

**(1993) 02 GAU CK 0001****Gauhati High Court****Case No:** Civil Revision No. 398 of 1988

Ratanlal Saraf and Another

APPELLANT

Vs

Mahabir Prasad Agarwalla and  
Others

RESPONDENT

**Date of Decision:** Feb. 5, 1993**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4(2), Order 43 Rule 1, Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 9
- Constitution of India, 1950 - Article 227

**Citation:** (1993) 2 GLR 327**Hon'ble Judges:** S.N. Phukan, J**Bench:** Single Bench**Advocate:** A.K. Maheswari, for the Appellant; G.N. Sahewalla and K.K. Mour, for the Respondent**Judgement**

S.N. Phukan, J.

This revision petition u/s 115 read with Section 151 CPC and Article 227 of the Constitution has been filed against the order dated 19.9.88 passed by learned Sadar Munsiff No. 1, Dibrugarh in Misc. (J) Case No. 8 of 1987 arising out of Title Suit No. 37 of 1986, The above Misc. Case was registered on an application filed by the Defendants who are Petitioners in this petition, under Order 9 Rule 13 read with Section 151 Code of Civil Procedure.

2. The O Ps herein filed the above Title Suit as Plaintiffs against the present Petitioners who were impleaded as Defendants for recovery of Khas possession from the suit premises and also for recovery of arrears of rent. After the summons were served, the present Petitioners applied for time to file written statements which was granted. It has been alleged that the Defendants Petitioner No. 1, who is the sole proprietors of the firm viz Defendant Respondent No. 2 is an old man aged

about 76 years and also not keeping in good health. In the later part of 1986 he left for Calcutta for some urgent affairs of his business and he fell ill there and could not return to Dibrugarh to attend the court. He was asked by the doctor to take complete rest. It has been alleged that in view of the above circumstances, he could not give necessary instructions to his lawyer and also could not procure the important documents. Therefore, time was prayed for on different dates and ultimately court fixed 11.6.87 as the date fixed for filing written statement. On that date also Defendants-Petitioner prayed for, time which was rejected and the court fixed 25.2.87 for ex-parte hearing. On that day also the Defendants-Petitioners prayed for vacating the ex parte order and also further time which was refused and proceeded to try the suit ex parte. After examining one witness, the suit was decreed ex parte by order dated 25.2.87 vide Annexure-1. Being aggrieved, a petition under Order 9 Rule 13 read with Section 151 CPC was filed for setting aside the ex parte decree and by the impugned order, the petition was rejected on the ground that it was not maintainable under Order 9 Rule 13. The said order is at Annexure-2, Hence, the present petition.

3. An affidavit in reply has been filed on behalf of the O Ps denying all the allegations.

4. It may be stated that on 5.7.91, an application was filed for converting the present petition as an appeal. But at the time of hearing Mr. Sahewalla, learned Counsel for the O Ps submitted that even if the present revision petition is not maintainable, the learned Counsel will not press this point. But in my opinion, this question as to whether against the above order a revision or an appeal will lie has to be decided for future guidance. As the petition under Order 9 Rule 13 was dismissed on the ground that it is not maintainable, the 2nd question to be decided in the present dispute is whether such a petition is maintainable.

5. To decide both the points it is necessary to re-produce both amended and as well as unamended provisions of Rule 10 of Order 8, CPC as the ex-parte order was passed under the above rule. The unamended provision of Rule 10 runs as follows:

Where any party from whom a written attachment is required fails to present the same within the time fixed by the court, the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

The above Rule 10 which was amended by the amending Act of 1976 runs as follows:

Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, as the case may be, the court shall pronounce judgment against him or make such order in relation to the suit as it thinks fit and upon such judgment a decree shall be drawn up.

(emphasis supplied)

It may be stated that by the above amending Act of 1976, Clause (b) of Rule 1 of Order 43 CPC was omitted. Regarding this omission in the "objects and reasons" of the Act of 1976 it is stated as follows:

Clause (b) provide for appeal against an order under Order 8 Rule 10 where the Defendants fails to file a written statement within time fixed by the court and the court pronounce judgment against him. This clause is being omitted with a view to reducing two appeals, because the Defendant can in an appeal from the decree passed us a result of the order take the same point as he can take in an appeal under Clause (b).

6. Thus it is clear that prior to the amendment of 1976 any order passed under Order 8 Rule 10 CPC was appealable by virtue of the provisions of Clause (b) under Rule 1 of Order 43. But after amendment of the above Rule 10 of Order 8 it was specifically provided that upon such judgment, under the above Rule 10 a decree shall be drawn up. As decree follows after judgment is passed under above Order 10, an appeal would lie u/s 96 Code of Civil Procedure. Therefore, the above Clause (b) of Rule 1 of Order 43 was omitted to prevent 2 appeals. According to Section 115 CPC this Court has jurisdiction to interfere in a case decided by subordinate court in which no appeal lies. As judgment passed under Order 8 Rule 10 is followed by a decree, such decree being appealable u/s 96 CPC a revision u/s 115 CPC is not maintainable. Learned Counsel for the Petitioner Mr. A.K. Maheswari has placed before this Court a decision of Delhi High Court in [Nand Gopal Bacchas and Others Vs. Bank of India](#), wherein the learned single judge held that against the judgment passed under Order 8 Rule 10 CPC no revision petition would lie as an appeal is maintainable. I am in respectful agreement with the above ratio.

7. Even if the present revision petition is not maintainable as a petition has been filed to convert it into an appeal, this Court can examine the legality or otherwise of the impugned order.

Now next question is whether against the decree passed under Order 8 Rule 10 Code of Civil Procedure, a petition under Order 9 Rule 13 is maintainable? The opening words of Order 9 Rule 13 are important for consideration of this point and the said words runs as follows:

In any case in which a decree passed ex parte against the Defendant....

Therefore, if it is an ex parte decree, the remedy under Order 9 Rule 13 will be available. It is true that against the decree passed under Order 8 Rule 10 an appeal is also maintainable. Out it cannot be said that both the remedies are mutually exclusive. There is no bar in resorting to both the remedies simultaneously or any one of them alone. Only bar in my opinion is that if both the remedies are availed of and one succeeds the other become infructuous, I further hold that availability of remedy by way of an appeal is no bar to an application under Order 9 Rule 13 as the above opening words of Rule 13 is wide enough to include all ex parte decree.

8. In support of the contention that the petition under Order 9 Rule 13 CPC is maintainable Mr. Maheswari has drawn attention of this Court to the decisions in [M. Manick Peter and Others Vs. K. Surendranathan, ; A.K.P. Haridas Vs. V.A. Madhavi Amma and Others](#), [Kuvrap Industries v. State Bank of Mysore AIR 1985 Karn 11](#) and [N. Jayaraman Vs. Glaxo Laboratories India Ltd., Madras,](#) In all the above decisions, the High Courts of Kerala, Karnataka & Madras have held that against an ex parte decree passed under Order 8 Rule 10 Code of Civil Procedure, a petition under Order 9 Rule 13 CPC for setting aside the said ex parte decree is maintainable even though the said ex parte decree is appealable. I am in respectful agreement with the views expressed by the above High Courts.

9. Mr. Sahewalla has urged that under Order 8 Rule 10 CPC even if no written statement is filed the Defendant can participate in the proceeding and thereafter if any decree is passed it will not be an ex parte decree and as such petition under Order 9 Rule 13 CPC will not be maintainable. I agree with the learned Counsel that if the decree which is passed under Order 8 Rule 10 is not an ex parte decree, a petition under Order 9 Rule 13 will not be maintainable and only an appeal would lie. Therefore, in the case in hand it has to be examined whether the decree was an ex parte decree or not?

10. In the impugned order dated 25.2.87 vide Annexure-1 to the petition it is clearly recorded that "suit is allowed to be heard ex parte". Therefore, this is an ex parte decree and as such a petition under Order 9 Rule 13 is maintainable. Therefore, the impugned order rejecting the petition under Order 9 Rule 13 on the ground that it was not maintainable is bad in law and is liable to be set aside, which I hereby do.

11. The relevant portion of the order dated 25.2.87 passed in the Title Suit No. 37 of 1986 from which the ex parte decree followed runs as follows:

...Suit is allowed to be heard ex parte as the Defendant started delatory tactics Under Order 8 Rule 10 Code of Civil Procedure.

Plaintiff is examined on s/a. Also perused the documents on record.

There is a prima facie case.

Suit is decreed ex parte with cost, arrear and compensation as prayed for.

12. According to Rule 8 of Order 10 which has been extracted above, the court has to pronounce judgment against the Defendant. According to Sub-rule (2) of Rule 4 of Order 22 Code of Civil Procedure, the judgment of courts shall contain concise statements of the case, points for determination, the decisions thereon and the reasons for such decisions. The above order/judgment does not fulfil the requirements of the above Sub-rule (2) of Rule 4 of Order 22 and as such this cannot be treated as a judgment in the eye of law. Therefore, the above judgment/order is liable to be set aside.

13. For the reasons stated above, the present petition/appeal is accepted and both the impugned order dated 19.9.88 passed in Misc. (J) Case No. 8 of 1987 by the learned Sadar Munsiff, Dibrugarh rejecting the petition under Order 9 Rule 13 CPC on the ground that it is not maintainable and the order dated 25.2.87 passed in Title Suit No. 37 of 1986 decreeing the suit ex parte under Order 8 Rule 10 CPC are set aside. The Petitioners Defendants shall pay a cost of Rs. 300/-before the learned trial court within 2 months from today failing which this order shall be deemed to have been vacated. On such payment being made, the main Title Suit No. 37 of 1986 shall be restored to file and thereafter within a period of one month the Defendants-Petitioners shall file written statement and if no written statement is filed the learned trial court shall proceed to decide the matter ex parte and shall write the judgment in accordance with law.

With the above direction and observation, the petition is disposed of.