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**(2017) 03 BOM CK 0049**  
**In the Bombay High Court**  
**Case No : Appeal from Order No. 3 of 2017**

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| Smt. Shobha | Vs | APPELLANT  |
| Shri Mohan  |    | RESPONDENT |

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**Date of Decision :** 08-03-2017

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Section 96(2)

**Citation :** (2017) 3 MhLJ 334

**Hon'ble Judges :** A.S. Chandurkar, J.

**Bench :** Single Bench

**Advocate :** Mr. R.D. Bhuibhar, Advocate, for the Appellant; Served, for the Respondent

**Final Decision :** Allowed

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## Judgement

A.S. Chandurkar, J.(Oral) - Notice for final disposal of the appeal has been duly served on the respondent. However, there is no appearance on his behalf to contest the appeal.

2. The appellant has preferred the present appeal under provisions of Order-XLIII, Rule 1 (u) of the Code of Civil Procedure, 1908 [for short "the Code"] as she is aggrieved by the order passed by the appellate Court remanding the proceedings to the trial Court for fresh adjudication.

3. The appellant is the original plaintiff who has filed suit for declaration that registered Will-Deed dated 12th September, 2011 executed by her late husband was void and has prayed for its cancellation. In the said suit, the respondent did not file his Written Statement and hence the suit proceeded ex parte against him. The appellant led her evidence and by judgment dated 12th November, 2014, the said suit was decreed. The respondent, being aggrieved filed an appeal under Section 96 of the Code. The appellate Court was of the view that the respondent had sufficient reason for not appearing before the trial Court on the date of hearing and therefore, ex parte decree passed against him was liable to

be set aside. On that premise, the judgment of the trial Court was set aside, the suit was remanded for giving an opportunity to the respondent to file his Written Statement and thereafter contest the suit on merits. Being aggrieved, the original plaintiff has filed the present Appeal from said order.

4. Shri R.D. Bhuibhar, learned counsel for the appellant, submitted that as the suit had proceeded ex parte against the respondent, it was open for the respondent to either move an application under provisions of Order-IX, Rule 13 of the Code for setting aside the ex parte decree, or to challenge the said decree by filing an appeal under Section 96 of the Code. The respondent having chosen the latter remedy, the grounds of appeal would, therefore, be restricted so as to urge that the material brought on record by the original plaintiff was not sufficient to pass decree. According to him, in such appeal under Section 96 of the Code, it was not open for the appellate Court to go into the question as to availability of any sufficient cause by the defendant for not appearing at the hearing of the suit. He submitted that the appellate Court went into the question with regard to sufficiency of the reason for the defendant to remain absent and on that basis, set aside the ex parte decree. According to him, such course was not permissible and in that regard, he placed reliance on the judgment of the Madhya Pradesh High Court in *Ramlal Chaubasia and others v. Rewa Coal fields Ltd.*, Calcutta [1966 JLJ 820].

It was then urged that unless the appellate Court was of the view that a re-trial was necessary, it could not invoke its jurisdiction under provisions of Order-XLI, Rule 23A of the Code. Such consideration was missing in the judgment of the appellate Court. In that regard, he placed reliance on the judgment in *Mahadeorao Damduji Satavne v. Nagpur Improvement Trust and others* [2015 (5) Mh.L.J. 70]. It was, therefore, submitted that the impugned order was liable to be set aside.

5. There is no appearance on behalf of the respondent to contest the appeal. I have given due consideration to the submissions made on behalf of the appellant and I have also gone through the impugned order.

6. The question that deserves consideration is whether the appellate Court could have gone into the reasons assigned by the respondent for remaining absent before the trial Court while considering an appeal filed under provisions of Section 96 of the Code against the ex parte decree.

7. It is not in dispute that the respondent did not file any Written Statement in the trial Court. The suit proceeded ex parte against him and the same was decreed by the trial Court. It is further not in dispute that against such ex parte decree, an appeal under Section 96 (2) of the Code can be filed or review of the judgment under provisions of Order-XLVII, Rule 1 of the Code can be sought or proceedings can be initiated under provisions of Order-IX, Rule 13 of the Code. The record does not indicate that the respondent had either applied for review or had sought for setting aside the ex parte decree.

8. Perusal of the judgment of the appellate Court indicates that it was of the view that the respondent was prevented by sufficient reason for not appearing before the trial Court. The stand taken by the respondent that he was not kept informed by his lawyer was accepted and it is on that basis that the appellate Court found it fit to remand the proceedings. To put it differently, the grounds that were germane for considering an application for setting aside the ex parte decree had weighed with the appellate Court while remanding the proceedings.

9. In *Bhanu Kumar Jain v. Archana Kumar and another* [2005 (2) Mh.L.J. 839], the Honourable Supreme Court considered the question as to whether an appeal under Section 96 of the Code was maintainable despite the fact that an application under provisions of Order-IX, Rule 13 of the Code was dismissed. In that context, the following observations made in paragraphs 24 and 25 of the said judgment are required to be taken into consideration :-

"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 material 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."

10. From the aforesaid observations, it can be seen that in the appeal filed under provisions of Section 96 (2) of the Code, it could be urged that the material brought on record by the plaintiff was not sufficient for passing a decree in his favour and that the suit could not have been posted for ex parte hearing. On the other hand, under provisions of Order-IX, Rule 13 of the Code, the defendant can urge that he had sufficient and cogent reasons for not attending the hearing of the suit on the relevant date. There is, therefore, material difference between the scope of both the proceedings. In the present case, as the appeal was filed under provisions of Section 96 (2) of the Code, the appellate Court ought to have decided the same in the light of the law as laid down.

11. The observations of the Division Bench of the Madhya Pradesh High Court in para 7 of its judgment in *Ramlal Chaubasia and others* [supra] are relevant and the same reads thus:-

"7. In our opinion, it is open to a defendant, who has filed an appeal against an ex parte decree under Section 96 (2) of the Code, to show from the record as it stands that there is, in the order proceeding ex parte against him, any error, defect or irregularity which has affected the decision of the case. If he succeeds in so doing, the ex-parte decree will be set aside and the case will be remitted

for retrial. But, in the appeal against the ex parte decree he cannot be allowed to show that he was prevented by any sufficient cause from appearing at the hearing. For that purpose, he must have recourse to the special procedure under Order 9, Rule 13 of the Code for setting aside the said decree."

In the light of the aforesaid position, it is clear that the appellate Court decided the appeal on an incorrect legal premise. It took into consideration the reasons assigned by the respondent for remaining absent in the suit and on that count, thought it fit to set aside the ex parte decree and remand the proceedings. Such consideration was not permissible in the light of the scope of the appeal under Section 96 (2) of the Code. Once it has been found that the appeal has been decided without keeping in mind the parameters within which it was so required to be decided, the impugned judgment would be liable to be set aside.

12. In view aforesaid discussion, the judgment of the appellate Court in Regular Civil Appeal No.354 of 2015 dated 22nd April, 2016 is quashed and set aside. The said appeal is restored to file for fresh adjudication in the light of the parameters laid down by the Honourable Supreme Court in the decision referred to herein above. It is clarified that appellate Court shall decide the appeal on its own merits and in accordance with law.

13. The present Appeal from Order is allowed in aforesaid terms. No costs.