

## **Order-09 Appearance of Parties and Consequence of Non-appearance**

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### **1. Parties to appear on day fixed in summons for defendant to appear and answer :-**

On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

### **2. Dismissal of suit where summons not served in consequence of plaintiffs failure to pay costs :-**

<sup>1</sup> Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges, if any, chargeable for such service, or failure to present copies of the plaint as required by rule 9 of Order VII, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made, if notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent on the day fixed for him to appear and answer."

1. Rule 2 Sub. by "THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 2002" [22 of 2002] in published in the Gazette of India, Extraordinary, Part II, Section No. 25 I, dated May 24, 2002

**3. Where neither party appears, suit to be dismissed :-**

Where neither party appears when the suit is called on for hearing the Court may make an order that the suit be dismissed.

**4. Plaintiff may bring fresh suit or Court may restore suit to file :-**

Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for <sup>1</sup> [such failure as is referred to in rule 2] or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

1. Subs. by C.P.C. (Amendment) Act No. 104 of 1976., for the words and bracket "his not paying the Court-fee postal charges (if any) required within the time fixed before the issue of the summons".

**5. Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons :-**

<sup>1</sup>[(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for, a period of <sup>23</sup> ["seven days"] from the date of the

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

1. Subs. by Act 24 of 1920, Sec. 2, for the original sub-rule (1).

2. Subs. by C.P.C. (Amendment) Act No. 104 of 1976, Sec. 59, for the words "three months"(w.e.f. 1st February, 1977).

3. Substituted for " [one month] ", vide " Order-09 Appearance of Parties and Consequence of Non-appearance" Dt.December 30, 1999 Published in Received the assent of the President on the 30th December, 1999 and was published in the Gazette of India, (Extra.), Part II sec.1, No. 59, dated December 30, 1999

## **6. Procedure when one plaintiff appears :-**

(1) Where the plaintiff appears and the defendant does not appear when the suit is called on (or hearing, then- When summons duly served.-<sup>1</sup>

[(a) if it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte;]

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served insufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

1. Subs. by C.P.C. (Amendment) Act No. 104 of 1976, Sec. 59 (w.e.f. 1st February, 1977).

## **7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance :-**

Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns

good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

**8. Procedure where defendant only appears :-**

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

**9. Decree against plaintiff by default bars fresh suit :-**

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his

(2) No order shall be made under this rule unless notice of the application has been served on the opposite-party.

**10. Procedure in case of non-attendance of one or more of several plaintiffs :-**

Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

**11. Procedure in case of non-attendance of one or more of several defendants :-**

Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendant who do not appear.

**12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person :-**

Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the

satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear, Setting aside decrees ex parte

**13. Setting aside decree ex parte against defendant :-**

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any or the other defendants also: <sup>1</sup> [Provided further that no Courts shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.] Bombay.-In its application to the State of Maharashtra in Order IX, for the existing rule 13 and marginal note, the following rule and marginal note shall be substituted as under: "13. Setting aside decree ex parte against defendant.-In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs payment into Court or otherwise (sic) as it thinks fit, and shall appoint a day for proceeding with the suit : Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also: Provided also that no such decree shall be set aside merely on the ground of irregularity of service of summons; if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim. The proposed explanation to rule 13, as in the Bill provided that where an appeal has been filed against a

decree passed ex parte and the appeal has been disposed of, no application shall lie for setting aside the ex parte decree. The Joint Committee felt that such a prohibition should not be - made in a case where the appeal has been withdrawn. The scope of inquiry in an appeal against a decree passed ex parte being different from the scope of an application for setting aside a decree passed ex parte, the defendant should not be deprived of an opportunity of filing an application for setting aside the decree if he has withdrawn the appeal against ex parte decree, the Joint Committee did not, however, propose to extend the period of limitation so that the defendant, who may intend to file an application for setting aside ex parte decree, should satisfy the requirement of Limitation Act, 1963 . The explanation, as proposed in the Bill has, therefore, been modified to achieve the said object.

1. Ins. by C.P.C. (Amendment) Act No. 104 of 1976, Sec. 59 (w.e.f. 1st February, 1977).

**14. No decree to be set aside without notice to opposite-party :-**

No de- cree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party. Bombay.-In its application to the State of Maharashtra in Order IX, after the rule 14, the following rule with marginal note shall be inserted as under: "15. Application of the provisions of this Order to appeals.-In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal.