

**(1974) 08 BOM CK 0021****Bombay High Court (Nagpur Bench)****Case No:** A.F.O. No. 30 of 1974

Namdeo Sakharam Meshram

APPELLANT

Vs

Motilal Udaichand Jain

RESPONDENT

**Date of Decision:** Aug. 13, 1974**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 13, Order 9 Rule 6

**Citation:** AIR 1975 Bom 191 : (1974) MhLJ 959**Hon'ble Judges:** Masodkar, J**Bench:** Single Bench**Advocate:** A.M. Bapat, for the Appellant; B.R. Mandlwekar, for the Respondent**Judgement**

1. This appeal is filed against the order made by the Civil Judge. Senior Division on April 8, 1974, holding that the Miscellaneous Judicial Case No. 20 of 1973, was incompetent as the Special Civil Suit No. 16 of 1972 decided on February 27, 1973 was disposed of with the aid of the provision of Order 17. Rule 3 of the CPC and therefore, an application under Order 9, Rule 13, did not lie. The merits of the sufficient cause had not been answered.

2. Some facts are not in dispute. The said Special Civil Suit was filed seeking specific relief on the basis of agreement to sell agricultural land. The 6th on January 1973 was the date fixed for evidence and thereafter the hearing of the suit was adjourned to 22nd January and then to 1st February, on which date plaintiff entered the witness-box and examined himself in chief. An application was filed on behalf of the defendant by the counsel seeking time for cross-examination. That was allowed and the case was posed for February 21, 1973. The counsel informed the defendant about this adjournment by a registered notice of February 10 1973. By that notice the defendant was informed that in case he did nt appear the counsel would report "no instruction". In the present application itself the allegations were made, which

are not as even required not that defendant was ill from 19th of February and, therefore, could not attend the Court on 21st. He had however, instructed the counsel to seek an adjournment, but those instruction could not reach the counsel. Eventually on 21-2-1973 the counsel of the defendant passed a pursis before the Court stating that he had no instructions. The matter was not immediately disposed of but it appears the Court proceeded to fix 27-2-1973 and made an ex parte decree on that date.

3. In the application itself k filed by the defendant in Misc Judicial Case NO. 20 of 1973, all these allegations appear to have been made. The learned Judge has taken the view that te disposal of the suit on 27-2-1973 was under Order 17 Rule 3, and therefore, the application itself was not tenable.

4. Now the only question that falls for consideration in the present appeal is whether the disposal of the suit on 27-2-1973 was under Order 17. Rule 2, or Rule 3, of the Code. Some debate has been raised before me as to the exact scope of the two provisions by referring to the authorities which will be noticed a little later. But as far as the present controversy is concerned it is enough to observe that on 27-2-1973 the defendant was neither himself nro by his pleader present. The disposal of the suit was not on 21-2-1973 but was on 27-2-1973. Therefore, when the suit was decided on 27-2-1973, it was in the absence of the defendant and that clearly answered Order 17, Rule 2, and not Order 17, Rule 3, as has been found by the learned Judge. What is the effect of earlier withdrawal of the counsel on the earlier date on this decision only remains to be considered.

5. In the scheme of the Code. Order 17 is an Order dealing with adjournments, while Order 9 deals with appearance of parties and consequence of non- appearance. Order 5 requires to be summoned, while Order 3 permits the parties to be represented by other i.e. recognised agents or pleaders. Hearing of the suit and examination of witnesses is the subject-matter of Order 18, while Order 20 directs that the Court after the case has been heard shall pronounce the judgment in open Court either at once or as soon thereafter as maybe practicable on some future day and when the judgment is to be pronounced on some future day the Court shall fix a day of which there shall be a notice to the parties or their pleaders (Rule 1). Section 33 of the Code enjoins the Court after the case has been heard to pronounce judgment and declares that on such judgment a decree has to follow. By the term judgment "It is understood to mean, the statement given k by the Judge of the grounds of a decree or an order, and by them term "decree" it is understood to mean the formal expression of as adjudication which conclusively determines the rights of parties with regard to matters in controversy. while the term "Order means the formal expression of any decision of Civil Court which is not a decree.

6. These provision indicate an integrated scheme that has to operate upon the procedural life of a suit right from its institution till its successful culmination in a judgment followed by a decree. The requirement of making a judgment after

hearing parties is mandatory. Rule 1 of Order 20 permits that after the parties are heard the Court may pronounce the judgment at once or may in its discretion postpone the day of judgment and in that case it is required to fix a day for the purpose of judgment of which notice has to be given to the parties or their pleaders. Therefore, making of the judgment is the process of the decision of the suit itself. It is obvious logically that when Order 17, Rule 3, which is one of the rules dealing with adjournments, enables the Court to proceed to decide the suit forthwith, it confers a discretion to here the suit and pronounce the judgment of either without adjourning it or after adjourning it at some other day.

7. As the matter between the three rules of Order 17 stands, it appears to me plaint these are to be construed in the context of the subject-matter with which Order 17 itself deals. All these rules are clearly enabling. Rule 1 permits as adjournment and imposition of costs and it can be assumed that in the present case the Court had exercised the power on 1-2-1973 under Rule 1 by which it permitted an application filled by the counsel for the defendant seeking time to cross-examine the plaintiff who was examined-in-chief. On that date it is further clear that the defendant was not present and only was represented by his counsel and even on the adjourned date defendant was not present and his counsel after due notice to him reported no instructions. Therefore, looking to the rules, the only rule which indicated the result was Rule 2 of Order 17. That rule is completely answered for it takes in a day to which the hearing of the suit was adjourned and one of the parties, i.e. the defendant failed to appear either in person or because his counsel withdraw, by a counsel. The Court was, therefore, enabled to proceed to dispose of the suit in that to hear the evidence in the absence of defendant which stage is clearly indicated by Order 9, Rule 6. That the Court decided to proceed under Order 9, is sufficiently clear from the admitted position that when it fixed the case for 27-2-1973 for judgment, the Court did not direct issue of the notice to the defendant. though that is the requirement of O. 20 R. 1, Thus the Court treated the defendant ex parte from the stage his counsel withdrew on 21-2-1973 is obviously clear. It is not necessary to deal with each and every provision of Order 9, suffice it to say, however, that Rule 6 of that Order permits the Court to proceed ex parte to a party on whom the summons has been served. Rule 3 of Order 17 posits a stage that when any party to the suit has been given time to produce a evidence or to cause the attendance of witnesses or to perform any other act necessary to the further progress of the suit for which time was allowed the Court is enabled not with standing the failure of the party to do so to proceed to decide the suit forthwith. On its plain reading Rule 3 enables the Court to refuse an adjournment. It is really a positive power which is inherent in the Court which is clearly spelt out by the latter clause where the rule says that notwithstanding such default, the Court would be able to decide the suit forthwith. In other words, the Court may refuse an adjournment to the party seeking time to produce the evidence or to keep his witnesses ready in attendance or to do anything which was necessary for the further progress of the suit for which

already an adjournment was granted. More or less therefore, the provisions of Rule 3 are distinct in purpose and clearly enabling in nature. They cannot be intermixed with the scheme by Rule 2 which permits the Court to proceed in the absence of the party in the manner indicated by Order 9 of the Code. Rule 3 of Order 17, on the other hand, posits a power to refuse an adjournment and to proceed to decide the suit. The entire phraseology of Rule 3 is clear and it does not mention anything about the absence of the party on the other hand, in the context of Order 17, it permits the Court without further adjourning the suit to proceed to decide the same. Therefore, Rule 3 postulates a decision clearly on merits upon the material that may be available either for or against the suitor, whether present or absent. If the decision is itself *ex parte*, then it is obvious, it is referable not to Rule 3 (of Order 17) but to the enabling power under Order 9, Rule 3 or Rule 6 or Rule 8. It is only Order 9 that deals with appearance of parties and consequences of non-appearance. If by reason of the appearance and non-appearance the power is exercised, it is obvious that the matter would fall under Order 17, Rule 2, and Rule 3 would be irrelevant. This will be further clear if one takes into account the provisions of Order 9, Rules 6 and 7, as far as the defendant's absence is concerned along with other rules of Order 9. If the hearing of the suit is adjourned after the Court decided to proceed *ex parte* Rule 7 of Order 9, permits or before the date of the next hearing. In case where there are more defendants, Rule 11 of Order 9 permits the Court to make suitable orders against the absentee defendants and hear the suit for those who are present or represented. Rule 13 speaks of the case in which a decree is passed *ex parte* against the defendant. Once the Court proceeds under Rule 6, Order 9, against the defendant, or proceeds against some of the defendants by virtue of Rule 11 of Order 9 in the same manner it is obvious that upon the judgment being pronounced the decree that is made is *ex parte* to such defendants. The question in each case therefore has to be answered looking to the several provisions enabling the Court to deal with different situation as indicated by Order 9 along with Order 17, Rule 3 itself.

8. As I said earlier, Rule 3 of Order 17 appears to me to be a power which permits a decision of the suit without resort to Order 9 after refusing an adjournment; in other words, it is a power not to proceed in the manner indicated by Order 9. If, however, there is indication that the was procedure and powers under Order 9 that were followed, then clearly the matter is under Rule 2 and not under Rule 3.

9. Pausing here, the usual debate as to the construction of these Orders is also raised in the present appeal and it may briefly be noticed. It is urged by Mr. Mandlekar the learned counsel appearing for the respondent that Rule 3 of Order 17 is an independent power to proceed to decide the suit once the qualifying clause is satisfied . In other words, the learned counsel submits that it is a duty enjoined by the Code upon the Court to proceed to judgment once there is a party before it in default. Once there is default contemplated by the three clauses in the body of Rule 3, the counsel submits there is no application of Order 9 at all in other words, for the

purpose of suit the Court would treat the party as present and proceed on the footing that it has not led any evidence. He submits that once the Court recognises the party as present, then the provisions of Order 9 are clearly out of consideration and consequently Rule 13 would not be available to the present appellant.

10. As against this Mr. Bapat the learned counsel appearing for the appellants submits that once the facts are indicative of the absence of one of the parties and the Court decides to proceed in the absence of party the provisions of Order 9 are very much in operation and the matter can be governed by Order 17, Rule 2. That judgment is already made by the Court on the material available before it is not decisive of the procedure followed by the Court. Both the parties tried to rely on the provision of Order 3 for the respective submission to indicate that mere reporting non - instructions would or would not amount to absence of the party for whom the advocate or pleader reported non-instructions.

11. This Court had occasion to consider the matter in Basalingappa Kushappa Kumbhar and Others Vs. Shidramappa Irappa Shivanagi and Another, , where in the Full bench after noticing the provisions of Order 17, Rules 2 and 3, as well Order 5, Rule 1, did hold that after the defendant's pleader withdrew for want of instructions and where the decree was made on evidence subsequently led by the plaintiff, it should be treated as a decree made ex parte. For that matter it was ruled that the question as to whether defendants pleader can be said to have appeared depended not upon his mere presence in Court but upon whether he was duly instructed in the matter before the Court and that was a question of fact to be determined in each case. No doubt these observations were made where the defendant's pleader had withdrawn for want of instruction after his application for adjournment on that ground was rejected and thereafter the evidence of the plaintiff was led and decree made. All these facts were treated to answer the disposal of the suit ex parte to the defendant. As to the provisions of Order 17, Rules 2 and 3, it was observed that Rule 2 enabled the Court to pass any orders either to grant further adjournment or dispose of the suit on such condition was it might think proper. It did not, however, empower the Court to decide the suit on merits if no evidence had been recorded before the default of appearance had taken place and if the evidence is led after the default, the entire proceeding would be ex parte and Rule 3 applied where the previous adjournment was granted for any purpose mentioned in the rule and that the party had committed default. the would not apply to a general adjournment contemplated by Order 15, Rule 3. It was held that even in the case of special adjournment when the defendant failed to appear and his pleader withdraw on the date so adjourned, that would be a case of default governed by Rule 3. As to the scope of these two rules, the Court found that the scope of Rules 2 and 3 is quite distinct from each other. Under Rule 3 case is contemplated in which the Court has material before it to enable it to proceed to a decision. The mere fact of a party committing a default in the performance of what he was directed to do would not lead to the dismissal of plaintiffs suit if he was the party in default, or the decreeing

of the claim against the defendant if the defendant was the person who made the default, for the words "not notwithstanding such default" implied that the Court could proceed to dispose of the suit upon such materials as were before it. On the other hand Rule 2 contemplated disposal of suit and included cases in which there might or might not be material before the Court to enable it to pronounce the decision on merits. If, therefore, there was no material on record the appropriate procedure was to follow as was indicated by Rule 2. In the body of the judgment the other decisions of this Court ILR (1892) 16 Bom 23 , Gurunath Eknath Sukre Vs. Laxmibai Govind Kanista,; Gurunath Eknath v. Laxmibai Govind, ILR (1899) 23 Bom 414 ; Soonderlal v. Goorprasad, AIR 1924 Bom 139 ; Rukmansa Rajansa Hosmani Vs. Shankargouda Basangouda Lakhya,; Rukmansa Rajansa v. Shankargouea, ILR (1895) 20 Bom 736; Shrimant Sayaji rao v. S. Smith and AIR 1923 Bom 27, Ratanbai v. Shanker Deochand) have been referred to and as to the effect of representation by the Counsel of the party defendant it is observed:-

".....Where therefore, the defendant does not appear in person and there is none else to instruct his pleader, the only person through whom he can be said to appear is a pleader who must be duly instructed and able to answer all material questions. It follows, therefore, that if the pleader is present in Court on any day of hearing but has no instruction as to how to proceed with the case, there is no appearance of the defendant. Whether applauder is duly instructed is a question of fact, but if High Court refuse s to take part in the trial on the ground that he has no instructions and then withdraws from the case either after, or without making an application for adjournment, all further proceedings against the defendant become ex parte .....

These observations of the Full Bench would clearly cover the case of the present kind. Here when on the first day plaintiff was examined in chief, the counsel sought an adjournment to instruction. On the adjourned date he was present but had no instruction and it has o be observed that in fact on the earlier date also he had no instructions and that is why the adjournment was granted to seek instruction to cross-examine the plaintiff's witness. Thus on both dates when the plaintiffs was heard in examination-in-chief, in fact, the defendant was absent and though he was represented by counsel, the counsel had no instructions. The counsel withdrew eventually on the next date and the Court made a decree on 27-2-1973, i.e. about 7 days thereafter, and all the proceedings must therefore by applying the test laid down by the Full Bench of this Court be held to be expert to the defendant.

12. Mr. Mandlekar relies on the decision of the Madhya Pradesh High Court in Madanlal v. Jai Narayan, AIR 1972 Madh Pra 8 which does not appear to be apposite. In fact, even in the body of the judgment the contingency of a counsel reporting no instructions has been treated from two differing angles. It is observed:

"A counsel sometimes reports no instructs when his fee is not paid or when his client does not equip him with necessary information's regarding the material facts.

In such a case, when the counsel reports no instructions it is just to show that he is not ready to go on. In fact this is in accord with his duty to the Court and by doing so, the shows ordinary courtesy to the Court so that the Court has not to wait for him. Such reporting of no instructions an act of the counsel in his personal capacity. But where the counsel appears and seeks an adjournment, his appearance is on behalf of the party. Once he has so appeared his reporting no instructions, when adjournment is refused does not grant amount to non-appearance of the party. There is no difference in such appearance of the party when he represents. If the party had appeared in person and had sought an adjournment but the adjournment had been refused and then party had abstained from taking part in the proceedings or disappeared from the court room, it would to be a case of non-appearance of a party so as to attract Rule 2. Therefore, if reporting of no instructions by the counsel is of the latter kind and the Court decides the suit on merits it will be under Rule 3, and not under Rule. 2".

This reasoning clearly runs counter to what was stated by Full Bench of this Court. It is not mere physical presence that is contemplated but taking part in the proceedings from a stage is indicated by these provisions. It is not therefore, possible to uphold the contention of Mr. Mandlekar who relies on these observations, to hold that it was under Rule 3 that the disposal of the suit was made in the present case. As indicated earlier. in this case not only when the plaintiff was heard the counsel had reported no instruction but he sought an adjournment which was granted and in effect on the date adjourned, he could not get any instructions and therefore reported so to the court. The total effect was that the defendant did not effectively appear in the suit when the same was heard and it must be found that the decision of the suit was ex parte to the defendant of the suit was ex parte to the defendant. Even in Madanalal's case the Madhya Pradesh High Court while considering the various aspects of Rules 2 and 3 of the Order 17, has answered the question referred to them by observing:

"It is not open to the Court to proceed under Order 17, Rule 3, C. P. C., in the absence of a party . In case of non-appearance of a party the matter must be dealt with under Order 17, Rule 2, C. P. C. However under Rule 2 the Court has widest possible discretion to dispose of the suit in one of the modes directed by Order 9, C. P. C. or to make such other order as it thinks fit, but not to dismiss the suit on merits.

Where the Court proceeds under Order 17, Rule 3, in the absence of a party although the other conditions laid down in the said Rule are fulfilled, the order must be construed as one under Order 17, Rule 2, not on the ground that it was not expedient for the Court to do so but on the ground that the Court had no power to do so".

This ratio of the judgment in Madanalal's case is indicative that in the absence of a party Rule 3 is not available nor there s any decision of the suit contemplated by that

rule. It is only when the Court can proceed to decide the suit in the presence of the parties the provision of Rules 3 permits the decision. In all other cases 3 permits the decision. In all other cases where the decision is in the absence of any party, procedure under Rule 2 is indicated.

13. This ratio does not help in any manner the submission made by Mr. mandlekar the learned counsel appearing fro the respondent. On the other hand, that itself indicates the view that for the purpose of decision under Order 17, Rule 3, it must be made in the presence of parties and not in their absence. If for any reason it is possible to establish that the decision was given in the absence of a party and as such by recourse to Order 9 of the Code, Rule 3 of Order 17 is nt answered and the matter will have to be treated as governed by Rules 2, notwithstanding the mention of either rule in the order made by the Court.

14. That being the position, and as indicated earlier by me, it is plain that it is only Rule 2 that was attracted by the present decree made on 27th of February, 1973. In fact the proceeding after the withdraw of the counsel on 21-2-73 were all ex parte. I have already observed that Rule 3 is merely enabling and is not indicative of any definite procedure. It is only Rule 2 of Order 17 that permits the procedure to be followed under Order 9 when the parties failed to appear before the Court. if, therefore, the Court proceeds on the basis that there is failure of a party to appear in the suit, it follows that it is proceeding in the manner and mode directed by Order 9 of the Code.

15. That being the position, it is to be held that the present appellate was entitled to file an application under Order 9, Rule 13, seeking relief by establishing sufficient cause. The order made by the court dismissing his application on that ground cannot therefore, be sustained. The same is accordingly set aside and the matter is remitted back hearing the parties and affording them all opportunity of leading evidence to show whether the applicant makes out a sufficient cause to set aside the ex parte decree.

16. The appeal thus succeeds and is allowed. However, under the circumstances, which purely raised a question of law, there would-be no orders as to costs in the present appeal. The parties are directed to appear before the trial Court on 16th of September, 1974.

17. Appeal allowed.