

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

**APPEAL FROM ORDER NO. 1025 OF 2015
WITH
CIVIL APPLICATION NO. 1255 OF 2015**

Atmaram Vasudeo Sawant	...	Appellant
V/s.		
Central Bank of India & Ors.	...	Respondents

- Mr.Rajesh B. Parab for the Appellant.
- Ms.Sapana Rachure i/b. T.N. Tripathi & Co. for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 31st OCTOBER, 2018.

P.C. :

1] Heard learned counsel for the Appellant and learned counsel for Respondent No.1.

2] This Appeal takes an exception to the order dated 07/05/2015 passed by the City Civil Court, Mumbai, thereby dismissing Notice of Motion No.4747 of 2014 in Suit No. 7665 of 1985.

3] The said Notice of Motion was filed by the Appellant herein for setting aside the ex-parte 'judgment and decree' dated 20/09/2014 passed by the trial Court in Suit No.7665 of 1985.

4] The Appellant is the original Defendant No.3 in the said suit and the guarantor for the loan sanctioned by the Respondent-Bank in favour of Defendant No.1. According to him, though he has filed the written statement in the suit and has appeared through his Advocate, subsequently on account of the illness of his Advocate, his Advocate did not remain present in the Court and as a result, the ex-parte decree came to be passed. Therefore, he had filed this Notice of Motion before the trial Court seeking to set-aside the said decree. The trial Court has however referring to the 'Roznama' of the suit rejected the said Notice of Motion and hence, the instant Appeal.

5] Perusal of the Roznama of the trial Court goes to show that initially the said suit was filed in this Court and in that suit on 08/09/2008, learned Advocate for the Respondent-Bank has discharged himself from the suit. Thereafter, the suit came to be transferred to the City Civil Court, Mumbai, on account of enhancement of its jurisdiction. Then the issues were framed in the presence of the parties.

6] The Roznama of the trial Court dated 13/08/2013 goes to show that the Affidavit of Examination-in-Chief on behalf of the

Plaintiff was filed and the matter was kept for his cross-examination. However, the Plaintiff remained absent on 27/09/2013, though Defendant No.3 was very much present. In the absence of the Plaintiff, the matter could not be proceeded further. Therefore, it was adjourned till 19/11/2013. On 19/11/2013 also, as per the Rozanama, the Plaintiff was not present and hence, the trial Court has observed that the Plaintiff is not submitting himself for cross-examination. It is true that, on that day the Defendant was also not present, but as rightly held by the trial Court the suit could not be proceeded further, because of continuous absence of both the parties and hence, adjourned the matter to 17/04/2014. On that day also, none of the party remained present. The cross-examination of the Plaintiff could not took place, as the Plaintiff was also not present. Then the trial Court has adjourned the matter to 22/07/2014, on which date both the parties were absent and thereafter, pronounced the judgment on 11/09/2014.

7] Thus, the record and the proceedings of the trial Court of the suit is more than sufficient to show that it was the Plaintiff who had not remained present before the Court in order to submitting himself for cross-examination. The trial Court has however relied upon his evidence which was not subjected to cross-examination and decreed the suit.

8] In view thereof, there is sufficient ground made out by the Appellant-Defendant No.3 for setting aside the said judgment and decree. As the trial Court itself has observed in its impugned order that the default and mistake is on the part of the Advocate, then the Appellant should not have been penalized or punished for the same.

9] The trial Court has rejected the said Notice of Motion, also on the count that, once the written statement was filed, then the application for setting-aside the ex-parte decree under Order-9 Rule 13 of CPC cannot be maintainable. However, in the present case, as the suit is decreed under Order-17 Rule 2 of CPC, as held by the Hon'ble Supreme Court in the case of *Videocon International Ltd. Vs. Video Links and Others*, 2006(10) LJSOft 134, the decree passed in the suit being under the provisions of Order-17 Rule 2 of CPC, remedy under Order-9 Rule-13 of CPC is available.

10] In view thereof, the impugned order passed by the trial Court dismissing the Notice of Motion filed by the Appellant is set-aside. The said Notice of Motion is accordingly allowed and as a result, the judgment and decree passed by the trial Court against the present Appellant stands set-aside. The suit is restored to its original file as

against the Appellant only.

11] In view of disposal of the Appeal, the Civil Application does not survive, hence stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]