

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NOS.1667, 1669, 1836, 1837, 1838, 1839, 1840,
1841, 1842, 1860, 2396 OF 2022

WRIT PETITION NOS. 1667 OF 2022

Jyoti w/o Mahesh Agrawal, Aged about
 – 58 years, Occ. : Agriculturist, R/o.
 Zansi Rani Square, Chappanwadi, Tehsil
 and District Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
 (Construction) Central Railway
 Ajani, Nagpur, Tq.& District Nagpur.
2. The State of Maharashtra, Through
 Hon'ble Collector, Yavatmal,
 Tq. & District – Yavatmal.
3. The Special Land Acquisition Officer,
 Road Project, Yavatmal, District
 Yavatmal.

... RESPONDENTS

WITH

WRIT PETITION NOS. 1669 OF 2022

Jyoti w/o Mahesh Agrawal, Aged about
 – 58 years, Occ. : Agriculturist, R/o.
 Zansi Rani Square, Chappanwadi, Tehsil
 and District Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
2. The State of Maharashtra, Through
Hon'ble Collector, Yavatmal,
Tq.&District – Yavatmal.
3. The Special Land Acquisition Officer,
Road Project, Yavatmal, District
Yavatmal.

... RESPONDENTS

WITH**WRIT PETITION NOS. 1836 OF 2022**

Chandraprabha Pandurang Musale,
Aged Major; Occupation : Agriculturist,
R/o Wadgaon, Tq. & Dist. Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal District
4. The Land Acquisition, Resettlement
and Rehabilitation Authority, Nagpur.

... RESPONDENTS

WITH

WRIT PETITION NOS. 1837 OF 2022

Archana Prashant Yende, Aged Major,
Occ. : House Wife, R/o. Yavatmal, Tq. &
Dist. Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal, District
4. The Land Acquisition, Resettlement
and Rehabilitation Authority, Nagpur.

... RESPONDENTS

WITH

WRIT PETITION NOS. 1838 OF 2022

Abhijit s/o Chandrakant Bhumare, Aged
Major, R/o Wadgaon, Tq. & Dist.
Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal District
4. The Land Acquisition, Resettlement
and Rehabilitation Authority, Nagpur.

... RESPONDENTS

WITH

WRIT PETITION NOS. 1839 OF 2022

Chandraprabha Pandurang Musale,
Aged Major, Occu. Housewife, R/o
Wadgaon, Tq. & Dist. Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal District
4. The Land Acquisition, Resettlement
and Rehabilitation Authority, Nagpur.

... RESPONDENTS

WITH

WRIT PETITION NOS. 1840 OF 2022

1. Hemant Chandrakant Bhumare, Aged
Major, Occupation : Agriculturist
2. Sangita w/o Hemant Bhumare, Aged
Major, Both R/o Wadgaon, Tq. & Dist.
Yavatmal.

... PETITIONERS

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal District
4. The Land Acquisition, Resettlement
and Rehabilitation Authority, Nagpur

... RESPONDENTS

WITH

WRIT PETITION NOS. 1841 OF 2022

Hemant Chandrakant Bhumare, Aged
Major, Occupation : Agriculturist, R/o
Wadgaon, Tq. & Dist. Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal District
4. The Land Acquisition, Resettlement
and Rehabilitation Authority, Nagpur

... RESPONDENTS

WITH**WRIT PETITION NOS. 1842 OF 2022**

Sangita w/o Hemant Bhumare, Aged
Major, R/o Wadgaon, Tq. & Dist.
Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal District

4. The Land Acquisition, Resettlement and Rehabilitation Authority, Nagpur

... RESPONDENTS

WITH

WRIT PETITION NOS. 1860 OF 2022

Pradip s/o Gurudasmal Lakhani, Aged about – 59 years, Occ. : Agriculturist and business, R/o. Shivaji Nagar, Yavatmal, Ta.& District Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
2. The State of Maharashtra, Through
Hon'ble Collector, Yavatmal,
Tq.&District – Yavatmal.
3. The Special Land Acquisition Officer,
Road Project, Yavatmal, District
Yavatmal.

... RESPONDENTS

WITH

WRIT PETITION NOS. 2396 OF 2022

Trambakrao Sadashiv Kadu, Aged Major,
Occupation : _____, R/o Wadgaon, Tq.
& Dist. Yavatmal.

... PETITIONER

VERSUS

1. Deputy Chief Engineer
(Construction) Central Railway
Ajani, Nagpur, Tq.& District Nagpur.
(At Wardha District Wardha)
2. The State of Maharashtra, Through
Collector, Yavatmal,
3. The Special Land Acquisition Officer,
Road Project, Yavatmal District
4. The Land Acquisition, Resettlement
and Rehabilitation Authority, Nagpur

... RESPONDENTSWrit Petition Nos.1667 and 1669 of 2022

Smt. P.V. Ganediwala, Advocate with Shri P.R. Agrawal, Advocate for the petitioner.

Shri N.S. Deshpande, Deputy Solicitor General of India for respondent no. 1.

Smt. T. Khan, Assistant Government Pleader for respondent nos.2 and 3.

Writ Petition Nos.1836, 1837, 1838, 1839, 1840, 1841, 1842, 2396 of 2022.

Shri A.B. Patil, Advocate with Shri A.B. Nakshane, Advocate for the petitioners.

Shri N.S. Deshpande, Deputy Solicitor General of India for respondent no. 1.

Smt. T. Khan, Assistant Government Pleader for respondent nos.2 to 4.

Writ Petition No.1860 of 2022.

Shri S.V. Manohar, Senior Advocate with Shri A.A. Naik, Advocate for the petitioner.

Shri N.S. Deshpande, Deputy Solicitor General of India for
respondent no. 1.

Smt. T.H. Khan, Assistant Government Pleader for respondent nos. 2
and 3.

CORAM : VINAY JOSHI, J.
CLOSED FOR JUDGMENT ON : 28.11.2022.
JUDGMENT PRONOUNCED ON : 19.12.2022.

JUDGMENT :

RULE. Rule is made returnable forthwith.

2. Heard finally by consent learned Counsel appearing for the parties.

3. This batch of petition raises a common question for consideration about the legality and validity of the impugned orders passed under Order IX Rule 13 of the Code of Civil Procedure (the Code) thereby treating orders to be *ex-parte*. For the sake of convenience all petitions are taken together for disposal.

4. Petitioners are the owner of different pieces of agricultural land which was proposed to be acquired for the Wardha to Nanded Rail Project. The acquisition proceeding has commenced by publication of preliminary notification under Section 11 of the Right to Fair

Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('the Act of 2013'). It was followed by publication of declaration and notices to interested persons, in terms of Section 19 and 21 of the Act of 2013. After holding necessary inquiry respondent no. 3 has passed different Awards in terms of Section 23 of the Act of 2013 determining compensation. Being aggrieved and dissatisfied by the quantum of compensation, the claimants (land owners) made a Reference in terms of Section 64 of the Act of 2013 to the Land Acquisition Rehabilitation and Resettlement Authority (First Authority) established under Section 51 of the Act of 2013. In response to the notices, respondent no. 1-Deputy Chief Engineer (Construction), Central Railway (acquiring body) put its appearance and contested the claims by filing written statement. The claimants have filed their evidence on affidavit. Likewise, respondent no.1(Acquiring Body) also filed evidence on affidavit in support of resistance. The First Authority has enhanced the rate of compensation vide different reference orders.

5. The respondent no.1-Acquiring Body has filed applications under Order IX Rule 13, read with Section 151 of the Code for setting aside reference orders stating reference orders to be *ex-parte*. The same Authority (for removal of confusion referred as Second Authority)

has set aside the orders by holding that there was no cross-examination to the claimants' evidence as well as evidence of the Acquiring Body was not considered by the First Authority. In short, it has been held that, the First Authority has not decided the claims on merit. Therefore, by setting aside reference orders, restored the proceedings filed under Section 64 of the Act of 2013 for fresh adjudication. Those similar orders are subject matter of challenge.

6. Facts of all petition are similar with minor deviation. At the inception, it is advantageous to note the admitted fact of the cases which is rather a matter of record. In all petition, initially, Land Acquisition Officer has determined the compensation against which Reference was made under Section 64 of the Act of 2013. It is not in dispute that in all proceedings, the Acquiring Body was served who in turn put their appearance through Advocate Sawarkar (same advocate in all proceedings) and filed written statements. It is also not in dispute that the Acquiring Body has also filed evidence on affidavit in all proceedings.

7. For the sake of convenience details of all petition have been stated in tabular form as below :

Writ Petition No. with name	Appearance of Railway in Reference u/s 64 of the Act.	Date of Written Statement by Railway	Date of Evidence by Claimants	Date of Evidence by Railway	Date of Arguments	Date of Judgment
1667/2022 Jyoti Agrawal	30.10.2019	03.09.2020	28.10.2020	23.12.2020	09.02.2021	23.02.2021
1669/2022 Jyoti Agrawal	30.10.2019	03.09.2020	28.10.2020	23.12.2020	09.02.2021	23.02.2021
1860/2022 Pradip Lakhani	30.11.2019	28.10.2020	28.10.2020	27.01.2021	09.02.2021	23.02.2021
1836/2022 Chandrababha Musale	04.11.2019	09.10.2020	09.11.2020	08.02.2021	02.03.2021	19.03.2021
1837/2022 Archana Yende	04.11.2019	09.10.2020	09.11.2020	08.02.2021	02.03.2021	19.03.2021
1838/2022 Abhijeet Bhumare	04.11.2019	09.10.2020	09.11.2020	08.02.2021	02.03.2021	19.03.2021
1839/2022 Chandrababha Musale	04.11.2019	09.10.2020	09.11.2020	08.02.2021	02.03.2021	19.03.2021
1840/2022 Hemant Bhumare	04.11.2019	09.10.2020	09.12.2020	08.02.2021	02.03.2021	19.03.2021
1841/2022 Hemant Bhumare	04.11.2019	09.10.2020	09.12.2020	08.02.2021	02.03.2021	19.03.2021
1842/2022 Sangita Bhumare	04.11.2019	09.10.2020	09.12.2020	08.02.2021	02.03.2021	19.03.2021
2396/2022 Trimbakrao Kadu	04.11.2019	09.10.2020	09.11.2020	08.02.2021	02.03.2021	19.03.2021

8. Since all matters are identical, for the sake of convenience I took up the facts of Writ Petition No.1667 of 2022 pertaining to

claimant (land owner) Jyoti Mahesh Agrawal, whose land ad-measuring 2H 42R has been acquired for Wardha to Nanded Rail Project. Award has been passed on 10.07.2017 in terms of Section 23 of the Act of 2013 determining compensation. Being aggrieved by the said Award the claimant made a Reference under Section 64 of the Act of 2013 for enhancement of the compensation. In response to the notices, the Deputy Chief Engineer (works), Railway has appeared through Advocate Sawarkar on 30.10.2019 and filed Written Statement (page 71) on 03.09.2020. Claimant Jyoti Agrawal led evidence on affidavit (page 80) on 28.10.2020. It was accompanied with several documents supporting the claim for enhancement. In said Reference, evidence affidavit has been filed on behalf of Railway on 23.12.2020 (page 93). The authority has decided the claim on 23.02.2021 (page 107) by enhancing the rate of compensation.

9. Since the controversy revolves around the question whether the Reference order can be treated as an *ex-parte*, it necessitates to go through the Roznama of the proceeding bearing case No.631/AMT/YVT/2019. With the assistance of both side, the entire Roznama has been carefully examined. The writ petitioners (claimants) are seriously disputing that the Reference order is an *ex-parte*, whilst Acquiring Body claims it to be *ex-parte* amenable to set aside in terms

of Order IX Rule 13 of the Code.

10. The Roznama (page 191) indicates that Advocate Sawarkar for respondent/railway filed his appearance on 30.10.2019. It was followed by filing of Written Statement by advocate Sawarkar for Railway on 03.09.2020. The Roznama indicates that on 28.10.2020 claimant has filed evidence affidavit along with documents. Advocate Sawarkar for Railway has received the copy of evidence affidavit and the matter was posted for verification and cross-examination on 13.11.2020. On that day, the claimant has filed evidence close Pursis on which the matter was adjourned for cross-examination to 20.11.2020. On 20.11.2020 respondent nos. 1 and 2 were absent but the matter was adjourned to 04.12.2020 at the request of respondent - Railway for evidence.

11. On 23.12.2020, advocate Sawarkar for Railway has filed evidence affidavit on which the matter has been adjourned to 15.01.2021 for final arguments. On that day claimant filed application calling other side to admit documents, and claimants verification was recorded. On adjourned date i.e. on 27.01.2021, advocate Sawarkar was absent, hence it was again adjourned for arguments to 09.02.2021. The Roznama dated 09.02.2021 discloses that in presence of advocate

Sawarkar (for the Railway) the arguments were advanced by the claimant's learned Counsel and the matter was posted for judgment to 23.02.2021. On the adjourned date, in presence of both advocates, the order was passed enhancing the rate of compensation. Since the dates of appearance and stages assumes significance, it has been extracted from the Roznama.

12. The said Reference order has been set aside by the Second Authority under Order IX Rule 13 of the Code treating it to be *ex-parte* vide order dated 07.03.2022. The petitioner/ claimant has challenged the said order dated 07.03.2022 passed under Order IX Rule 13 of the Code. It is the petitioner's contention that the order was purely passed on merits therefore, provisions of Order IX Rule 13 of the Code would not apply. It is submitted that the respondent /acquiring body has put its appearance in the proceeding through Advocate Sawarkar, written statement was filed and evidence affidavit was also filed. According to the petitioner, the Authority has also heard the submissions of both sides and after considering the entire material passed the order, which cannot be termed as an *ex-parte*.

13. As against this, learned Deputy Solicitor General of India (D.S.G.I.) by supporting the impugned order would submit that

Advocate Sawarkar was absent on the date of hearing and therefore, order assumes a character of *ex-parte* hence the provisions of Order IX Rule 13 of the Code would apply. Moreover, he would submit that in terms of Section 60(3) of the Act of 2013, the Authority is not bound by the Code but can regulate its own procedure while dealing with the matter. It is also submitted that the Authority is under obligation to follow the principles of natural justice as well as it has power to review its own decision.

14. So far as the last contention about power to review is concerned, there can be no dispute that Section 60(1)(f) of the Act of 2013, confers a power of review to the Authority. However, the said submission is wholly untenable because, the respondent has specifically approached to the Second Authority under Order IX Rule 13 of the Code stating the order to be *ex-parte*. There is vast difference in between the powers to set aside *ex-parte* order and the power of review. Both provision works in different area. Firstly, the respondent had not applied to the Second Authority seeking review of its own order by invoking the provisions of Section 114 read with Order XLVII of the Code. The Misc. Civil Application 118 of 2021 filed by the respondent (railway) is purely under order IX Rule 13 read with Section 151 of the Code. Apart from the provision quoted in the

application, there is no whisper in the entire application to infer that the respondent was seeking review of the Reference order dated 23.02.2021. The grounds for review and grounds for setting aside *ex-parte* order are quite distinct having no nexus with each other. Application under Order IX Rule 13 of the Code is guided by the grounds contained therein. In two exigencies the *ex-parte* order can be set aside i.e. if the summons was not duly served, or the party was prevented by any sufficient cause from appearing on the date of hearing. Whilst in case of review, it would be tenable if there is discovery of new material or there has been error apparent on the face of the record. Undoubtedly, the respondent is not coming with a case of discovery of new and important material or stating that there is error apparent on the face of the record. Needless to say that, the error apparent would be an error, which would strike at the face of the record which does not require elaborate arguments. Moreover, learned D.S.G.I. has not adhered to his submission that the respondent is claiming to upset the Reference order under the powers of review.

15. It necessitates to see whether the Reference order can be treated as an *ex-parte* to invoke the provisions of Order IX Rule 13 of the Code. It has been argued by the respondent that since Advocate Sawarkar was absent, the Reference order is *ex-parte* and thus, the

provisions of Order IX Rule 13 of the Code would apply. The principal question falls for consideration is whether the Reference order can be treated as an *ex-parte*. There was no quarrel in between the parties that summons was duly served on the respondent. The respondent is precisely laying hands on the second limb that he was prevented by sufficient cause from appearing therefore, the impugned order assumes the character of *ex-parte* order.

16. Learned D.S.G.I. would submit that even if the respondent files a written statement, but remains absent, a decree can be treated as an *ex-parte*. In this regard, he relied on the decision of this Court in case of ***R.P Bros vs. Fakhruddin Siraj Topiwala 2017(6)Mh.L.J. 845***. In said case, the defendant appeared and filed his written statement. The matter was sent for mediation where the plaintiff agreed to withdraw the suit. In these circumstances, the defendant did not appear assuming that the matter was settled, however the plaintiff filed evidence affidavit and due to non-appearance of the defendant, no-cross order was passed. In absence of defendant, the plaintiff has argued the matter and ultimately the judgment was passed. In said situation, this Court was called upon to answer whether the application of the defendant under Order IX Rule 13 of the Code is maintainable. In said case the defendant has filed written statement, however did not appear

before the Court on the date of hearing or on adjourned dates. The defendant also did not led evidence which was followed by hearing the arguments of the plaintiff in absence of the defendant, followed by judgment. In said situation, it has been observed that though the defendant has filed his written statement, however he remained absent throughout, therefore, the decree passed in his absence has to be termed as '*ex-parte*' exposing itself under Order IX Rule 13 of the Code.

17. The facts of the case in hand are quite distinct. This is not a case where after filing of written statement, the defendant (respondent) disappeared, but he was throughout present till the final arguments advanced by the petitioner (claimants). Rather it reveals from the record that the arguments of both sides have been heard by the First Authority. Therefore, being different facts, the above decision would not assist to the respondent in any manner.

18. Learned D.S.G.I. for the respondent relied on the decision of the Supreme Court in case of ***G. Ratna Raj (dead) by Legal representatives vs. Sri Muthukumarasamy Permanent Fund Limited and anr. (2019) 11 SCC 301*** to contend that, if the defendant was absent after filing of written statement and the decree is passed, it can be termed as an *ex-parte* decree. In fact, the said decision relates to the

applicability of explanation added to order XVII Rule 2 of the Code. In said case the plaintiff's evidence was recorded and case was closed. When the case was fixed for recording of the defendant's evidence, the defendant remained absent. The defendant did not led evidence. In that context it has been ruled that, since the defendant was absent and did not led evidence, the Court could only proceed under Order XVII Rule 3(b) read with Order XVII Rule 2 of the Code. In that situation it is observed that explanation to Order XVII Rule 2 of the Code is not applicable since there is no evidence on behalf of absentee party.

19. Learned D.S.G.I. further relied on the decision of the Supreme Court in case of *International Woollen Mills vs. Standard Wool (U.K) Ltd. (2001) 5 SCC 265* to impress that what amounts to judgment 'on merits'. The said decision is not applicable since it relates to the executability of foreign decree. In given facts it has been held that the decree was not on merits and could not be enforced in India. Being distinct facts, the said decision would not render any assistance to resolve the controversy.

20. Besides that the learned D.S.G.I. relied on the decision of this Court in case of *Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra and ors 2013(4) Mh.L.J. 561* to contend about the

importance of cross-examination and also to state that affidavit cannot be treated as an evidence. He was not clear on the second submission because amended provisions of Order XVIII Rule 4 of the Code, permits to lead evidence on affidavit. So far as the first contention regarding importance of cross-examination, there can be no dispute, however the party has to exercise their right to that extent.

21. For the applicability of explanation to Rule 2 of Order XVI of the Code, the Court has to satisfy itself that, a substantial portion of the evidence of any party has been already recorded, such a party has failed to appear on any day, and on the adjourned date of hearing. In fact, this explanation is in the nature of an exception to the general power given under the Rule conferring discretion on the Court to act under special circumstances permitting Court to adopt the modes provided in Order IX of the Code if on facts, the substantial portion of the evidence is led by the party and then remained absent, the Court has discretion to deem its presence and proceed further. Thus, the applicability of explanation depends upon the facts of the case. In other words, if evidence of absentee party i.e. defendant is available, it is open for the Court to proceed as a regular suit instead of taking recourse of Order IX of the Code. However, the case in hand is more worse as one is even not required to take recourse of explanation to

Order XVII Rule 2 of the Code, since the defendant was throughout present till the date of judgment barring isolated occasion. Therefore, it is clear that if on the fixed date one of the party remained absent and for that party's no evidence has been led, only then the Court has no option but to proceed and dispose of the matter in accordance with Order XVII Rule 2 of the Code in any one of the mode prescribed under Order IX of the Code. The mandate of resorting the provisions of Order IX of the Code would apply only if the party is absent on the date of hearing.

22. In the light of said position, one needs to revert to the facts of the case to find out whether the decree can be termed as an *ex-parte*. Perusal of the Reference order (631/AMT/YVT/2019) indicates the appearance of Advocate Sawarkar on behalf of Acquiring Body. The order bears a reference that Acquiring Body has filed written statement at Exhibit 7. Moreover, the First Authority has referred the contents of written statement in the order. Though there is reference in the order that respondent has not led evidence, however the respondent's evidence affidavit was very much on record. More particularly, there is a reference (page 110) that the Authority has heard argument of both sides and upon considering the facts, proceeded in passing the Reference order.

23. Contextually, Roznama of the case needs reference. It indicates that Advocate Sawarkar has filed written statement, received the copies of claimant's evidence as well as filed his evidence affidavit on 23.12.2020. Not only that, on the date of argument advanced by claimant (i.e. on 09.02.2021) respondents Counsel Sawarkar was very much present. On that day, the matter was specifically adjourned to 23.02.2021 for judgment. Moreso, in presence of Advocate Sawarkar, judgment was delivered. Close examination of Roznama discloses that respondent's Advocate Sawarkar was throughout present till the matter was adjourned to 27.01.2021 for final arguments. Only on that day, Advocate Sawarkar was absent, however it is not the case that on that day the First Authority has heard the arguments of claimant and delivered the judgment in absence of respondent's Advocate Sawarkar.

24. The record indicates that on 27.01.2021 though the matter was fixed for final arguments, however due to absence of respondent's Advocate Sawarkar, it was simply adjourned for arguments to 09.02.2021. On said date in presence of Advocate Sawarkar, claimant's learned Advocate has advanced arguments and the matter was placed after two weeks i.e. on 23.02.2021 for judgment. Not only that, on the date of judgment also Advocate Sawarkar was very much present. Pertinent to note that Reference order bears reference that arguments

of both side were heard. In the scenario, how it can be said that the judgment was delivered in absence of respondents to treat it *ex-parte*.

25. It is not the case of the respondent that they were either prevented by the First Authority to cross-examine the claimant, or precluded from advancing final arguments. Rather all steps were in presence of respondent's Advocate Sawarkar. If the respondent chooses not to cross-examine the plaintiff's witnesses one cannot compel him to do so. The respondent may choose not to advance arguments if he desirous so. Herein, the respondent though led evidence still opted for not to cross-examine the claimant. The respondent never says that in his absence the final arguments were advanced and judgment was delivered.

26. The respondent appears to have capitalized the isolated absence of Advocate Sawarkar only on a single day i.e. on 27.01.2022. The entire thrust is on the absence of Advocate Sawarkar on the said particular date. The respondent would have some space to claim the decree to be *ex-parte*, if on 27.01.2021 itself in his absence, the matter was disposed of. However, as noted above, on 27.01.2021, since the respondent's Advocate was absent, the First Authority has simply adjourned the matter meaning thereby it was inconsequential date.

Rather the First Authority did nothing in absence of respondent's Advocate but once again placed the matter for final arguments on 09.02.2021. Pertinent to note that, in presence of Advocate Sawarkar, learned Advocate for the claimant has advanced arguments. I may reiterate that judgment bears a reference that final argument of both side were heard. Even if it is assumed that respondents argument were not heard, but it is not their case that the First Authority has declined them from making submission. There is possibility of making common submission by Advocate Sawarkar since all the matters are identical and running parallel. In such a scenario, if the respondent chooses to not to cross-examine the claimant to his detriment, he cannot take advantage thereof.

27. It is not the respondent's case that Roznama was incorrect, but concededly on the date of argument, he was present as well as on the date of judgment too. Pertinent to note that on 09.02.2021 in presence of Advocate Sawarkar, learned Advocate of the Claimants has advanced arguments, however the matter was not decided forthwith. Particularly, it has been adjourned after two weeks for order/judgment. Therefore, if Advocate Sawarkar has any grievance that he was not heard, he could have approached to the First Authority, having sufficient time. However, neither he requested the First Authority for

adjourning the case for his arguments nor it is a case of the respondent that the First Authority has precluded him from making submissions. In any eventuality, the respondent cannot take disadvantage of his complete inaction by saying that the matter proceeded *ex-parte*. Rather respondent's absence on insignificant date (27.01.2021) is tried to be projected, which has no meaning at all. It is evident that respondents' Advocate Sawarkar has very much participated in the proceedings, but chooses to remain ideal. He was present on the date of final arguments and therefore, in any eventuality it can not be said that he was prevented from appearing on the date of hearing to treat the order *ex-parte*.

28. It has been primely argued that the First Authority has not given proper opportunity to the respondent. While setting aside the reference order the Second Authority repeatedly quoted that there was no cross-examination and the opportunity was denied to the respondent. However, the close examination of entire record speaks otherwise. Careful examination indicates that in Writ Petition Nos.1667/2022, 1669/2022 and 1860/2022 the First Authority has specifically mentioned in reference order that arguments of both side were heard. Likewise, Roznama dated 02.03.2021 of remaining petitions discloses that First Authority has specifically mentioned that

arguments of both side were heard. Thus the record indicates that the First Authority has heard final submissions of the respondent and therefore the contention in that regard, is untenable. Notably, it is not a case of the respondent that either the First Authority has wrongly quoted in reference order or Roznama about the arguments advanced by the respondents. Therefore, certainly it cannot be said that no opportunity was given to the respondent by the First Authority while passing reference orders.

29. Looking the matter from another angle, the order bears a reference of written statement as well as contentions raised therein. The First Authority has considered those contentions while passing the order. In the situation, it would not lie in the mouth of the respondent that the First Authority has not given fair opportunity. Perusal of impugned order passed under Order IX Rule 13 of the Code indicates that (page 172) the Second Authority was conscious that the matter was contested by filing written statement as well as respondent's Advocate Sawarkar has advanced arguments. The Second Authority also took a note that the respondent (Acquiring Body) has filed evidence affidavit of one Mr. Siddharth Gupta – Deputy Chief Engineer (Constructions). However, the Second Authority has observed (para 12, page 173) that though the evidence affidavit was filed by both sides,

there is no cross-examination. The said observation does not convey as to what the Second Authority wanted to say. The Authority or Court cannot compel the party to cross-examine the rival. One may very well choose to abstain from cross-examining the rival, but in that case he can not claim that the order is *ex-parte*. If such view is adopted then one may not cross examine and after judgment seeks to set aside the order by stating it to be *ex-parte*. The provision of Order IX Rule 13 of the Code is meant to remedied the situation where matter proceeded in absence of defendant for his no fault. It would not apply to the cases where defendant remains present but voluntarily forsake to participate.

30. The Second Authority while setting aside the order has observed (para 18 page 175) that, the claimant has not demonstrated or pointed out that the case was decided on merits. As a matter of fact, the respondent was coming with an application under Order IX Rule 13 of the Code in the capacity of applicant. It is for the respondent/applicant to establish that the order was *ex-parte* so as to uphold the applicability of Order IX Rule 13 of the Code. However, the Second Authority has put reverse burden on the claimants to establish that the case was decided on merit. Thus, the very approach of the Second Authority of casting a reverse burden on the claimant, is wholly erroneous.

31. The Second Authority stated that the Advocate for the Acquiring body has filed documents to show that he was tested positive (COVID-19) in the Month of January 2021, therefore, unable to appear. I have already detailed above that, only on 27.01.2021 respondents Advocate was absent, which was insignificant date of the proceeding. Pertinent to note that the Second Authority has not commented as to on which date respondents Advocate was absent, and about the consequence of his absence. Rather the Second Authority has neglected the important aspect of the matter that on 09.02.2021 the final arguments were heard in presence of respondent's Advocate. Therefore, isolated absence on insignificant date would not empower the respondent to claim the applicability of Order IX Rule 13 of the Code stating the order to be *ex-parte*. If, such view is adopted then most of the suits have to be treated *ex-parte*, because in each case, on some or other date, the defendant remains absent. One has to see as to what was the consequence of defendant's absence on particular date. The provisions of Order XVII Rules 2 and 3 of the Code would apply if the party remains absent on the date of hearing and not on insignificant date. As a matter of fact, in case at hand on the date of hearing, the respondent's Counsel was very much present, therefore in any eventuality the impugned order cannot be treated to be *ex-parte*.

32. The application under Order IX Rule 13 of the Code can be made only in a cases where the *ex-parte* order has been passed against the defendant. The grounds available for defendant are only two, i.e (i) the summons was not duly served and (ii) he was prevented by sufficient cause from appearing when the suit was called for hearing. The second ground cannot be stretched to the extent of encompassing any isolated intermittent absence of defendant that too on a date on which the matter was simply adjourned. When the defendant appears, files written statement, chooses not to cross-examine (claimant), files his own evidence affidavit, choose not to advance arguments though present, it cannot be said that the Court proceeded in deciding the matter *ex-parte*.

33. The Reference order was passed by the First Authority under Section 64 of the Act of 2013. Section 60 of the Act of 2013 specifies the powers of the Authority and a procedure to be followed while passing the Reference order. Though in terms of Section 60(3) of the Act of 2013, the Authority is not bound by the procedure laid down in the Code however it does not mean that the Authority can follow a course which is too novel to be logical or palatable. The Authority is invested with a power to regulate its own procedure, however, it does not mean that one can devise a procedure so as to take benefit of his

own wrong. The enabling provisions are to be used in the aid to advance cause of justice, to remove procedural difficulties but not beyond that. It is to be remembered that the provisions of the Act of 2013 are in addition to existing laws and not in derogation thereof. It also conveys that to remedied the technical difficulties, the powers have been invested to the Authority to lay down its own procedure and not for any other reason.

34. The Second Authority has expressed that it shall be guided by the principles of natural justice in terms of Section 60(3) of the Act of 2013 while exercising jurisdiction under Section 64 of the Act of 2013. There can be no dispute about the said proposition, however, the respondent is unable to demonstrate as to how the First Authority has acted in defiance with the Rules of natural justice. Undoubtedly, one must get a right of hearing but one cannot be compelled to exercise said right. The entire proceeding shows that on each and every stage, the respondent was present before the First Authority, partook in the proceeding and voluntarily abstained from cross-examining the rival. In civil cases one cannot be compelled to do those things. Obviously, if the respondent himself chooses not to exercise his valuable right of cross-examination and advance arguments, then it is not open for him to say that the Authority has not followed the Rules of natural justice.

35. The term '*ex-parte*' means in absence of party. Order IX of the Code provides consequences of non-appearance of the party. Particularly, Rule 6 to Order IX prescribes a procedure in the contingency when only plaintiff appears. In case when summons was duly served but the defendant does not appear then the Court may make an order that the suit be heard *ex-parte* in terms of Sub-clause (a) of Clause (1) to Rule 6 of Order IX of the Code. Basically, when defendant fails to appear and consequently no evidence could be recorded on his behalf and defendant's case is closed, then the Court is bound to proceed under Rule 2 of Order XVII of the Code. The basic requirement is the absence of defendant when the suit was called on for hearing resulting into deciding case without defendant's presence.

36. The provisions of Order IX Rule 13 of the Code have been introduced to remedied the situation where the defendant is absent meaning thereby the cause was decided in his absence. It is for the reason that, there is no contest due to absence of defendant at the time of hearing. Even if written statement is filed but the defendant remains absent throughout till adjudication then certainly the decision can be termed as an '*ex-parte*', however a casual absence of defendant on any intermediate date would not suffice to treat the decision *ex-parte*. The defendant cannot take disadvantage of his isolated absence on

insignificant date to state that the order was *ex-parte*. In order to assume the character of *ex-parte*, there must be absence of defendant at the time of hearing, meaning thereby in his absence the Court has proceeded in passing the decree. In short, defendant's voluntary act of not cross examining the party and not advancing arguments, is not capable enough to term the order as '*ex-parte*'.

37. In sum and substance, the order passed by the First Authority after considering the rival contentions was purely on merit. The respondent was throughout present in the proceeding as well as participated till fag end. The First Authority has taken into account written statement of the respondent as well as his evidence affidavit was on record. The First Authority has heard submissions of the claimants in presence of the respondent and as per record also heard submissions of respondent too. It is not a case that on the date of hearing, the respondent was absent to claim the benefit. The factual position in all petitions is one and the same. The Second Authority fell in serious error in holding that the orders were *ex-parte* decision amenable to set aside in terms of Order IX Rule 13 of the Code. In absence of the applicability of Order IX Rule 13 of the Code, the same Authority has no power to set aside its own order. Though submissions are made on merits that the First Authority went wrong in assessing

compensation, however said challenge would squarely fall within the competence of the Appellate Forum and not to the same Authority. In short, the impugned orders passed in all petition are unsustainable in the eyes of law.

38. In view of above, all petitions are allowed. Impugned orders therein are hereby quashed and set aside. The related applications under Order IX Rule 13 of the Code are not maintainable and accordingly dismissed. No order as to costs.

(VINAY JOSHI, J.)

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