

learned Single Judge of the Bombay High Court in Civil Writ Petition No. 1488 of 2015 titled **“Maharashtra State Electricity Board vs. Miraj Electric Supply Co. Ltd. Ors.”**, whereby the petition was allowed, the order dated 30.09.2014 passed by the Trial Court allowing the application under order IX Rule 13 of the Code of Civil Procedure, 1908¹ was set aside and the *ex parte* decree was maintained.

4. Shorn of unnecessary facts, Maharashtra State Electricity Board² filed Special Civil Suit No. 125 of 1988 in the Court of Civil Judge, Senior Division at Sangli impleading Miraj Electric Supply Co. Ltd.³ as defendant no. 1 and its five Directors as defendant nos. 2 to 6 for recovery of Rs. 1,42,85,177.47/- with costs of suit and further praying for interest at the rate of 18% per annum from the date of presentation

¹ In short, “CPC”

² In short, “MSEB”

³ In short, “MESC”

of the suit till realisation of the aforesaid amount. The defendants appeared and filed their written statements. The plaintiff's evidence was being led and at that stage the counsel for the defendants Shri. M.B. Karmarkar withdrew his Vakalatnama vide Ex. 112. He had also not cross-examined the witnesses. The Trial Court, on 04.12.2004, directed for suit to proceed under Order XVII Rule 2 of CPC against the defendants. Thereafter the Trial Court proceeded to record the evidence of the plaintiff and, vide judgement and order dated 29.01.2005, decreed the suit *ex parte* with costs. The operative portion of the judgment is reproduced hereunder:

“Suit is decreed *ex parte* with cost, as under:

1. The defendants No. 1 to 6 jointly and severally to pay Rs. 1,42,85,177.47 Ps. (Rs. One crore, forty two lakhs, eighty five thousands, one hundred seventy seven and forty seven paise only) to the plaintiff board M.S.E.B.). They shall pay interest at the rate

of Rs. 18% p.a. on the arrears amount of Rs. 1,0490032.36 Ps. (Rs. One crores four lakhs nineteen thousands thirty two and thirty six paise only) from the date of the suit till its realization.

2. Decree be drawn up accordingly.”

5. The defendants, on coming to know of the *ex parte* decree, belatedly filed an application under Order IX Rule 13 CPC accompanied by an application for condonation of delay under Section 5 of the Limitation Act, 1963 on 21.09.2006. The Trial Court, vide order dated 20.09.2010, allowed the application under Section 5 of the Limitation Act finding the explanation to be satisfactory for the delay caused with costs of Rs. 3,000/- on the defendants to be deposited within ten days.

6. Thereafter, the Trial Court vide order dated 30.09.2014, allowed the application under Order IX Rule 13 CPC, set aside the *ex parte* decree dated 29.01.2005 while imposing fine of Rs. 1,000/- and

restored the Special Civil Suit No. 125 of 1988 to its original number.

7. The plaintiff-MSEB preferred a Writ Petition before the High Court under Articles 226 and 227 of the Constitution. The High Court, by the impugned order dated 12.01.2015, allowed the Writ Petition, set aside the order dated 30.09.2014. As a result, the suit of the respondent-MSEB stood decreed *ex parte*. The petition was allowed on the ground that the application under Order IX Rule 13 CPC would not be maintainable in as much as the High Court had applied the explanation under Order XVII Rule 2 CPC.

8. Aggrieved by the same, the present appeal has been preferred by impleading MSEB as respondent no.1, the contesting respondent, and also impleading the other four Directors as respondent nos. 3 to 6. It also impleaded MESC as respondent no. 2. At some

stage during the pendency before this Court, the respondent nos. 2 to 6 were directed to be deleted from the array of parties vide order dated 21.10.2019. However later on, vide order dated 15.09.2021, Respondent Nos. 2 and 6 were restored as party respondents.

9. It would be worthwhile to mention that the appeal has been preferred by one of the Directors, as noted in the beginning, being defendant no.5 before the Trial Court.

10. We have heard learned counsel for the parties and perused the record.

11. The submission of learned counsel for the appellant is that the High Court committed a grave error in applying the explanation to Order XVII Rule 2 CPC. According to him, the order passed by the Trial Court decreeing the suit *ex parte* and the earlier order dated 04.12.2004 was only an order under

Order XVII Rule 2 CPC and not under the explanation as the explanation would not be applicable. It was also submitted that the Trial Court itself, while decreeing the suit, had recorded that it was an *ex parte* decree and under Order IX Rule 13 CPC an *ex parte* decree could be applied for being recalled.

12. On the other hand, the submission of learned counsel for the respondent MSEB is to the effect that out of the five Directors only one of them had approached this Court, whereas the defendant no.1-company as also the other four Directors defendant nos. 2 to 4 and 6 are not before this Court challenging the said order. It is further submitted that the High Court was right in allowing the writ petition by invoking the explanation to Order XVII Rule 2 CPC and the appeal deserves to be dismissed.

13. It would be worthwhile to mention that this Court, vide order dated 10.12.2018, had directed the

appellant to deposit 50% of the suit claim i.e. half of Rs. 1,42,85,177/- within a period of six weeks and the matter was directed to be listed after six weeks. On 25.01.2019, this Court being satisfied that 50% of the suit claim had been deposited before the Trial Court, directed that the Trial Court would invest the said amount in a Fixed Deposit initially for a period of six months in a Nationalized Bank with automatic renewal. This Court, further, condoned the delay, issued notices to the respondents and further stayed the impugned judgment.

14. Before proceeding to consider the submissions, it would be appropriate to reproduce Order XVII Rule 2 CPC, which reads as follows:

“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.”

15. It would also be relevant to reproduce Order IX

Rule 13 which reads as follows:

“Setting aside decree *ex parte* against defendant-In any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as

against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

Explanation- Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposal of on any ground other than the ground that the appellants has withdrawn the appeal, no application shall lie under this rule of setting aside the *ex parte* decree.”

16. A plain reading of Order IX Rule 13 makes it apparent that where in a case, a decree is passed *ex parte* against defendant, a party may apply to the Court for setting aside the same for reasons satisfying the Court regarding non-appearance.

17. Coming to Order XVII Rule 2 CPC, it would be apparent that if the parties or any one of them failed to appear on a day to which the hearing of the suit is adjourned, 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 deems fit.

18. In the present case, the defendants did not appear on 04.12.2004, nor their counsel appeared as he had already withdrawn his Vakalatnama by a written request. The Trial Court directed for the suit to proceed under Order XVII Rule 2 CPC against the defendants. The effect of the order dated 04.12.2004 was that the Trial Court could have proceeded to dispose of the suit in one of the modes directed in that behalf by Order IX CPC. Coming back to Order IX CPC, it is to be noticed that under Rule 6 thereof where summons are duly served and the defendant does not appear when the suit is called on for

hearing, then the Court may make an order that the suit be heard *ex parte*. This is in fact the procedure adopted by the Trial Court in the present case. Accordingly, after the evidence of the plaintiff was concluded and the defendant continued to remain absent, the Trial Court decreed the suit *ex parte*, vide judgment dated 29.01.2005. The operative portion thereof clearly mentions that the suit is decreed *ex parte*.

19. Now coming to the explanation, what is stated therein is 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 would be at liberty to proceed with the case as if **such party** were present. Two phrases are important in the explanation “any party” and “such party”. “Any party” refers to the party which has led

evidence or substantial evidence and “such party” refers to that very party which has led evidence or substantial evidence. What is discernible is that under Order XVII Rule 2, the Court would proceed to pass orders with respect to any of the parties being absent or both the parties being absent. Whereas the explanation is confined to record the presence of that party and that party alone, which has led evidence or substantial evidence and has thereafter failed to appear. In the present case, admittedly the suit was at the stage of plaintiff’s evidence as is apparent from the order dated 04.12.2004. The evidence of the defendants had not even started and the defendants’ counsel had not even cross-examined the plaintiff’s evidence.

20. The explanation in the present case could have been invoked only if the plaintiff, after adducing his evidence or substantial evidence, failed to appear, the

Court could have recorded his presence while disposing of the suit. But once the defendant had not led any evidence at all, the explanation could not be invoked as against the defendant/appellant. The High Court committed an error in applying the explanation to Order XVII Rule 2 CPC and based upon it holding that an application under Order IX Rule 13 CPC would not be maintainable as the presence of the defendant would be deemed to be recorded at the time of disposal of the suit.

21. As a matter of fact, once the counsel had withdrawn his Vakalatnama, in normal course, the Trial Court ought to have issued notice to the defendants to engage another counsel, which it did not do and proceeded *ex parte*. The Trial Court committed an error in doing so. Further, the Trial Court, in its wisdom and discretion having allowed the application under Order IX Rule 13 CPC, the High

Court ought to have refrained itself from interfering with an order which advanced the cause of justice by affording opportunities to both the parties so that the suit could be decided on merits.

22. For all the reasons recorded above, we are unable to uphold the impugned order of the High Court. The appeal is allowed. The impugned order of the High Court is set aside. The Trial Court will proceed to decide the Special Civil Suit on its own merits, after giving due opportunities to the parties and strictly proceed in accordance with law.

23. Once the *ex parte* decree has been set aside, the amount of 50% deposited by the appellant needs to be suitably accounted for. It is true that under Order IX Rule 13 CPC, the Court, while allowing the application, could impose such terms and conditions as it deems fit and this being a money decree, the Trial Court could have required the appellant to

deposit some amount. The appellant is one of the five Directors of the defendant no.1. Although the relief claimed was for joint and several liability of each of the Directors, in our view the deposit of 50% at the hands of appellant above would be too excessive. We accordingly provide that the amount deposited by the appellant under the order of this Court, which is lying in the Trial Court, may be adjusted as follows:

- (i). 20% of the suit claim, along with interest accrued thereon, may be retained by the Trial Court and may continue to deposit the same in the Fixed Deposit initially for a period of six months, renewable on an automatic basis, till further orders are passed in that regard, depending upon the outcome of the suit;
- (ii). Whereas 30%, along with accrued interest thereon, may be returned to the appellant within four weeks of the date of filing of this

order before the Trial Court along with an application for return of amount as directed above.

24. No order as to costs.

25. Pending application, if any, stand disposed of.

.....**J.**
(VIKRAM NATH)

.....**J.**
(AHSANUDDIN AMANULLAH)

NEW DELHI
AUGUST 16, 2023