

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER (ST) NO. 8010 OF 2017
with
CIVIL APPLICATION (ST) NO. 9167 OF 2017

M/s. CliniRX Research Pvt. Ltd.
A Company incorporated under
the Company Act, 1956, having its
registered office 4th Floor,
Suit No.402, TQM Business Centre,
Sector 29, Gurgaon, Haryana 122001

And
4th floor, Link House, 3,
Bahdur Shah Zafar Marg,
New Delhi 110002

..Appellant
(Org. Defefndant)

v/s.

1) Bicare Limited
A Company incorporated under
the Company Act, 1956 through its
Authorized representative
Mr. Suyog Bagul,
Finance Controller GCS SBU,
Bilcare Ltd.
Age Adult, Occupation Service
having its registered office at
1028, Shiroli, Rajgurunagar,
Pune 410505.
(Org. Plaintiff)

2) Mr. Rakesh Bansal,
Age 49 years, Occ: Professional
4th Floor, Link House 3,
Bahadur Shah Zafar Marg,
New Delhi 110002
(Org. Defendant No.2)

3) Mr. Sujit Kumar Mukherjee
Director,
Age Adult, Occ: Service,
4th Floor, Link House, 3
Bahadur Shah Zafar Marg,
New Delhi 110002
(Org. Defendant No.3)

4) Mr.Pawan Kumar Rustagi
Director,
Age : Adult, Occ: Service,
B1, 1589, Vasant Kunj,
New Delhi 110070
(Org. Defendant No.4)

5) Bhawana Rustagi,
Secretary,
Age Adult, Occ: Service,
A-8, Jagat Puri, Gali No.1,
New Delhi 110051
(Org. Defendant No.5)

..Respondents

Mr. Vijay Thorat, Sr. Advocate a/w. Sandeep Gaur a/w. Mr. Deep Narayan Mishra for the for the Appellant/Applicant.

Mr. Astad Randeria a/w. Mr. Harshad dedhia a/w. Bhounick Vaidya i/b. Kanga & Co. for the Respondent No.1.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED FOR JUDGMENT ON : 11TH SEPTEMBER, 2017
JUDGMENT PRONOUNCED ON : 14th NOVEMBER, 2017.

JUDGMENT :

1. The appellant-original defendant, has challenged the Order dated 6th March, 2017 whereby the learned Joint Civil Judge, Senior Division, Rajguru Nagar, Khed, dismissed the application under Order 9 Rule 13 of CPC for setting aside the judgment and decree dated

28th July, 2016 in Special Civil Suit No. 2 of 2016 (Old Spl. Civil Suit No.22 of 2014).

2. The brief facts relevant to decide this appeal are as under:

The respondent was the plaintiff and the appellant was the defendant in Spl. Civil Suit No.22 of 2014 filed in the court of Civil Judge, Senior Division, Pune and shall be hereinafter referred to as the plaintiff and the defendant respectively.

3. The plaintiff had filed a suit against the aforesaid defendant for recovery of money. The defendants on being served with summons, put in appearance through their Advocate and sought time to file the written statement. The defendant did not file the written statement despite opportunities given, hence on 23rd July, 2014, the trial Court passed 'No written statement' order and adjourned the matter for hearing.

4. The evidence of the plaintiff was recorded, arguments were heard, and the suit was adjourned for judgment. While the suit was pending for judgment, the defendant filed an application under Section 8 of the Arbitration Act (Exhibit 246). The suit was thereafter

transferred to the Court of Rajguru Nagar, Khed. The defendant was directed to remain present before the Court at Rajguru Nagar on 8th January, 2016. The defendant did not appear before the said Court. The learned Judge dismissed of the application under Section 8 of the Arbitration Act on 1st February, 2016 and further by judgment dated 28th July, 2016 decreed the suit and directed the defendant to pay to the plaintiff a sum of Rs.1,28,75,943/- with 12% pendente lite interest.

5. The defendant filed an application dated 21st October, 2016 under Order 9 Rule 13 of CPC for setting aside the judgment and decree dated 28th July, 2016. The plaintiff also filed an application under Section 39 r/w. Order 21 Rule 5 of CPC for transfer of the decree to New Delhi, which was allowed by Order dated 2nd January, 2016. The defendant challenged the said order as well as the order of dismissal of the application under Section 8 of the Arbitration Act. The petition challenging dismissal of application under section 8 was later withdrawn. The petition arising from order dated 2nd January, 2016 was disposed of by this court by Order dated 20th February, 2017 by directing the trial Court to decide the application under Order 9 Rule 13 within two weeks from the date of the order. The

plaintiff was also directed not to initiate execution proceeding for a period of four weeks starting from 23rd February, 2017.

6. Pursuant to the said order, the trial court heard the parties on the application under Order 9 Rule 13 of CPC and by the impugned Order dated 6th March, 2017 dismissed the application mainly on the ground that the judgment and decree was passed under Order 8 Rule 5 of CPC and the judgment and decree not being ex-parte, the application under Order 9 Rule 13 was not maintainable. Being aggrieved by the said order, the defendants have filed this appeal.

7. Mr. V.N.Thorat, learned Senior Counsel for the defendant has submitted that though the defendant had not filed the written statement, the learned Judge had not passed the decree under Order 8 Rule 5 of CPC and had in fact called upon the plaintiff to adduce evidence. He, therefore, contends that the judgment was not under Order 8 Rule 5 of CPC. He submits that Order 17 Rule 3 applies when party to whom time was given fails to adduce and or take further steps. This provision is not applicable in the present case. Moreover, the defendant was not present on the date of the hearing. Hence the Court could not have passed a decree on merits by exercising powers

under Order 17 Rule 3 CPC and that the only course available was to proceed under Order 17 Rule 2 of CPC. The learned Sr. Counsel for the defendant submits the learned Trial Judge had proceeded under Order 17 Rule 2 of CPC and passed the judgment under Order 9 Rule 6 of CPC. This being the case, the only remedy available to the defendant was to file an application under Order 9 Rule 13 CPC. In support of his contention, he has relied upon the decision of this court in

(1) Badrinarayan Raghunath Sharma vs. Suresh Nathamal 2002 (4) Mh.L.J. 522;

(2) Union of India, Principal Collector of Customs v. Board of Trustees of the Port of Bombay; 2008 (1) BCR 494;

(3) Lachhiram Chudiwala v. Bank of Rajasthan 2006 (6) All MR 431;

(4) Ashok Kundalrai Mohekar v. National Textile Corporation Ltd. 2015(4) Bom.C.R. 494;

(5) The Steamship Mutual Underwriting Association (Bermuda) Ltd. & Ors. v. Thakur Shipping Company Ltd. & Ors. 2001(3) ALL MR 159;

(6) Chandrakant Babulal Panchal & Anr. v. Ashwinibhai Mancharam Patel & Anr. 2003(1) Bom. C.R 37;

(7) Anjirabai Chandrabhan Moon v. Sukhdeo Kashinath Thool &

Ors. 2002 (4) Bom C.R. 572.

(8) Prakash Chander Manchanda v. Janaki Manchanda (1986) 4 SCC 699.

8. Per contra Mr. Randeria, the learned counsel for the plaintiff has submitted that a plain perusal of the roznama reveals that the defendant had sought time to file the written statement. The defendant had not filed the written statement despite the opportunity given, and as such the court had passed 'no written statement' order and had called upon the plaintiff to adduce evidence. He submits that the decree does not cease to be a decree under Order 8 Rule 5 of CPC merely because the plaintiff was called upon to adduce evidence. He submits that since the decree under Order 8 Rule 5 of CPC is not an ex-parte decree, as rightly held by the trial Judge, the application under Order 9 Rule 13 of CPC is not maintainable. The learned Counsel Shri Randeria has relied upon the decision of the Apex Court in Maya Devi v. Lalta Prasad (2015) 5 SCC 588 and the decision of this Court in Menomal Kushaldas Sindhi v. Gangadhar Pannalal Rai 1982 Mh.L.J.188.

9. Before advertng to the facts of the case, it would be

advantageous to refer to the provisions of Rule 5 of Order 8 of CPC which reads thus:

“ 5. Specific denial :- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be noted admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability;

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission,

(2) Where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

10. A plain reading of this provision clearly indicates that the failure to file a written statement does not necessarily entail passing of a judgment and decree. Order 8 Rule 5 of the CPC does not mandate such recourse. This provision gives discretion to the court either to pronounce the judgment on the basis of the uncontroverted

facts contained in the plaint or to call upon the plaintiff to prove such facts.

11. It may be mentioned that a judgment pronounced in exercise of discretion under Order 8 Rule 5 for failure of the defendant to file written statement has to be followed by a decree. In the case of ***Dhanwantraï R. Joshi vs. Satish J. Dave 1999(1) Bom.C.R. 97***, the question which was referred to the Division Bench was "whether the decree passed in the absence of the defendant and his counsel is a decree passed under Order 9 Rule 6 or is it a decree passed under Order 8 Rule 5 if the same is also passed on the ground that written statement has not been filed". The Division Bench of this Court after considering the relevant provisions under Order 8, 9 and 17 as well as the principles laid down by the Apex Court in *Sangramsingh v. Election Tribunal. Kotah AIR 1955 SC 425* held thus:

"12. In our view, considering the scheme of Order VIII, Rule 5 or Rule 10, as well as Order IX, it is apparent that both operate in different fields Order VIII, Rule 5, specifically provides that if defendant fails to file Written Statement as contemplated therein, the Court may pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, or the Court may in its discretion, require any such fact to be proved. If the judgment is pronounced on the basis of the facts contained in the plaint, decree is to be drawn in

accordance with Order VIII, Rule 5(4). Similarly, if a party from whom written statement is required under Order VIII, Rule 10, fails to present the same within the time permitted or fixed by the Court, the Court is entitled to pronounce judgment against such party, or make such order in relation to the suit as it thinks fit. If the judgment is pronounced, the decree is required to be drawn up. Such decree pronounced on non filing of written statement cannot be considered to be an *ex parte* decree as contemplated under Order IX, Rule 6. These types of decrees are passed because of failure to file written statement. Further, in a case where Written Statement is not filed and at the time of hearing, even if the defendant is present, the Court is entitled to pronounce the judgment and pass decree. If the defendant is absent and the Written Statement as required is not filed, the Court is also entitled to pronounce judgment on the basis of the averments made in the plaint.

13. As against this, under Order IX, the Court is required to follow different procedure. Order IX, Rule 1 provides that on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house and suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. This means that suit is fixed for hearing and on the date of hearing if neither parties appears then the suit may be dismissed as provided under Order IX, Rule 3. If the defendant fails to appear on the date of hearing, the Court is required to pass an order that the suit be heard *ex parte* and to proceed further with the hearing of the suit. This requires recording of evidence and to proceed with the matter. After recording evidence *ex parte*, the Court can pronounce judgment on the basis of the evidence which is brought by the plaintiff. In such cases, the suit is not disposed of as provided under Order VIII, Rule 5 or Rule 10 on the basis of the averments made in the plaint.

14. Further, under Order IX, Rule 13, the defendant is entitled to file application for setting aside *ex parte* decree on two grounds, namely (i) that the summons was not duly

served and (ii) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. This also indicates that the suit is required to be fixed for hearing and on the date of hearing the defendant is absent.

15. In this view of the matter, in our view, application under Order IX, Rule 13 is not maintainable when the Court has passed a decree under Order VIII, Rule 5 or Rule 10 of the C.P.C. There is no provision in Order VIII for setting aside a decree passed under Rule 5 or 10 thereof for non-filing of Written Statement. The only remedy open in such cases is to file an appeal against such decree. Decree under Order VIII, Rule 5 or Rule 10 is passed because of the specific provisions under Order VIII that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, then it shall be taken to be admitted except against a person under disability, and thereafter there is a provision that the Court has discretion to pronounce judgment on the basis of the facts contained in the plaint. This scheme is totally different from the scheme of passing ex parte decree under Order IX.”

12. The principles laid down by the Division Bench in *Dhanwantrai* (supra) have been followed and reiterated in all subsequent judgments relied upon by the learned Sr. Counsel Shri Thorat. Hence it is not necessary to make a separate reference to these judgments. The aforesaid judgments lay down a clear proposition that the decree passed in exercise of discretion under Order 8 Rule 5 is not an ex-parte decree and is not amenable to the remedy under Order 9 Rule 13 of CPC and the only remedy available is to file an appeal against

such decree.

13. It may also be noted here that when the court proceeds to call upon the plaintiff to prove the facts contained in the plaint, the failure of the defendant to file the written statement does not preclude him from participating in further proceedings, cross-examining the plaintiff and his witnesses and impeaching their credibility and from advancing the arguments and demonstrating that the plaintiff on his own case is not entitled for the reliefs claimed. The only consequence of not filing the written statement would be that the defendant would not be entitled to set up his defence or lead his own evidence. Nevertheless all further proceedings are required to be conducted in accordance with normal rules prescribed by the Code of Civil Procedure in the conduct of the suit. As it has been held by the Apex in ***Balraj Taneja versus Sunil Moden 1999 (8) SCC 396*** :

...."Whether it is the case which is contested by the defendants by filing a written statement, or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved."

14. Needless to state that the when the defendant fails to file the written statement and the court requires the facts to be proved and ultimately pronounces the judgment based on the evidence adduced by the plaintiff, such judgment cannot be treated as one under provisions of Rules 5 or 10 of Order 8 of CPC.

15. In the instant case the records reveal the defendant had put in their appearance through their Advocate on 4th March,2014. By application at Exhibit 16 the defendant had sought time to file the written statement. Though the defendant had not filed the written statement, the learned Judge had not exercised the discretion to pronounce the judgment on the basis of uncontroverted facts in the plaint but had called upon the Plaintiff to prove the said facts. The judgment and decree was therefore not passed under Order 8 Rule 5 of CPC. In view of this factual position, the application under Order 9 Rule 13 could not have been dismissed on the premise that the judgment was pronounced under Order 8 Rule 5 of the CPC.

16. It is to be noted that the defendant herein has sought to set aside the decree by invoking provisions of Order 9 Rule 13 of the CPC. There is no dispute that the decree passed under Order 9 Rule6

of CPC can be set aside under by exercising powers under Order 9 Rule 13 CPC. However, the question for consideration is whether the decree, which is sought to be set aside, is an ex-parte decree.

17. The term "ex-parte" connotes absence of the other party. The provisions under Order 9 and 17 relate to such eventuality. The provisions relevant to decide the present controversy are under Order 9 Rule 6 and Order 17 Rule 2 and 3 and the same read as under:

“6. Procedure when only plaintiff appears.- (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then

(a) When summons duly served—If it is proved that the summons was duly served, the court may make an Order that the suit be heard ex parte;

(b) When summons not duly served—if it is not proved that the summons was duly served, the court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time—if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the court shall postpone the hearing of the Suit to a future day to be fixed by the court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the court shall Order the plaintiff to pay the costs occasioned by the postponement.

ORDER 17 :

“ Rule 2. Procedure if parties fail to appear on day fixed.- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other orders as it thinks fit.

Explanation : Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion proceed with the case as if such party were present.”

“ Rule 3. Court may proceed notwithstanding either party fails to produce evidence, etc.- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default,—

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under Rule 2.

18. These provisions, in particular Order 9 Rule 6 (1) (a) envisages a situation when the plaintiff appears and the defendant does not appear on the first hearing despite due service of summons. This provision enables the Court to make an order to hear the suit ex-parte. Whereas, Order 17 Rule 2 and 3 would apply when the parties or any one of them fail to appear on the adjourned date of hearing.

In such a situation, Rule 2 of Order 17 provides two alternative courses. It enables the Court to take recourse to one of the modes under Order 9, i.e. to dismiss the suit for default under Order 9 Rule 8 if the plaintiff is absent or to hear the suit ex-parte by taking recourse to Order 9 Rule 6 of CPC if the defendant is absent at the adjourned date of hearing. The second limb of Order 17 Rule 2 empowers the Court to make such other order as it thinks fit. Explanation to this Rule carves out an exception to the Rule and gives discretion to the court to proceed with the case in the absence of the party if such party has already adduced substantial evidence.

19. Whereas Rule 3 of Order 17 applies when the party to whom time was granted fails to produce evidence or to take steps necessary for progress of the suit. Rule 3 contemplates two contingencies- i.e. when the parties are present in the court, in which case notwithstanding the default, the court is to proceed with further hearing of the suit. The judgment in such case would be on merits and the same would not be open to remedy under Order 9 Rule 13 CPC. Secondly, when the parties or any one of them is absent, the court has to take recourse to Rule 2.

20. In **B. JANAKIRAMAIAH CHETTY versus A.K. PARTHASARTHI AND ORS. (2003) 5 SCC 641**, the Apex Court while considering the scope and ambit of Explanation to Rule 2 has held thus:

The Explanation permits, the Court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the Court to be exercised in a given circumstances. For application of the provision, the Court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded;

(b) such party has failed to appear on any day and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the Court to adopt any of the modes provided in Order IX or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the Rule, conferring discretion on the Court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the Court may in its discretion deem as if such party was present. Under Order IX Rule 3 the Court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6, and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are 'proceed with the case'. Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the Court or not.

In Rule 2, the expression used is "make such order as it deems fit", as an alternative to adopting one of the modes

directed in that behalf by Order IX. Under Order XVII Rule 3(b), only course open to the Court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes. Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two Rules. However, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led or applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need, for adjourning the suit or deferring the decision.

21. It therefore follows that when the Defendant fails to appear on the adjourned hearing, the court is vested with the discretion either to take recourse to Order 9 Rule 6 or to make any order deem fit and if the case is covered by the explanation, to proceed with the case as if the defendant were present.

22. It may be mentioned that the Apex Court in the case of Sangram Singh and Arjun Singh has explained the consequences of making an ex-parte order under Order 9 Rule 6. The Apex Court has held that the right to proceed 'ex-parte' is a right which accrues from day to day. It is not a mortgaging of the future but only applies to the particular hearing at which a party is afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on 'the day to which the hearing of the suit is adjourned', he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing. It is further held that the defendant against whom the suit is ordered to proceed ex-parte has a right to appear at an adjourned hearing. However, he has no right to set back the hands of the clock unless he can show good cause for his non-appearance and the court in

exercise of powers under Order 9 Rule 7 directs that he be heard in answer to the suit. The remedy under Order 9 Rule 7 is available as long as the suit is adjourned for 'hearing'. Once this stage is crossed i.e. when the hearing is completed, then the remedy would not be under Order 9 Rule 7 but under Order 9 Rule 13 CPC.

23. It is thus well settled that the fact that the case is ordered to proceed ex-parte would not preclude the defendant from participating in further proceedings from the stage at which he comes in. He has a right to appear at the adjourned hearing and participate in the proceeding from that stage. The only embargo is that he cannot be relegated back to the stage as on the date he had absented himself on the date fixed for hearing, unless he appears at or before the adjourned hearing and assigns good cause for his previous non-appearance and the court in exercise of powers under Order 9 Rule 7 sets aside the exparte order and directs he be heard in the suit.

24. The issue raised in this appeal needs to be considered keeping in mind the above provisions and the principles of law. First and foremost, a brief reference to some of the relevant dates and the sequence of events in the suit:- Upon being served with summons,

the defendant put in appearance on 4th March, 2014 and sought time to file written statement. Time was granted and the suit was adjourned to 2nd April, 2014 and again to 23rd April, 2014. On both these dates the defendant did not file written statement despite being represented by an advocate. The case was adjourned to 23rd July, 2014 on which date neither the defendant nor his advocate was present. The court passed "No written statement" order and fixed the matter for hearing on 6th August, 2014, on which date, the examination-in-chief of the plaintiff was recorded in presence of the advocate for the defendant.

25. It is to be noted that though the defendant had appeared on 6th August, 2014, he did not file an application under Order 9 Rule 7 for setting aside the ex-parte order and permitting him to file the written statement, but filed an application (Exhibit 35) to stay the suit. The plaintiff filed his reply to the said application on 17th September, 2014. On 27th October, 2014 the advocate for the defendant was present but the case was adjourned at the request of the plaintiff. On the next two hearings the defendant and his advocate did not appear. The learned judge adjourned the hearing to 16th December, 2014, on which date the defendant once again remained absent and the case

was adjourned to 21st January, 2015 for orders on application (Exhibit 35). The defendant appeared on 21st January, 2015 through his advocate and the Court ordered to “file the said application” and posted the matter for further chief.

26. On 24th March, 2015, examination in chief of the plaintiff was concluded in the presence of the advocate for the defendant. On the same day the defendant filed an application to allow him to advance arguments on application at Exhibit 35. The said application was allowed, arguments on (Exhibit 35) were heard on 4th August, 2015 and the same was disposed of on the same day and the suit was adjourned to 7th September, 2015 for cross examination of PW1.

27. On 7th September, 2015 neither the defendant, nor his advocate were present and hence the suit was adjourned to 16th September, 2015 for cross examination of PW1. The defendant and his advocate failed to remain present on the said date, the cross-examination of PW1 was closed and the case was adjourned for further evidence of the plaintiff on 21st September, 2015. The plaintiff did not adduce further evidence and hence the case was posted for final arguments on 6th October, 2015.

28. The records reveal that on 6th October, 2015 the defendant was represented by his advocate despite which he did not file any application under Order 9 Rule 7 and did not seek leave to cross examine the plaintiff. The advocate for the defendant had not advanced any arguments though he was present when the suit was finally heard and posted for judgment.

29. As stated earlier the term ex-parte presupposes that the case had proceeded in the absence of the defendant and the absence of the defendant was due to non-service of summons or for any other sufficient cause. The records reveal that the defendant had appeared on being served with summons. He had also appeared after the case was ordered to proceed without the written statement but had not sought leave to file the written statement. The defendant had therefore forfeited its right to file the written statement and consequently to set up its defence and lead evidence.

30. It is also to be noted that the evidence of the plaintiff was recorded in presence of the advocate for the defendant. True that the Learned Judge, taking recourse to Rule 2 of Order 17, had closed the

cross of the plaintiff in view of the absence of the defendant and his advocate. Nevertheless, the advocate for the defendant was present on the subsequent date when the case was adjourned for final hearing but he had not sought to set aside the said ex parte order. The defendant having failed to seek remedy under Order 9 Rule 7 CPC despite having appeared on subsequent dates, had no right to be relegated to the earlier position. and had therefore lost the privilege of cross-examining the plaintiff though he was entitled to participate in further proceedings. The records reveal that the defendant was permitted to participate in further proceedings. However, despite being present in the Court on 6th October, 2015 the advocate for the defendant had chosen not to advance the arguments. In such circumstances, the defendants cannot claim that the suit was heard ex-parte.

31. The record reveals that the judgment was not pronounced on the schedule date and the case was adjourned repeatedly on the ground that the learned Judge was busy with other urgent matters. It is seen that on 1st December, 2015 while the matter was posted for judgment, another advocate put in his appearance on behalf of the defendant and filed an application for adjournment. The suit was

posted for judgment on 28th December, 2015 on which date the defendant filed an application under Section 8 of Arbitration Act. On the same date the suit was transferred to Rajguru Nagar, Khed, and the parties were duly notified to appear before the said Court. The defendants did not appear before the Court at Rajguru Nagar. The learned judge heard the plaintiff and dismissed the application under Section 8 of Arbitration Act. On the subsequent date of hearing the plaintiff was heard and the judgment and decree was passed on 28th July, 2016. It is in this context that the judgment and decree is projected to be an ex-parte decree.

32. The question, which arises, is whether failure of the defendant to appear before the transferee court and whether pronouncement of the judgment without hearing the defendant would render the decree "ex-parte".

33. In this regard it would be relevant to refer to the provision under Order 18 Rule 15, which reads thus;

Order 18 Rule 15 of the Code is as follows:

"15. Power to deal with evidence taken before another Judge.- (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or

memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rule and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24."

34. In ***Rasiklal Manickchand Dhariwal v. M.S.S.Food Products***

(2012) 2 SCC 196 the Apex Court has observed as :

"25. The hearing of a suit begins on production of evidence by the parties and suit gets culminated on pronouncement of the judgment. Under Order XVIII Rule 1 of the Code, the plaintiff has a right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by him the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. On the day fixed for the hearing of the suit or any other day to which the hearing is adjourned, as per the provisions contained in Order XVIII Rule 2, party having the right to begin is required to state his case and produce his evidence in support of issues which he is bound to prove. Under Order XVIII, Rule 2 sub-rule (2), the other party shall then state his case and produce his evidence. Under sub- rule (3A) of Rule 2 of Order XVIII, the parties in suit may address oral arguments in a case and may also avail opportunity of filing written arguments before conclusion of oral arguments. Rule 15 of Order XVIII provides for the contingency where the Judge before whom the hearing of the suit has begun is prevented by death, transfer or other cause from concluding the trial of a suit. This provision enables the successor Judge to proceed from the stage at which his predecessor left the suit. The provision contained in Rule 15 of Order XVIII of the Code is a special provision. The idea behind this provision is to obviate re-recording of

the evidence or re-hearing of the suit where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit and to take the suit forward from the stage the predecessor Judge left the matter. The trial of a suit is a long drawn process and in the course of trial, the Judge may get transferred; he may retire or in an unfortunate event like death, he may not be in a position to conclude the trial. The Code has taken care by this provision that in such event the progress that has already taken place in the hearing of the suit is not set at naught. This provision comes into play in various situations such as where part of the evidence of a party has been recorded in a suit or where the evidence of the parties is closed and the suit is ripe for oral arguments or where the evidence of the parties has been recorded and the Judge has also heard the oral arguments of the parties and fixed the matter for pronouncement of judgment. The expression "from the stage at which his predecessor left it" is wide and comprehensive enough to take in its fold all situations and stages of the suit. No category or exception deserves to be carved out while giving full play to Rule 15 of Order XVIII of the Code which amply empowers the successor Judge to proceed with the suit from the stage at which his predecessor left it.

...

31.. The expressions "state his case", "produce his evidence" and "address the court generally on the whole case" occurring in Order XVIII Rule 2, sub-rule (1) and sub-rule (2) have different meaning and connotation. By use of the expression "state his case", the party before production of his evidence is accorded an opportunity to give general outlines of the case and also indicate generally the nature of evidence likely to be let in by him to prove his case. The general outline by a party before letting in evidence is intended to help the court in understanding the evidence likely to be followed by a party in support of his case. After case is stated by a party, the evidence is produced by him to prove his case. After evidence has been produced by all the parties, a right is given to the parties

to make oral arguments and also submit written submissions, if they so desire. The hearing of a suit does not mean oral arguments alone but it comprehends both production of evidence and arguments. The scheme of the Code, as embodied, in Order XVIII Rule 2, particularly, sub-rules (1), (2), (3) and (3A) and Order XVIII Rule 15 enables the successor Judge to deliver the judgment without oral arguments where one party has already lost his right of making oral arguments and the other party does not insist on it.

...

35. Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit. Merely, because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order IX Rule 7 of the Code and thereby entitling them to address the court on the merits of the case"

35. In the instant case, it is not in dispute that while the suit was pending before the Pune Court, the hearing was concluded and the suit was adjourned for judgment. Hence there was no question of any further proceedings in the suit. The fact that the defendant had filed an application under Section 8 of Arbitration Act, after the suit was closed for judgment or that transferee Court had heard the said application would not change or reverse this situation.

36. As stated earlier, the defendant had failed to avail the

opportunity of arguing the case while the suit was pending before the Court at Pune. The defendant had also failed to appear before the Court at Rajguru Nagar, Khed. In such fact situation he cannot be permitted to raise a grievance that the successor Judge, who delivered the judgment, had not given him an opportunity to advance final arguments. Furthermore, in terms of the provisions of Rule 15 of Order 18 the transferee Court was not under obligation to hear the defendant on merits. Hence the judgment pronounced without hearing the defendant cannot be said to be an ex-parte judgment.

37. Even otherwise, Rule 2 of Order 17 gives wide discretion to the Court to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it deems fit. Moreover, the explanation to the Rule gives discretion to the Court to proceed in the absence of the party, where substantial portion of the evidence of such party has been recorded. In the instant case, the plaintiff had already adduced the evidence that the defendant was present on the subsequent date but he had not availed himself of the opportunity of cross examining the plaintiff. The defendant had not filed the written statement, hence there was no question of the defendant adducing any evidence as required under the explanation. The

defendant had also not advanced oral argument while the suit was pending before Pune Court. The hearing of the suit was therefore concluded in all aspects and neither the plaintiff nor the defendant was required to take any further steps in the suit. In view of the above facts, the successor Judge was perfectly within his powers to consider the evidence on record and to pass a judgment on merits, without taking recourse to the provisions of Order 9 CPC, Hence, looking at the matter from all angles, the judgment and decree cannot be said to be an ex-parte decree. Consequently, the application under Section 9 Rule 13 of CPC is not maintainable and the only remedy open is to file an appeal against such decree.

38. Under the circumstances and in view of discussion supra, the appeal is dismissed.

. Civil application (St) No. 9167 of 2017 does not survive in view of disposal of the Appeal from Order, and the same is accordingly disposed of.

(ANUJA PRABHUDESSAI, J.)