

G.N.R. BABU @ S.N. BABU

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v.

DR. B.C. MUTHAPPA & ORS.

(Civil Appeal No. 6228 of 2022)

SEPTEMBER 06, 2022

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[AJAY RASTOGI AND ABHAY S. OKA, JJ.]

Code of Civil Procedure, 1908 – ss.96, 105 & Or.IX, r.13 – Ex-parte decree against defendant – Appeal u/s.96 – Scope of adjudication – Ex-parte decree was passed against the appellant-defendant in the suit filed by first respondent – Plea of the appellant that the High Court in appeal u/s.96 while confirming the decree on merits proceeded on the basis that the issue regarding the failure to serve the suit summons can be agitated only in an application filed for setting aside ex-parte decree by invoking r.13 of Or.IX – Correctness of – Held: The appellant while challenging ex-parte decree by filing an appeal, can always point out from the record of the trial court that the order passed to proceed with the suit ex-parte against him was illegal – Though he would not be entitled to lead evidence in appeal for making out a sufficient cause for his absence before the trial court, he can always argue on the basis of the record of the suit that either the suit summons was not served upon him or that even otherwise also, the trial court was not justified in proceeding ex-parte against him – Only when the application made by a defendant u/r.13 of Or. IX is dismissed that such a defendant cannot agitate in the appeal against ex-parte decree that the order directing that the suit shall proceed ex-parte was illegal or incorrect – However, in the present case, the appellant had not filed application u/r.13 of Or.IX, therefore, such a contention can be raised by him – Also, on facts proceeding ex-parte against the appellant was not warranted – Impugned order passed by the High Court as well as the decree of the Trial Court set aside – Further, on facts the prayer for remand of the suit is accepted – Appellant to pay costs of Rs.2,00,000/- to the first respondent – Original suit restored.

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Code of Civil Procedure, 1908 – s.105 – Held: Under s.105 when a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case can be set forth as a ground of objection in the Memorandum of Appeal.

- A *Code of Civil Procedure, 1908 – Or.V, r.17 – Requirement under – Non-fulfillment of – Ex-part decree passed against the appellant and second respondent observing that they did not appear despite the service of summons – Held: Record shows that an attempt to serve summons by the regular mode failed as the premises of the appellant were found to be locked – Trial Court did not direct affixing of a copy of the summons on the outer door of the premises in which the appellant was residing, as required by r.17 of Or.V – Without verifying whether the address of the appellant, as shown in the cause title of the suit was correct, summons was ordered to be served through Registered Post AD – Decree set aside.*

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C **Partly allowing the appeal, the Court**

D **HELD:** 1.1 In this case, the question is when the defendant did not avail the remedy under Rule 13 of Order IX of CPC, whether it is open for him to agitate in the regular appeal against the decree that the trial court had no justification for proceeding ex parte against the appellant. In such a case, though the appellant would not be entitled to lead evidence in appeal for making out a sufficient cause for his absence before the trial court, he can always argue on the basis of the record of the suit that either the suit summons was not served upon him or that even otherwise also, the trial court was not justified in proceeding ex parte against him. The reason is that under Section 105 of CPC, when a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case can be set forth as a ground of objection in the Memorandum of Appeal. Thus, in such a case, the appellant can always urge in an appeal against the decree that an interim or interlocutory order passed during the pendency of the suit affecting the decision of the case was illegal. Therefore, the appellant, while challenging ex parte decree by filing an appeal, can always point out from the record of the trial court that the order passed to proceed with the suit ex parte against him was illegal. As held in the case of Bhanu Kumar Jain, only when the application made by a defendant under Rule 13 of Order IX of CPC is dismissed that such a defendant cannot agitate in the appeal against ex-part decree that the order directing that the suit shall proceed ex- parte was illegal or incorrect. However, in this case, the appellant has not filed application under Rule 13 of

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Order IX of CPC. Therefore, such a contention can be raised by A him. [Para 8][210-F-H; 211-A-C]

Bhanu Kumar Jain v. Archana Kumar & Anr. (2005) 1 SCC 787 : [2004] 6 Suppl. SCR 1104 – relied on.

1.2 On facts of the case in hand, it is found that there is a noting in the order sheet of the trial court dated 27th October 2014 that the summons issued to the appellant and second respondent was returned unserved with the remark that their respective premises were locked. However, on 05th January 2015, the trial court ordered issue of summons by Registered Post Acknowledgement Due at the same address. The order sheet of 05th March 2015 records that the summons sent to the appellant and the second respondent by post was returned with the remarks “Intimation Delivered”. Thus, the record shows that an attempt to serve summons by the regular mode failed as the premises of the appellant were found to be locked. The trial court did not direct affixing of a copy of the summons on the outer door of the premises in which the appellant was residing, as required by Rule 17 of Order V of CPC. Without verifying whether the address of the appellant, as shown in the cause title of the suit was correct, summons was ordered to be served through Registered Post AD. Therefore, there was no warrant for proceeding ex parte against the appellant. Moreover, it is found from the rejoinder that a multi-storeyed building consisting of ground plus four floors has been constructed on the suit property and the residential premises in the building on the suit property have been occupied by different persons. As noted earlier, there is a decree passed for the demolition of the building constructed on the suit property. This is one more reason to accept the prayer for remand of the suit. The suit was instituted in the year 2014. As a result of passing an order of remand, the disposal of the suit filed by the first respondent will be delayed. Therefore, the appellant will have to be saddled with costs quantified at Rs.2,00,000/- (Rupees two lacs only). Though no adjudication is being made on the issue whether the occupants of the building are necessary parties to the suit, a liberty will have to be granted to the first respondent, if he so desires, to implead the persons in possession of the premises in the building constructed on the

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- A suit property. The impugned judgment and order passed by the High Court as well as the impugned judgment and decree dated passed by the learned Judge of the City Civil Court at Bangalore are set aside. Original Suit No.6610 of 2014 is restored to the file of the City Civil Court, Bangalore. The first respondent shall be entitled to costs quantified at Rs.2,00,000/- (Rupees two lacs only) from the appellant. The payment of costs shall be the condition precedent. [Paras 9-11, 13][211-D-H; 212-A-C, F]

Bhivchandra Shankar More v. Balu Gangaram More & Ors. (2019) 6 SCC 387 : [2019] 7 SCR 298 – referred to.

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Case Law Reference

[2004] 6 Suppl. SCR 1104	relied on	Para 6
[2019] 7 SCR 298	referred to	Para 6

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6228 of 2022.

From the Judgment and Order dated 22.03.2016 of the High Court of Karnataka at Bengaluru in R.F.A. No. 494 of 2016.

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Anand Sanjay M. Nuli, Dharm Singh, Suraj Kaushik, Nanda Kumar K.B., M/s Nuli & Nuli, Advs. for the Appellant.

Arvind Kamath, Sr. Adv., Shivram Jasra, Bhargava V. Desai, Ms. Charu Modi, S. K. Kulkarni, M. Gireesh Kumar, Ankur S. Kulkarni, Ms. Uditha Chakravarthy, Advs. for the Respondents.

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The Judgment of the Court was delivered by

ABHAY S. OKA, J.

1. Leave granted.

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2. The appellant, who is the original first defendant, has taken an exception to the judgment and order dated 22nd March 2016 passed by the High Court of Karnataka in an appeal being R.F.A.No.494 of 2016 preferred under Section 96 of the Code of Civil Procedure, 1908 (for short ‘CPC’).

3. The first respondent who is the original plaintiff, filed a suit in the City Civil Court at Bangalore (now Bengaluru) for a declaration

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that he was the absolute owner of the property subject matter of the suit comprising of Site No.28 at BTM Layout, Bangalore. Site No.28, according to the first respondent, consisted of lands bearing survey nos.56, 57 and 60 of Bilkenahalli Village and survey nos.61, 71 and 72 of N.S. Palya Village, Bangalore South Taluk, Bangalore. Site No.28 is hereinafter referred as “the suit property”. Apart from claiming a declaration of ownership, the first respondent contended that a structure erected by the appellant on the suit property was illegal and therefore, a decree was sought for removal of the structure. The other two respondents in this appeal were the second and third defendants respectively. The learned Judge of the City Civil Court at Bangalore, by his judgment and order dated 19th September 2015, passed a declaratory decree by declaring the first respondent as the owner of the suit property. A decree was also passed directing the appellant and the second respondent to remove the structure on the suit property. The appellant and the second respondent were also restrained by a decree of perpetual injunction from entering in the suit property and from interfering with the peaceful possession and enjoyment thereof by first respondent. In paragraph 20 of the said judgment, the learned trial Judge observed that the appellant and second respondent did not appear despite the service of summons and did not contest the suit. By the impugned judgment and order, the High Court confirmed the decree on merits.

4. In support of the appeal, apart from raising various contentions on merits of the decree, the learned counsel for the appellant Shri Anand Sanjay M. Nuli urged that appellant’s address mentioned in the cause title of the suit was incorrect and on the date of institution of the suit, he was residing at another address set out in the grounds of appeal. Therefore, the suit summons was not duly served upon the appellant.

5. The learned counsel appearing for the appellant submitted that the High Court proceeded on erroneous basis that the issue regarding the failure to serve the suit summons can be agitated only in an application filed for setting aside *ex parte* decree by invoking Rule 13 of Order IX of CPC. The submission of the learned counsel appearing for the appellant is that on the basis of the record of the suit, the appellant could always point out that the service of summons was not effected or that it was otherwise illegal to proceed *ex parte* against him. He would further submit that as can be seen from the rejoinder filed by the appellant, a multi-storeyed building consisting of ground and four upper floors has

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- A been constructed by the appellant on the suit property long back and the building is occupied by the purchasers of the premises therein. He submitted that there is a very drastic decree passed for demolition of the said building constructed on the suit property without impleading the purchasers of the premises therein as parties. He would, therefore, urge
- B that by setting aside the decree of the trial court, the suit be remanded for fresh adjudication.

6. Shri Arvind Kamath, the learned senior counsel appearing for the first respondent-plaintiff submitted that the third respondent-Bangalore Development Authority was the owner of the suit property and that the

- C first respondent is the allottee of the suit property from the third respondent.
- C He submitted that the sale deed on the basis of which the appellant is claiming ownership is in respect of some other property, as can be seen from the description of the property in the sale deed. The learned senior counsel relied upon a decision of this Court in the case of **Bhanu Kumar Jain v. Archana Kumar & Anr.**¹ in support of his contention that in an
- D appeal against an *ex parte* decree, the appellant-defendant can challenge the decree only on merits. If he wants to challenge the decree either on the ground that summons was not duly served to him or that he was prevented by sufficient cause from appearing in the suit, his remedy is to apply under Rule 13 of Order IX of CPC. He also relied upon another decision of this Court in the case of **Bhivchandra Shankar More v. Balu Gangaram More & Ors.**² in which the decision of this Court in the case of **Bhanu Kumar Jain**¹ was followed. He submitted that it is not open for the appellant to challenge the decree of the trial court on the ground that summons was not duly served as he has not filed an application for setting aside the decree. He submitted that there is a
- F concurrent finding of the trial court and High Court that the first respondent has established his title and ownership over the suit property and that the building constructed thereon is completely illegal. The learned senior counsel, therefore, urged that the present appeal be dismissed.

7. We have given careful consideration to the submissions. Firstly,
- G we will deal with the scope of adjudication in an appeal preferred under Section 96 of CPC by a defendant against whom the trial court has proceeded *ex parte* and a decree has been passed. In the case of **Bhanu Kumar Jain**¹ a Bench of three Hon'ble Judges of this Court dealt with

¹ (2005) 1 SCC 787

H ² (2019) 6 SCC 387

a case where an application for setting aside *ex parte* decree was filed by a defendant under Rule 13 of Order IX of CPC. The said application was dismissed. Even an appeal preferred against the order of dismissal of the said application was dismissed. An appeal under Section 96 of CPC was also preferred by the said defendant. The submission before this Court was that the subject matter of the application under Rule 13 of Order IX of CPC and the subject matter of the appeal against decree being the same, it is against the public policy to allow two parallel proceedings to continue simultaneously. In paragraph 23 of the decision, this Court noted that the question before it was whether an appeal against *ex parte* decree was maintainable despite the fact that an application under Rule 13 of Order IX of CPC was dismissed. Paragraphs 24 to 27 of the said decision read thus :

“24. An appeal against an ex parte decree in terms of Section 96(2) of the Code could be filed on the following grounds

- (i) the materials on record brought on record in the *ex parte* proceedings in the suit by the plaintiff would not entail a decree in his favour, and
- (ii) the suit could not have been posted for *ex parte* hearing.

25. In an application under Order 9 Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for *ex parte* hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true.

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- A 27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of an interlocutory order passed in the suit, subject to the conditions laid down therein."

B [Emphasis added]

C This Court held that though after dismissal of an appeal under Section 96 of CPC against *ex parte* decree, application under Rule 13 of Order IX of CPC will not be maintainable, there is no bar on unsuccessful defendant adopting both the remedies simultaneously.

D C such a case, if the regular appeal against the decree is dismissed, obviously the application under Rule 13 of Order IX of CPC cannot proceed.

E The reason is that explanation to Rule 13 of Order IX of CPC lays down that where there has been an appeal against a decree passed *ex parte* and the appeal has been disposed of on any ground other than withdrawal, application for setting aside *ex parte* decree will not lie. However, in the event an application under Rule 13 of Order IX of CPC is dismissed, the defendant can prosecute the appeal against the decree as a right to prefer appeal under Section 96 cannot be taken away in absence of any express provision to the contrary in CPC. In paragraph 38 of the aforesaid decision, this Court held that when application under Rule 13 of Order IX of CPC filed by a defendant is dismissed, the defendant cannot be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for *ex parte* hearing and/or existence of a sufficient cause for non-appearance of the defendant.

F 8. In this case, the question is when the defendant did not avail the remedy under Rule 13 of Order IX of CPC, whether it is open for him to agitate in the regular appeal against the decree that the trial court had no justification for proceeding *ex parte* against the appellant. In such a case, though the appellant would not be entitled to lead evidence in appeal for making out a sufficient cause for his absence before the trial court, he can always argue on the basis of the record of the suit that either the suit summons was not served upon him or that even otherwise also, the trial court was not justified in proceeding *ex parte* against him. The reason is that under Section 105 of CPC, when a decree is appealed from, any error, defect or irregularity in any order affecting the decision

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of the case can be set forth as a ground of objection in the Memorandum of Appeal. Thus, in such a case, the appellant can always urge in an appeal against the decree that an interim or interlocutory order passed during the pendency of the suit affecting the decision of the case was illegal. Therefore, the appellant, while challenging *ex parte* decree by filing an appeal, can always point out from the record of the trial court that the order passed to proceed with the suit *ex parte* against him was illegal. As held in the case of **Bhanu Kumar Jain¹**, only when the application made by a defendant under Rule 13 of Order IX of CPC is dismissed that such a defendant cannot agitate in the appeal against *ex parte* decree that the order directing that the suit shall proceed *ex parte* was illegal or incorrect. However, in this case, the appellant has not filed application under Rule 13 of Order IX of CPC. Therefore, such a contention can be raised by him.

9. Now coming to the facts of the case in hand, we find that there is a noting in the order sheet of the trial court dated 27th October 2014 that the summons issued to the appellant and second respondent was returned unserved with the remark that their respective premises were locked. However, on 05th January 2015, the trial court ordered issue of summons by Registered Post Acknowledgement Due at the same address. The order sheet of 05th March 2015 records that the summons sent to the appellant and the second respondent by post was returned with the remarks “Intimation Delivered”. Thus, the record shows that an attempt to serve summons by the regular mode failed as the premises of the appellant were found to be locked. The trial court did not direct affixing of a copy of the summons on the outer door of the premises in which the appellant was residing, as required by Rule 17 of Order V of CPC. Without verifying whether the address of the appellant, as shown in the cause title of the suit was correct, summons was ordered to be served through Registered Post AD. Therefore, in our view, there was no warrant for proceeding *ex parte* against the appellant.

10. Moreover, we find from the rejoinder that a multi- storeyed building consisting of ground plus four floors has been constructed on the suit property and the residential premises in the building on the suit property have been occupied by different persons. As noted earlier, there is a decree passed for the demolition of the building constructed on the suit property. This is one more reason why we are inclined to accept the prayer for remand of the suit. The suit was instituted in the year 2014.

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- A As a result of passing an order of remand, the disposal of the suit filed by the first respondent will be delayed. Therefore, the appellant will have to be saddled with costs quantified at Rs.2,00,000/- (Rupees two lacs only). Though we are not making any adjudication on the issue whether the occupants of the building are necessary parties to the suit, a liberty will have to be granted to the first respondent, if he so desires, to implead the persons in possession of the premises in the building constructed on the suit property.

11. Accordingly, the present appeal is partly allowed. The impugned judgment and order dated 22nd March 2016 passed by the High Court as

- C well as the impugned judgment and decree dated 19th September 2015 passed by the learned Judge of the City Civil Court at Bangalore are hereby set aside. Original Suit No.6610 of 2014 is restored to the file of the City Civil Court, Bangalore.

- D 12. The parties to the appeal shall mark their presence before the learned Principal Judge, City Civil Court at Bangalore on Monday, the 26th September 2022 at 10:30 a.m. It will be open to the Principal Judge of the City Civil Court to transfer the suit for disposal to any of the Judges of the City Civil Court. The appellant shall file his written statement within maximum period of one month from 26th September 2022. Under no circumstances, the appellant shall be granted extension of time to file
- E written statement. Considering the fact that the suit is of the year 2014, the trial court shall endeavour to give necessary priority to the disposal of the suit.

- F 13. The first respondent shall be entitled to costs quantified at Rs.2,00,000/- (Rupees two lacs only) from the appellant. The payment of costs shall be the condition precedent. The appellant shall either directly pay the costs amount to the first respondent and produce the receipt thereof within four weeks from today or shall deposit the costs amount with the City Civil Court within four weeks from today.