

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

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 15th OF JUNE, 2022

FIRST APPEAL No. 761 of 2022

Between:-

**MESARSH H.B. PRODUCTS BAHERIYA
GADGAD KANPUR ROAD SAGAR M.P.
THROUGH NARAD JAIN S/O LATE
LAXMICHAND JAINJ AGED ABOUT 59
YEARS PARTNER JAIN MANDIR KE PAAS,
ANKUR COLONY MAKRONIYA, SAGAR
TEHSIL AND DISTRICT SAGAR (MADHYA
PRADESH)**

.....APPELLANT

(BY SHRI A.M. KHARE, ADVOCATE)

AND

**MESARSH H.T. PRODUCTS BAHERIYA
GADGAD KANPUR ROAD SAGAR M.P.
THROUGH PARTNER VIMAL KUMAR JAIN
S/O LATE LAXMICHAND JAIN AGED
ABOUT 66 YEARS JAIN MANDIR KE PAAS,
769, VILANI BHAWAN ANKUR COLONY
MAKRONIYA, SAGAR TEHSIL AND
DISTRICT SAGAR (MADHYA PRADESH)**

.....RESPONDENTS

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

ORDER

This first appeal has been filed challenging the judgment and decree dated 17/12/2021 passed by the Fourth District Judge, Sagar in R.C.S.A./3900010/2016, whereby learned trial Court has dismissed the

suit for want of evidence of the plaintiff. Learned counsel for the appellant submits that although the learned Court has passed the order dismissing the suit in the form of judgment and decree but perusal of it, shows that, learned Court has not considered any evidence and has not decided the matter on merits and ultimately has dismissed the suit for want of evidence of the plaintiff. Accordingly, he submits that such dismissal of suit comes within the purview of Order 17 Rule 2 of CPC and not under Order 17 Rule 3 of CPC. He submits that because of passing of judgment and decree, he has preferred first appeal but in fact he has remedy to challenge the same by way of application under Order 9 Rule 9 of CPC accordingly, he prays for permission and liberty to file application under Order 9 Rule 9 of CPC before the same Court.

2. Heard learned counsel for the appellant and perused the impugned judgment and decree along with other order-sheets submitted by the appellant/plaintiff on record of the first appeal.

3. Bare perusal of the impugned judgment and decree shows that learned Court below in Para 8 of the same has mentioned that the plaintiff was given more than 14-15 opportunities for producing evidence but he has not adduced any evidence and due to non-production of evidence by the plaintiff, the defendant has also not produced any evidence and ultimately, the learned Court has dismissed the suit for want of evidence of the plaintiff and not on merits.

4. Provisions of Order 17 Rule 2 & 3 of CPC are reproduced as under:

Order XVII Rule (2) of CPC- Procedure if parties failed

to appear on day fixed- Where, on any day to which the hearing of the suit is adjourned, the parties on 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 order as it thinks fit.

(Explanation- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present)

3. Court may proceed notwithstanding either party fails to produce evidence, etc.- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, 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.-

a) if the parties are present, proceed to decide the suit forthwith, or

b) if the parties are, or any of them, is, absent, proceed under Rule 2.

5. Bare perusal of the provision contained in Order 17 Rule 2 of CPC depicts that if on the date of evidence, the plaintiff does not appear then the learned Court is free to dismiss the suit and undisputedly on the date of evidence, the plaintiff didn't appear, therefore, the learned Court was free to dismiss the suit for want of evidence of the plaintiff and it was not required to even list the case for evidence of the defendant. In any case, although the learned Court has passed the judgment and decree which prima facie appears to be under Order 17 Rule 3 of CPC but in

view of the fact that the plaintiff was not present in the Court on the date of evidence, the dismissal of suit will come under Order 17 Rule 2 of CPC and not under Order 17 Rule 3 of CPC.

6. Hon'ble the Apex Court in the case of *Mohandas Vs. Ghisia Bai reported in 2002 SCC OnLine SC 68*, has held that if the plaintiff does not appear on the date of evidence, the case will fall under Order 17 Rule 2 of CPC and not under Rule 3. Similar view has been taken by coordinate Bench of this Court in the case of *Laxman Krishnani Vs. Jitendra Kumar decided on 01/12/2015 in M.A. No.491/2013*.

7. As the judgment and decree whereby the suit has been dismissed for want of evidence, comes under Order 17 Rule 2 of CPC, therefore, the plaintiff has remedy of filing application under Order 9 Rule 9 of CPC before the same Court where the plaintiff can lead evidence regarding his absence on the date when suit was called for hearing.

8. Subject to the law of limitation, the plaintiff is granted liberty to file the application under Order 9 Rule 9 of CPC before the same Court who has passed the impugned judgment and decree dated 17/12/2021 and if such application is filed by the plaintiff, the same shall be decided by the concerning Court on its own merits without being influenced by the aforesaid order.

9. It is made clear that this Court has not expressed any opinion on the merits of the case.

10. Registry is directed to return the certified copy of the impugned judgment and decree after retaining the photocopy thereof on record of this first appeal.

(DWARKA DHISH BANSAL)
JUDGE

RS

