

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

COMMERCIAL APPEAL FROM ORDER NO. 29 OF 2025

WITH

INTERIM APPLICATION NO. 12831 OF 2025

IN

COMMERCIAL APPEAL FROM ORDER NO. 29 OF 2025

M/s. Leelap Clothing Pvt. Ltd.

...Appellant
(Orig. Defendant)

Versus

M/s. Raman Impex Pvt. Ltd.

...Respondent
(Orig. Plaintiff)

Mr. Zal Andhyarujina a/w Ms. Maithili Parikh i/by Saif Mobhani and
Tasmiya Khan for the Appellant.

Mr. Nitesh S. Das for the Respondent.

CORAM : R.I. CHAGLA J
FARHAN P. DUBASH, J

DATE : 8 December 2025

SHARAYU
PANDURANG
KHOT

Digitally
signed by
SHARAYU
PANDURANG
KHOT
Date:
2025.12.16
11:00:00
+0530

ORDER :

1. By this Commercial Appeal, the Appellant is impugning

the order dated 30th September 2025 passed by the learned City Civil Court, Borivali Division at Dindoshi, Mumbai dismissing the Appellant's Notice of Motion under Order IX Rule 13 of the Code of Civil Procedure, 1908 ("the C.P.C.").

2. The brief statement of facts are as under :-

- i. The Respondent / original Plaintiff had raised a dispute with the Appellant / original Defendant viz. that inspite of supply, delivery of various types of garments, the Appellant had failed to pay several invoices for goods supplied. The Respondent had accordingly filed the Commercial Suit in the City Civil Court, Borivali Division at Dindoshi, Mumbai in the year 2020.
- ii. The Appellant claims that it was never served with the summons / notice in the above Commercial Suit. The Appellant claims that the address reflected in the

Commercial Suit as well as in the execution Petition at Chennai was not the correct address of the Appellant and hence, service was never effected.

- iii. The Respondent had sought permission from the Court to serve the Appellant vide e-mail and by order dated 22nd March 2021, the Court had allowed the Respondent to serve the Appellant vide e-mail.
- iv. The Respondent claims to have effected service on the Appellant on 21st October 2021 on the two e-mail addresses and filed Service Affidavit on 11th November 2021 and the same was marked as Exh.12 in the Court record.
- v. The Appellant upon perusal of the Suit records, on 29th October 2021 had learnt that the Vakalatnama dated 29th October 2021 was filed in the name of Appellant through one Advocate Kunal Dalal though

the Appellant claims that it had never authorised any such advocate nor executed any Vakalatnama in his favour.

- vi. On the basis of the said Vakalatnama, and the Affidavit of Service filed by the Respondent, the City Civil Court by an order dated 19th March 2022 proceeded with the Suit without Written Statement of the Appellant.
- vii. The City Civil Court on 27th July 2022 while exhibiting the Respondent's documents, recorded that the Commercial Suit was being heard *ex-parte* and thereby foreclosing the cross-examination by the Appellant and permitting the Respondent to file a pursis on the same day and posting the matter for arguments.
- viii. The judgment and decree dated 17th November 2022 was passed by the City Civil Court, Borivali Division at

Dindoshi, Mumbai directing the Appellant to pay to the Respondent an amount of Rs. 20,11,854/- along with further interest on Rs. 13,65,065/- at the rate of 21% from the date of filing of the Suit till realization.

- ix. The Appellant claims to have become aware of the judgment and decree only upon receipt of notice of the Advocate of the Respondent on 30th April 2025 in Execution Petition-EA No. 1 of 2025 filed before the Commercial Court, Chennai.
- x. The Appellant preferred Notice of Motion on 9th June 2025 before the City Civil Court, Borivali Division at Dindoshi, Mumbai under Order IX Rule 13 of the C.P.C. bearing Notice of Motion No. 1831 of 2025 for setting aside the *ex-parte* decree.

xi. The Notice of Motion of the Appellant filed under Order IX Rule 13 of the C.P.C. for setting aside the *ex-parte* decree came to be dismissed on 30th September 2025 (“**impugned order**”) by the City Civil Court, Borivali Division at Dindoshi, Mumbai.

xii. Accordingly, the present Appeal has been filed.

3. Mr. Zal Andhyarujina, learned Senior Counsel for the Appellant has submitted that by the impugned order dated 30th September 2025, the learned Judge has rejected the Notice of Motion filed by the Appellant / original Defendant on the premise that the Defendant had to challenge the judgment and decree dated 17th November 2022 by filing an Appeal under Section 13 of the Commercial Courts Act, 2015. The learned Judge held that the judgment and decree is not an *ex-parte* judgment and decree under Order IX Rule 13 of the C.P.C., as the Defendant had appeared, but failed to file Written Statement and also failed to file its evidence.

4. Mr. Andhyarujina has submitted that under Order XVII Rule 2 of the C.P.C., it is provided that where the party fails to appear at the hearing of the Suit, 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. The Explanation appended to Order XVII Rule 2 of the C.P.C. provides that where the evidence or 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 was present.

5. Mr. Andhyarujina has submitted that the said provision has been considered by the Supreme Court in **G. Ratna Raj (Dead) by Legal Representatives Vs. Sri Muthukumarasamy Permanent Fund Limited and Anr.**¹ and it has been held that in a case where only the Plaintiff's evidence has been recorded and thereafter the case was closed without recording the Defendant's evidence or the Defendant had not led any evidence, it would not fall under the Explanation to

¹ (2019) 11 SCC 301

Order XVII Rule 2 of the C.P.C.. The Supreme Court has held that in order to attract the Explanation, "*such party*" which has led evidence or has led substantial part of the evidence, if fails to appear on any day to which the hearing of the case is adjourned, the Court may treat "*such party*" as "*present*" on that day and is accordingly empowered to proceed in the Suit. In that case, the party, who was absent and was proceeded *ex-parte*, was the "Defendant" and they had not led any evidence whereas it was the Plaintiff, who was present and had led his evidence.

6. The Supreme Court accordingly held that since the Defendant was proceeded *ex-parte* and found not to have led any evidence, the Court could only proceed under Order XVII Rule 3(b) read with Order XVII Rule 2 of the C.P.C. for disposal of the Suit by taking recourse to one of the modes directed in that behalf by Order IX of the C.P.C. or could have made any other order as it thinks fit. The Supreme Court held that the Division Bench was justified in allowing the application filed under Order IX Rule 13 of the C.P.C. and, in consequence, was justified in setting aside the preliminary

decree treating the said decree as "*ex-parte* decree".

7. Mr. Andhyarujina has submitted that the said decision of the Supreme Court is clearly applicable to the present case where also the matter against the Defendant was proceeded *ex-parte*, in view of the Defendant not having led any evidence, whereas it was the Plaintiff, who remained present and lead evidence. The Court, accordingly, passed the *ex-parte* decree within the meaning of Order IX Rule 6(a) of the C.P.C. by proceeding to hear the Suit *ex-parte* and therefore, the Notice of Motion filed under Order IX Rule 13 of the C.P.C. for setting aside of the *ex-parte* decree is clearly maintainable.

8. Mr. Andhyarujina has also placed reliance upon the judgment of this Court (Nagpur Bench) in **Ashok Kundalrai Mohekar Vs. The National Textile Corporation & Ors.**². This Court has held that the application under Order IX Rule 13 was maintainable, in view of the evidence of the Plaintiff having been led and the Plaintiff having filed various documents on record, which came to be exhibited in the

² Writ Petition No. 3802 of 2013 Judgment dated 12.03.2015

absence of the Defendant. This Court held that in such circumstances, the decree passed was an *ex-parte* decree. It was further held that application moved by the Defendants therein under Order IX Rule 13 of C.P.C. was perfectly tenable.

9. Mr. Andhyarujina has also placed reliance upon the judgment of this Court in **R.P Bros through its Proprietor Mr. Rashmikanth Chanulal Kuvadia Vs. Mr. Fakhruddin Siraj Topiwala**³, wherein the learned Single Judge of this Court has held in the facts of that case that it was not in dispute that the Defendant did not appear before the Court on the date the hearing of the Suit was adjourned. It was also not in dispute that the Defendant did not lead any evidence and in fact did not enter the witness box. The Defendant had only filed its Written Statement. This being the case, under Order XVII Rule 2 read with Rule 3(b) of the C.P.C., the Suit could have been disposed of in any one of the modes as directed in that behalf by Order IX. This Court held that to set aside such decree, an application under Order IX Rule 13 of the C.P.C. was certainly maintainable.

³ Writ Petition (L) No. 17138 of 2017 Judgment dated 28.06.2017

10. Mr. Andhyarujina has accordingly, submitted that the learned Judge of the City Civil Court has erred in not treating the decree as an *ex-parte* decree. Further, the City Civil Court ought to have entertained the Notice of Motion filed under Order IX Rule 13 of the C.P.C. and not held that from the decree only an Appeal under Section 13 of the Commercial Courts Act, 2015 is maintainable. He has accordingly submitted that the impugned order dated 30th September 2025 rejecting the Notice of Motion No. 1831 of 2025 filed by the Appellant as not maintainable ought to be set aside.

11. Mr. Nitesh Das, learned Counsel for the Respondent has supported the impugned order by submitting that the appropriate remedy for the Appellant challenging the judgment and decree dated 17th November 2022 is by filing an Appeal under Section 13 of the Commercial Courts Act, 2015. He has submitted that the said decree passed by the City Civil Court, was not an *ex-parte* decree, but had been passed pursuant to the writ of summons having been served on the Defendant.

12. Mr. Das has submitted that the Defendant had been represented by one advocate Kunal Dalal on 11th November 2021, who undertook to file Vakalatnama on the next date. Thereafter, the Defendant had not made an appearance in the Suit and the learned Judge of the City Civil Court after giving sufficient opportunity passed the final judgment on 17th November 2022.

13. Mr. Das has submitted that it is only upon the filing of execution application by the Respondent / original Plaintiff and notice being issued by the Executing Court upon the Appellant / Judgment Debtor therein that the Appellant had taken out Notice of Motion No. 1831 of 2025 under Order IX Rule 13 of the C.P.C. for setting aside of the judgment and decree with a sole intention to delay the Execution Proceedings.

14. Mr. Das has submitted that the Appeal under Section 13(1-A) of the Commercial Courts Act, 2015 is required to be filed within 60 days from the decree of the Commercial Court and in the event, an Appeal was filed challenging the decree dated 17th

November 2022, it would now be time barred, as there is a delay of about 3 years. He has submitted that the learned Judge of the City Civil Court has correctly held the Notice of Motion of the Appellant under order IX Rule 13 of the C.P.C. to be not maintainable. He has accordingly, submitted that the present Appeal requires to be dismissed.

15. Having considered the submissions, it would be necessary to reproduce Order XVII Rules 2 and 3 of the C.P.C., which read as under :-

“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.”

16. The Explanation appended to Order XVII Rule 2 of the C.P.C. provides that 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 was present. In the present case, the Explanation to

Order XVII Rule 2 of the C.P.C. will not apply, as the Appellant / original Defendant in the Commercial Suit being “*such party*” had neither led evidence nor substantial part of the evidence, and/or then failed to appear on any day to which the hearing of the case was adjourned. In the present case, the Defendant had not led any evidence and the Suit was proceeded *ex-parte* against the Defendant. Thus, as has been held in **G. Ratna Raj (Dead) by Legal Representatives** (supra), the Court could only proceed under Order XVII Rule 3(b) read with Order XVII Rule 2 of the C.P.C. for disposal of the Suit by taking recourse to one of the modes directed in that behalf by Order IX of the C.P.C.. The decree which has been passed in the present case is an “*ex-parte decree*” within the meaning of Order IX Rule 6(a) of the C.P.C. and, therefore, can be set aside under Order IX Rule 13 on making out a sufficient ground by the Appellant / original Defendant.

17. The learned Judge of the City Civil Court accordingly, has erred in rejecting the Notice of Motion filed by the Appellant under Order IX Rule 13 of the C.P.C. as not being maintainable on the

premise that only an Appeal under Section 13 of the Commercial Courts Act, 2015 against the decree is maintainable. This by not treating the decree as an *ex-parte* decree. The learned Judge of the City Civil Court has not considered the settled law including the judgment of the Supreme Court in **G. Ratna Raj (Dead) by Legal Representatives** (supra) as well as the judgments of this Court in **Ashok Kundalrai Mohekar** (supra) and **R.P. Bros through its Proprietor Mr. Rashmikanth Chanulal Kuvadia** (supra), which have held that where the Defendant has not lead any evidence and/or not entered into the witness box, the case would fall under Order XVII Rule 2 read with Rule 3(b) of the C.P.C., and the Suit can be disposed of in any one of the modes as directed on that behalf by Order IX. Consequently to set aside any such decree, an application under Order IX Rule 13 of the C.P.C. was certainly maintainable.

18. The Respondent's contention that the writ of summons had been served on the Appellant / original Defendant and the Appellant / original Defendant's advocate had undertaken to file Vakalatnama which was also thereafter filed and after which the

Appellant / original Defendant's advocate also initially made an appearance, overlooks the fact that the Commercial Suit was thereafter proceeded against the Appellant / original Defendant *ex-parte*, as the Appellant / original Defendant had not led evidence and/or entered into the witness box. It has been held in **R.P. Bros through its Proprietor Mr. Rashmikanth Chanulal Kuvadia** (supra) that even where the Appellant / original Defendant has filed its Written Statement and thereafter not lead any evidence and/or entered into the witness box, the case would be under Order XVII Rule 2 read with Rule 3(b) of the C.P.C., and the Suit could have been disposed of in any one of the modes as directed in that behalf by Order IX. Consequently any such decree passed thereon, can be set aside in an application under Order IX Rule 13 of the C.P.C..

19. The impugned order dated 30th September 2025 passed by the learned Judge of the City Civil Court, Borivali Division at Dindoshi, Mumbai is accordingly, required to be quashed and set aside. Hence, we pass the following order:-

: ORDER :

- (i) The impugned order dated 30th September 2025 dismissing the Notice of Motion of the Appellant under Order IX Rule 13 is quashed and set aside.
- (ii) The Notice of Motion No. 1831 of 2025 is restored to the file of the City Civil Court, Dindoshi, Mumbai for hearing on merits and which shall be disposed of on the same pleadings already filed by the parties, preferably on or before 31st January 2026.
- (iii) Till the disposal of the Notice of Motion No. 1831 of 2025, the execution of *ex-parte* decree dated 17th November 2022 passed by the City Civil Court, Dindoshi, Mumbai is stayed.
- (iv) Commercial Appeal From Order is disposed of in the above terms. There shall be no order as to costs.

(v) In view of this order, Interim Application No. 12831 of 2025 does not survive and is accordingly disposed of.

[FARHAN P. DUBASH, J.]

[R.I. CHAGLA J.]

15-2-COMAO-29-25.doc
Sharayu Khot.