

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

918 SECOND APPEAL NO.180 OF 2018

Mahadev s/o Pandurang Gite,
Age 38 years, Occupation Business,
R/o Behind Asha Talkies, Right Hand,
Pingle Nagar, Beed Tq.Dist. Beed. **... Appellant.**

VERSUS

Vilas s/o Vithalrao Rathod,
Age 28 years, Occupation Business,
R/o Bashirganj, Beed Tq.Dist.Beed. **... Respondent.**

...
Advocate for Appellant : Mr. Thombre S.S.

Advocate for Respondent : Mr. T. M. Tandale
...

**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 16-04-2019.**

ORAL ORDER :

1. Present appeal has been filed by original defendant. Present respondent is the original plaintiff who had filed Regular Civil Suit No.275 of 2013 before 3rd Jt. Civil Judge, Junior Division, Beed for recovery of amount of Rs.3 lakhs.
2. Original plaintiff had come with a case that, he was taking education in Navgan College and defendant was the lecturer on hour basis. They got acquainted with each other and then developed family

relations. Plaintiff's brother is employed in police whereas plaintiff's father was government servant. His father expired on 19-05-2010 and then plaintiff as well as his mother has received the monitory benefits of death of his father from the Government. Defendant represented plaintiff that, he would be opening a school by name Arya New English School at village Dhondrai Tq. Georai Dist. Beed, and then he was in need of money to the extent of Rs.3 lakhs for the purpose of construction of the school. He gave promise that, he would return the amount in February 2012. Plaintiff believed in the say of the defendant and then extended the said amount on 26-09-2011. A receipt in respect of receipt of the amount executed by the defendant and it was promised in the said receipt that he would return the amount on 01-02-2012. On that day plaintiff made inquiry with defendant but then defendant prayed for extension of the period of repayment till June 2012. Accordingly the time was extended. Separate agreement was entered into on that day by for he repayment of amount by 01-06-2012, and then the earlier receipt was cancelled. Defendant had also given cheque drawn of Rajshri Shahu Bank as security for the repayment of the said amount. Thereafter, defendant lodged a false complaint with Superintendent of Police, Beed and in that respect the plaintiff was called to Shivaji

Nagar, Police Station, Beed. It was revealed to the plaintiff that, defendant is avoiding to repay the amount, therefore, he sent notice dated 08-02-2013 to the defendant and called upon him to repay the said amount. The said notice was not accepted by the defendant. Hence, suit was filed for repayment of the said amount together with interest @ 6 % per annum.

3. Defendant appeared in the matter, however failed to file written statement, and therefore, matter proceeded without written statement of the defendant. Plaintiff has led evidence and taking into consideration the evidence, documentary as well as oral, suit was decreed. Defendant was directed to pay amount of Rs.3 lakhs together with interest @ 6 % per annum from the date of suit till actual realization of the entire amount.

4. The defendant filed appeal bearing Regular Civil Appeal No.51 of 2014 before learned District Court -4, Beed. After hearing both sides, the appeal came to be dismissed on 03-11-2017, hence the defendant has filed the present second appeal.

5. Heard learned advocate appearing for the appellant. Taking into consideration the Judgment and decree passed by both the

Courts below, notice was issued. Respondent appeared through advocate, however today the learned advocate is absent.

6. The learned advocate appearing for the appellant submitted that, both the Courts below have not considered the facts properly. So also the learned first appellate Court did not consider the point of law that the appellant can file the first appeal and challenge the decree and it is not always necessary to file an application under Order IX Rule 13 of Code of Civil Procedure to get the exparte decree set aside. The appellant failed to file the written statement and contest the suit, therefore in fact an opportunity ought to have been made available to the appellant by remanding the matter for trial afresh.

7. Limited point is involved in this second appeal which has been filed under Section 100 of Code of Civil Procedure. Unless it is shown by the appellant that, there is substantial question of law involved in the case, the second appeal cannot be admitted. Therefore, it is required to be seen as to whether dismissal of the first appeal by the first appellate Court and rejection of the prayer for remand under Order XLI Rule 23-A of Code of Civil Procedure was justified or not. It is not in dispute that, the defendant was

duly served with the summons. He had appeared before the trial Court through advocate but thereafter failed to file the written statement, and thereafter the matter proceeded before the trial Court. If we perused the appeal memo before the first appellate Court, there is absolutely no reason given by the appellant as to what was the hurdle for him to appear before the trial Court and contest the matter. Order XLI Rule 23-A of Code of Civil Procedure requires that, in case the decree is reversed in appeal then only case can be remanded or a case should made out by the appellant to remand the case. Now on what point the first appellate Court could have reversed the decree passed by the learned trial Court was not argued as well as explained in appeal memo by the appellant. Even if it could have been brought before the first appellate Court that there was some reasonable and genuine reason for the defendant for not appearing and filing the written statement, and then not taking part in the further proceedings before the trial Court, then it could have been considered at the most. But when the appeal memo itself is silent, so also appeal memo before this Court silent on that point. A name excuses right to be contended that, there was a compromise before police authorities and then it was decided that the plaintiff will not proceed with the suit. The defendant does not contend that,

he had ever tried to place that compromise deed before the trial Court and then request for dismissal of the suit. In fact the appeal memo before the first appellate Court as well as before this Court is silent on that point as to when that compromise deed was executed. Therefore, when absolutely no reason was given by the appellant justifying his absence before the trial Court, there was no question of remand by the first appellate Court. Therefore, no substantial question of law has been pointed out requiring admission of the second appeal, hence the second appeal is disposed of as not admitted.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.