

Order IX rule 11 CPC 1908 : The forgotten provision

*Dharmendra Singh Adhikari**

If there is one provision in the Code of Civil Procedure, 1908, we could say has suffered negligence not only by the trial courts, but also by the writers on the subject, is Order IX rule 11 of the Code. For the obvious reasons that it is very common in most of the suits that defendants happen to be more than one and some of them often do not appear when suit is fixed for hearing. In such situations, provisions of Order IX rule 11 CPC should be followed. However, in practice provisions of rule 6 of the Order IX CPC which applies to suits having only one defendant are followed. Courts while following the provisions of rule 6, as soon as one or some of the defendants do not appear, pass a specific order that suit shall proceed *ex-parte* against the absentee defendant or defendants and while passing the judgment, if suit is decreed, make no fit order in respect of absentee defendants. In other words, if suit is decreed, instead of a fit order under rule 11, invariably *ex-parte* decree is passed against the absentee defendants. In consequence, the absentee defendant in every such case gets right to move an application under Order IX rule 13 to get the decree set aside. Since an *ex-parte* judgment against the absentee defendant at the same time might also be a detail judgment on merit against the defendant who appeared and contested the suit, what very often happens is that after restoration of the suit under rule 13, when the suit is again put on trial and the absentee defendant put the same defence as was put by the defendant who appeared and contested the suit, trial of the restored suit becomes a mere formality when everyone knows what the result would be. Perhaps holding such trial is not different from watching replay of match played many days before between Juventus and Bayern Munich.

2. Besides above, what has been seen is that in spite of the fact that provisions of Order IX rule 11 are of immense procedural utility and a detail legal opinion may be given thereon, authors on the subject give no space to the said rule in their commentaries which although run in series of volumes. To the extreme disappointment, most of the authors prefer to comment nothing on the said provision and a formality is done by merely quoting the same as it is from the Code.

* Joint Director, Uttarakhand Judicial & Legal Academy

3. To begin with, Order IX rule 11 CPC reads as follows:

Procedure in case of non-appearance of one or more of several defendants-Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the court shall at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

4. So far as the suit having one defendant is concerned, things are very clear. If the defendant does not appear in the suit, same is proceeded against the defendant *ex-parte* and in the event suit is decreed, same is always an *ex-parte* decree. The only exception to this general rule is in explanation to rule 2 of Order XVII of the Code which provides that in the event evidence of the defendant has already been recorded, completely or substantially and he does not appear thereafter, the Court instead of proceeding against the defendant *ex-parte*, may proceed in the suit, as if he is present and pass the judgment on merits. This principle equally applies to the plaintiff and if evidence of the plaintiff has already been recorded, completely or substantially and he does not appear thereafter, the court instead of dismissing the suit for want of prosecution, may proceed with as if plaintiff is present in the case. In other words, the Court may pass judgment on merit if the plaintiff does not appear after completion of his evidence. Consequently, the only remedy which remains with the plaintiff and defendant, as the case may be, is to challenge the judgment by way of appeal.

5. Unlike the suit having sole defendant, where in his non-appearance, normal rule is to proceed *ex-parte* right from the beginning and to pass judgment accordingly, the rule of procedure in suits having more than one defendant is different. The rule 11 of Order IX provides that in the event some defendants do not appear, the Court shall proceed in their absence and in respect of such absentee defendants may pass fit order while passing the judgment. Certainly this rule is applicable when some of the defendants do not appear. When all the defendants do not appear, Court would certainly follow procedure of rule 6 and if the Court passes a decree, unless Court proceeds as per the explanation to rule 2 of Order XVII, same would always be an *ex-parte* decree. However, when some of the defendants do not appear in the case, nature of the decree, if the same is passed, in respect of absentee

defendants, depends upon the fit order which the Court at the time of pronouncing the judgment passes. In simple words, the fit order means the order of the Court regarding the absentee defendants as to if the decree against them will be *ex-parte* or otherwise.

6. Of course there is no doubt that if the suit is dismissed by the Court, there arises no occasion for the Court to make a fit order in respect of the absentee defendants. The occasion for the same arises when the suit is decreed against the absentee defendant. At that time, as opined above, a fit order is passed by the Court as to if the decree would be *ex-parte* against the absentee defendants or it shall have the same effect as it has in respect of the defendants who appeared and contested the suit. If while passing the judgment, it is ordered by the Court that the judgment and decree shall not be *ex-parte* against the absentee defendants and shall have the same effect as in case of the defendants who appeared and contested the suit, the door for the absentee defendants under Order XIII rule 13 stands closed and the only remedy which remains available is to challenge the decree by way of an appeal.

7. The aforesaid provision appears to achieve some basic objectives of law and has emerged from a very mature legislative vision. The first objective, as it appears is that the case, if once tried and adjudicated at length should not be opened again, at least before the same Court which has once already given a detail judgment and by so expressed its opinion on the merits of the case. Second objective appears to be based on the reasoning that if the interests of the defendants are same and do not conflict, the honest and serious contest by the defendants who appeared in the case should be extended to the defendants who by their own choice remained absent. Third objective appears to give the absentee defendant no chance to prepare his defence in accordance with the opinion expressed by the Court on merits of the case disclosed in judgment already passed once. One more objective behind the provisions of rule 11 appears to be to avoid the existence of parallel proceedings when the decree is challenged in appeal by the defendant who appeared and contested the suit and at the same time prayer of the absentee defendant to set aside the decree also remains under consideration under Order IX rule 13 of the Code before the Court which passed the decree. Certainly, these objectives should be achieved by following the provisions of the rule 11 and for the same, in view of the facts

and circumstances of the case, a fit order should be passed by the Courts while passing the judgment.

8. It appears that rule 11 has been drafted by the legal minds of extraordinary legislative vision which every one of us should honour for the reason that the rule does not say to proceed *ex parte* against the defendant as soon as he does not appear in the suit, rather simply says that the suit shall proceed. In other words, while empowering the Courts to proceed in the absence of the absentee defendants, word *ex-parte* has been avoided to be used in the provision concerned for the simple reason that jurisdiction of the court to pass the *ex-parte* decree vide a fit and reasoned order has been reserved for the stage when final judgment is to be passed. As already mentioned, the Courts are also able to do so at the final stage of the suit when the entire defence set up by the defendants who appeared, their evidence and other material *etc.* are before the Court on the basis of which only the fit order may be passed under the rule.

9. So far as the considerations which the Courts should keep in mind while making a fit order regarding those defendants who do not appear in the suit are concerned, in this regard we may think as follow :

- (a) If the interests of the defendants who appeared in the suit are in conflict or in contrary to the defendants who did not appear and the plaintiff is able to prove his case against all the defendants or against the absentee defendants, in such situation it is but natural to say that the defendants who appeared and contested the case defended their own interest. In such case, it is reasonable that while passing the judgment it is fit to order that the judgment and the decree shall be *ex-parte* against the absentee defendants.
- (b) If the defendants who appeared in the suit and the defendants who did not appear had distinct and different interests and plaintiff is able to prove his case against all the defendants or against the absentee defendants, in such situation it is but natural to say that the defendants who appeared and contested the case defended only their interest. In such case, it is reasonable that while passing the judgment it is fit to order that the judgment and decree shall be *ex-parte* against the absentee defendants.
- (c) If all the defendants had the same interest in the suit and it appears

from the facts of the case that the defendants who did not appear would have given the same defence, the defendants who appeared and honestly, adequately, sincerely contested the suit had, and the plaintiff was able to prove his case against all the defendants, then the fit order which may be made while pronouncing the judgment is to pass decree of same nature against the absentee defendants.

- (d) If the defendants who appeared in the suit admitted the case of the plaintiff, or made a formal defence or for any other reason it can be said that there was no actual trial and adjudication in the case and the no conclusive opinion on merit of the case was disclosed by the Court, in such a case while pronouncing the judgment and if suit is decreed, it is reasonable to make express order that the judgment and decree shall be *ex-parte* against the absentee defendants. The reason being very simple reason that if on the application of the absentee defendants the decree is set aside under Order IX rule 13 and restored suit is contested by such defendants, the actual trial and adjudication will occur for the first time.
- (e) If some of the defendants after they had already given complete evidence or substantial part thereof, do not appear, in view of provision of explanation to rule 2 of Order XVII of the Code, the Court may proceed against such defendants, as if they were present and may pass judgment on merits and the occasion to proceed under Order IX rule 11 does not arise.
- (f) If all the defendants do not appear and suit is decreed, it is always *ex-parte*.

10. Since very less has been found written on the subject, therefore, it is expected that valuable views and suggestions will come from the respected readers.
