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**(1965) 04 MP CK 0004**

**Madhya Pradesh High Court**

**Case No:** C. Revision No. 768 of 1964

Holaram

APPELLANT

Vs

N.K. Pande

RESPONDENT

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**Date of Decision:** April 9, 1965

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 23, 105

**Citation:** (1968) JLJ 370

**Hon'ble Judges:** Shivdayal, J

**Bench:** Single Bench

**Advocate:** Y.S. Dharmadhikari, for the Appellant; S.N. Shukla, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

@JUDGMENTTAG-ORDER

Shivdayal, J.

In the Respondent's suit, the trial Court had fixed 30 March 1963 "for filing written statement and issues" (vide order dated 25 February 1963). On that date (30 March) which was the first date of hearing, the Defendant did not appear. The trial Court proceeded ex-parte, recorded the statement of the Plaintiff and reserved its judgment. Thereafter the Defendant appeared and made an application for setting aside the ex-parte order. It was allowed and the ex-parte order was set aside. The parties then went to trial. Issues were framed. Evidence of the parties was recorded. Ultimately, by its judgment the trial Court dismissed the suit. From that judgment and decree, the Plaintiff appealed. The learned District Judge allowed the appeal on the ground that the trial Court's order setting aside the ex-parte order was wrong. In the result, he ordered remand and directed the trial Court for a fresh judgment on the sole basis of the plaint and the Plaintiff's deposition which was recorded ex-parte. Aggrieved by that order, the Defendant has come up in revision. There cannot be the slightest doubt that the order of the appellate Court must be set

aside.

2. Shri Shukla, Learned Counsel for the Plaintiff, raises a preliminary objection. It is contended that the remand order passed by the District Judge is appealable. There is no substance in the objection. The only remand order from which an appeal lies is the one which falls within the purview of Order 41, Rule 23, CPC Code, i. e., where the judgment of the trial Court is on a preliminary point. Since to no other remand order, Order 43 Rule 1 (u) applies and there is no other provision for an appeal from other remand orders, the only remedy is by way of revision. In the present case, the judgment of the trial Court was based on the determination of all the issues and not on a preliminary point. This revision is, therefore, competent. The preliminary objection is rejected.

3. It appears that the point which prevailed in the lower appellate Court was abruptly picked up. In fact, the interlocutory order of the trial Court by which the ex-parte order of 30 March 1963 was set aside, was not open to be attacked before the appellate Court. u/s 105 of the Code of Civil Procedure, it is not every interlocutory order passed by the trial Court which can be attacked in appeal. Every error, defect or irregularity in an interlocutory order, which was not open to appeal, cannot be set forth as a ground of objection. In the appeal from the decree, only such error, defect or irregularity in an interlocutory can be set forth as affects the decision of the case, which expression means affecting the decision of the case on its merits. This is well established. Clearly enough, an interlocutory order setting aside an ex-parte order does not affect the decision of the case on the merits. Shri Shukla strenuously relies on the observations in [Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another](#), and Arjun Singh v. Mohindra Kumar AIR 1964 SC 1993, to urge that an objection can be raised u/s 105. With respect I do not find any such observations in either of them. The passage in Arjun Singh, relied on by the Learned Counsel is this:

The case of an application under Order 9, R. 7 would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceedings and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate Court.

To me it is quite plain that their Lordships said so about the dismissal of an application under Order 9, Rule 7, CPC Code. That can certainly be agitated in the appellate Court u/s 105 of the Code because the exclusion of a party from the hearing of the suit would affect the decision of the case on its merits. But the converse is not true. Setting aside an ex-parte order merely ensures a hearing upon the merits but it is not an order that affects the merits of the case. (See, for instance, Radhamohan v. Abbas All ILR 53 All 612 (FB), and [Radha Ballabh Vs. Jawahar Lal](#), Section 105, therefore, does not apply. In Sathyadyan (supra) their Lordships

considered the applicability of Section 105(2) which relates to an order of remand. I must, then, hold that the learned District Judge had no jurisdiction to go into the correctness of the interlocutory order dated 3 April 1963, whereby the ex-parte order of 30 March 1963 was set aside. This is sufficient to set aside District Judge's order.

4. Moreover, the Plaintiff, having participated in the trial and having fought the suit on merits and having suffered judgment against himself, could not be heard in the appellate Court to say that the trial Court was bound to decide the suit solely on his statement which was recorded ex-parte on the 30th March.

5. The revision is allowed. The order passed by the District Judge is set aside. The case shall go back to the appellate Court for disposing of the appeal on merits. The Petitioner shall get his costs. Counsel's fee Rs. 40.