IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 728 OF 2019

Punjab National Bank,
through Punjab National Bank,
Jalgaon Branch ... Petitioner
Versus
Shrimati Santoshi Ashok Agrawal ... Respondent.

Mr. S.V. Adwant, Advocate for the Petitioner.
Mr. Amit Ashok Agrawal, Respondent/party-in-person.

CORAM	**:**	**SHARMILA U. DESHMUKH, J.**
Reserved on	**:**	**JANUARY 07, 2023.**
Pronounced on	**:**	**JANUARY 27, 2023.**

PER COURT :-

1. The petition challenges the *ex-parte* judgment and decree dated 7th April, 2006 passed in RCS No.390 of 2000 by learned Civil Judge, Junior Division, Jalgaon; order dated 27.11.2012 passed in Civil Misc. Application No.153 of 2007 in RCS No.390 of 2000 by the learned Civil Judge, Junior Division, Jalgaon; and the judgment dated 21st June, 2018 passed by learned District Judge-3, Jalgaon in RCA No.116 of 2013.

2. The questions which are required to be determined is firstly whether the judgment and decree dated 7th April, 2006 was an ex-parte decree, secondly whether the Regular Civil Appeal No.116 of 2013 was maintainable in its present form and if the

answer to the above two questions is in the affirmative, thirdly whether sufficient cause has been made out for setting aside the ex-parte decree dated 7th April, 2006. For the reasons indicated hereinafter, in my opinion, the answer to the first two questions is in the affirmative, however, the Petition must fail as no sufficient cause has been made out for setting aside the ex-parte decree.

3. Briefly the stated facts of the case are as under:

. RCS No.390 of 2000 was instituted by the Respondent initially against one Nedungadi Bank Ltd. Calicut, of which she was a registered shareholder and was holding in all 1500 shares of the bank, which was reported lost in the year 1996, pursuant to which the request was made to the Bank to reissue the duplicate share certificate following which the Respondent claimed to have received 500 share certificates and for the balance of 1000 share certificates, RCS No.390 of 2000 was instituted on 16th October, 2000 before the Civil Judge, Senior Division, Jalgaon.

. Nedungadi Bank Ltd. was arrayed as defendant in the suit and after filing of written statement on 30th August, 2001, issues were framed. On 31st March, 2003, a notification was published by the Government of India, Ministry of Finance and Company Affairs, Department of Economic Affairs (Banking Division), sanctioning the scheme of amalgamation of Nedungadi Bank Ltd. with the Petitioner bank i.e. Punjab National Bank. The Petitioner Bank came to be substituted in place of the Nedungadi Bank Ltd. as per the order of the trial Court dated 3rd January, 2004. The Respondent led evidence on 14.07.2005 and an order of “no cross examination” came to be passed on 19th November, 2005, and thereafter, the evidence close pursis was filed by the Respondent. On 7th April, 2006, the counsel for the Petitioner in the trial Court filed retirement pursis and on the same date i.e. on 7th April, 2006, the judgment and decree came to be passed, decreeing the suit.

4. The judgment and decree dated 7th April, 2006 came to be challenged by filing Misc. Civil Application No.153 of 2007 on 18th December, 2007, under Order IX Rule 13 of the Code of Civil Procedure, 1908 (for short, “**the Code**”) for setting aside the ex-parte decree, which came to be rejected by the trial Court. The order of the trial Court rejecting the application for setting aside the ex-parte decree came to be challenged before the Appellate Court in Misc. Civil Appeal No.116 of 2013, purportedly under Order XLIII Rule 1(d) of the Code on 9th April, 2013, which came to be dismissed on 21st June, 2018.

5. Shri Adwant, learned counsel appearing for the Petitioner submits that the application which was filed before the trial Court was an application under Order IX Rule 13 of the Code, as the decree dated 7th April, 2006 was an *ex-parte* decree. He submits that the trial Court had proceeded under Order XVII Rule 2 in the absence of the parties and has proceeded to dispose of the suit. The application under Order IX Rule 13 for setting aside the decree was

thus maintainable. He would further contend that the Appellate Court had misdirected itself only by reason of the appeal being registered as Regular Civil Appeal and has thereby erred in holding that the appeal is not maintainable in the present form. He has invited this Courts attention to the scheme of amalgamation and in particular to the valuation of assets and determination of liabilities and would contend that the market value of the share is to be valued on basis of its average market value by reason of it been affected by abnormal factors.

6. *Per contra*, Shri Amit Ashok Agrawal, party-in-person-Respondent submits that the decree is not an ex-parte decree as the counsel for Petitioner was present during the proceedings and the retirement pursis by the counsel was filed on 7th April, 2006 i.e. on the date of the judgment and decree and not prior thereto. He would further urge that the grounds which are pleaded at paragraph Nos.14, 15 and 16 are pleaded for the first time. He would further urge that Regular Civil Appeal was filed in the year 2013 and the impugned judgment has been passed in June, 2018 after a period of five years and the Petitioner did not bother to correct the nomenclature of the appeal which was numbered as Regular Civil Appeal No.116 of 2013. He has invited the attention of this Court to the scheme of amalgamation which provides at Clause 3 that the legal proceedings if pending shall be prosecuted and enforced by or against the transferee bank.

7. In rejoinder, Shri Adwant, submits that the nomenclature does not make difference and in the present case the prayers of the Appeal would show that it was preferred against order dated 27th November, 2022, rejecting the petitioner's application preferred under Order IX Rule 13 of the Code. In support, Shri Adwant relies upon the following decisions:

(i) ***Prakash Chander Manchandra & Anr. Vs. Janki Manchanda***, reported in **(1986) 4 SCC 699**;

(ii) ***G.Ratna Raj (dead) By Legal Representatives vs. Sri Muthukumarasamy Permanent Fund Limited and Another***, reported in ***(2019) 11 SCC 301***.

8. Considered the rival submissions of the parties.

9. It is necessary to refer to the provisions of Order XVII Rule 2 and 3 of the Code, which is the bone of contention between the parties, as the Petitioner claims that the trial Court has proceeded under the provisions of Order XVII Rule 2, whereas Shri Agrawal (party-in-person-respondent) would contend that the proceedings are not ex-parte decree, as the parties were present and as such, the decree has been passed under Order XVII Rule 3 (a). Order XVII Rule 2 and 3 of Code, are reproduced hereunder:

> ***2. Procedure if parties fail to appear on day fixed.-*** *Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such*

other order as it thinks fit.

Explanation- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.*- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,*

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule 2."

10. Order XVII Rule 2 of the Code, provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX. The explanation to Order XVII Rule 2 provides that where such a party who fails to appear on any date of which date suit is adjourned has led the evidence or a substantial portion of evidence, the Court may, in its discretion proceed with the case as if such parties were present. In the present case the Petitioner had not led evidence and hence the explanation to Rule 2 is not applicable.

11. Order XVII Rule 3 of the Code provides where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default- (a) if the parties are present, proceed to decide the suit forthwith; or (b) if the parties are, or any of them is, absent, proceed under Rule 2. It is an admitted position that after the scheme of amalgamation, the Petitioner came to be substituted in the place of Nedungadi Bank Ltd., and was represented by the Counsel for the erstwhile Nedungadi Bank Ltd. The retirement pursis was filed on the date of passing of the judgment and decree dated 7th April, 2006 by the counsel for the Petitioner.

12. It will therefore have to be considered whether the petitioner-bank who was represented by counsel of erstwhile Nedungadi Bank during the hearing was present or absent to determine whether the Court had proceeded under Order XVII Rule 3(a) or under Order XVII Rule 3 (b). The judgment and decree annexed at page No.48 of the petition, records that "the defendant remain absent and failed to cross-examine the plaintiffs witness. The defendant also failed to lead his evidence. Therefore, the suit proceeded further under Order 17 R.3 of C.P.C."

13. Considering that the suit was proceeded under Order XVII Rule 3 and the factual position noted in the judgment of the trial

Court that the defendant remained absent, it is evident that the Court had proceeded under the provisions of Order XVII Rule 3 (b) and as such, had proceeded under Rule 2 of Order XVII. The findings on Issue No.1 framed by the trial Court reiterates the position that the defendant had failed to appear and lead his evidence.

14. In view of the factual position recorded in the judgment of the trial court, it is evident that the Trial Court has proceeded ex-parte against the petitioner-bank and as such, the application preferred by the Petitioner for setting aside the ex-parte decree under the provisions of Order IX Rule 13 was maintainable.

15. Shri Amit Ashok Agrawal, who appears as party-in-person-respondent, has based his submission on the retirement pursis but in view of the factual position recorded in the judgment of Trial Court, it cannot be said that the Petitioner was present during the hearing. What is to be noted is whether the parties or any of them were absent and the mode adopted by the trial Court in proceeding with the suit, which in the present case, is evident from the judgment itself that the Court had proceeded under the provisions of Order XVII Rule 3 (b) of the Code.

16. As regards the finding of the Appellate Court that the appeal preferred by the petitioner-bank was Regular Civil Appeal under Order XLI Rule 1 of the Code, in my view, the finding cannot be sustained for the reason that the prayer in the appeal was

specifically for setting aside the order dated 17th November, 2012 on the application bearing Misc. Civil Application No.153 of 2007, preferred by the Petitioner under Order IX Rule 13. In my view, the registration of the appeal as Regular Civil Appeal, which nomenclature admittedly was not corrected by the Petitioner, cannot be said to be decisive *factum* and what is to be considered is the relief sought in the said proceedings. I am unable to accept the finding of the Appellate Court that the Appeal was not maintainable in present form.

17. The Appellate Court has proceeded to dismiss the Petitioner's Appeal by observing that the decree cannot be termed as 'ex-parte proceedings', as the petitioner-bank had appeared and contested proceedings by filing their respective written statement on record and therefore, the question of non-service of summons does not arise. In my opinion, the Appellate Court has failed to take into consideration the provisions of Order XVII Rule 2 and 3 of the Code and has misinterpreted the provisions of Order IX Rule 6 (1)(a) of the Code. The position which is indicated from the judgment of the trial Court is that the petitioner-bank did not appear and did not lead any evidence and consequently, the Court proceeded *ex parte* against the petitioner-bank.

18. For the reasons stated above, the findings on the first and second question which arose for determination is in the affirmative

and in my opinion, the judgment and decree dated 7th April, 2006 was an *ex parte* decree and the Appeal was maintainable.

19. Now the third question to be determined is whether the Petitioner has shown sufficient cause to set aside the ex-parte decree. Order IX Rule 13 of the Code permits the setting aside of ex-parte decree if the party satisfies the Court that it was prevented by an sufficient cause from appearing when the suit was called on for hearing. Misc. Civil Application No.153 of 2007 preferred by the Petitioner under Order IX Rule 13 of the Code, avers about the merits of the case. It states that after the Petitioner acquired knowledge about the ex-parte decree, an application for certified copy was filed on 31st August, 2007, which copies were received by them on 26th November, 2007 and within 30 days the application came to be filed. The basic requirement of an application under Order IX Rule 13 about setting out sufficient cause is absent. The application does not set out any cause much less sufficient cause for non appearance of the Petitioner when the suit was called on for hearing. The finding of the Appellate Court that it was duty of the party to remain present and to check status of the suit and in the present case, the Petitioner had not made any attempt to search status of the suit till the execution petition was filed, rendered in the facts of the case, cannot be faulted with. The Petitioner being a nationalized bank is expected to be well informed of the legal proceedings.

20. Learned Counsel for the Petitioner did not address the Court on this aspect or even argue that the reason given by the Petitioner constituted sufficient cause for non appearance. As a result, although I have held that the proceedings were ex-parte proceedings and Appeal was maintainable, I do not find sufficient cause made out in the application for non appearance by the Petitioner.

21. As a result, Petition fails and is dismissed.

(SHARMILA U. DESHMUKH, J.)