



**IN THE HIGH COURT OF MADHYA PRADESH  
AT GWALIOR**

**BEFORE**

**HON'BLE SHRI JUSTICE G. S. AHLUWALIA**

**ON THE 15<sup>th</sup> OF JULY, 2025**

**SECOND APPEAL No. 352 of 2014**

***JAKIR @ NATHTY AND OTHERS***

*Versus*

***FITRAT HUSSAIN AND OTHERS***

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**Appearance:**

*Shri Vikas Singhal - Advocate for appellants.*

*Shri Navnidhi Parharya- Advocate for respondents No.1 to 8.*

*Shri Dilip Awasthi – Government Advocate for respondent/State.*

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**JUDGMENT**

This Second Appeal, under Section 100 of CPC, has been filed against the judgment and decree dated 21.07.2014 passed by X Additional District Judge, Gwalior (M.P.) in Regular Civil Appeal No.28A/2012 as well as judgment and decree dated 17.09.2012 passed by X Civil Judge Class-II, Gwalior (M.P.) in Civil Suit No.153A/2012.

2. Appeal is admitted on the following Substantial Question of Law:

“Whether the Lower Appellate Court was right in not staying further proceedings of appeal in the light of pendency of application filed under Order IX Rule 13 CPC or not?”

3. Since the parties are represented by their counsel, therefore, this appeal is heard finally.



4. Respondents No.1 to 8/plaintiffs filed a suit for declaration of title and permanent injunction.

5. From the order-sheets of the trial court, it appears that the suit filed by respondents No.1 to 8 was dismissed in default by order dated 16.09.2010. Thereafter, the suit was restored in the light of order dated 23.06.2012 passed in MJC No.13/2010. The case was taken up on 10.07.2012 and on the said date, defendants No.1, 3 to 10, 12 were represented by their counsel (It appears that presence of defendants No.3 to 10 was wrongly mentioned in place of defendants No.5 to 10. In fact, Shri B.D. Jain, Advocate, was appearing on behalf of defendants No.2 to 4, but he was absent on the said date). There was no representation on the part of defendants No.2, 3, 4, 13 and 14 and accordingly, it was directed that the process fee be paid for defendants No.2, 3 and 4. On 20.07.2012, none appeared for defendant No.3 and accordingly he was proceeded ex parte and a direction was given to pay fresh process fee at the correct address of defendants No.2, 4, 13, 14. By order dated 24.08.2012, all the defendants except defendant No.12 were proceeded ex parte and thereafter, by order dated 05.09.2012 even defendant No.12 was also proceeded ex parte. On the very same day Fitarat Hussain (PW-1), Gafoor Ahmad (PW-2) and Narayan Singh (PW-3) filed their affidavits under Order XVIII Rule 4 CPC. After verification of the contents of the affidavits, evidence of the plaintiffs was closed and the case was fixed for final arguments. Ultimately, on 14.09.2012 final arguments were heard and judgment was passed on 17.09.2012.

6. Thereafter, respondents No.1 to 8/plaintiffs filed Regular Civil Appeal No.28A/2012.

7. An application was filed by the defendants before the Appellate Court that they have already moved an application under Order IX Rule 13 CPC for setting



aside the *ex parte* decree, therefore, further proceedings of appeal may be stayed.

8. The said application was rejected by the Appellate Court by order dated 09.07.2014 by holding that the present appeal has been filed by the appellants against that part of the decree which has not been granted to the appellant. So far as application filed under Order IX Rule 13 CPC is concerned, it was held by Appellate Court that the trial court is merely required to find out as to whether there was any sufficient cause for the defendants for their absence on the day when they were proceeded *ex parte* and in case if it is found that the absence of defendants was *bona fide*, then it can set aside the *ex parte* decree. Thereafter, the Appellate Court proceeded to hear the appeal and ultimately appeal was decreed by judgment and decree dated 21.07.2014.

8. Challenging the proceedings which were adopted by the Appellate Court, it is submitted by Shri Singhal that once an application filed under Order IX Rule 13 CPC was pending, therefore, the Appellate Court should have stayed further proceedings of Civil Appeal and should have waited for the outcome of the application. It is submitted that the Appellate Court lost sight of the fact that the record which was before the said court was of an uncontested case and the question as to whether the *ex parte* judgment and decree was rightly passed against the defendants or not was already *sub judice*. Once the judgment and decree passed by the Trial Court would merge in the judgment and decree passed by the Appellate Court then it is very difficult for the trial court to recall the judgment and decree passed by it. Under these circumstances, it is submitted that in fact the Appellate Court should have stayed the proceedings and should have directed the trial court to decide the application filed under Order IX Rule 13 CPC expeditiously so that the further proceedings can be taken up as per the decision on the application filed under Order IX Rule 13 CPC.



9. *Per contra*, the aforesaid submission made by counsel for appellants is vehemently contested by counsel for respondent.
10. Heard learned counsel for the parties.
11. The moot question for consideration is that when an application filed under Order IX Rule 13 CPC was already pending, then whether the Appellate Court should have decided the appeal filed by the plaintiffs or not?
12. Once a judgment is passed by the Appellate Court then the judgment passed by the Trial Court would automatically stand merged in the judgment passed by the Appellate Court. Under these circumstances, this Court is of considered opinion that after merger of the judgment passed by the Trial Court in the judgment of Appellate Court, the Trial Court will be left with no discretion/jurisdiction to set aside the *ex parte* judgment and decree passed by it. Under these circumstances, this Court is of considered opinion that the Appellate Court has committed a material illegality by not staying the further proceedings of the appeal.
13. Accordingly, the order dated 09.07.2014 passed by the Appellate Court is hereby set aside. As a consequence thereof, the judgment and decree dated 21.07.2014 passed by X Additional District Judge, Gwalior (M.P.) in Regular Civil Appeal No.28A/2012 is also hereby set aside.
14. The matter is remanded back to the Appellate Court with a direction that the further proceedings of First Appellate Court shall remain suspended till the application filed by defendants under Order IX Rule 13 CPC is finally disposed of.
15. The suit was filed on 20.07.2006. Nineteen long years have passed with no authoritative and final adjudication of the *lis*.



16. Accordingly, in order to avoid further delay, the parties are directed to appear before the Trial Court **on 19.08.2025**. It is directed that the defendants shall get only two opportunities to examine all their witnesses in support of their application filed under Order IX Rule 13 CPC. Similarly, the plaintiffs would also get only two opportunities to examine all their witnesses in support of their objection to the application filed under Order IX Rule 13 CPC. The Trial Court is directed to decide the application within a period of three months from 19.08.2025.

17. After the application filed under Order IX Rule 13 CPC is decided by the Trial Court, the Appellate Court shall proceed further in accordance with law.

18. Needless to mention that in case if the application is allowed and *ex parte* judgment and decree dated 17.09.2012 passed by the Trial Court is set aside, then Regular Civil Appeal No.28A/2012 would automatically become infructuous.

19. With aforesaid observation, the appeal is finally ***disposed of***.

20. Office is directed to immediately send back the record of the Trial Court as well as of the Appellate Court to the concerning courts for further action.

**(G.S. Ahluwalia)**  
**Judge**