

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

WRIT PETITION NO. 1488 OF 2015

Maharashtra State Electricity Board ... Petitioner

Versus

Miraj Electric Supply Co. Ltd. & Ors. ... Respondents

Ms. Anjali R. Baxi for Petitioner.

Mr. Suresh M. Sabrad for Respondent No.5.

CORAM : NITIN W. SAMBRE, J.

DATE : JUNE 27, 2018.

P.C. :

. The Petitioner – MSEB filed a Special Civil Suit No. 125 of 1988 against the Respondents for recovery of an amount of Rs. 1,42,85,177.47 ps. towards the energy charges as the Respondents – Defendants were holding a license for purchasing bulk supply of electricity power and the present Petitioner – Plaintiff has supplied bulk energy.

2. In the said suit, present Respondents – Defendants filed their appearance and joint written statement vide Exhibit – 26, thereby denying the entire suit claim. During the pendency of the suit, the learned Counsel

Mr. Karmarkar withdrew his Vakalatnama vide pursis Exhibit – 106. As a consequences, the witnesses of the Petitioner – Plaintiff were not cross-examined and the suit proceeded under Order 17 Rule 2 of the Code of Civil Procedure (For short, 'the Code') vide order dated December 4, 2004. The issues in the matter were framed at Exhibit – 32 which read thus :

“ISSUES

- 1] *Does Plaintiff prove that as per the notification of Government of Maharashtra, dated 19.11.1986 it revoked the license of Defendant No.1 and has taken over the assets w.e.f. 30.1.87 and accordingly handing over and taking over report was prepared ?*
- 2] *Does plaintiff prove that the inventory in respect of the assets was taken over by the plaintiff and estimate book value of assets of defendant No.1 was prepared and deducted as alleged ?*
- 3] *Does Plaintiff prove that Defendants did not take the arrears of bills as per the statement of accounts and liable to pay interest @ R. 18% p.a. calculated to Rs. 35,57,655.95 Ps. ?*
- 4] *Does plaintiff prove that it had demanded the charges in respect of energy consumed and defendants requested to collect the arrears from their consumers, Prior to 31.1.87 and accordingly the work of billing and collection was made ?*
- 5] *Does Plaintiff prove that the defendants agreed to pay 2% amount on the total amount of arrears ?*

6] Whether plaintiff is entitled to claim Rs. 104190032.35 towards the amount of bills of consumer No.1, 102 and 106 as shown in the statement of account ?

7] Whether plaintiff is entitled to claim interest of Rs.35,57,655.95 Ps. upto 29.2.1988 with interest at the rate of Rs. 18% p.a. ?

8] Whether plaintiff is entitled to claim interest of Rs. 308289.16 Ps. ?

9] Whether Plaintiff is entitled to claim miscellaneous charges of Rs. 200/- ?

10] Whether suit is bad for non joinder of State of Maharashtra as the necessary party ?

11] Do defendants prove that action of Government to revoke license of defendant No.1 is improper and illegal ?

12] Do Defendants prove that inventory was never prepared and as such the alleged inventory is not bonafide and correct ?

13] Do they prove that there was no proper and legal inventory whether plaintiff board had taken over assets of defendant No.1 ?

14] Do Defendants prove that the calculations of the estimate book value of assets of Defendant No.1 totally wrong and without jurisdiction ?

15] Do Defendants prove that calculation of bills prior to 31.7.87 was to be credited towards the energy bills to be received from defendants for electric supply ?

16] Do Defendants prove that Plaintiff recovered the bills from Defendant's consumers and the amount of Rs.10419032.36 ps. was credited to defendants account as alleged ?

17] Do Defendants prove that plaintiff do not fulfill the obligation laid down under the term 11 of the license and as such suit is not tenable ?

18] Whether defendants are entitled to claim set-off of Rs. 14285177.47 ps. under Order VI of C.P.C. ?

19] Do Defendants prove their counter claim of Rs. 300/- and interest @ Rs. 18% p.a. ?

20] Whether suit is false and frivolous and as such the defendants are entitled to claim compensatory cost of Rs. 3500/- ?

21] Whether Plaintiff is entitled to recover Rs. 14285177.47 ps. ?

22] What order and decree ?

23] Does Plaintiff prove that the detailed inventory was signed by the representatives of Plaintiff and the defendants ?

24] Do Defendants prove that without valuation of assets the suit of the plaintiff is not tenable ?

25] Do Defendants further prove that plaintiff has not complied provisions of Section 7 and 7A of the Indian Electricity Act and hence suit is not tenable ?”

3. After appreciating the evidence of the Petitioner - Plaintiff and the other documentary evidence on record the trial court was pleased to decree the suit as under :

“ORDER

Suit is decreed ex parte with costs as under :

1. *The Defendant Nos. 1 to 6 jointly and severally to pay Rs. 1,42,85,177.47 ps. (Rs. One Crore forty-two lakhs eighty five thousand one hundred seventy seven and forty seven paise only) to the plaintiff board (M.S.E.B.). They shall pay interest at the rate of Rs. 18% p.a. on the arrears amount of Rs. 1,04,90,032.36 ps. (Rs. One crore Four Lakhs Ninety Thousand Thirty two and paise thirty six only) from the date of the suit till its realization.*
2. *Decree be drawn up accordingly.”*

4. The Respondents – original Defendants filed Misc. Application No. 60 of 2011 under Order 9 Rule 13 of the Code for setting aside the ex parte Judgment and Decree dated 29th January 2005 passed in Special Civil Suit No. 125 of 1988. Amongst other the grounds raised were the Respondent No.1 – Company was sold to one D. V. Bapat. It is claimed that it was the Respondent No.1 - Company who has required to oppose the entire case of the Petitioner and the Respondent Nos. 2 to 6 were the formal parties. It is further claimed that in another Special Civil Suit No. 13 of 1990 since the lawyer for the Respondents – Defendants was not keeping well, Vakalatnama in favour of some other lawyer was issued. According to the Respondents, it was the duty and responsibility of

Mr. Bapat to look after the proceedings in the suit in question and it is because of failure of their lawyer and Mr. Bapat the decree came to be passed. It is claimed that Judgment is not on merit, hence the same is liable to be set-aside and fresh opportunity needs to be granted.

5. The Petitioner - Plaintiff replied to the said proceedings under Order 9 Rule 13 of the Code. It is brought to the notice of the Court that the application itself is not maintainable, as the Judgment passed by the court below was under Order 17 Rule 2 of the Code which was passed after framing of issues, recording of evidence etc.

6. The learned court of Joint Civil Judge Senior Division, Sangli allowed the said Misc. Application No. 60 of 2011 under Order 9 Rule 13 of the Code and set aside the Judgment and Decree dated 29th January 2005 passed in Special Civil Suit No. 125 of 1988 with costs of Rs. 1000/-. As such, this Writ Petition.

7. Heard Ms. A.R.S. Baxi, the learned Counsel for Petitioner and Mr. Suresh M. Sabrad, the learned Counsel for Respondent No.5.

8. This Court on 13th March 2015 has issued notice for final disposal and stayed the impugned order dated 30th September 2014 passed in Misc. Application No. 60 of 2011.

9. The learned Counsel for Petitioner would urge that in the main suit summonses were served on all the Respondents – original Defendants and as such they have engaged the Advocate who has filed written statement on behalf of the Respondents – Defendants. According to her, based on the pleadings of the respective party, the court has framed issues at Exhibit – 32. She would then pointed out that the witness of the Plaintiff i.e. PW-1 Shri Sadashiv Shivbal Phutane filed his Affidavit in lieu of examination-in-chief at Exhibit – 111 and produced various documents viz – Agreement, Notices, Credit Memos, Demand Notice, various communications etc. According to her, Exhibit – 111 to Exhibit 154 are the documents which were duly proved by the Petitioner – Plaintiff through his witness.

10. The Respondents – Defendants produced two documents with List Exhibit – 28, however, they have neither proved those documents by entering into the witness box nor examined the witnesses of the Plaintiff.

11. The learned trial court then proceeded to analyze the evidence brought on record in the backdrop of pleadings of the respective party and proceeded to decree the suit on its merit. According to her, the suit proceeded under Order 17 Rule 2 of the Code vide order dated December 4, 2004 was never the subject matter of challenge before any of the court. According to her, once the Judgment and Decree is passed pursuant to the provisions of Order 17 Rule 3-A of the Code, the Application under Order 9 Rule 13 of the Code is not maintainable. According to her, the law on the said issue is well settled and she would draw support from the Judgment of this Court in the matter of *Arvind Nathubhai Dattani V/s Maniben Karsandas Dattani and another*¹ and *Ramchandra Ramgopal (M/s) through Jugalkishore s/o Navalkishore Kothari V/s Kamalkishore s/o Onkarmal Rungta and others*².

12. According to her, once the court has proceeded pursuant to the provisions of Order 17 Rule 2 and decides the suit upon appreciation of pleadings of respective party and the oral and documentary evidence brought on record, the Application under Order 9 Rule 13 is not

1 2012(2) Mh.L.J.20

2 2005(2) Mh.L.J.623

maintainable. She would draw support from para nos. 6 and 7 in the matter of **Arvind Nathubhai Dattani** (*cited supra*) which read thus :

“6. Relying upon the decision of the Supreme Court in *B. Janakiramaiah Chetty vs. A.K.Parthasarathi & Ors.*, 2003(5) SCC 641 and in particular paragraph no.10 thereof, learned counsel for the plaintiff submitted that the Court erred in coming to the conclusion that substantial part of the evidence was recorded inasmuch as the evidence of attesting witness was absolutely necessary for the proof of the Will. Since the attesting witness was not examined it cannot be said that the substantial portion of the evidence was recorded. The contention of the plaintiff that the Court wrongly came to the conclusion tht the substantial portion of the evidence was recorded cannot be accepted. In any event, it is not permissible for a co-ordinate Bench of the Court to hold that the Court wrongly decided to proceed under explanation to Rule 2 of Order 17. Such contention can only be considered by an appellate Bench. Since the Court has proceeded under explanation of Rule 2 of Order 17 of the Code and decided the suit on merits, the only remedy available to the plaintiff, in my view, is to challenge the order in appeal. Whether the Court ought or ought not to have exercised the powers under explanation to Rule 2 of Order 17 cannot be subject-matter of an enquiry in a motion purporting to be a

motion under Order 9 Rule 13 of the Code. In the present motion, the Court is only required to see whether the suit has been dismissed under Rule 8 or Rule 3 of Order 13 for entertaining an application under Rule 9 or Rule 4 of Order 9 of the Code. Once it comes to the conclusion that the suit is not dismissed under Rule 3 or sRule 8 of Order 9 of the Code but is dismissed on merits, (by exercising powers under explanation to Order 17 Rule 2 of the Code), the Court cannot exercise the powers under Rule 4 or Rule 9 of Order 9 of the Code but require the party to challenge the order of dismissal in appeal.

7. For these reasons, there is no merit in the motion which is hereby dismissed.”

13. She would also draw support from para no.10 of the Judgment in the matter of **Ramchandra Ramgopal** (*cited supra*) which read thus :

“10. This Court in Judgment reported in judgment in the case of H.P.Co-op. vs. M/s. Maico Ltd. reported at 2000(2) Mh.L.J. 317, has considered the situation in which the defendant had filed written statement and the Court had framed the issues and thereafter adjudicated upon those on the basis of material available. This Court has held that provisions of Order 9 Rule 13 are not attracted as it is only an ex parte decree. In the facts of present case, this ruling squarely covers the situation

inasmuch as the defendants had filed their written statement and the trial Court had framed issues. Thereafter, it has considered the evidence adduced by the original plaintiff by expressly mentioning that it is a joint and several judgment and decree. In such a situation, it cannot be said that it is a ex parte judgment or decree to which provisions of Order 9 Rule 13 are applicable. The provisions of Order 9 Rule 11 permit the Court to proceed further with the suit when one or more of the defendants do not appear and provisions of Order 9 Rule 13 permit the defendants to move for setting aside the decree if it is against him/them. Perusal of Order 17 Rule 2 reveal that when the suit is fixed for hearing and adjourned and any of the parties fail to appear on such date, the Court has option to dispose of the suit in the mode and manner specified in Order 9 or it can make such Order as it thinks fit. Provisions of Order 17 Rule 3 permit the Court to proceed further in suit where any party to a suit to whom time has been granted fails to produce his evidence, or witnesses or fails to perform such other acts as is necessary for further prosecution of the suit for which time had been allotted to him. Under sub-rule 3(a), if the parties are present, the Court can proceed to decide the suit forthwith. If the parties or any one of them is absent, the Court can proceed under Order 17 Rule 2. Here, the trial Court has found that original defendant No.2 Jugalkishore, a partner of firm – respondent No.1 in C.R.A.No.933 of 1994 and

respondent No.1 in C.R.A.No.292 of 1994 was present before the Commissioner who had gone to his residence for recording his evidence but he did not adduce any evidence before the Commissioner. The Court has, therefore, proceeded further under Order 17 Rule 3(a) of Civil Procedure Code and has decided the suit forthwith after appreciation of evidence available on record. It is, therefore, clear that it is not an ex parte judgment and decree and as such the trial Court was not correct in setting it aside as ex parte judgment and decree. Once, this view is taken, it is clear that the judgment dated 14-12-1993 in MJC No. 76 of 1993 is unsustainable and said judgment is liable to be quashed and set aside and the MJC deserves to be dismissed. The same also stands true in relation to order dated 7-2-1994 passed below Ex. 20 in MJC No. 77 of 1993.”

14. Per contra, the learned Counsel for Respondents would urge that even if the present Respondents have filed their appearance, written statement and the documents, the fact remains that once the Advocate engaged by them has sought discharge, the need that was expected of the trial court was to issue notice to the Respondents – Defendants. The aforesaid non-compliance on the part of the learned court below amounts to denial of opportunity of hearing. He would add that once it is noticed

that there is no opportunity of hearing, the decree has to be termed as ex parte and is rightly done by the trial court. He would then urge that in such an eventuality, provisions of Order 9 Rule 13 of the Code is very much available to the Respondents and such powers which are given in the set of facts were lawfully exercised by the learned trial court. He would draw support from the judgment of the Apex Court in the matter of ***Malkiat Singh and another V/s Joginder Singh and others***¹. He would draw support of the observations made in para nos. 6 and 7 which read thus :

“6. There is no denying the fact that the appellants had engaged a counsel to defend them in the civil suit. The counsel for the appellants pleaded “no instructions” but the court did not issue any notice to the appellants, who were admittedly not present on the date when their counsel reported no instructions in the court. It is nobody's case that the counsel informed them after he had reported no instructions to the court. The appellants only came to know about the order date 18-11-1991 and the ex parte decree dated 8-2-1992 when they approached their counsel on 6-6-1992. It was within four days thereafter that the appellants filed an application under Order 9 Rule 13

¹ (1998) 2 SCC 206

CPC for setting aside the order dated 18-11-1991 and the decree dated 8-12-1992.

7. *The appellants in their application clearly pleaded that they were neither careless nor negligent and as soon as they learnt about the ex parte decree dated 8-2-1992 and the order dated 18-11-1991, they filed the application to set aside the order and ex parte decree. A perusal of the record also reveals that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial court, which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer. In taking this view, we are fortified by a judgment of this Court in Tahil Ram Issardas Sadarangani v. Ramchand Issardas Sadarangani wherein the Bench opined : (SCC p.257, para 4)*

“4. It is not disputed in the present case that on 15-3-1974 when Mr. Adhia, Advocate withdrew from the case, the petitioners were not present in court. There is nothing on the record to show as to whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when

Mr. Adhia withdrew from the case, the interests of justice required that a fresh notice for actual date of hearing should have been sent to the parties. In any case in the facts and circumstances of this case we feel that the party in person was not at fault and as such should not be made to suffer.”

15. According to him, this Court in a similar set of facts in the matter of ***Prashant Vagaskar and others V/s Municipal Corporation of Greater Bombay and others***¹ has observed that the Application under Order 9 Rule 13 of the Code is very much maintainable. He would draw support from the observations made in para no.22 of the said Judgment which read thus :

“22. In this view of the law, therefore, mere fact that the plaintiff No.2 was present in the Court at the time when the suit was called for dismissal on 30-8-2001, cannot, on the facts of this case, provide for any valid ground for holding that the plaintiffs were present in the Court and in spite of that, they defaulted in taking part in proceedings or were guilty of bypassing the Court. In the facts and circumstance, the plaintiffs were justified in praying for adjournment and, therefore, in my opinion, the Court below was wrong in refusing to grant adjournment, merely on the technical ground that one of the

1 2002(2) Mh.L.J.154

plaintiffs was physically present in the Court and was not ready to proceed with the suit.”

16. Considered rival submissions.

17. It is worth to refer here the provisions of Order 17 Rule 2 of the Code. The said provision contemplates a procedure, if parties failed to appear on the day fixed by the Court for hearing of the suit. The Rule then provides for the court to proceed to dispose of the suit in one of the mode directed in that behalf by Order 9 of the Code or make such order as it thinks fit.

18. From the record it depicts that on December 4, 2004 the court passed an order proceeding with further hearing of the suit pursuant to the provisions of Order 17 Rule 2 of the Code. The court then recorded the evidence of the plaintiff. Not only this, at the behest of defendant at times the matter was placed before the Lok Adalat for settlement, however, the Respondents herein have chosen to absent even before the Lok Adalat. The learned court then proceeded to analyse the evidence of the plaintiff in the backdrop of pleadings of the respective parties and proceeded to decree the suit on merits.

19. Once a decree on merit upon appreciation of pleadings and oral and documentary evidences passed in the backdrop of the provisions of Order 17 Rule 2 of the Code, this Court in the judgment in the matter of **Ramchandra Ramgopal** and **Arvind Nthubhai Dattani** (*cited supra*) has rightly held that an application under Order 9 Rule 13 of the Code is not maintainable. The reliance is rightly placed on both the judgments so as to infer that once an order under Order 17 Rule 2 of the Code is passed, the provisions of Order 9 Rule 13 of the Code are not available to the aggrieved party.

20. It is worth to note here that, if the Petitioner – Plaintiff remained absent, it is always open for the civil court to dismiss the suit under Order 8 or 9 Rule 3 of the Code, however, the explanation – (2) to the Order 17 has explained that if the evidence or substantial portion of evidence of a party is recorded and if such party fails to appear on the given day, then the matter shall fix for hearing on an adjourned date. The court may in its discretion proceed with the hearing by presuming that the party is present before the court though it is absent. In such an eventuality, it is always open for the learned civil court to ignore the

absence of the parties and proceed with the hearing of the suit, may be if required to record the evidence.

21. The provisions of Order 17 Rule 2 of the Code can be invoked provided the court is satisfied that in the suit evidence of the party is substantially recorded and the party has failed to appear before the court.

22. This is exactly what has happened in the present case that though based on the pleadings of respective party the issues were framed and the examination-in-chief was recorded, the Defendants have chosen to remain absent. Once the court proceeded pursuant to the explanation under Order 17 Rule 2 of the Code as is done in the present case, it has to be inferred that the suit is decided on merit and the remedy under Order 9 Rule 13 is not available so as to treat the decree as an ex parte

23. So far as the reliance placed by the learned Counsel for Respondents on the Judgment in the matter of **Malkiat Singh** (*cited supra*) passed by the Apex Court is concerned, the law laid down therein can be distinguished based on the provisions of Order 17 of the Code. In the said case there does not appear to be a specific provisions under Order

17 Rule 2 of the Code as noticed in the present case. In the present case, under Order 17 Rule 2 of the Code the order was passed on December 4, 2004 and as such the suit was decided by the learned civil court on its merit upon appreciation of the pleadings and evidence brought on record. In that view of the matter, the law laid down in the matter of **Malkiat Singh** (*cited supra*) will be of hardly any assistance to the Petitioner. Apart from above, the factual matrix reflected in the matter of **Prashant Vagaskar** cited by the learned Counsel for Respondents will be of hardly any assistance to the factual matrix of the present case.

24. The fact remains that the learned court while dealing with the Application under Order 9 Rule 13 of the Code appears to have merely asking as set aside the money decree. It is worth to observe here that the Respondents herein have also failed to demonstrate as to what prompted the learned Counsel Mr. Karmarkar to withdraw their appearance on behalf of the Respondents. The needs that is to be expected from the Respondents was to justify their act by giving complete instructions to their lawyer Mr. Karmarkar, but he has failed to appear in the matter or withdrew himself from the proceedings.

25. It is not the case of the present Respondents that they have given complete instructions and were diligent in pursuing the suit proceedings through the said lawyer. Rather the Respondents have tried to use the act of their lawyer of withdrawing from the proceedings so as to substantiate their claim for setting aside the alleged ex parte decree. It is for the Respondents to justify that they have given complete instructions.

26. In response to the Court's query whether the learned Counsel for Respondents is ready and willing to deposit the decretal amount, the learned Counsel had shown his inability to deposit the amount.

27. For all the aforesaid reasons, the order impugned is held to be not sustainable and is liable to be quashed and set-aside.

28. As such, the Writ Petition stands allowed in terms of prayer clause – (b).

29. The order dated September 30, 2014 passed by the Joint Civil Judge Senior Division, Sangli in Misc. Civil Application No. 60 of 2011 is hereby quashed and set aside.

30. The Respondents shall be at liberty to take out such proceedings as shall be permissible and available in law in questioning the Judgment and Decree passed in Special Civil Suit No. 125 of 1988 on January 29, 2005.

(NITIN W. SAMBRE, J.)