



IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

(288)

CR No.6496 of 2024

Date of Decision: 21.01.2025

**Amit Chhibber and another**

...Petitioners

Vs

**The Sky Rock City Welfare Society**

...Respondent

**CORAM : HON'BLE MR. JUSTICE VIKRAM AGGARWAL**

Present: Mr. Rohit Verma, Advocate  
for the petitioners.

\*\*\*\*

**VIKRAM AGGARWAL, J (ORAL)**

The present revision petition is directed against the order dated 29.07.2024 (Annexure P-8) passed by the Court of learned Civil Judge (Jr. Division), SAS Nagar Mohali, vide which the application filed by the petitioners for rejecting the application filed by the respondent under Order IX Rule 13 of the Code of Civil Procedure (for short 'CPC') was dismissed.

2. The petitioners-plaintiffs filed a suit for recovery against the respondent-defendant. The same was decreed ex parte vide judgment and decree dated 13.03.2018 (Annexure P-3). An appeal was filed against the said ex parte judgment and decree by the petitioners-plaintiffs seeking modification in the period for which interest had been granted. The said appeal was partly accepted vide judgment and decree dated 05.11.2022 (Annexure P-4) passed by the Court of learned Additional District Judge, SAS Nagar Mohali.

3. An application under Order IX Rule 13 CPC (Annexure P-5) was filed by the respondent-defendant for setting aside the *ex parte*

judgment and decree dated 13.03.2018 and the order dated 12.02.2018 vide which the respondent-defendants had been proceeded against *ex parte*. The same was accompanied by an application for condonation of delay in filing the same as also an application for staying the execution proceedings.

4. An application (Annexure P-6) was filed by the petitioners-plaintiffs for dismissal of the application under Order IX Rule 13 CPC on the ground that the judgment and decree of the trial Court had merged with the judgment and decree of the First Appellate Court, and, therefore, the application under Order IX Rule 13 CPC was not maintainable in terms of explanation to Order IX Rule 13 CPC. The application was opposed by way of a reply (Annexure P-7) and vide the impugned order, the said application was dismissed holding that the appeal had not been filed by the respondents-defendants but by the petitioners-plaintiffs and, under the circumstances, the respondents-defendants would retain their right to file an application under Order IX Rule 13 CPC.

5. I have heard learned counsel for the petitioner.

6. Learned counsel for petitioner submits that in view of the explanation to Order IX Rule 13 CPC, the application under Order IX Rule 13 CPC filed by the respondents-defendants would not be maintainable as the judgment and decree passed by the trial Court has merged with the judgment and decree passed by the First Appellate Court. Learned counsel submits that under the circumstances, the only remedy with the respondents-defendants would be to file an appeal.

7. I have considered the submissions made by learned counsel for the petitioners.

8. Order IX Rule 13 CPC reads as under:-

***“13. 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 there was sufficient cause for his failure to appear 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 also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.***

***Explanation I.—Where a summons has been served under Order V, rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.***

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

9. The question to be determined here would be as to whether explanation II would apply only if a defendant who had been proceeded against ex parte files an appeal or it would apply also when a plaintiff files an appeal for modification of the judgment and decree passed in his favour. It is a settled position of law that when an *ex parte* judgment and decree is passed, there is a twin remedy with the defendant i.e., either to file an application under Order IX Rule 13 CPC or to file an appeal against the *ex parte* judgment and decree. The argument raised by learned counsel for the petitioners seems to be attractive at the first blush because the

explanation does not mention as to whether the appeal referred to in the explanation would be an appeal filed by the defendant only, or by the plaintiff also. In view thereof, let us examine the issue.

10. The explanation to Order IX Rule 13 CPC was enacted by the Civil Procedure Code (Amendment) Act, 1976 w.e.f February 1, 1977. The Supreme Court of India examined the effect of the application in the case of *Rani Choudhary Vs. Lt. Col. Suraj Jit Choudhary, AIR 1982 Supreme Court 1397*, wherein it was held as under:-

*“2. The real question is whether the 'Explanation to Rule 13 Order IX of the Civil Procedure Code bars the appeal filed by the respondent against the ex parte decree. The Explanation was enacted by the Civil Procedure Code (Amendment) Act, 1976 with effect from Feb. 1, 1977. Prior to its enactment, a defendant burdened by an ex parte decree could apply to the trial Court under Rule 13 Order IX for setting aside the decree. He could also appeal under Section 96 against the decree. The mere filing of the appeal did not take away the jurisdiction of the trial Court to entertain and dispose of the application for setting aside the ex parte decree. It was where the appeal was disposed of and the appellate decree superseded the trial Court decree by reversing, confirming or varying it that the trial Court could not proceed to set aside its ex parte decree. For the trial Court decree was said to have merged with the appellate decree. There are of course cases where the trial Court decree does not merge with the appellate decree. Such instances arise when the appeal is dismissed as having abated by reason of the omission of the appellant to implead the legal representatives of a deceased respondent or where it is dismissed as barred by limitation. So there is a limited area where the trial Court decree merges in the appellate decree, and when that takes place an application before the trial*

*Court for setting aside the decree loses all meaning. It was a limited area defined by the operation of the doctrine of merger. From Feb. 1, 1977 the area was extended enormously. With the Explanation in operation, no application for setting aside an ex parte decree can lie where the defendant has filed an appeal and the appeal has been disposed of on any ground other than the ground that the appeal has been withdrawn by the appellant. No doubt the provision is described as an "Explanation", but as is well known it is not the rubric which decisively defines the true nature of a statutory provision. Its true nature must be determined from the content of the provision, its import gathered from the language employed, and the language construed in the context in which the provision has been enacted. In the present case, the rule in Heydon's case, (1584) 76 ER 637, approved of and applied by this Court in Swantraj v. State of Maharashtra, 1974(3) SCR 287 and many other cases, is attracted. What was the law before the amendment, what was the mischief and defect for which the law did not provide, what remedy has Parliament resolved and appointed to cure the mischief, and the true reason of the remedy.*

3. *It has been observed earlier that a defendant intending to avoid an ex parte decree could apply to the trial Court for setting it aside and could also appeal to a superior Court against it. The Courts were open to a duplication of proceedings, and although the immediate relief claimed in the two proceedings was not identical both ultimately aimed at a re-decision on the merits. Moreover, on the two proceedings initiated by the defendant, the application under Rule 13 Order IX would subsequently become infructuous if the appeal resulted in a decree superseding the trial Court decree. It was also possible to envisage the appeal becoming infructuous if the trial Court decree was set aside on the application under Rule 13 Order IX before the appeal was*

*disposed of. The plaintiff was in the unfortunate position of being dragged through two courts in simultaneous proceedings. Public time and private convenience and money was sought to be saved by enacting the Explanation. The Civil Procedure Code (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under Rule 13 Order IX for setting aside an ex parte decree only if the defendant has opted not to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer an adjudication by the appellate Court on the merits of the decree or have the decree set aside by the Trial Court under Rule 13 or Order IX. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under Rule 13 Order IX. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation.”*

11. Order IX Rule 13 CPC itself deals with setting aside an *ex parte* decree against the defendants. The explanation would, therefore, normally apply to a situation where defendant files an appeal and the same is disposed of on any ground other than the ground that the appellant had withdrawn the appeal. The explanation cannot be stretched to mean that even if the plaintiff files an appeal, the remedy of the defendant who had been proceeded against *ex parte* would be extinguished. Whether the defendant succeeds in the application under Order IX Rule 13 CPC is a different aspect altogether

because the application would be decided on its own merits. However, to say that in case even if the plaintiff files an appeal, the defendant would be precluded from filing an application under Order IX Rule 13 CPC would be totally unacceptable. The argument of learned counsel for the petitioner is, therefore, found to be devoid of merit.

12. This judgment was relied upon by a Co-ordinate Bench in case of *Chanan Singh Vs. Dayal Singh 1998(4) RCR (Civil) 558* and the view was reiterated. The view of the Supreme Court of India shows that the entire discussion was about the appeal to be filed by the defendant and not by the plaintiff. This is so because the provision itself has been enacted for the defendant and not for the plaintiff.

In view of the aforementioned facts and circumstances, the present revision petition is dismissed.

(VIKRAM AGGARWAL)  
JUDGE

January 21, 2025

Rekha

Whether speaking/reasoned : Yes/No  
Whether reportable : Yes/No