

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

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**APPEAL FROM ORDER No. 761 OF 2019
WITH
CIVIL APPLICATION No. 907 OF 2019
IN
APPEAL FROM ORDER No. 761 OF 2019**

Rishi Raj Tejuja and Anr.

**...Appellants/
Applicants**

Vs.

**Namrata Manoharlal Hinduja
and Ors.**

...Respondents

*** * * ***

**Mr. Kumar Dubey a/w. Mr. Anilkumar Pandey for
Appellants**

Mr. Vijay M. Vaghela for Respondent Nos. 1 and 2

Coram : Sandeep K. Shinde, J.

Dated: 29th APRIL, 2022.

P.C. :

1. This appeal from order preferred under Order 43 Rule 1(d) of the Code of Civil Procedure, assails the order dated 4th January, 2019 in Notice of Motion No. 1778/2016, in Execution Application No. 44/206 in Suit No. 4587/2009 passed by the Learned Judge, Bombay City Civil Court at Bombay.

2. Briefly stated facts of the case are as under; the Appellants, were Defendant Nos. 1 and 3 in Suit No. 4587/2009, instituted by

the Respondents in the High Court Bombay on 5th October, 2009. Defendant No.1 caused appearance, through Advocate – Himanshu Kode, on 10th October, 2011. Likewise, Defendant No.2 appeared on 7th March, 2010. Defendant No.3 did not cause appearance, although was served. On 11th March, 2010 and 12th July, 2010, Prothonotary and Senior Master, after perusing the service of writ of summons, passed order for suit to proceed without, "written statement", against all the Defendants. As such, the suit was categorized as 'undefended'. Whereafter, in view of Bombay City Civil Court (Amended) Act, 2012, the suit was transferred to the City Civil Court, Bombay as, 'undefended suit'. Indisputedly, after transfer of suit, the Defendants did not appear, when the it was called on for hearing. As a result, suit proceeded ex-parte, and on 8th August, 2014, a decree was passed against the Defendants in the sum of Rs.28,16,141/-. Afterwhich Plaintiffs- decreeholders instituted the execution proceedings, vide Execution Application No. 44/2016. On 1st April, 2016, Bailiff served, a warrant of attachment on Mr. Lal Metharam Gulabali. Thereafter, Defendants, moved an application being Notice of Motion No. 1658/206 before executing court, seeking multiple reliefs including, that, the ex-parte decree dated 8th

August, 2014 passed in the Suit No. 4587/2009, be set-aside. The Learned executing court, rejected the Notice of Motion No. 1778/2016 by order dated 4th January, 2019. That order is challenged in this Appeal from Order, under Order 43, Rule 1(d) of the Civil Procedure Code.

3. Heard learned counsel for the parties.

4. At the outset, learned counsel for the Respondents would urge that the appeal from order, against the order dated 4th January, 2019 was not maintainable, reason being, the judgment passed by the Trial Court was one under Order VIII, Rule 10 of the CPC. He would submit that the decree passed under Order VIII, Rule 10 of the CPC is appealable under Section 93 of the Code and not Order 43 of the CPC. Learned counsel would make distinction, between the order passed under Order VIII, Rule 10 and Order IX, Rule 13 of the CPC. In support of this contention, he relied on the judgment of this Court in the case of **Rashtriya Chemicals and Fertilizers Ltd. Vs. OTA Kandla Pvt. Ltd. [1992(2) Mh. L.J. page 1266]**. In the said judgment, the Learned Judge of this Court has held:- “Where the Defendant is served and represented, by his counsel, but fails to file his written statement despite opportunity given to him the decree passed

against him would be one under the provisions of Order VIII, Rule 10 of the Civil Procedure Code. Hence, when a decree is passed under Order VIII, Rule 10, Civil Procedure Code, an application under Order IX, Rule 13 for setting aside such a decree is not maintainable.” Whereas, disputing the proposition of appellants, as to maintainability of appeal, learned counsel appearing for the Appellants would contend that even where a suit is decreed ex-parte under Order VIII, Rule 10 for not filing written statement an application to set-aside the decree under Order IX, Rule 13 is maintainable even though there is right of appeal against the decree. He would submit remedy of appeal and remedy under Order IX, Rule 13 are mutually exclusive. In support of this contention, Learned counsel relied on judgment of the Kerala High Court, in the case of **A.K.P. Haridas vs. V.A. Madhavi Amma and Ors.**; AIR 1988 Ker 304.

5. Question, as to whether, ex-parte decree passed under Order VIII, Rule 10 could be set aside, by taking recourse to Order IX, Rule 13 of the CPC, is really not required to be gone into, because herein ex-parte decree was passed, for 'non appearance' of the defendants, when suit was called on, and thus

application under Order IX, Rule 13 of the CPC was maintainable. Question, is, whether Appellants-Defendants were prevented by sufficient cause from appearing when suit was called on for hearing.

6. In any case, Defendant Nos.1 and 2 were duly served with writ of summons and thereafter the suit was categorized as "undefended suit" in March, 2010 for want of written statement. Since then, the Defendants did not care to cause the order of no written statement set-aside. As such, suit remained undefended through out. Indisputedly, after suit was transferred to City Civil Court at Bombay, Defendants did not appear when it was called on for the hearing. Therefore, it was proceeded ex-parte and culminated into ex-parte decree. An application moved by the Defendants under Order IX, Rule 13 for setting- aside the ex-parte decree, although was running into, twenty-three paragraphs, yet, it does not reveal good and sufficient cause for non-appearance. In fact, application does set-out their, 'defence' in detail. Therefore, Defendants did not justify their, default of appearance, when the suit was called on. Apart from that, Defendants moved the application in executing proceeding and

not in the suit. For all that reasons, in my view, the impugned order calls for no interference. Appeal is dismissed.

(Sandeep K. Shinde, J.)