# Rasiklal Manickchand Dhariwal & Anr vs M/S M.S.S.Food Products on 25 November, 2011

## Author: R.M. Lodha

## Bench: R.M. Lodha, Aftab Alam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10112 OF 2011

(Arising out of SLP (Civil) No. 27180 of 2008)

Rasiklal Manickchand Dhariwal & Anr. .... Appellants

Versus

M/s. M.S.S. Food Products ....Respondent

JUDGMENT

R.M. Lodha, J.

Leave granted.

2. This appeal, by special leave, raises questions of legality of an ex parte decree passed by the trial court and affirmed in first appeal by the High Court of Madhya Pradesh.

3. M/s. M.S.S. Food Products--respondent (hereinafter referred to as `plaintiff') sued the appellants--(i) Dhariwal Industries Ltd. and (ii) Rasiklal Manikchand Dhariwal (hereinafter referred to as `defendants') in the court of 1st Additional District Judge, Mandaleshwar (West) Madhya

Pradesh for declaration that defendants do not have right to use the mark "Manikchand" to sell masala, gutka, supari, supari mix or any other goods which is deceptively similar to the mark "Malikchand'; for perpetual injunction restraining the defendants from dealing in or selling the above articles under the name/brand "Manikchand"; for rendition of the accounts of profits earned by the defendants by selling the said goods and other consequential reliefs.

4. The case of the plaintiff is this: Prabhudayal Choubey son of Ramprasad alias Malikchand started the business of supari, ayurvedic pan masala and ayurvedic medicines in the brand name "Malikchand" in the year 1959-60. He continued his business upto April 1986. Prabhudayal Choubey assigned his trade mark of supari and ayurvedic pan masala "Malikchand" to his son Ashok Sharma sometime in the month of April, 1986. Ashok Sharma continued his business of supari, ayurvedic pan masala and ayurvedic medicines etc. upto March 1992. Ashok Sharma assigned the trade mark "Malikchand", vide assignment deed dated April 1, 1992, to Kishore Vadhwani, proprietor of M/s. Tulsi Stores who continued with the business of pan masala, gutka, supari and supari mix etc. till March, 1996. Kishore Vadhwani further assigned the trade mark "Malikchand" to the plaintiff on April 1, 1996. Since then plaintiff has been carrying on the business of gutka, pan masala, mix supari etc. in the trade mark "Malikchand".

5. It is further case of the plaintiff that the defendants have started selling gutka, pan masala, supari, supari mix, zarda, etc. in the name of "Manikchand", - phonetically similar to the plaintiff's mark "Malikchand" - and thereby passing off their goods as and for plaintiff's goods. The plaintiff alleged that defendants have been selling the inferior quality goods resulting in huge losses to it.

6. The defendants filed written statement and traversed plaintiff's claim. They disputed plaintiff's claim of prior user and averred that name of Prabhudayal's father was Ramprasad and not Malikchand. They denied that any business was run by Prabhudayal Choubey in the name of "Malikchand". On the other hand, the defendants claimed that way back in 1966, an application for registration of trade mark "Manikchand" was submitted as the name of Defendant No. 2's father was Manikchand and they have been doing their business of supari, gutka, tobacco, etc. in the name of "Manikchand". It is the case of the defendants that the plaintiff started running business of gutka, using the name "Malikchand" identical to the trade name of the defendants "Manikchand" wrongly and fraudulently with an intention to ride on the goodwill of the defendants and to protect their right, the defendants have filed a suit (Suit No. 574 of 2004) in the Bombay High Court wherein plaintiff's counsel appeared on March 10, 2004. As regards the documents concerning prior user of the trade name "Malikchand" by the plaintiff, the defendants averred that the plaintiff has fabricated and forged these documents and then filed the suit for passing off action, declaration and injunction. The defendants, thus, prayed that plaintiff's suit was liable to be dismissed.

7. The trial court having regard to the pleadings of the parties, on December 6, 2004, initially framed the following eight issues :

> "1. Whether the plaintiff has been running his business of Food, Pan Masala, Supari Mix by the name of Mailkchand from the year 1959-60?

2. Whether the defendants have been running the said business by the name of "Manikchand" trademark identical to trademark of plaintiff i.e. "Malikchand"? If yes then its effect?

3. Whether the defendants have been selling the goods having prepared of inferior quality by the name of Manikchand trademark identical to the trademark of plaintiff "Malikchand" due to which credit of plaintiff is being adversely affected? If yes, then its effect?

4. Whether defendants have been running their business from the year 1960 having lawfully obtained the trademark "Manikchand" from the competent officer? If yes, then its effect?

5. Whether the plaintiff is entitled to get the accounts of the said amount which defendants have earned unlawful profits having sold the pouch by the name of Manikchand trademark identical to the trademark of plaintiff?

6. (a) Whether plaintiff valued the suit properly?

6. (b) Whether the plaintiff has paid the sufficient court fee?

7 Whether the plaintiff has instituted the suit on false grounds? If yes, then whether the defendants are entitled to get special damages for the plaintiff? 8 Relief & cost?"

8. Then, on December 24, 2004, the following two additional issues were framed by the trial court:

"9. Whether the suit instituted by the plaintiff is liable to be stayed under Section 10 C.P.C.

10. Whether this court has got the jurisdiction to entertain the present suit instituted by the plaintiff?"

9. Along with the plaint, the plaintiff made an application for temporary injunction pending suit, restraining the defendants from selling their products under the name `Manikchand'.

10. On March 16, 2004, an ad interim ex parte injunction restraining the defendants from using the mark `Manikchand' was granted by the trial court in favour of the plaintiff and against the defendants. The appeal preferred by the defendants against that order was disposed of by the High Court on March 22, 2004. On April 6, 2004, the trial court allowed the plaintiff's application for temporary injunction and made the ad interim ex parte injunction order dated March 16, 2004 absolute to remain operative till the disposal of the suit. The appeal preferred by the defendants against that order was dismissed by the High Court on May 11, 2004. The High Court while dismissing the defendants' appeal directed the trial court to conclude the trial of the

suit expeditiously and finally dispose of it, preferably within a period of six months from the date of receipt of the copy of the order i.e. May 11, 2004.

11. The defendants challenged the order of temporary injunction passed by the trial court and affirmed in appeal by the High Court in a special leave petition before this Court on July 20, 2004.

12. In the course of proceedings in the suit many interlocutory applications were made by the defendants and few by the plaintiff. Some of these applications are: On June 14, 2004, an application (I.A. No. 9) was made by the defendants before the trial court under Order VII Rule 11 of the Civil Procedure Code, 1908 (for short, `the Code') for rejection of the plaint. On August 19, 2004, the defendants made another application (I.A. No. 10) under Section 151 of the Code for directing the parties to file respective original documents. On September 10, 2004, the defendants filed an application (IA No. 11) under Order XXX Rule 10 of the Code for dismissal of suit as the same was filed in the name of a proprietorship firm. On December 6, 2004, the defendants moved an application (IA No. 14) for discovery and production of documents under Order XI Rules 12 and 14 of the Code. On January 5, 2005, the defendants made an application (IA No. 20) under Order VI Rule 17 for the amendment of the written statement. On January 19, 2005, the plaintiff filed an application (IA No. 21) for summoning of the witnesses and on January 20, 2005, the plaintiff made an application for permission to file photocopies of the original documents and (I.A.No. 22) for leading secondary evidence. On January 24, 2005, the plaintiff made an application for production of additional documents. The defendants responded to these applications. On February 8, 2005, the plaintiff made application (IA No. 26) under Section 152 of the Code. On February 15, 2005, the defendants made three applications, namely, I.A. No. 27 for summoning documents under Order XVI Rules 1 and 6 of the Code; IA No. 28 for inspection of documents under Order XI Rule 14 read with Section 151 of the Code and IA No. 29 for production of documents on oath. On that day, plaintiff also made an application under Order VII Rule 14(3) of the Code for filing additional documents.

13. Pertinently, all the applications made by the defendants such as amendment of written statement; for leave to deliver interrogatories and discovery and production of documents; dismissal of suit under Order XXX Rule 10 of the Code; for summoning of documents etc., were dismissed by the trial court.

14. On February 25, 2005 this Court dismissed defendants' appeal arising from the order of temporary injunction granted by the trial court and affirmed in appeal by the High Court. While dismissing the special leave petition, this Court directed the trial court to comply with the direction of the High Court and complete the trial and disposal of the suit within six months from that date.

15. In terms of the order of the High Court and subsequent order of this Court, the suit was required to be disposed of by the trial court expeditiously and the trial court endeavoured to proceed accordingly, but the defendants continued to make application after application stalling the effort of the trial court in that direction. We shall refer to the proceedings appropriately while considering the arguments of the learned Senior Counsel for the appellants. Suffice it to state here that on February 28, 2005, the trial court closed the defendants' right to cross-examine the plaintiff's witnesses. The matter was then fixed for March 17, 2005. On that date, nobody appeared on behalf of the defendants and the matter was directed to proceed ex parte. The plaintiff closed the evidence and the trial court heard the arguments of the plaintiff and reserved the judgment and fixed the matter for March 28, 2005 for pronouncement of judgment. It appears that later on the Advocate for the defendants appeared on that date and signed the order sheet.

16. After the arguments were heard on March 17, 2005 and although the matter was fixed for pronouncement of judgment on March 28, 2005, on behalf of the defendants, an application was made on March 21, 2005 for setting aside the ex parte order. The defendants continued to make applications even thereafter. The judgment was not pronounced on March 28, 2005 or immediately thereafter.

17. Then, it so happened that the Presiding Officer who heard the arguments got transferred and the new Presiding Officer assumed charge on August 28, 2006. Even thereafter the defendants kept on making application after application. The trial court heard arguments on those applications and all these applications were dismissed. The trial court pronounced the judgment on March 7, 2007 whereby plaintiff's suit was decreed as follows :

"23. Consequently, finally having allowed the suit, decree has been issued that :-

(a) It has been declared that defendants do not have any right to sell Supari, Pan Masala, Mixed Supari, Gutka sell by packing in pouch under the name and trade mark "Manikchand".

(b) Defendants are hereby restrained by order of permanent injunction from selling the pouch of supari, pan masala and mix supari under the name Manikchand and should not copy the colour screen and design of "Manikchand" zarda pouch and should not advertise or publish their pouch of supari, pan masala, jarda under the trade mark "Manikchand".

(c) Defendants are hereby directed to submit the accounts of the profits earned by them during the period from 15.3.2001 to 15.3.2005 by selling the supari, pan masala, gutka etc. under the "Manikchand" within two months in this court.

(d) Defendants shall bear the cost of this suit of the plaintiff."

18. Against the ex parte decree dated March 7, 2007, the defendants preferred first appeal before the Madhya Pradesh High Court. The Division Bench of that Court vide its judgment dated August 13, 2008 dismissed the defendants' first appeal except the relief in respect of profits relating to damages. In other words, the High Court maintained the judgment and decree of the trial court insofar as reliefs granted in paragraph 23(a) and (b) were concerned but set aside the relief granted to the plaintiff in paragraph 23(c) and instead awarded token relief of Rs. 11,00,000/- (Rupees Eleven Lakh) only. It is from this judgment that the present special leave petition has arisen.

19. We heard Mr. Shekhar Naphade and Mr. Pravin H. Parekh, Senior Advocates for the appellants at quite some length. We also heard Dr. A.M. Singhvi, Mr. Mukul Rohatgi and Mr. Vikas Singh, Senior Advocates for the respondent. We also permitted the parties to file their brief written submissions which they did.

20. Mr. Shekhar Naphade, learned senior counsel for the appellants argued that the judgment passed by the Presiding Officer of the trial court on March 7, 2007 and affirmed in appeal by the High Court is a nullity having been delivered by a Judge who never heard the matter. He submitted that the predecessor Judge Smt. Bharati Baghel had recorded the evidence ex parte and heard advocate for the plaintiff on March 17, 2005; reserved the judgment and fixed the date for pronouncement of judgment but she never delivered the judgment. She was transferred and the new Presiding Officer assumed charge on August 28, 2006. The successor Presiding Officer though heard various applications made by the defendants but never heard the parties insofar as suit was concerned and delivered the judgment which apparently is not in conformity with the legal mandate that one who hears the matter must decide the case. In this regard, Mr. Naphade relied upon a decision of this Court in Gullapalli Nageswara Rao and Ors. v. Andhra Pradesh State Road Transport Corporation and Anr.1. He also referred to Order XX Rule 1 of the Code and argued that this provision requires the Judge to hear the parties and, thus, there was an obligation on the Presiding Judge who delivered the judgment to have heard oral arguments of the parties. In support of his submission, he relied upon a decision of Madras High Court in the American Baptist Foreign Mission Society, by its Attorney Rev. W.L. Ferguson, Jaladi Ayyappaseti and Anr. and Gurram Seshiah and Anr. v. Amalanadhuni Pattabhiramayya and Ors.2. Mr. Shekhar Naphade also argued that Order XVIII Rule 15 of the Code has no application since the defendants had appeared before the Trial Judge on March 17, 2005 itself after the matter was heard ex parte and reserved for the judgment thereafter and that entitled the defendants to make oral arguments.

1 (1959) Supp 1 SCR 319 2 48 Ind. Cas.859

21. On the other hand, learned Senior Advocates for the respondent heavily relied upon Order XVIII Rule 15 of the Code and submitted that the successor Judge has to proceed from the stage the predecessor Judge had left the case and, therefore, the successor Judge had jurisdiction to prepare and deliver the judgment on the basis of the record of the case and had no jurisdiction to fix the case again for arguments and set the clock back to the pre-judgment stage. Reliance, in this regard, was placed on a decision of this Court in Arjun Singh v. Mohindra Kumar and Others3. It was also submitted on behalf of the respondent that from the two orders passed by the trial court on February 28, 2005 and March 17, 2005, the two special leave petitions (Special Leave Petition

(Civil) Nos. 7339 of 2006 and 7340 of 2006) were filed which were dismissed by this Court as withdrawn on December 1, 2006. By that time, the Presiding Officer had already changed but this Court did not remand the matter to the trial court for fresh arguments and permitted the appellants to raise their plea in the first appeal which necessarily implied that the successor Judge could proceed from the stage left by the predecessor Judge i.e., pronounce the judgment. It was also submitted on behalf of the respondent that appellants have not at all 3 (1964) 5 SCR 946 been prejudiced as the High Court has considered the entire case of the appellants threadbare as was put forth in the course of arguments. Moreover, the judgment and decree of the trial court has now merged with the judgment of the High Court. In this regard, reliance was placed on a decision of this Court in Kunhayammed and others v. State of Kerala and another4.

22. Order XVIII Rule 2 of the Code provides as under :

> "2. Statement and production of evidence.--(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. (2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.
>
> (3) The party beginning may then reply generally on the whole case.
>
> (3A) Any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.
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> (3B) A copy of such written arguments shall be simultaneously furnished to the opposite party. (3C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

4 (2000) 6 SCC 359 (3D) The Court shall fix such time limits for the oral arguments by either of the parties in a case, as it thinks fit."

23. Order XVIII Rule 15 of the Code is as follows:

> "15. Power to deal with evidence taken before another Judge.- (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rule and may proceed with the suit from the stage at which his predecessor left it.

> (2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24."

24. Order XX Rule 1 of the Code provides that the court, after the case has been heard, shall pronounce the judgment in an open court either at once or on some future date after fixing a day for that purpose of which due notice shall be given to the parties or their pleaders.

25. The hearing of a suit begins on production of evidence by the parties and suit gets culminated on pronouncement of the judgment. Under Order XVIII Rule 1 of the Code, the plaintiff has a right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by him the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. On the day fixed for the hearing of the suit or any other day to which the hearing is adjourned, as per the provisions contained in Order XVIII Rule 2, party having the right to begin is required to state his case and produce his evidence in support of issues which he is bound to prove. Under Order XVIII, Rule 2 sub-rule (2), the other party shall then state his case and produce his evidence. Under sub- rule (3A) of Rule 2 of Order XVIII, the parties in suit may address oral arguments in a case and may also avail opportunity of filing written arguments before conclusion of oral arguments. Rule 15 of Order XVIII provides for the contingency where the Judge before whom the hearing of the suit has begun is prevented by death, transfer or other cause from concluding the trial of a suit. This provision enables the successor Judge to proceed from the stage at which his predecessor left the suit. The provision contained in Rule 15 of Order XVIII of the Code is a special provision. The idea behind this provision is to obviate re-recording of the evidence or re-hearing of the suit where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit and to take the suit forward from the stage the predecessor Judge left the matter. The trial of a suit is a long drawn process and in the course of trial, the Judge may get transferred; he may retire or in an unfortunate event like death, he may not be in a position to conclude the trial. The Code has taken care by this provision that in such event the progress that has already taken place in the hearing of the suit is not set at naught. This provision comes into play in various situations such as where part of the evidence of a party has been recorded in a suit or where the evidence of the parties is closed and the suit is ripe for oral arguments or where the evidence of the parties has been recorded and the Judge has also heard the oral arguments of the parties and fixed the matter for pronouncement of judgment. The expression "from the stage at which his predecessor left it" is wide and comprehensive enough to take in its fold all situations and stages of the suit. No category or exception deserves to be carved out while giving full play to Rule 15 of Order XVIII of the Code which amply empowers the successor Judge to proceed with the suit from the stage at which his predecessor left it.

26. In Gullapalli Nageswara Rao and Ors.1, this Court stated the principle that one who hears must decide the case. The Court said :

> "The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a

> procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes and empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure."

27. The above principle with reference to hearing by a quasi judicial forum is not applicable to all situations in the hearing of the suit. "Hearing of the suit" as understood is not confined to oral hearing. "Hearing of the suit" begins when the evidence in the suit begins and is concluded by the pronouncement of judgment. The Code contemplates that at various stages of the hearing of the suit, the Judge may change or he may be prevented from concluding the trial and in that situation, the successor Judge must proceed in the suit from the stage the predecessor Judge has left it.

28. Learned senior counsel for the appellants has placed reliance on the decision of the Madras High Court in the case of American Baptist Foreign Mission Society2 . The principle of law in that case that a decree passed behind back of a legal representative of the deceased party is nullity has no application to the facts of the present case. The facts in the American Baptist Foreign Mission Society2 were peculiar. That was a case where after evidence was let in on April 19, 1916, the case was adjourned to April 26 for further arguments. On April 20, one of the defendants (14th defendant) died but his legal representatives were not brought on record. The judgment was delivered on May 3, 1916. It was contended on behalf of the legal representative of the deceased party before the High Court that the decree passed behind her back after her husband's death was without jurisdiction. The Madras High Court upheld the argument. Referring to Rule 1 of Order XX, the Madras High Court held that the arguments should be heard before the case can be regarded as ripe for judgment and in the case before them before the conclusion of arguments, the 14th defendant had died and, thus, the case was not ripe for judgment rendering the decree bad in law. We are afraid, the above decision of Madras High Court has no application at all. Order XVIII Rule 15 of the Code was not at all under consideration before the Madras High Court.

29. A decision of the Lahore High Court, in the case of Harji Mal and Anr. v. Devi Ditta Mal and Ors.5 deserves to be noticed by us. In that case, in the second appeal before the High Court, one of the contentions advanced by the appellants was that the Senior Sub- Judge who disposed of the case and wrote the judgment did not 5 AIR (1924) Lah 107 actually hear oral arguments although written arguments were before him and, therefore, the judgment was a nullity and the matter needed to be remanded to the trial court. The facts in that case were these :

> the Sub-Judge who heard the case fixed the 10th of November, for arguments. On that date, an adjournment was sought by the counsel who appeared. The Sub-Judge did not allow adjournment but directed them to file written arguments, if they wished to do so. The written arguments were submitted. While the matter was reserved for the judgment, the Sub-Judge decided to inspect the spot but he could not carry out inspection as he was transferred. The successor Judge took over and he inspected the

spot and delivered the judgment. While dealing with the argument, as noticed above, the Division Bench of the Lahore High Court referred to Order XVIII Rule 2 of the Code and noted that the said provision gave an option to the parties to argue their case when their evidence was conducted and it was for them to decide whether they would avail of this privilege. The High Court held that it was for a party to argue the case if they wished to do so and as they did not do so, the only construction which can be put upon the events is that they deliberately failed to avail themselves of such opportunity. The judgment is in brief and to the extent it is relevant may be reproduced :

"1. In this second appeal the first point raised by counsel is that the Senior Sub-Judge who disposed of the case and wrote the judgment did not actually hear oral arguments although written arguments were before him, and reliance has been placed on 57 I.C. 34 and 91 P.R. 1904, as authorities to show that under these circumstances the judgment is a nullity and the case must be remanded to the trial court.

2. The facts are that Mr. Muhammad Shah, the Sub- Judge, who heard the case fixed the 10th of November, for arguments. On that date Counsel appeared and stated that they were not ready to argue and asked for an adjournment, which he did not allow but directed them to put in written arguments, if they wished to do so. They, therefore failed to avail themselves of the opportunity given them to argue the case before the Judge who had tried it. Further adjournments were given for written arguments and these were finally submitted on the 10th December. The Sub-Judge then came to the conclusion that it was necessary to inspect the spot, though what advantage exactly was to be obtained from this inspection is not clear. He was transferred before he carried out his inspection leaving the judgment unwritten and on the 22nd of January the parties appeared before Mr. Strickland, his successor, who fixed the 5th February for inspection. Later, the counsel for the defendants, who are now the appellants, appeared before him and asked for an adjournment which he granted. He eventually carried out the inspection in the presence of the parties and then gave judgment. Now 91 P.R. 1904 is to be distinguished as being the case of a first appeal and in 57 I.C. 34 it is clear that the parties had no opportunity to argue the case before the successor. Here they had ample opportunity before both Sub-Judges. In Order 18, Rule 2, an option is given to the parties to argue their case when the evidence is conducted and it is for them to decide whether they will avail themselves of this privilege. Here they were given a further opportunity at a later date, the 10th November, and failed to make use of it. It is contended that even so they were entitled to an opportunity before the successor of Muhammad Shah who was not in the same advantageous position as he was, inasmuch as he had not heard the evidence. Even so they certainly had more than one opportunity when they appeared before Mr. Trickland. It was for them to argue the case if they wished to do so. They did not do so and the only construction which can be put upon the events is that they deliberately failed to avail themselves of such opportunity and left the case

in his hands knowing that the written arguments were before him."

30. We are in agreement with the view of the Lahore High Court that Order XVIII Rule 2 of the Code gives an option to the parties to argue their case when the evidence is conducted and it is for them to decide whether they will avail themselves of this privilege and if they do not, they do so at their peril. Insofar as the case in hand is concerned, the right of the defendants to cross-examine plaintiff was closed on February 28, 2005. The matter was then fixed for March 17, 2005 for the remaining evidence of the plaintiff. On that day, none appeared for the defendants although the matter was called out twice. In that situation, the Judge ordered the suit to proceed ex parte against the defendants; heard the arguments of the plaintiff and closed the suit for pronouncement of judgment on March 28, 2005. In these facts, the defendants, having lost their privilege of cross-examining the plaintiff's witnesses and of advancing oral arguments, now cannot be permitted to raise any grievance that the successor Judge who delivered the judgment has not given them an opportunity of oral arguments.

31. The expressions "state his case", "produce his evidence"

> and "address the court generally on the whole case" occurring in Order XVIII Rule 2, sub-rule (1) and sub-rule (2) have different meaning and connotation. By use of the expression "state his case", the party before production of his evidence is accorded an opportunity to give general outlines of the case and also indicate generally the nature of evidence likely to be let in by him to prove his case. The general outline by a party before letting in evidence is intended to help the court in understanding the evidence likely to be followed by a party in support of his case. After case is stated by a party, the evidence is produced by him to prove his case. After evidence has been produced by all the parties, a right is given to the parties to make oral arguments and also submit written submissions, if they so desire. The hearing of a suit does not mean oral arguments alone but it comprehends both production of evidence and arguments. The scheme of the Code, as embodied, in Order XVIII Rule 2, particularly, sub-rules (1), (2), (3) and (3A) and Order XVIII Rule 15 enables the successor Judge to deliver the judgment without oral arguments where one party has already lost his right of making oral arguments and the other party does not insist on it.

32. In light of the legal position and the factual matrix of the case, we are unable to accept the contention of the learned senior counsel for the appellants that the trial court violated the fundamental principle of law, i.e. "one who hears must decide the case".

33. Mr. Shekhar Naphade, learned senior counsel for the appellants contended that even if it be assumed (though the appellants seriously dispute that) that the trial court was justified in proceeding ex parte against the defendants on March 17, 2005 but since the defendants had appeared on subsequent dates, their right to address the court on merits of the case could not have been denied. Learned senior counsel submitted that proceeding ex parte under Order IX Rule 7 of the Code on March 17, 2005, did not take away the defendants' right to participate further in the

proceedings of the suit. In this regard, senior counsel relied upon a decision of the Bombay High Court in Radhabai Bhaskar Sakharam v. Anant Pandurang Pandit and Anr.6 and a decision of Nagpur High Court in Kashirao Panduji v. Ramchandra Balaji7. It was submitted that the judgment of the Nagpur High Court in Kashirao Panduji7 was binding on the trial court as at the relevant time, Mandaleshwar was within the jurisdiction of the Nagpur High Court.

6 AIR (1922) Bom 345 7 AIR (35) 1948 Nag 362

34. The contention, at the first blush, appears to be attractive but has no substance at all. In the first place, once the hearing of the suit is concluded; and the suit is closed for judgment, Order IX Rule 7 of the Code has no application at all. The very language of Order IX Rule 7 makes this clear. This provision pre-supposes the suit having been adjourned for hearing. The courts, time out of number, have said that adjournment for the purposes of pronouncing judgment is no adjournment of the "hearing of the suit". On March 17, 2005, the trial court in the present case did four things, namely, (i) closed the evidence of the plaintiff as was requested by the plaintiff; (ii) ordered the suit to proceed ex parte as defendants failed to appear on that date; (iii) heard the arguments of the Advocate for the plaintiff; and

(iv) kept the matter for pronouncement of judgment on March 28, 2005. In view of the above, Order IX Rule 7 of the Code has no application at all and it is for this reason that the application made by the defendants under this provision was rejected by the trial court.

35. Secondly, once the suit is closed for pronouncement of judgment, there is no question of further proceedings in the suit. Merely, because the defendants continued to make application after application and the trial court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression "appeared on the day fixed for his appearance" occurring in Order IX Rule 7 of the Code and thereby entitling them to address the court on the merits of the case. The judgment of Bombay High Court in Radhabai Bhaskar Sakharam6 on which reliance has been placed by the learned senior counsel for the appellants, does not support the legal position canvassed by him. Rather in Radhabai Bhaskar Sakharam6, the Division Bench of the Bombay High Court held that if a party did not appear before the suit was heard, then he had no right to be heard. This is clear from the following statement in the judgment :

> ".....Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay and if that is the case he may be mulcted in costs. But if he does not appear before the suit is heard, then he has no right to be heard....."

(Emphasis supplied)

36. The Nagpur High Court in the case of Kashirao Panduji7 referred to the decision of Bombay High Court in Radhabai Bhaskar Sakharam6 and observed as under:

> "14. The suit was just in its initial stage. In Radhabai v. Anant Pandurang A.I.R. 1922 Bom. 345 it is held that if a party appears before the case is actually heard, he has a right to be heard. The provisions of Order 9 are never meant to be penal provisions, and it is only in clear cases of gross negligence and misconduct that a party should be deprived of the opportunity of having a satisfactory disposal of the case which evidently can only be done when both parties have full opportunity of placing their case and their evidence before the Court."

37. There is no quarrel to the legal position that if a party appears before the case is actually heard and if he has otherwise not disqualified himself from being heard, he has a right to be heard. There can also be no quarrel about the general observations made by the Nagpur High Court with regard to Order IX of the Code but each case has to be seen in its own facts. As regards the instant case, it has to be borne in mind that the High Court in its order dated May 11, 2004 while dismissing the defendants' appeal directed the trial court to conclude the trial of the suit expeditiously and finally dispose of it, preferably within a period of six months from the date of receipt of the copy of the order which was passed on May 11, 2004. Unfortunately, the suit could not be disposed of by the trial court as directed by the High Court. This Court on February 25, 2005 while dismissing the defendants' appeal arising from the High Court's order dated May 11, 2004, directed the trial court to comply with the direction of the High Court and complete the trial and dispose of the suit within six months from that date. In complete disregard of the above direction, the defendants continued to make application after application. As a matter of fact, nine interlocutory applications were filed by the defendants after the hearing of the suit was expedited by the High Court and the order of this Court of February 25, 2005 reiterating the expeditious disposal of the suit. After the direction was issued by this Court on February 25, 2005, the trial court endeavoured to dispose of the suit speedily but the defendants continued to make application after application. It was in this backdrop that on February 28, 2005, the trial court rejected the defendants' applications and asked the Advocate for the defendants to cross-examine plaintiff's witnesses. On that date, the Advocate for the defendants stated that he has no authority to cross-examine plaintiff's witnesses; he is not in position to do anything and the court may do whatever it wants. It was in this background that the trial court closed the defendants' right to cross-examine the three witnesses of the plaintiff and fixed the matter for March 17, 2005. On that day, i.e., March 17, 2005 nobody appeared on behalf of the defendants although the matter was called twice. It was then that the trial court directed the matter to proceed ex parte. The plaintiff closed its evidence and the trial court heard the arguments of the plaintiff ex- parte and closed the suit for pronouncement of judgment. The above narration of facts leads to irresistible conclusion that the defendants forfeited their right to address the trial court on merits.

38. Learned senior counsel for the appellants also contended that the suit was listed on March 17, 2005 for plaintiff's evidence only and, therefore, the trial court could not have heard the final arguments and reserved the judgment for pronouncement. In this regard, reference was made to the proceedings of the trial court recorded on February 28, 2005 and also Rule 6 of the Madhya Pradesh Civil Courts Act, 1958 (for short, `Civil Courts Act'). Learned senior counsel also pressed into service a decision of this Court in Sahara India and Ors. v. M.C. Aggarwal HUF8.

39. We have already noted above the proceedings of the trial court on February 28, 2005. The said proceedings do indicate that on that date the defendants' counsel refused to cross-examine the three witnesses tendered in evidence by plaintiff and told the trial court that he was not in position to do anything and the court may do whatever it wants to. Faced with this situation, the trial court closed the defendants' right to cross-examine the plaintiff's three witnesses. As regards remaining witnesses of the plaintiff, the trial court kept the matter for March 17, 2005. On March 17, 2005, none appeared for the defendants and the plaintiff decided not to examine more 8 (2007) 11 SCC 800 witnesses. It was in this situation that the trial court ordered the suit to proceed ex parte. The trial court heard the arguments of the plaintiff's advocate and reserved the judgment for pronouncement. Is the course adopted by the trial court impermissible in law? We think not. In a situation like this where the plaintiff has closed his evidence and the defendants failed to appear, Order XVII Rule 2 of the Code was clearly attracted. The said provision is 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."

40. In view of the above provision, the trial court was required to proceed to dispose of the suit in one of the modes prescribed in Order IX of the Code. Order IX Rule 6 (1)(a) lays down the procedure where after due service of summons, the defendant does not appear when the suit is called on for hearing. In that situation, the court may make an order that suit shall be heard ex parte. The legal position with regard to Order IX Rule 6 has been explained by a 3-Judge Bench of this Court in the case of Arjun Singh3, wherein this Court stated thus :

> ".....Rule 6(1)(a) enables the Court to proceed ex parte where the defendant is absent even after due service. Rule 6 contemplates two cases: (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the hearing which is fixed is for the disposal of the suit and the defendant is not present on such a day. The effect of proceeding ex parte in the two sets of cases would obviously mean a great difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced....."

41. The following observations made by this Court in Arjun Singh3 with reference to Order IX Rule 7, Order IX Rule 13 and Order XX Rule 1 are quite apposite and may be reproduced as it is:

> ".....On the terms of O.IX, r.7 if the defendant appears on such adjourned date and satisfies the court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled -- "set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and O.IX, r.7 and O.IX, r. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus, provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice. Mr. Pathak, however, strenuously contended that a case of the sort now on hand where a defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider that the suggestion that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that O.XX, R.1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by O.IX, r. 7 is passed the next stage is only the passing of a decree which on the terms of O.IX, r. 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under O. IX, r.13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of O. IX, r.7....."

42. In light of the above legal position, the trial court cannot be said to have committed any error in ordering the suit to proceed ex parte; hearing the arguments and closing the suit for pronouncement of judgment. What is provided by Rule 6 of the Civil Courts Act is that each case fixed for any day shall be entered in advance immediately upon a date or adjourned date being fixed and such entry would show the purpose for which it is set down on each date. It further provides that the cases should be classified in such a manner as to show at a glance the nature of work fixed for the particular date. Rule 6 basically provides for a procedure which is required to be followed in maintaining the register for the purpose of the dates fixed in the matter and the purpose for which the date has been fixed. The said provision does not in any way impinge upon the power of the court to proceed for disposal of the suit in case both the parties or either of the parties fail to appear as provided in Order IX of the Code.

43. The decision of this Court in Sahara India8 relied upon by the learned senior counsel for the appellants hardly has any application to the facts of the present case. The facts in that case are indicated in paragraph 4 of the Report. On May 13, 2002, the case was fixed for the evidence of the plaintiff. On that day, the Presiding Officer was on leave and the case was adjourned to May 29, 2002 for the plaintiff's evidence. On May 29, 2002, none appeared for the defendants and the matter was adjourned to May 31, 2002 for final arguments and for orders after lunch. Finally, the suit was decreed by the trial court. The first appeal from the judgment and decree of the trial court was dismissed. The matter then reached this Court. It is true that it was argued before this Court that the course adopted by the trial court has no sanctity in law and even if the defendants were not present, the order could have been passed at the most to set the defendants ex parte and another date should have been fixed. It was also argued before this Court that the reason for non-appearance was due to the wrong noting of the date by the counsel appearing for the defendants. In paragraph 8 of the decision, this Court stated thus :

> "8. We find that the High Court has disposed of the first appeal practically by a non-reasoned order. It did not even consider the plea of the defendants as to why there was non-appearance. Be that as it may, the course adopted by the trial court appears to be unusual. Therefore, we deem it proper to remit the matter to the trial court for fresh adjudication. Since the matter is pending the trial court shall dispose of the matter within three months from the date of receipt of our order.

44. From the above, it is clear that what persuaded this Court in remanding the matter back to the trial court was that the High Court disposed of the first appeal by a non-reasoned order. The High Court did not even consider the plea of the defendants as to why there was non-appearance. The observation, "Be that as it may, the course adopted by the trial court appears to be unusual" must be seen in its perspective. The statement does not exposit any principle of law.

45. It was contended by Mr. Shekhar Naphade, learned senior counsel for the appellants that diverse interlocutory applications, particularly, applications (i) to produce original documents under Section 151 of the Code (IA No. 10), (ii) under Order XXX Rule 10 of the Code for dismissal of the suit (IA No. 11),

(iii) for the leave of the court to deliver interrogatories under Order XI Rule 1 of the Code (IA No. 13), (iv) for production of excise documents under Order XI Rules 12 and 14 of the Code (IA No. 14),

(v) for summoning records from the Central Excise Department under Order XVI Rules 1 and 6 of the Code (IA No. 27) and (vi) for inspection of documents under Order XI Rule 14 of the Code (IA No.

28) were made but wrongly rejected by the trial court by various orders. He submitted that these orders were challenged before the High Court and then brought to this Court. This Court granted liberty to the defendants to raise contentions concerning rejection of these applications in the appeal against the decree. The appellants challenged the orders rejecting these applications before the High Court in the first appeal and raised contentions in this regard but the High Court did not advert to

these contentions at all. Learned senior counsel submitted that rejection of these applications and non- adherence to pre-trial procedures have rendered the impugned judgment and decree bad in law.

46. The judgment of the High Court is not brief, and is rather occupied with an elaborate discussion but there is no reference of challenge to the orders passed by the trial court on various interlocutory applications. Confronted with this difficulty, learned senior counsel relied upon statement made at page `I' of the synopsis, paragraph 21, wherein it is stated :

> "The following issues were taken in the ground of appeal and argued but have not even been discussed by the Hon'ble High Court in its impugned judgment. .....
>
> (d) That the Petitioner had also assailed the dismissal of various applications filed by the Petitioner during the course of trial in view of the liberty granted by this Hon'ble Court but none of the grounds has been considered or discussed or even averred to in the impugned judgment.

....."

It is true that in the counter affidavit filed by the respondent, nothing has been said about the above statement made in the synopsis. However, in our view, in case the contentions raised by the appellants were not considered by the High Court, the proper course available to the appellants was to bring to the notice of the High Court this aspect by filing a review application. Such course was never adopted. In view of this, we are not persuaded to permit the appellants to challenge the orders passed by the trial court on the interlocutory applications now and argue that trial court erred in not adhering to the pre-trial procedures.

47. Mr. Shekhar Naphade, learned senior counsel for the appellants also challenged the correctness of the order dated December 7, 2005 passed by the trial court granting plaintiff permission to lead secondary evidence. In our view, the trial court cannot be said to have erred in permitting the plaintiff to lead secondary evidence when the original assignment deed was reportedly lost.

48. Learned senior counsel for the appellants vehemently contended that the evidence let in by the plaintiff is no evidence in the eye of law and, therefore, on such evidence, the plaintiff's suit could not have been decreed. The argument of the learned senior counsel is that on behalf of the plaintiff, three witnesses were tendered in evidence; their examination-in-chief was filed by means of affidavits but, as required under Order XVIII Rule 5 of the Code, they never entered the witness box nor confirmed the contents of the affidavits. In this regard, learned senior counsel relied upon a decision of the Bombay High Court in the case of F.D.C. Limited v. Federation of Medical Representatives Association India & Ors.9 and a decision of this Court in Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd.10 affirming the view of the Bombay High Court in the case of F.D.C. Limited9. Learned senior counsel would submit that as a matter of fact, the plaintiff did make an application on February 28, 2005 for permission to follow the procedures as stated in the case of Ameer Trading Corpn. Ltd.10 but on the next date, i.e., March 17, 2005 that application was

withdrawn. According to him, irrespective of withdrawal of such application, the plaintiff had to follow the procedure provided in order XVIII Rule 5 of the Code before examination-in-chief of its witnesses through affidavits could be treated as evidence as the case before the trial court was an appealable case. He also argued that the documents referred to in the affidavits have not been proved according to the provisions of the Evidence Act and under Order XVIII Rule 4 of the Code. It was, thus, contended by the learned senior counsel that there has been absolutely non-application of mind by the trial court in decreeing plaintiff's suit.

49. Order XVIII Rule 4 of the Code provides for the mode of recording the evidence. The said provision reads as follows :

> 9 AIR 2003 Bom 371 10 (2004) 1 SCC 702 "4. Recording of evidence.--(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:
>
> Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.
>
> (2) The evidence (cross-examination and re-

examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

> Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:
>
> (3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.
>
> (4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule."

50. As to how the evidence is to be taken in appealable cases is provided in Rule 5 of Order XVIII of the Code. This provision reads as follows :

> "5. How evidence shall be taken in appealable cases.--In cases in which an appeal is allowed, the evidence of each witness shall be,--
>
> (a) taken down in the language of the Court,-
>
> (i) in writing by, or in the presence and under the personal direction and superintendence of, the Judge, or
>
> (ii) from the dictation of the Judge directly on a typewriter, or
>
> (b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge."

51. The purpose and objective of Rule 4 of Order XVIII of the Code is speedy trial of the case and to save precious time of the court as the examination-in-chief of a witness is now mandated to be made on affidavit with a copy thereof to be supplied to the opposite party. The provision makes it clear that cross-examination and re- examination of witness shall be taken either by the court or by Commissioner appointed by it. Proviso appended to sub-rule (1) of Rule 4 of Order XVIII further clarifies that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with the affidavit shall be subject to the order of the court. In a case in which appeal is allowed, Rule 5 of Order XVIII provides that the evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the Judge or from the dictation of the Judge directly on a typewriter or recorded mechanically in the presence of the Judge if the Judge so directs for reasons to be recorded in writing.

52. The above provisions, namely, Order XVIII Rule 4 and Order XVIII Rule 5 of the Code came up for consideration before this Court in the case of Ameer Trading Corpn. Ltd.10. Before we refer to this judgment, it is appropriate that the judgment of the Bombay High Court in F.D.C. Limited9 is noted. The Single Judge of that Court in F.D.C. Limited9 held as under :-

> "7. It is to be noted that the legislature being fully aware about the provision of law contained in Rule 5 which was already there even prior to the amendment to Rule 4, has amended the Rule 4 with effect from 1.7.2002 specifically providing thereunder that the examination in chief "in every case" shall be on affidavit. One has to bear in mind the decisions of the Apex Court in the case of Dadi Jagannadham v. Jammulu Ramulu reported in 2001 (7) SCC 71 on the settled principles of interpretation of statutes that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intend to and the court as far as possible should adopt construction which will carry out obvious intention of legislature, and in East India Hotels Ltd., and Anr. v. Union of India and Anr. reported in (2001) 1 SCC 284 that "An act has to be read as a whole, the different provisions have to be harmonised and the effect has to be given to all of them". The harmonious reading of Rules 4 and 5 of Order XVIII would reveal that while in each and every case of recording of evidence, the examination in chief is to be permitted in the form of affidavit and while such evidence in the form of affidavit being taken on record, the procedure described under Rule 5 is to be followed in the appealable cases. In non appealable cases, the affidavit can be taken on record by taking resort to the provisions of law contained in Rule 13 of Order XVIII. In other words, mere production of the affidavit by the witness will empower the court to take such affidavit on record as forming part of the evidence by recording the memorandum in respect of production of such affidavit taking resort to Rule 13 of Order XVIII in all cases, except in the appealable cases wherein it will be necessary for the Court to record evidence of production of the affidavit in respect of examination in chief by asking the deponent to produce such affidavit in accordance with Rule 5 of Order XVIII. Undoubtedly, in both the cases, for the purpose of cross- examination, the court has to follow the procedure prescribed under Sub-rule 2 of Rule 4 read with Rule 13 in case of non-appealable cases and the procedure prescribed under Sub-rule 2 of Rule 4 read with Rule 5 in appealable cases.
>
> 8. In other words, in the appealable cases though the examination in chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 5. In non appealable cases however, the affidavit in relation to examination in chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to Rule 13 of Order XVIII. The cross- examination of such deponent in case of appealable cases, will have to be recorded by complying the

provisions of Rule 5, whereas in case of non appealable cases the court would be empowered to exercise its power under Rule 13.

9. In fact Rule 4, either unamended or amended makes no difference between appealable or non appealable cases in the matter of method of recording of evidence. Such differentiation is to be found in Rule 5 and 13. The Rule 4, prior to the amendment, provided that when witness would appear before the court, his testimony would require to be recorded in the presence of and under the personal direction of the Judge which was required to be done in appealable cases as well as in non appealable cases. Only method of recording testimony in appealable cases that was to be in terms of Rule 5 whereas in other cases in terms of Rule 13. Now, in terms of Rule 4, after its amendment, it provides that recording of evidence in relation to examination in chief shall be in all cases by way of affidavits. However, as already observed above, in appealable cases the same to be admitted in evidence or to be made part and parcel of the evidence by following the method prescribed under Rule 5 and in other cases, the one prescribed under Rule 13.

10. Experience has shown that by allowing the parties to place on record the examination in chief in the form of affidavit, saves lot of time of the Court, the litigants and the public. The provisions of law of procedure are to be read and interpreted, to give full effect to the intention of the legislature. The intention behind the amendment to Rule 4 is to curtail the delay in disposal of the suits. As the recording of evidence in the form of affidavit being in aid of avoiding delay in disposal of the suits, and there being no conflict disclosed between the provisions of Rules 4 and 5 on being read as above, it is to be held that in each and every case, the evidence in examination in chief before the trial court can be in the form of affidavit, the only difference to be observed will be in the procedure of taking such affidavit on record and in the appealable cases it has to be taking resort to the provisions of Rule 5 and in other cases to Rule 13."

53. At this stage, a reference to Rule 13 of Order XVIII of the Code may also be made. The said provision provides for memorandum of evidence in unappealable cases. It reads as follows:

"13. Memorandum of evidence in unappealable cases.-- In cases in which an appeal is not allowed, it shall not be necessary to take down or dictate or record the evidence of the witnesses at length; but the Judge, as the examination of each witness proceeds, shall make in writing, or dictate directly on the typewriter, or cause to be mechanically recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the Judge or otherwise authenticated, and shall form part of the record."

54. It is also relevant to mention that Rule 5 of Order XVIII was substituted by Act 104 of 1976 with effect from February 1, 1977. Order XVIII Rule 4 of the Code was in fact substituted by a later Act, namely, Act No. 22 of 2002 with effect from July 1, 2002. Rule 4 Order XVIII begins with the

expression, "in every case" and says that the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

55. Now, we consider the decision of this Court in Ameer Trading Corpn. Ltd.10 . The interpretation of Order XVIII Rule 4 and Rule 5 of the Code fell for consideration in that case. In paragraph 15 of the Report, this Court stated, `the examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order XVIII speaks of examination-in-chief. .....Such examination-in-chief of a witness in every case shall be on affidavit". The Court then stated in paragraph 17 that Rule 4 of Order XVIII, as amended with effect from July 1, 2002 specifically provides that the examination-in-chief in every case shall be on affidavit. It was noticed by this Court that Rule 5 of Order XVIII has been incorporated prior to the amendment in Rule 4. Noticing the difference between Rule 4 and Rule 5 of Order XVIII, the Court said that Rule 4 of Order XVIII did not make any distinction between appealable and non-appealable cases so far as mode of recording evidence is concerned. Then, in paragraph 19 of the Report, the Court observed as under :

> "19. It, therefore, appears that whereas under the unamended rule, the entire evidence was required to be adduced in court, now the examination-in-chief of a witness including the party to a suit is to be tendered on affidavit. The expression "in every case" is significant. What thus remains viz. cross-examination or re-examination in the appealable cases will have to be considered in the manner laid down in the rules, subject to the other sub-rules of Rule
>
> 4."

56. This Court applied Heydon's Rule as well as the principles of purposive construction and stated (i) the amendment having been made in Rule 4 of Order XVIII of the Code by the Parliament later, the said provision must be given full effect and (ii) the two provisions must be construed harmoniously. In paragraph 33 of the Report, this Court stated as follows :

> "33. The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross- examining him. The defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court."

57. It is pertinent to notice that in Ameer Trading Corpn. Ltd.10, a decision of the Rajasthan High Court in the case of Laxman Das v. Deoji Mal & Ors.11 was cited wherein the view was taken that 11 AIR 2003 Rajasthan 74 in the appealable cases, Order XVIII Rule 4 of the Code has no application

and the court must examine all the witnesses in court. The contrary view taken by the Bombay High Court in F.D.C. Limited9 was also cited. This Court considered the decision of the Rajasthan High Court in the case of Laxman Das11 and the decision of Bombay High Court in F.D.C. Limited9 and noticed the conflict in the two decisions. When this Court stated in paragraph 32, "we agree with the view of the Bombay High Court", the Court agreed with the view of the Bombay High Court that irrespective of whether the case is appealable or non-appealable the examination-in-chief has to be permitted in the form of affidavit. Paragraph 32 of the Report cannot be read to mean that paragraphs 7 and 8 of the decision of the Bombay High Court in F.D.C. Limited9 were approved by this Court in entirety. This is for more than one reason. In the first place, this Court after quoting the view of Rajasthan High Court in the case of Laxman Das11 in paragraph 30 and the view of Bombay High Court in the case of F.D.C. Limited9 in paragraph 31, said, "we agree with the view of the Bombay High Court". This expression, thus, means that this Court has preferred the view of Bombay High Court concerning the interpretation of Rule 4 of Order XVIII of the Code over the view of the Rajasthan High Court. Second and equally important, after quoting paragraphs 7 and 8 of the decision of the Bombay High Court in F.D.C. Limited9, the Court has not said that they agree with the above view of the Bombay High Court. Third, the subsequent paragraph 33 makes the legal position further clear. This Court said, "presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examining him". The prejudice principle was accordingly applied and the Court said that the defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event the defendant desires to cross-examine the said witness he would be permitted to do so in the open court. For all this, it cannot be said that in Ameer Trading Corpn. Ltd.10, it has been laid down as an absolute rule that in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be treated as part of the evidence unless the deponent enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature. Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the Notary or Judicial Officer or any other person competent to administer oath. The examination-in-chief is, thus, on oath already. In our view, there is no requirement in Order XVIII Rule 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-chief in the form of affidavit has to make himself available for cross-examination in the witness box, unless defendant's right to cross examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence.

58. On February 28, 2005, the three witnesses whose examination-in-chief was tendered by the plaintiff in the form of affidavits were present for cross-examination but despite the opportunity given to the defendants, they chose not to cross-examine them and thereby the trial court closed the defendants' right to cross- examine these witnesses. In view of this, it cannot be said that any prejudice has been caused to the defendants if these three witnesses did not enter the witness box.

59. Learned senior counsel for the appellants also submitted that the suit was not maintainable under Order XXX Rule 10 of the Code having been filed in the name of the proprietorship firm--M/s. M.S.S. Food Products. Relying upon a decision of the Bombay High Court in the case of Bhagvan Manaji Marwadi & Ors. v. Hiraji Premaji Marwadi12, it was urged that a proprietorship firm cannot sue in its name.

60. Rule 10 of Order XXX of the Code reads as follows :

> "10. Suit against person carrying on business in name other than his own.--Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply accordingly."

61. The above provision is an enabling provision which provides that a person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name. As a necessary corollary, the said provision does not enable a person carrying on business in a name or style other than in his own name to sue in such name or style.

62. The plaint filed by the plaintiff describes the title of the plaintiff as follows:

> 12 AIR 1932 Bom 516 "Messrs. M.S.S. Food Products, Plot No. D, Sector-E, Sanver Road Industrial Area, Indore, Through - Proprietor - Nilesh Vadhwani, Son of Shri Ashok Vadhwani, aged 27 years, Occupation - Business."

63. The above description of the plaintiff in the plaint at best may be called to be not in proper order inasmuch as the name of Nilesh Vadhwani must have preceded the business name in the cause title. This is not an illegality which goes to the root of the matter. Moreover, the defendants did file an application (IA No. 11/2004) under Order XXX Rule 10 of the Code before the trial court but that came to be rejected on November 27, 2004. The said order was challenged at interlocutory stage and the matter ultimately reached this Court. This Court refused to interfere with the order but gave liberty to the defendants to challenge the same in the first appeal, if aggrieved by the judgment and decree. Even after rejection of the application under Order XXX Rule 10 of the Code by the trial court vide order dated November 27, 2004, the defendants yet attempted to raise the same controversy by making an application for amendment in the written statement but that too was dismissed. This order was also challenged at interlocutory stage by the defendants but the said order was not interfered with by the High Court and this Court and liberty was granted to the defendants to challenge the same in the first appeal against the final judgment and decree. However, from the perusal of the judgment of the High Court, it appears that no argument was advanced with regard to correctness of these two orders. We have already referred to this aspect in the earlier part of our judgment. The judgment of the Bombay High Court in the case of Bhagvan Manaji Marwadi12 is of no help to the appellants for the above reasons.

64. Mr. Shekhar Naphade, learned senior counsel for the appellants strenuously urged that statutory excise record (since pan masala/gutka are exigible to excise duty) having not been filed by the plaintiff which was the best piece of evidence, the adverse inference ought to have been drawn against the plaintiff that plaintiff never manufactured pan masala/gutka under the brand "Malikchand" and the factum of manufacturing "Malikchand" pan masala and gutka having not been proved, there was no question of restraining the defendants from using their brand "Manikchand" in the passing off action. In support of his contention that the party is bound to produce best evidence in his possession to prove his case, learned senior counsel placed reliance on a decision of this Court in Gopal Krishnaji Ketkar v. Mahomed Haji Latif and Ors.13 It was also argued that the defendants are well-known registered brand having national as well as international presence for more than two decades; the turnover of the defendants is more than rupees three hundred crores per annum and they have been incurring huge expenditure on sales, promotion and advertisement and that on account of continuous use of trade "Manikchand" from the year 1961 on a commercial scale, their mark has acquired the status of well-known mark within the meaning of Section 2(1)(zg) of the Trade Marks Act, 1999 and the High Court as well as trial court ought to have taken judicial notice of the brand and goodwill of "Manikchand". It was also submitted that the plaintiff has produced the fabricated documents viz., bill that referred to service tax in the year 1990 whereas service tax came into force in the year 1994 only. The deeds of assignment do not inspire confidence as assignment has been made for a consideration of Rs. 500/- which is too meager and, as a matter of fact, the Bombay police after investigation found that the two assignment deeds dated May 1, 1986 and April 1, 1992 were forged and fabricated.

65. We are not persuaded by the submission of learned senior counsel for the appellants. The defendants did not cross- 13 AIR 1968 SC 1413 examine the plaintiff's witnesses despite opportunity having been granted to them. There could have been some merit in the submissions, had the defendants cross-examined the plaintiff's witnesses on these aspects. But, unfortunately, they did not avail of that opportunity. In the circumstances, if the trial court and the High Court accepted the plaintiff's evidence which remained un-rebutted and unchallenged and also relied upon the documents produced by the plaintiff, it cannot be said that any illegality has been committed by the trial court in decreeing plaintiff's suit or any illegality has been committed by the High Court in dismissing the first appeal.

66. Learned senior counsel for the appellants then contended that the matter was posted for judgment on March 7, 2007 and the counsel for the plaintiff submitted that he did not wish to argue the matter and since the plaintiff did not argue the matter, as required by Order XX Rule 1 of the Code, the learned Trial Judge ought to have dismissed the suit. We find no merit in this submission. As noticed above, the matter was fixed for pronouncement of judgment on March 28, 2005. The judgment could not be pronounced on that day and the matter, thereafter, was fixed on various dates on the diverse applications made by the defendants. In the meanwhile, the Presiding Officer who heard the arguments of the plaintiff and kept the judgment reserved got transferred and new Presiding Officer assumed the office. We have already dealt with in detail that in the facts and circumstances of the case, on transfer of the predecessor Judge who heard the arguments, it was not incumbent upon the successor Judge to hear the arguments of the defendants. The proceedings reveal that ultimately the matter was kept for pronouncement of judgment on March 7, 2007. On

that day, the court disposed of various applications made by the defendants and pronounced the judgment. The order sheet of March 7, 2007 does record that the plaintiff's advocate expressed that he did not want to address any arguments. This statement is in the context of not advancing further arguments as on behalf of the plaintiff, the arguments had already been advanced; the judgment was reserved and kept for pronouncement. The contention of the learned senior counsel is noted to be rejected.

67. Lastly, learned senior counsel relying on "doctrine of proportionality" submitted that even if it is held that the defendants were in default in reaching the court late on March 17, 2005 and failed to cross-examine the plaintiff's witnesses, the court could have at best imposed cost on the defendants and given them an opportunity to lead evidence and contest the suit on merits. Had this course been adopted, there would not have been any prejudice to the plaintiff since it was enjoying an interim order in its favour since March 16, 2004. It was, thus, submitted that there was no occasion for the Trial Judge to proceed ex parte, and in not permitting the defendants to argue the case. The contention of the learned senior counsel for the appellants is that the judgment and decree passed by the trial court is not proportionate to the default on the part of the defendants and, accordingly, liable to be set aside.

68. We have already indicated above that in view of the direction of the High Court and reiteration of that direction by this Court, the trial court was required to complete the trial and dispose of the suit within six months from the date of the order of this Court. Obviously, the trial court had to proceed with the trial of the suit speedily. On February 28, 2005, the matter was fixed before the trial court for cross-examination of plaintiff's witnesses. The defendants' advocate moved an application for adjournment which was rejected by the trial court and when the trial court asked the defendants' advocate to proceed with the cross-examination, he told the court to do whatever it wanted. What option was left to the court except to close the right of the defendants to cross-examine plaintiff's witnesses. On the next date, the defendants or their advocates even did not appear. The court was constrained to proceed ex parte against the defendants, hear the plaintiff's advocate when the plaintiff closed its evidence and reserve the judgment to be pronounced at a later date.

69. Recently, in the case of M/s. Shiv Cotex v. Tirgun Auto Plast P. Ltd. & Ors. (Civil Appeal No. 7532 of 2011) decided on August 30, 2011, this Bench speaking through one of us (R.M. Lodha, J.), said, "..... Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward? .....". In paragraph 16 of the judgment, we stated :

> "No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system.....The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit - whether plaintiff or defendant - must cooperate with the court in ensuring the effective work on the date

of hearing for which the matter has been fixed. If they don't, they do so at their own peril....."

70. The doctrine of proportionality has been expanded in recent times and applied to the areas other than administrative law. However, in our view, its applicability to the adjudicatory process for determination of `civil disputes' governed by the procedure prescribed in the Code is not at all necssary. The Code is comprehensive and exhaustive in respect of the matters provided therein. The parties must abide by the procedure prescribed in the Code and if they fail to do so, they have to suffer the consequences. As a matter of fact, the procedure provided in the Code for trial of the suits is extremely rational, reasonable and elaborate. Fair procedure is its hallmark. The courts of civil judicature also have to adhere to the procedure prescribed in the Code and where the Code is silent about something, the court acts according to justice, equity and good conscience. The discretion conferred upon the court by the Code has to be exercised in conformity with settled judicial principles and not in a whimsical or arbitrary or capricious manner. If the trial court commits illegality or irregularity in exercise of its judicial discretion that occasions in failure of justice or results in injustice, such order is always amenable to correction by a higher court in appeal or revision or by a High Court in its supervisory jurisdiction. Having regard to the facts of the present case, which we have already indicated above, it cannot be said that the trial court acted illegally or with material irregularity or irrationally or in an arbitrary manner in passing the orders dated February 28, 2005 and March 17, 2005. The defendants by their conduct and tactics disentitled themselves from any further indulgence by the trial court. The course adopted by the trial court can not be said to be unfair or inconsistent with the provisions of the Code.

71. In view of the above, appeal has no merit and is dismissed with costs which we quantify at Rupees 50,000/- (fifty thousand).

.....J. (Aftab Alam) .....J. (R.M. Lodha) NEW DELHI.

NOVEMBER 25, 2011.