

(1999) 10 BOM CK 0085**Bombay High Court****Case No:** Writ Petition No. 5389 of 1986

Himachal Pradesh Co-operative
Marketing and Development
Federation Limited

APPELLANT

Vs

M/s. MAFCO Limited

RESPONDENT**Date of Decision:** Oct. 13, 1999**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1, Order 9 Rule 13
- Constitution of India, 1950 - Article 226

Citation: (1999) 4 ALLMR 516 : (2000) 1 BomCR 608 : (2000) 2 MhLJ 317**Hon'ble Judges:** Pratibha Upasani, J**Bench:** Single Bench**Advocate:** Mrs. Kiran Bhagalia and M.V. Sali, for the Appellant;**Judgement**

@JUDGMENTTAG-ORDER

Dr. Pratibha Upasani, J.

This writ petition is filed by the petitioners/ original defendants, being aggrieved by the Order dated 13th August, 1986, passed by the Vth Jt. Civil Judge, Senior Division, Pune, dismissing the application of the petitioners for setting aside the decree passed in Special Civil Suit No. 601 of 1977.

2. Few facts, which are required to be stated, are as follows:

The respondents, namely, M/s. MAFCO Limited, who were original plaintiffs, had filed suit against the present petitioners, namely, Himachal Pradesh Co-operative Marketing and Development Federation Limited, to recover a sum of Rs. 1,63,134.50 Ps. and costs. The plaintiff Company entered into an agreement with the defendants for purchase of quality seeds of potatoes from the defendants under the terms and conditions embodied in the letter dated 7th October, 1974. The defendants were,

however, unable to supply the required quality potato seeds. The plaintiffs' grievance was that the potato seeds supplied by the defendants were of sub-standard quality and were of rotten quality. The plaintiffs abandoned the damaged seeds and submitted a detailed statement of damaged, spoiled and rotten quantities of seeds which was annexed to the plaint. According to the plaintiffs, the defendants committed breach of the terms and conditions of the agreements with regard to the supply of potato seeds. Hence the suit.

3. The defendants filed their Written Statement and took various defences. It should be noted at this stage that though the defendants had filed their Written Statement, they did not appear at the time of hearing of the suit. Only the plaintiffs' witness Mr. K. V. Patil deposed on behalf of the plaintiffs, whose evidence went unchallenged as the defendants were not present. The defendants also did not examine any witness on their behalf. The learned IVth Joint Civil Judge, Senior Division, Pune, accepted the version of the plaintiffs and passed the impugned judgment and order decreeing the plaintiffs' suit.

4. Being aggrieved by the said judgment and order passed by the learned IVth Joint Civil Judge, Senior Division, Pune, the defendants filed Misc. Application No. 18 of 1984 for setting aside the said decree, making various submissions in the said application, justifying their absence at the time of hearing of the suit. The learned Vth Joint Civil Judge, Senior Division, Pune, after hearing both the sides, however, rejected the said application of the defendants. It is against this order, that the present writ petition has been filed.

5. At the time of admission of the present writ petition, interim stay in terms of prayer clause (b) of the petition, staying the execution, operation and implementation of the decree in Special Civil Suit Ho. 601 of 1977 was granted on the petitioners' depositing in the lower Court, a sum of Rs. 50,000/-, which the petitioners have done. Today, Civil Application taken out by the respondents for withdrawing the said amount of Rs. 50,000/- is also on the Board and is being heard along with the present writ petition.

6. Mrs. Bhagalia, appearing for the petitioners argued that the suit should not have been decreed ex-parte on 17th June, 1983. She further argued that the petitioners' Head Office is at Simla in Himachal Pradesh, that their Advocate Mr. Vaidya expired on 30th November, 1980 and that the petitioners' officer did not know about it. She, however, admitted that notice of hearing of the suit was sent to the petitioners on 21st February, 1983 and that thereafter, the petitioners, with difficulty the record and instructed Mrs. Bhagalia, who was junior of Mr. S.K. Vaidya, to appear in the matter. Mrs. Bhagalia further submitted that the order of the lower Court was improper and wrong on principles of law and justice and hence it should be set aside and the matter be heard on merits and be disposed of in accordance with law.

7. Mr. Sali, appearing for the respondents canvassed two points before me. Mr. Sali, firstly, submitted that if it is the contention of the petitioners that the decree passed by the IVth Joint Civil Judge, Senior Division, Pune, was an ex-parte decree, then the petitioners' remedy was to file an appeal as per the provisions of Order 43, Rule 1(d) of the Code of Civil Procedure, 1908. He argued that the petitioners rushed to the High Court by way of filing this writ petition without taking recourse to this remedy provided by the statute and on this ground alone, the petition should be dismissed. In short, Mr. Sali argued that if the impugned order was passed on defendants' application made under Order 9, Rule 13 of the Code of Civil Procedure, 1908, then their statutory remedy was to file an appeal as per the provisions of Order 43, Rule 1(d) of the Code of Civil Procedure, but the petitioners hastily approached this Court by way of writ petition, without taking recourse to this statutory remedy.

8. The second limb of argument of Mr. Sali was that, in fact, the judgment and decree dated 17th June, 1983 passed by the IVth Joint Civil Judge, Senior Division, Pune, was not ex-parte at all. He pointed out that the defendants' Written Statement, which was filed by them, was before the learned IVth Joint Civil Judge, Senior Division, Pune. The learned Judge took into consideration the said Written Statement filed by the defendants, framed as many as 13 issues, gave a finding against each issue and then decreed the plaintiffs' suit. Mr. Sali, therefore, submitted that in view of this, the decree dated 17th June, 1983, cannot be called an ex-parte decree and hence regular appeal ought to have been filed by the defendants against the said decree. He submitted that in any case, the petitioners ought not to have approached this Court by way of Writ Petition as it is not maintainable in view of the afore-mentioned legal position.

9. I have heard both the Advocates at length. I have also perused the proceedings, including the judgment dated 17th June, 1983 delivered by the IVth Joint Civil Judge, Senior Division, Pune, so also the Misc. Application No. 18 of 1984 filed by the defendants/petitioners for setting aside the said decree.

10. It is evident from the reading of the judgment that the learned IVth Joint Civil Judge, Senior Division, Pune, had taken into consideration the contentions raised by the defendants/petitioners in their Written Statement. The learned Judge then framed issues and after examining the plaintiffs' witness Mr. K.V. Patil and after discussing the contentions raised by the defendants in their written Statement, gave finding against each and every issue and then decreed the suit on merits. In my opinion, therefore, the said judgment is a judgment given on merits of the case and it cannot be said that the decree was passed ex-parte.

11. The same situation can be visualized from another angle. After the Examination-in-Chief of the plaintiffs' witness is over, the defendant may decline to cross-examine the plaintiffs' witness. He also may choose not to enter the Witness Box or to examine any other witness on his behalf. He might be present in the Court but still might opt to do either of these things. In such a situation, can it be said that

the judgment and decree passed by the Court in such circumstances, is an ex-parte decree ? In my opinion, the answer will have to be given in the negative. The judgment, under these circumstances, will be a judgment on merits and the decree cannot be called an ex-parte decree. Any application, therefore, under Order 9, Rule 13 of the Code of Civil Procedure, 1908, will not lie to set aside such a decree. For that purpose, a regular substantive appeal will have to be filed.

12. Order 9, Rule 13 states as follows:

"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.

13. Thus, an application under Order 9, Rule 13 of the CPC can be made in a situation where ex-parte decree is passed against the defendant and the grounds available to him are only two, namely, (1) that the summons was not duly served and (2) that he was prevented by sufficient cause from appearing when the suit was called on for hearing. When such an application under Order 9, Rule 13 of Civil Procedure Code, 1908 is made to the Court and this application is rejected, the remedy is provided under Order 43, Rule 1(d) of the Code of Civil Procedure. This remedy is by way of appeal from this order of rejecting defendant's application.

14. On the other hand, in the present petition at hand, however, the situation is totally different. The defendants had filed their Written Statement, which was before the Court. The same was considered by the Court; Issues were framed and settled by the Court; Finding against each and every issue was recorded by the Court, after examining the plaintiffs' substantive evidence in the Court and the defendants' contentions, raised in their Written Statement, Thus, the case of the plaintiffs and the case of the defendants was weighed and assessed by the learned Judge on the touch stone of preponderance of probabilities. It was only thereafter that the judgment was delivered by the learned Judge and decree came to be passed. Such a decree, by any stretch of imagination, cannot be called an "ex-parte decree" and, therefore, Misc. Application No. 18 of 1984 made by the defendants for setting aside the said ex-parte decree (which was not an ex-parte decree) was itself not maintainable. The Vth Joint Civil Judge, Senior Division, Pune, was, therefore, right in his observation made in para 6 that the judgment passed by his predecessor, namely, IVth Joint Civil Judge, Senior Division, Pune, was the judgment on merits,

and that the provisions of Order 9, Rule 13 of the CPC for setting aside the ex-parte decree were not available to the defendants. He, therefore, rightly dismissed the said Misc. Application by his Order dated 13th August, 1986. No interference is, thus, called for. Hence the following order :

Writ Petition No. 5389 of 1986 is dismissed. Rule discharged. Interim stay dated 26th November, 1986 is hereby vacated. No order as to costs.

Respondents are at liberty to withdraw the amount of Rs. 50,000/-, which is deposited by the petitioners in the lower Court.

Civil Application disposed of.

Certified copy expedited.

14. Petition dismissed.