to appear, the court has to proceed to dispose of the suit in one of the modes directed under O. 9. The explanation to Rule 2 gives a discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence.

In para 7 and 8, it is further held that in such a case, the Court cannot proceed to dispose of the suit on merits and after it proceeds to dispose of the suit in any one of the modes provided under Order IX in the present case to pass ex-parte decree, the defendant can subsequently file an application under Order IX Rule 13 for setting aside ex parte decree (emphasis supplied).

10 Taking into consideration the aforesaid judgment of the Hon'ble Supreme Court in the case of ***Prakash Chander Manchanda and***

Anr. (supra), this Court in the case of **Trimurthy Packing Paper Vs. Corporation Bank and others**, in para 8 held that since the suit in that case has been disposed of by resorting to any of the modes prescribed in Order IX of C.P.C. In the light of the Apex Court judgment in the case of **Prakash Chander Manchanda and Anr. (supra)**, application under Order IX Rule 13 of C.P.C. would be maintainable for setting aside the exparte decree.

Yet in another reported judgment of this Court in the case of **Balu @ Madhavrao Shankarrao Ghorpade since deceased by his LRs, Ajay Madhavrao Ghorpade and others. Vs. Radhakkabai Panditrao Ghorpade and others, reported in 2004(1) Mh.L.J. 323** held that the application for setting aside exparte decree under Order IX Rule 13 is maintainable if the defendant did not appear on the date of hearing and no evidence was led on behalf of the defendant. The judgment and decree passed by the court on uncontroverted evidence of the plaintiff would be exparte and not an order on merits. In that case also written statement was filed by the defendant in the suit.

The Hon'ble Supreme Court in the case of **Mahesh Yadav and another Vs. Rajeshwar Singh and others, reported in (2009) 2 SCC 205**, held that the application for setting aside exparte decree is maintainable under Order IX Rule 13 of C.P.C. In that case also, the

original defendant who was petitioner before the Hon'ble Supreme Court, did file written statement.

11 Therefore, from perusal of the judgments of the Apex Court and this Court, it follows that if the defendant did not appear on the date of hearing and no evidence was led on behalf of the defendant, the judgment and decree passed by the court on uncontroverted evidence of plaintiff would be *ex parte* and not an order on merits. It is undisputed position that the date which was fixed for hearing neither defendants nor the advocate for the defendants were present before the court. Therefore, the trial court was not correct in holding that the decree which came to be passed on 13.12.1994 in Special Civil suit No. 181 of 1992 was not *ex parte* decree, therefore, in the light of the judgment of the Hon'ble Supreme Court in the case of ***Prakash Chander Manchanda and another (supra)*** the case of the appellant is required to be accepted.

12 It is an admitted position that no written statement was filed by the appellants herein in the suit. It is also admitted position that no evidence was led on behalf of the defendants in the suit. On the date of hearing neither the defendants nor their advocate was present before the Court and therefore, in the light of law laid down by the Hon'ble Supreme Court and also by this Court, the decree which was

passed by the IInd Joint C.J.S.D. Aurangabad was exparte decree and therefore, application under Order IX Rule 13 was maintainable.

13 Though the counsel for the respondent Bank has justifiably argued that the appellant should be directed to deposit the decretal amount, however, in my opinion, the said prayer is beyond the scope of present Appeal From Order and thus the same cannot be entertained. However, learned counsel for the respondent is justified in asking costs from the appellants for dragging the respondent Bank into further litigation for their fault in not causing appearance on the date of hearing before the Court below. I am of the opinion that exparte decree came to be passed merely because the advocate for the defendants or for that matter the defendants themselves did not attend the hearing or participating in the proceeding before the Court below. That apart, it is an admitted position that the appellants have borrowed money from the respondent Bank. The Substantial amount of money has been borrowed by the appellants from the Bank. In this view of the matter, I am of the opinion that the respondents are justified in arguing that some amount towards expenses incurred for litigation and engaging advocate may be awarded to the respondent Bank. Therefore, I am of the opinion that the appellants shall pay Rs.10,000/- to the respondent Bank.

14 In this view of the matter, the impugned order dated 30.9.1996, passed below Exh.23 by the learned IInd Joint C.J.S.D. Aurangabad in MARJI No. 21 of 1995 is quashed and set aside. The MARJI No. 21 of 1995 is restored to its original position. It is clarified that the said application under Order IX Rule 13 is maintainable. The concerned court to hear and decide the said application on merits in accordance with law, within a period of two months from the date of receipt of the copy of this order. The appellants herein to pay Rs.10,000/- (Rupees Ten thousand only) to the respondent herein within one month from today.

15 Needless to mention that all contentions, which are to be agitated, on merits, are kept open, during the course of hearing of the application for setting aside the exparte decree.

16 The original record, if any, be sent back forthwith to the concerned Court.

17 Copy of this order be transmitted to the concerned court forthwith.

18 In the aforesaid circumstances, nothing remains to be decided in the civil application, thus the civil application No. 5320 of 1996 stands disposed of accordingly.
