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IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR

BEFORE  
HON'BLE SHRI JUSTICE VIVEK AGARWAL  
ON THE 21<sup>st</sup> OF NOVEMBER, 2022

**MISC. APPEAL No. 269 of 2019**

**BETWEEN:-**

STATE BANK OF INDIA BHOPAL, CIRCLE OFFICERS CO-OPERATIVE SOCIETY, BHOPAL THROUGH PRESIDENT SHRI MADAN JANI, HAVING IT'S REGISTERED OFFICE AT STATE BANK OF INDIA HEAD OFFICE HOSHANGABAD ROAD, BHOPAL (MADHYA PRADESH)

.....APPELLANT

*(BY SHRI SIDDHARTH NARULA, ADVOCATE)*

**AND**

1. M/S SURBHI ASSOCIATES THR ITS PARTNER SHRI SANTOSH KUMAR RAMTANI, R/O 228 ZONE-II M.P. NAGAR BHOPAL (MADHYA PRADESH)
2. SHRI SANTOSH KUMAR RAMTANI S/O SHRI CHANDANMAL, AGED ADULT, R/O 257, RACHANA NAGAR GOVINDPURA, BHOPAL (MADHYA PRADESH)
3. SHRI ESHU JAIN S/O SHRI ABHAYKUMAR JAIN, AGED ADULT, R/O 228, ZONE II, M. P. NAGAR, BHOPAL (MADHYA PRADESH)
4. SHRI RAVI BILGAIYA S/O SHRI BABULAL R/O 2/9 SANJAY COMPLEX MATA MANDIR, BHOPAL (MADHYA PRADESH)
5. STATE OF M. P. THR. DISTRICT COLLECTOR BHOPAL (MADHYA PRADESH)
6. M. P. STATE COOPERATIVE BANK, REPRESENTED THROUGH ITS MANAGER, REGISTERED OFFICE AT HAMIDIA ROAD, BHOPAL (MADHYA PRADESH)

.....RESPONDENTS

*(BY SHRI PRASHANT CHOURASIA, ADVOCATE FOR  
RESPONDENT NO.4)*

*(BY SHRI S.M. GURU, ADVOCATE FOR RESPONDENT NO.6)*

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*This appeal coming on for admission on this day, the court passed the following:*

**ORDER**

This miscellaneous appeal is filed by the plaintiff under Order 41 Rule 1(c) of CPC being aggrieved of order dated 29/10/2018 passed by learned 19th Additional District Judge, Bhopal in MJC No.481/2018 refusing to entertain an application under Order 9 Rule 9 of CPC on the ground that suit was dismissed in view of lack of evidence vide order dated 11/07/2013 and said being passed under Order 17 Rule 3 of CPC will be covered by the decision of Calcutta High Court in the case of **Lalit Chandra Das and others Vs. Sushil Chandra Guha and another, AIR 1980 Calcutta 148**, therefore, appeal will be maintainable against the said order and not an application under Order 9 Rule 9, CPC.

This Court requested Shri Ravish Chandra Agrawal, learned senior Advocate to guide this Court as to the correct legal position in this behalf.

Shri Ravish Chandra Agrawal, learned senior Advocate, graciously accepted and informed that in terms of the law laid down by Hon'ble Supreme Court in **Mohandas and others Vs. Ghisia Bai and others, AIR 2002 SC 2436** in which it is held that if suit is fixed for leading evidence by plaintiff, instead of leading evidence, neither plaintiff nor his witnesses were present, then suit has to be dismissed under Order 17 Rule 2 of CPC and not under order 17 Rule 3 of CPC. It is held that Order 17 Rule 2, CPC provides for procedure if parties fail to appear on day fixed. It provides that there, on any day to which hearing of the suit is adjourned, the parties or any of them fail to appear, the

Court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such orders as it thinks fit.

Order 17 Rule 3 of CPC provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, if the parties are present proceed to decide the suit forthwith or if the parties are, or any of them is, absent, proceed under Rule 2 of CPC.

Shri Ravish Chandra Agrawal, learned senior Advocate, submits that the provisions of Order 18 Rule 4 of CPC was substituted by Act 22 of 2002 in regard to recording of evidence, Legislature probably did not take into consideration provisions contained in Order 17 Rule 2 and 3 of CPC inasmuch as filing of affidavit under Order 18 Rule 4 of CPC will mean that evidence has been produced, therefore, there were only two courses open namely to proceed to decide the suit forthwith or proceed under Rule 2 of CPC.

Thus, it is evident from the facts of the present case that since evidence under Order 18 Rule 4 of the CPC was already filed in lieu of examination-in-chief by the plaintiff witnesses, then in the light of law laid down by Supreme Court in **Mohandas and others Vs. Ghisia Bai (supra)** dismissal of the suit is to be an order passed under Order 17 Rule 2 of the CPC and not under order 17 Rule 3 of the CPC.

Since the order of dismissing the suit for want of prosecution after filing of affidavits under Order 18 Rule 4 of the CPC is an order under Order 17 Rule 2 of the CPC and Order 17 Rule 2 CPC provides where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that

behalf by order IX or make such other order as it thinks fit, therefore, remedy for the petitioner was to invoke provisions contained in Order 9 of the CPC. That remedy was since rightly exercised by the appellant, learned Court of 19th Additional District Judge, Bhopal erred in treating the dismissal of the suit for want of prosecution under Order 17 Rule 3 of the CPC and has inappropriately held that suit having been dismissed invoking provisions under Order 17 Rule 3 of the CPC, application under Order 9 Rule 9 of the CPC will not be applicable.

Impugned order being contrary to the legal position explained by Supreme Court in **Mohandas and others Vs. Ghisia Bai (supra)**, so also in **B. Janakiramaiah Chetty Vs. A.K. Parthasarathi & Others, AIR 2003 SC 3527** is set aside. Appeal is allowed and the matter is remitted to the concerned Court to pass a fresh order on the application under Order 9 Rule 9 of the CPC. Let this exercise be completed within 60 days from the date of receipt of copy of this order, for which purpose parties shall appear before the concerned Court on 07/12/2022, for which no separate notice will be given.

This Court would like to place on record its appreciation for the help rendered by Shri Ravish Chandra Agrawal, learned Senior Counsel.

Certified copy as per rules.

(VIVEK AGARWAL)  
JUDGE

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