

**(1983) 05 AHC CK 0023**

**Allahabad High Court**

**Case No:** Second Appeal No. 441 of 1983

Smt. Kalindri Devi

APPELLANT

Vs

Balloo and Others

RESPONDENT

**Date of Decision:** May 19, 1983

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 3 Rule 1, Order 3 Rule 2, Order 3 Rule 4(2), Order 9 Rule 13, 96

**Citation:** AIR 1984 All 9 : (1983) 9 AWC 716

**Hon'ble Judges:** Deoki Nandan, J

**Bench:** Single Bench

**Advocate:** S.P. Mehrotra, for the Appellant;

**Final Decision:** Dismissed

### **Judgement**

Deoki Nandan, J.

This is a defendant's Second Appeal from an ex parte decree passed by the trial Court and confirmed on first appeal by the Lower Appellate Court. The ex parte decree was passed by the trial Court after the defendant-appellant's counsel, Mr. Ganga Ram Talwar, had reported "no instructions" and did not participate in the further hearing, although he remained present in the Court. The defendant-appellant's husband, who was her pairokar, was also present, but took no steps for the further defence of the case, although the trial Court did also grant some short time to him to properly instruct some counsel.

2. The complaint of the learned counsel for the appellant is that after Sri Ganga Ram Talwar had reported "no instructions", the trial Court could only proceed under Rule 2 of Order 17 of the Civil P. C., that is to say in one of the modes prescribed by Order 9, but the operative portion of the decree passed by the trial Court says that the suit was being decreed against the defendant appellant, who was defendant No. 5, on contest and was being decreed against the other defendants ex parte. No

application for setting aside of the ex parte decree was made under Order 9, Rule 13 of the Civil P. C. Instead an appeal was filed u/s 96 of the Civil P. C. The learned Judge of the Lower Appellate Court has held that the appellant cannot be deemed to have been absent inasmuch as her husband was present and also inasmuch as her counsel also continued to remain present. Mr. S. P. Mehrotra, learned counsel, invited my attention to Rules 1 and 2 of Order 3 of the Civil P. C. and submitted that the presence of the appellant's husband was not the presence of a recognized agent, inasmuch as there was no power of attorney authorising her husband to appear and to act on her behalf. It does appear that the Lower Appellate Court was in error in thinking that simply because the husband was the appellant's pairokar, she could be deemed to be present through him although he was not authorised to act by a power of attorney.

3. So far as Sri Ganga Ram Talwar is concerned, there was a vakalatnama in his favour and he was undoubtedly authorised to appear, act and plead on behalf of the defendant-appellant. He did not apply for withdrawal from the case and under sub-rule (2) of Rule 4 of Order 3 of the Civil P. C., his power to represent, that is to say, to appear, act and plead on behalf of the defendant-appellant in Court, must be deemed to have continued. However, Mr. S. P. Mehrotra invited my attention to a decision of the East Punjab High Court in AIR 1949 86 (P & H.) ; wherein it was held that if a counsel reports "no instructions", it cannot be said that the party, whom he represents, is present in the Court. The result is that although Sri Ganga Ram Talwar was duly authorised to appear, act and plead on behalf of the defendant-appellant and his authority to do so continued, yet he reported "no instructions" which means that he refused to appear for the defendant-appellant although he could. The result is that technically the defendant-appellant was absent although her husband, who was her pairokar and doing everything for her, and her counsel, duly authorised to appear, act and plead on her behalf, were both present in Court and could have, if they had chosen to do so, participated in the trial and defended the case. Therefore, the decree was technically passed ex parte and was liable to be set aside under Order 9, Rule 13 of the Civil P. C. on an application made in that behalf is sufficient cause for non-appearance was made out. The basic question, which thus arises, is whether the defendant-appellant had any sufficient cause or good reason for not appearing at the hearing, of the suit on the date fixed. As noticed above, no such application was made, but such cause, could have been shown in the appeal from the decree; vide P. P. Mahadeoji v. N. M. P.: 1979 AWC 305 : 1979 ALJ 840 . A perusal of the judgment of the Lower Appellate Court shows that no such cause whether good, bad or indifferent was even suggested. The decree could not, therefore, be set aside on any of the grounds, on which a decree could be set aside under Order 9, Rule 13 of the Civil P. C., in case it was deemed to be an ex parte decree passed under Order 9, read with Rule 2 of Order 17 of the Civil P. C.

4. As an appeal from the decree, on the merits of the case, u/s 96 of the Civil P. C., nothing was urged before the Lower Appellate Court to show that the judgment of

the trial Court suffered from any error.

5. There is no merit whatsoever in this Second Appeal. It is accordingly dismissed under Order 41, Rule 11, Civil P. C.