

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.2818 OF 2018

Nagpur Improvement Trust, through its Chairman, Nagpur .Vs. Ajay Bahuuddeshiya
Sewa Mandal Society, Nagpur

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri P.S. Tiwari, Adv. a/w Shri R.O. Chhabra, Advocate for the petitioner.
Ms R.K. Dadiyal, Advocate for the respondent.

CORAM : ANIL S. KILOR, J.

DATED : 18/01/2023

1. Heard.
2. In this writ petition, order below Exh.1 dated 22.03.2013 passed by the learned 4th Jt. Civil Judge, Jr. Dn., Nagpur in M.J.C. No.519 of 2011, rejecting the application under Order XI, Rule 13 of the Code of the Civil Procedure (in short, "C.P.C.") for setting aside ex-parte decree dated 21.09.2011, is under challenged.
3. In this case, the plaintiff/respondent filed a suit for declaration and perpetual injunction. The declaration that, the notice issued by the defendant/petitioner dated 04.12.2010 is illegal, and perpetual injunction to restrain the petitioner from removing the erected construction mentioned in the notice dated 04.12.2010.

4. The petitioner-Nagpur Improvement Trust appeared in the said suit but failed to file written statement. The suit was, therefore, proceeded without written statement vide order dated 26.04.2011.

5. The plaintiff examined the witnesses to substantiate the suit claim. After scrutiny of the oral as well as documentary evidence produced by the plaintiff, the suit was decreed in favour of the plaintiff/respondent vide judgment and decree dated 21.09.2011.

6. Thereupon, the M.J.C. No.519 of 2011 came to be filed under Order IX, Rule 13 to which the objection was raised that the same is not maintainable as the decree passed under Order VIII Rule 10 of the C.P.C. and not under Order IX Rule 6 of the C.P.C.

7. The learned trial Court held that the decree passed is not an ex-parte decree and it is not liable for setting aside as per Order IX, Rule 13 of the C.P.C. and accordingly, the application rejected.

8. I have heard the respective parties.

9. Shri Tiwari, learned counsel for the petitioner submits that, the written statement was not filed because of the mistake of the concerned officer. It is further submitted

that, the petitioner has committed illegality and the matter is serious and therefore, it is prayed that, this Court may quash and set aside the impugned order.

10. On the other hand, the learned counsel for the respondent strongly opposed the present petition and submits that the proceedings filed by the petitioner under Order IX Rule 13 of C.P.C. itself is not maintainable as the decree was passed as per Order VIII Rule 10 and in such matter, the appeal is the only remedy which the petitioner has not preferred till date even after lapse of period of 12 years. In support of her contentions, she has placed reliance on the judgments in the case of *Laxman Zingraji Adhau vs. Sushila Zinguji Thakre and others*¹, *Rashtriya Chemicals and Fertilizers Ltd. vs. Ota Kandla Pvt. Ltd.*² and *Lachhiram Chudiwala (H.U.F.) vs. Bank of Rajasthan Limited*³.

11. In the light of the rival submissions, I have perused the documents filed along with the writ petition as well as the impugned order.

12. After going through the record, following admitted facts emerged :-

1 1996(1) Mh.L.J. 671

2 1992 (2) Mh.L.J. 1266

3 2007 (1) Mh.L.J.

- a) The suit was filed for declaration and perpetual injunction by the respondent to declare that, the notice issued by the defendant dated 04.12.2010 is illegal, and perpetual injunction to the extent that, for restraining the petitioner from removing the erected construction mentioned in the notice dated 04.12.2010.
- b) The defendant/petitioner appeared but failed to file the written statement and therefore, by the order dated 26.04.2011, the suit was proceeded without written statement of the defendant.
- c) No action was initiated against the concerned officer who made default in filing the written statement and in contesting the suit.
- d) The suit was decreed as per Order VIII, Rule 10 and not as per Order IX, Rule 6 of the C.P.C.

13. In the case of *Laxman Zingraji Adhau* (Supra), this Court has observed thus:

“6. In S.B.I. v. Himalayan Tiles, (cited supra) this Court again reiterated the legal position that an application under Order 9, Rule 13 C.P.C. for setting aside the judgment pronounced in favour of the plaintiff for want of pleadings of the defendant under Order 8, Rule 5 or Rule 10 of C.P.C. is not maintainable, because such decree cannot be said to be an ex-parte decree under Order 9, Rule 6 of C.P.C. Thus, the consistent view of this Court is that the judgment passed by exercising power under Order 8, Rule 5 C.P.C. cannot be said to be an

ex-parte decree under Order 9, Rule 6 and, therefore, the application under Order 9, Rule 13 of C.P.C. for setting aside such judgment and decree would not be maintainable. The reason is obvious inasmuch as while passing the judgment by invoking the power under Order 8, Rule 5, Civil Procedure Code or Order 8, Rule 10, Civil Procedure Code, the Court is required to go into the merits of the case set up by the plaintiff, though, of course, the merits of the plaintiff's case are required to be seen in the absence of any pleadings by the defendant. It is only when the Court is satisfied that the plaintiff's case deserves to be decreed, such judgment and decree is passed and, therefore, any judgment and decree passed by invoking the aforesaid power cannot be equated with the ex-parte decree passed under Order 9, Rule 6, Civil Procedure Code. Consequently, an application under Order 9, Rule 13, Civil Procedure Code for setting aside such decree would not lie and cannot be held to be tenable."

14. In the case of Lachhiram Chudiwala (H.U.F.) (Supra), this Court has observed thus :

"10. On perusal of the judgment in Dhanvantrai's case, it is clear that an application under Order IX Rule 13 is not maintainable when the Court has passed a decree under Order VIII Rule 5 or Rule 10 of Civil Procedure Code. There is no provision in Order VIII for setting aside a decree passed under rule 5 or 10 thereof for nonfiling of written statement. The only remedy open in such cases is to file an appeal against the decree. It is also clear that where a suit is fixed for hearing and on the date of hearing if neither party appears then the suit could be dismissed as provided under Order 9

rule 3. However, where the defendant only fails to appear on the date of hearing, under Order 9 Rule 6(1)(a) the Court is empowered to pass an order that the suit be heard ex-parte and then to proceed with hearing of suit on the adjourned date. And if on the adjourned date of hearing also the defendant fails to appear, the Court after recording of evidence ex-parte can pronounce the judgment on the basis of the evidence which is brought by the plaintiff. In such cases, the suit cannot be said to have been disposed of under Order 8, rule 5 or rule 10 on the basis of the averments made in the plaint. In other words, if the defendants or their advocate fails to appear when the suit is called on for hearing and if the court passes an order that the suit be heard ex-parte and then proceeds to hear the suit ex-parte, records evidence and then pronounce the judgment, it cannot be treated as one under Order 8, rule 5 or rule 10 passed on the basis of the averments made in the plaint. In the present case, admittedly after seeking time on few dates for filing written statement all of a sudden the defendants and their advocate stopped appearing in the case and as a result of which the Court was forced to proceed with the hearing of the suit and pass a decree in the absence of the defendants and their advocate.”

15. Thus, from the above referred observations made by the co-ordinate Bench of this Court and in view of the undisputed facts that, the decree was passed as per Order VIII, Rule 10 and not as per Order IX, Rule 6, it is clear that proceedings under Order IX, Rule 13 is not maintainable.

16. In the circumstances, I do not find any error committed by the learned trial Court in passing the impugned order below Exh. 1 dated 22.03.2013 rejecting the application under Order IX, Rule 13.

Accordingly, the petition is **dismissed**.

JUDGE