

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Case No. :- **RFA No. 43/2023**
CM No. 6476/2023

**Gulshan Kumar aged 65 years,
S/O Lat Sh. Dharam Chand,
R/o 141 Sector 6, Channi Himmat, Jammu.**

..Appellant(s)

Through: None.

Vs.

- 1. Pinky Devi W/O Late Balwant Singh;**
- 2. Mansi Devi (Minor), D/O Late Balwant Singh;**
- 3. Kartik Choudhary (Minor), S/O Lat Balwant Singh;**
**All residents of Dayala Chack, Tehsil Hiranagar,
District Kathua.**
- 4. Raman Kumar S/O Ajit Singh R/O village Berian,
Mohalla Dinanagar, District Gudasapur;**
- 5. Manji Khan, S/O Sardar Mohd. R/o Pangyadi,
Tehsil Akhnoor, District Jammu;**
- 6. United India Insurance Company Ltd.
Old Hospital Road, Purani Mandi, Jammu;**
- 7. Tata AIG General Insurance Company Ltd.
B.O. Pathankot.**

.. Respondent(s)

Through: Ms. Damini Chauhan, Advocate vice
Mr. D.S. Chauhan, Advocate for R-6.
Mr. Vishnu Gupta, Advocate for R-7.

Case No. :- **c/w**
RFA No. 43/2023
CM No. 6479/2023

**Gulshan Kumar aged 65 years,
S/O Lat Sh. Dharam Chand,
R/o 141 Sector 6, Channi Himmat, Jammu.**

.....Appellant/Petitioner(s)

Through: None.

Vs.

- 1. Kamlesh Devi W/O Late Jagdish
Singh;**
- 2. Kaushlya Devi W/O Late Ram Bali;**
- 3. Rahul Singh;**
- 4. Sahil Singh**
Both Sons of Late Jagdish Singh
**All residents of Dayala Chack, Tehsil
Hiranagar, District Kathua.**

..... Respondent(s)

5. Raman Kumar S/O Ajit Singh,
R/O village Berian, Mohalla Dinanagar,
District Gudaspar;
6. Manji Khan, S/O Sardar Mohd.,
R/o Pangyadi, Tehsil Akhnoor, District
Jammu;
7. United India Insurance Company Ltd.
Old Hospital Road, Purani Mandi,
Jammu;
8. Tata AIG General Insurance Co. Ltd.
B.O. Pathankot.

Through: Ms. Damini Chauhan, Advocate vice
Mr. D.S. Chauhan, Advocate for R-7.
Mr. Vishnu Gupta, Advocate for R-8.

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT (ORAL)

07.02.2025

1. Since the impugned order in both the appeals is the same, therefore, this Court proposes to take up both the appeals together for disposal by way of a common order.
2. The present appeals have been preferred by the appellant under Sections 96 of the Civil Procedure Code (*for short*, **"CPC"**) against the order dated 18.09.2023 (*hereinafter referred to as the*, **"impugned order"**) passed by the Court of learned Principal District Judge, Kathua (Presiding Officer, MACT Cases), Kathua (*hereinafter referred to as the*, **"MACT, Kathua"**), whereby an application for condonation of delay and setting aside ex-parte decree has been dismissed with a prayer for setting aside the same.
3. The appellant through the medium of instant appeals has also sought a relief of setting aside the ex-parte decree dated 14.05.2019 passed in Claim petition Nos. 81/2015 & 82/2015 titled, **"Kamlesh Devi and ors. Vs. Raman Kumar and ors."** & **"Pinky**

Devi and ors. Vs. Raman Kumar and ors.” and ex-parte proceedings initiated against him on 18.04.2017.

4. The record reveals that this Court vide order dated 25.11.2024 granted last and final opportunity of two weeks to learned counsel for the appellants in both the appeals to deposit the statutory amount, failing which, it was directed that appropriate orders would follow. It has been brought to the notice of this Court by the learned counsel for the respondents that the aforesaid order has not been complied with till date.

5. Today, when the instant appeals were taken up, there was no representation on behalf of the appellant. However, Ms. Damini Chauhan, Advocate appearing vice Mr. D.S. Chauhan, Advocate on behalf of respondent-Insurance Company has submitted that the instant appeals are liable to be dismissed for the reason that the same are not maintainable under Section 96 of the CPC, as the said provision of the CPC relates to the *Appeals from Original Decrees*. For facility of reference, Section 96 of the CPC is reproduced as under:-

“96. APPEALS FROM ORIGINAL DECREES

- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by an Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.***
- (2). An appeal may lie from an original decree passed ex-parte.***
- (3) No appeal shall lie from a decree passed by the Court with the consent of parties.***
- (4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature***

cognizable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees].”

6. From a bare perusal of the aforesaid provision of the CPC, it is apparently clear that the appeal shall lie from the original decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decision of such Court and the aforesaid provision is also extended to the original decree passed ex-parte. It is also made clear that no appeal shall lie from a decree passed by the Court with the consent of the parties and from a decree in any suit of the nature cognizable by the course of small causes, when the amount or the value of the subject matter of the original suit does not exceed ₹10,000/- (Rupees Ten Thousand).

7. Learned counsel for the Insurance Company has vehemently argued that the instant appeals are not maintainable, as the appellant has preferred the same under Section 96 of the CPC against the impugned order and, thus, no appeal under the aforesaid provision was maintainable and, accordingly, she prays that both the appeals are liable to be dismissed.

8. With a view to fortify her claim, learned counsel for the Insurance Company has placed reliance on the judgment passed by the Hon'ble Apex Court in Civil Appeal (SLP) (C) No. 5489 of 2021, titled “***The Koushik Mutually Aided Cooperative Housing Society Vs. Ameena Begum & Another***”, decided on 01.12.2023, the relevant paras of which, for the facility of reference, is reproduced hereunder:-

“15. Against the order passed under Order IX Rule 13 CPC rejecting an application for seeking setting aside the decree passed ex-parte, an appeal is provided. When an application is filed seeking condonation of delay for seeking setting aside an ex-parte decree and the same is dismissed and consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) CPC is maintainable. Thus, an appeal only against the refusal to set aside the ex-parte decree is maintainable whereas if an order allowing such an application is passed, the same is not appealable.

16. Thus, when an application or petition filed under Order IX Rule 13 CPC is dismissed, the defendant can avail a remedy by preferring an appeal in terms of Order XLIII Rule 1 CPC. Thus, Civil Revision Petition under Section 115 of the CPC would not arise when an application/petition under Order IX Rule 13 CPC is dismissed. Thus, when an alternative and effective appellate remedy is available to a defendant, against an ex-parte decree, it would not be appropriate for the defendant to resort to filing of revision under Section 115 of the CPC challenging the order refusing to set aside the order of setting the defendant ex-parte. In view of the appellate remedy under Order XLIII Rule 1(d) CPC being available, revision under Section 115 of the CPC filed in the instant case was not maintainable.”

9. Reliance is also placed upon the judgment of the Apex Court rendered in case titled, “**Bhanu Kumar Jain Vs. Archana Kumar**”, reported in AIR 2005 SC 626, relevant extracts whereof, are reproduced hereunder for facility of reference:-

“26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud” has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of

an interlocutory order passed in the suit, subject to the conditions laid down therein.

28. It is true that although there may not be a statutory bar to avail remedies simultaneously and an appeal as also an application for setting aside the ex-parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.”

10. In the aforesaid case, the defendant has resorted to filing of revision under Section 115 of the CPC, challenging the order refusing to set aside the order of setting the defendant ex-parte and the Hon’ble Supreme Court has held that the revision under Section 115 of the CPC was not maintainable in view of the alternate and effective remedy available to the defendant under Order XLIII Rule 1(d) of the CPC. Applying the aforesaid principle in the instant case also, the appellant has chosen to file an appeal under Section 96 of the CPC instead of filing of appeal under Order XLIII Rule 1(d) of the CPC and, thus, the present appeals are not maintainable.

11. Thus, from a bare perusal of the observations made by the Hon’ble Apex Court in the aforesaid judgment, it is evident that when an application to set aside an ex-parte decree is dismissed, the appropriate remedy available under the Civil Procedure Code (CPC) is to file an appeal under Order XLIII Rule 1(d) of the CPC. This is because such orders are not appealable under Section 96 of the CPC, which applies to appeals against original decrees. The appellant in the instant cases wrongly filed appeals under Section 96 of the CPC, which is only applicable to original decrees, rather than filing an appeal under the correct provision (Order XLIII Rule 1(d)) against the

rejection of the application to set aside the ex-parte decree. Additionally, an appeal is not maintainable if an order is passed allowing the application to set aside the ex-parte decree.

12. Learned counsel for the Insurance Company has also drawn the attention of this Court to Order XLIII Rule 1(d) of the CPC. For facility of reference, the same is reproduced hereunder:-

**“Order XLIII Rule 1. Appeal from orders–
An appeal shall lie from the following orders under the provisions of section 104, namely:-**

(a) xxx

(c) xxx

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex-parte.”

13. A plain reading of Order XLIII Rule 1(d) of the CPC clearly indicates that an appeal lies under Section 104 against an order, including an order under Rule 13 of Order IX, which rejects an application (where an appeal is allowed) to set aside an *ex-parte* decree.

14. Lastly, learned counsel for the Insurance Company submits that in case appellant was aggrieved of the *ex-parte* decree, the only remedy available to him was to prefer an appeal under Section 173 of the Motor Vehicles Act (*hereinafter referred to as the, “Act”*) against the award, which till date, has not been availed and, accordingly, she prays that the instant appeals are not maintainable.

15. Mr. Vishnu Gupta, learned counsel appearing for the respondent-Tata AIG General Insurance Co. Ltd., supports the contention raised by the learned counsel for the Insurance Company, however, in addition to that, he submits that even otherwise, the

instant appeals are not maintainable for the reason that the appellant has not chosen to array all the necessary parties in the instant appeals and on this count as well, the instant appeals are liable to be dismissed for non-joinder of the necessary parties.

16. Heard learned counsel for the respondents at length and perused the record.

17. The record reveals that the appellant has failed to comply the order dated 25.11.2024 and there is no representation on behalf of the appellant. However, this Court after perusing the aforesaid statutory provisions concurs with the arguments advanced by the learned counsel for the Insurance Company. The appellant, instead of availing the remedy to challenge the ex-parte award under Section 173 of the Act, has chosen to file the instant appeals under Section 96 of the CPC against the impugned order, which order has been passed by the MACT, Kathua pursuant to the application preferred for condonation of delay and setting aside the ex-parte decree and the same has been dismissed, which, *by no stretch of imagination*, can be construed as an appeal from the original decree.

18. This Court is also in agreement with the submissions advanced by Ms. Damini Chauhan, Advocate, appearing on behalf of Mr. D.S. Chauhan, Advocate. The appellant, instead of invoking the remedy under Order XLIII Rule 1(d) of the CPC, has erroneously filed these appeals under a wrong provision of law. Therefore, these appeals are not maintainable and liable to be dismissed for the

reasons outlined above and also in light of the arguments advanced by the learned counsel for the Insurance Company and the consistent rulings of the Hon'ble Supreme Court in catena of judgments.

19. It is also a settled proposition of law that against an *ex-parte* decree, a defendant has three remedies available to him;

- (i) he can prefer an application under Order IX Rule 13 of the CPC for setting aside the said *ex-parte* decree,
- (ii) by way of filing an appeal against *ex-parte* decree under Section 96(2) of the CPC &
- (iii) by way of review before the same Court against the *ex-parte* decree.

The appellant, instead of availing the aforesaid remedies provided under CPC, has chosen to file the instant appeals under some misconception of law by resorting to Section 96 of the CPC against the order passed by the MACT, Kathua.

20. In light of the above, this Court concludes that since the appellant has failed to pursue the remedies available under the statute and has instead, filed these appeals under some misconception of law, invoking Section 96 of the CPC, which is not applicable to the case in hand. The filing of an application under Order IX Rule 13 and an appeal under Section 96(2) of the CPC against an *ex-parte* decree are the concurrent remedies available to the defendant and that once, an appeal preferred by the defendant against an *ex-parte* decree is dismissed except when it is withdrawn, the remedy under Order IX Rule 13 of the CPC cannot be pursued. Conversely, if an application under Order IX Rule 13 of the CPC is rejected, the appeal against the *ex-parte* decree can be preferred and

continued under Section 96(2) of the CPC. Accordingly, an appeal against the ex-parte decree is maintainable even if an application under Order IX Rule 13 CPC is dismissed.

21. Thus, in light of what has been discussed hereinabove, the appeals preferred by the appellant are not maintainable and the same are, accordingly, **dismissed** along with connected applications.

22. Before parting, the Court appreciates the assistance rendered by Ms. Damini Chauhan, Advocate appearing vice Mr. D.S. Chauhan, Advocate on behalf of respondent-Insurance Company.

JAMMU
07.02.2025
Ram Krishan

(Wasim Sadiq Nargal)
Judge

Whether the order is speaking? Yes/No
Whether the order is reportable? Yes/No