

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.360 OF 2015
ALONG WITH
CIVIL APPLICATION NO.461 OF 2015

<i>Sarswati Denial Gaikawad @ Marium</i>	]	<i>[Deleted]</i>
<i>Bee Mohammed Umer Sheikh</i>	]	<i>[Since Deceased]</i>
Raju Denial Gaikawad @ Altaf	]	... Appellant-Applicant
V/s.		
Mohammed Ali Mohammed Umer	]	
Shaikh and Anr.	]	... Respondents

Mr. Kunal J. Rane for the Appellant-Applicant.

Mr. Dias for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 30TH OCTOBER, 2018.

P.C. :

1. Learned counsel for the Appellant-Applicant submits that, Appellant No.1 has expired. Appellant No.2 is his only legal heir and he may be permitted to carry out necessary amendment to that effect. Leave granted. Appellant to carry out necessary amendment today itself, during the course of the day.

2. Heard Mr. Rane, learned counsel for the Appellant-Applicant and Mr. Dias, learned counsel for the Respondents.

3. This Appeal takes an exception to the 'Judgment and Order' dated

25th August 2014 passed by the City Civil Court, Mumbai, thereby dismissing the Notice of Motion No.1767 of 2013 filed by the Appellant herein for setting aside the ex-parte 'Judgment and Decree' dated 5th December 2012 passed in S.C. Suit No.756 of 2012.

4. The Trial Court has dismissed this Notice of Motion only on the count that, once the written statement is filed by the Appellant in the said Suit and the issues are framed, then the application for setting aside the said 'ex-parte Decree', under Order 9 Rule 13 of the CPC, is not maintainable and, therefore, the Notice of Motion has to be dismissed.

5. While challenging this impugned order passed by the Trial Court, learned counsel for the Appellant has relied upon the Judgment of this Court in the case of *Videocon International Limited Vs. Video Links and Others, 2006 (10) LJSOFT 134*, wherein, exactly in the similar fact situation, it was held that,

“The decree passed in such Suit being under the provisions of Order 17 Rule 2, the remedy under Order 9 Rule 13 of CPC is available to the Defendants”.

6. In that case also, the Respondent had filed written statement and also the counter-claim; issues were framed; then Plaintiff had filed affidavit-in-evidence. As Defendants and their Advocate were absent, the Court has passed “No-Cross” order and posted the matter for arguments.

Defendants and their Advocate were absent even on the adjourned date and as a result, the ex-parte decree came to be passed. While setting aside such an ex-parte decree, this Court has, after relying on the Judgment of the Hon'ble Apex Court in the case of *B. Janakiramaih Vs. A.K. Parthasarathi*, AIR 2003 SC 3527, held that,

“Such application for setting aside ex-parte decree is referable to the provisions of Order 17 Rule 2 of CPC and, therefore, the remedy under Order 9 Rule 13 of CPC is not lost.”

7. In the present case also, the Appellant, who was Defendant before the Trial Court, has filed a written statement. Accordingly, the issues were framed. But, thereafter, at the time of hearing of the Suit, Appellant remained absent and hence, the evidence of Respondent-Plaintiff remained unchallenged on record. Therefore, the Trial Court has decreed the Suit ex-parte, which ex-parte decree is referable to the provisions of Order 17 Rule 2 of CPC and hence, the remedy under Order 9 Rule 13 of CPC being available to the Appellant, the Trial Court was not justified in rejecting the Notice of Motion simply on the said count.

8. The Appeal is, therefore, allowed. The impugned order passed by the Trial Court, rejecting the Notice of Motion only on the count that, remedy under Order 9 Rule 13 of CPC is not available to the Appellant, is set aside.

9. The Trial Court is directed to decide Notice of Motion No.1767 of 2013 afresh, on its own merits.

10. Both the parties are directed to appear before the Trial Court on 10th December 2018.

11. Appeal stands disposed off in the above terms.

12. In view of the disposal of the Appeal, Civil Application No.461 of 2015 pending therein, does not survive and the same stands disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]