सत्यमेव जयते

न्यायालय

सहायक कलक्टर/उपखण्ड अधिकारी

गुढामालानी—बाड़मेर

(पीठासीन अधिकारी —केशव कुमार मीना आर.ए.एस.)

वाद संख्याः— 2024 / 15 दर्ज तिथिः—16.01.2024

वादी		प्रतिवादी
पूनमाराम पुत्र प्रभाराम वगैरह	बनाम	गोवाराम पुत्र करनाराम वगैरह
जरिये अधिवक्ता श्री डालूराम चौधरी		जरिये अधिवक्ता श्री रामजीवन विश्नोई

प्रार्थना पत्र अन्तर्गत आदेश—09 नियम—13
सिविल प्रक्रिया संहिता—1908
निर्णय तिथिः—09.01.2025

—:निर्णयः—

1. आज यह पत्रावली प्रार्थना—पत्र सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के अन्तर्गत बाबत् निर्णय प्रस्तुत हुई। प्रकरण का सुक्ष्म एवं सारतः वृतान्त इस प्रकार है कि प्रार्थी ने सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत हाजा न्यायालय में प्रार्थना पत्र प्रस्तुत किया। उक्त प्रार्थना पत्र का विवरण निम्न प्रकार हैः—
    - कि वादी/अप्रार्थी संख्या 01 ने प्रार्थना पत्र में वर्णित आराजी पर खातेदारी अधिकारों की घोषणा हेतु एक दावा संख्या 163/2023 हाजा न्यायालय में प्रस्तुत किया। उक्त दावा प्रतिवादीगण/प्रार्थी के विरूद्ध एकतरफा कार्यवाही अमल में लाते हुए दिनांक 26.12.2023 को डिक्री किया गया।
    - कि दावा संख्या 163/2023 में सम्मन विधिक रूप से तामील नहीं हुए। इसके बावजूद प्रतिवादीगण के विरूद्ध एकतरफा कार्यवाही अमल में लाई जाकर एकतरफा डिक्री जारी की गई। साथ ही प्रतिवादी/अप्रार्थी द्वारा अपने विरूद्ध की गई एकतरफा कार्यवाही को मंसूख करवाने हेतु सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—07 के अन्तर्गत प्रार्थना पत्र प्रस्तुत किया गया। उक्त सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—07 के अन्तर्गत प्रार्थना पत्र को भी एकतरफा सुनवाई कर खारिज करते हुए प्रकरण दिनांक 26.12.2023 को डिक्री किया गया।
    - कि न्यायालय द्वारा प्रतिवादीगण के विरूद्ध एकतरफा कार्यवाही अमल में लाते हुए सुनवाई का अधिकार के विधि के सुमान्य सिद्धांत के अनुसार सुनवाई का अधिकार का हनन करते हुए एकतरफा डिक्री जारी की गई।
2. प्रकरण दर्ज रजिस्टर किया जाकर अप्रार्थीगण को तलब किया गया। अप्रार्थीगण असालतन—वकालतन उपस्थित न्यायालय नहीं होने के कारण उनके विरूद्ध एकतरफा कार्यवाही अमल में लाई गई। तत्पश्चात प्रकरण में उक्त प्रार्थना पत्र पर बहस सुनी गई। दौराने बहस विद्वान अधिवक्ता प्रतिवादी/प्रार्थी ने न्यायालय के समक्ष जिरह प्रार्थना पत्र के तथ्यों को दौहराते हुये निवेदन किया कि न्यायालय द्वारा

प्रतिवादीगण के विरूद्ध एकतरफा कार्यवाही अमल में लाते हुए सुनवाई का अधिकार के विधि के सुमान्य सिद्धांत के अनुसार सुनवाई का अधिकार का हनन करते हुए जारी एकतरफा डिक्री से प्रार्थीगण को सुनवाई का अधिकार नहीं मिलने के कारण सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रार्थना—पत्र स्वीकार करते हुए जारी एकतरफा डिक्री को मंसूख फरमाते हुए प्रार्थी को प्रकरण में सुनवाई पर लिया जावे।

Provision

3. प्रकरण में पत्रावली का अवलोकन किया गया व बहस पर मनन किया गया है। प्रकरण में हाजा न्यायालय द्वारा जारी की गई डिक्री में प्रार्थी / प्रतिवादी संख्या 01 को सुनवाई का अवसर दिये जाने बाबत् उक्त सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत प्रार्थना पत्र प्रस्तुत किया गया है। प्रकरण में विश्लेषण से पूर्व सर्वप्रथम सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान का प्रकरण में अवलोकन किया जाना उचित प्रतीत होता है। अतः सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान का उद्धरण इस प्रकार हैः—

> ***13. Setting aside decree ex parte against defendant.***—*In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court* ***shall*** *make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*
>
> *Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:*
>
> *Provided further than no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.*
>
> *Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.*

Interpretation

4. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान की विस्तृत व्याख्या (Interpretation) की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *This rule requires an application by the defendant and if the defendant satisfies the court that (i) the summons was not duly served; or (ii) he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court will set aside the decree passed against him and appoint a day for proceeding with the suit.*

5. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया

संहिता—1908 के आदेश—09 नियम—13 के प्रावधान की विस्तृत व्याख्या (Interpretation) की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *8. It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the Court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.*
>
> *The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.*

6. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 3543 / 2019 उनवान *Y.P. Lele vs Maharashtra State Electricity Distribution Company* में दिनांक 16.08.2023 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान की विस्तृत व्याख्या (Interpretation) की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *8. (....) The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.*

Nature of Provision

7. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान की प्रकृति की (Nature of Provision) विस्तृत व्याख्या की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The language of the rule is plain, express and unambiguous and the grounds mentioned therein are exhaustive.*
>
> *XXX*
>
> *Since the Code makes specific provision for setting aside ex parte decree, no inherent power can be exercised to set aside such decree.*

8. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान की विस्तृत व्याख्या (Interpretation) की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *This rule requires an application by the defendant and if the defendant satisfies the court that (i) the summons was not duly served; or (ii) he was prevented by any sufficient cause from appearing when the suit was called out for hearing, the court will set aside the decree passed against him and appoint a day for proceeding with the suit.*

Reason

9. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *7316/2008* उनवान *Mahesh Yadav & Anr vs Rajeshwar Singh* में दिनांक 03.12.2008 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के आधार सिद्धांत (Reason) विस्तृत व्याख्या की है। उसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *While, however, saying so, we must express our dissatisfaction in the manner in which the learned Civil Judge has passed the order impugned before the High Court. The said order is an*

unreasoned one. The evidence adduced on behalf of the appellants were not analysed for arriving at a finding as to whether a case for setting aside an ex parte decree has been made out by the appellants or not. The matter had not been considered as is required in terms of Order IX Rule 13 of the Code of Civil Procedure. An order setting aside the ex parte decree being a judicial order should have been supported by reasons. The learned Judge could not have allowed the said application without following the legal principles on the basis whereof such an order could be passed.

Application

10. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान किसी प्रकरण में अनुप्रयोग (Application) की विस्तृत व्याख्या की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

When an application for setting aside ex parte decree is made by the defendant, the court should consider whether the defendant was prevented by "sufficient cause" from appearing before the court when the suit was called out for hearing. "Sufficient cause" is a question of fact.

11. माननीय इलाहाबाद उच्च न्यायालय द्वारा सिविल अपील 2062 / 2009 उनवान *Vijay Singh vs Shanti Devi* में दिनांक 08.09.2017 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान किसी प्रकरण में अनुप्रयोग (Application) की विस्तृत व्याख्या की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

14. The aforesaid provision lays down the procedure for setting aside a decree passed ex parte. The court can set aside an ex parte decree only on two grounds – firstly, that the summons was not duly served; and secondly, that the defendant was prevented by sufficient cause from appearing when the suit was called out. Once an ex parte decree is set aside, it basically means that the parties are relegated to the same position on which they stood before the passing of the ex-parte decree.

Process

12. माननीय इलाहाबाद उच्च न्यायालय द्वारा सिविल अपील 2062 / 2009 उनवान *Vijay Singh vs Shanti Devi* में दिनांक 08.09.2017 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान किसी प्रकरण में अनुप्रयोग की प्रक्रिया (Process) को स्पष्ट किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

12. We are only concerned with clause (a), which provides that if summons are duly served and the defendant does not put in appearance, the court may make an order that the suit would be heard ex parte. In this case, this was the procedure followed and an ex parte decree was passed. There is no manner of doubt that an ex parte decree is also a valid decree. It has the same force as a decree which is passed on contest. As long as the ex parte decree is not recalled or set aside, it is legal and binding upon the parties.

What to Consider

13. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1545 / 2019 उनवान *A Murugesan vs Smt. Jamuna Rani* में दिनांक 07.02.2019 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक तथ्यों को ध्यान में रखने (What to Consider) के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

11. From a perusal of the order of the Trial Court, it is clear that the Trial Court has taken into consideration the past conduct of the appellant-defendant in the suit, instead of confining the consideration as to whether the appellant has shown sufficient cause or not for not appearing in the matter on 16.03.2009. It is fairly well settled that when an application is filed for setting aside ex-parte decree under Order IX Rule 13 of CPC, the only aspect which is required to be considered is whether any sufficient cause is shown for absence in the matter when the matter was called. Without recording the specific finding, on the plea of the appellant that there was sufficient cause, the Trial Court has committed error in rejecting the application under Order IX Rule 13 of CPC. Even the appellate and the revisional court have not considered the matter in proper perspective and rejected the claim of the appellant.

Conduct of Party

14. माननीय उच्चतम न्यायालय द्वारा विशेष अनुमति याचिका 17942—43/1999 उनवान *G.P. Srivastava vs Shri R.K. Raizada & Ors* में दिनांक 03.03.2000 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक तथ्यों में से एक तथ्य पक्षकार का आचरण (Conduct of Party) को ध्यान में रखने के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

Under Order 9 Rule 13 C.P.C. an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex-parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The 'sufficient cause' for non appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non appearance of the defendant on the date fixed for hearing when ex-parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not malafide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.

Factor-I

15. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक कारक में से प्रथम कारक (Factor-I) को ध्यान में रखने के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

As provided in Rule 6, the suit may proceed ex parte against the defendant only when it is proved by the plaintiff to the

satisfaction of the court that the defendant did not appear even though the summons was duly served. In that case, an ex parte decree may be passed against him. Therefore, if the defendant satisfies the court that the summons was not duly served upon him, the court must set aside the ex parte decree passed against him.

Presumption of Summon

16. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक कारक में से प्रथम कारक (Presumption of Summon) को ध्यान में रखने के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

PRESUMPTION OF SERVICE BY REGISTERED POST & BURDEN OF PROOF:

13. This Court after considering large number of its earlier judgments in Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors., AIR 2010 SC 3817, held that in view of the provisions of Section 114 Illustration (f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post. However, the presumption is rebuttable on a consideration of evidence of impeccable character. A similar view has been reiterated by this Court in Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287.

14. In Gujarat Electricity Board & Anr. v. Atmaram Sungomal Poshani, AIR 1989 SC 1433, this Court held as under:

> *"There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service."*
>
> *(Emphasis added)*

15. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.

Service of Summon

17. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 5111 / 2000 उनवान *Sushil Kumar Sabharwal vs Gurpreet Singh* में दिनांक 23.04.2002 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग

के लिए आवश्यक कारक में से प्रथम कारक (Presumption of Summon) के तहत सिविल प्रक्रिया संहिता—1908 के आदेश—05 के तहत निर्धारित प्रक्रिया एवं प्रक्रिया की पालना के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *Rules 17 and 18 of Order 5, C.P.C. which lay down the procedure of service when the defendant refuses to accept service and the endorsement to be made by the serving officer, read thus:*
>
> > *"17. Procedure when defendant refuses to accept service, or cannot be bound.-Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant {who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time} and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door of some other conspicuous part of the house in which the defendant ordinarily reside or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.*
> > *18. Endorsement of time and manner of service.-The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.*

Subsititute Summon

18. इस संदर्भ में सिविल प्रक्रिया संहिता—1908 के आदेश—05 नियम—20 के प्रावधान का उद्धरण यहॉ प्रासंगिक है। जो कि इस प्रकार हैः—

> *20. Substituted service.—(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.*
>
> *(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in such locality in which the defendant is last known to have ordinarily and voluntarily resided, carried on business or personally worked for gain.*
>
> *(2) Effect of substituted service. Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.*

(3) Where service substituted, time for appearance to be fixed.—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Laps in Summon Process

19. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 5111 / 2000 उनवान *Sushil Kumar Sabharwal vs Gurpreet Singh* में दिनांक 23.04.2002 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक कारक में से प्रथम कारक (Presumption of Summon) के तहत सिविल प्रक्रिया संहिता—1908 के आदेश—05 के तहत निर्धारित प्रक्रिया की पालना में कमी को बताते हुए विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process wherever to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt. Incidently, we may state that though the date of appearance was 23rd February, 1993 the summons is said to have been tendered on 22nd February, 1993, i.e., just a day before the date of hearing.

The appellant has himself appeared in the witness box and deposed on oath that no summons was tendered to him by any process server of the Court. It is a case of oath against oath. In view of the facts which we have noticed here-in-above clearly the oath of the appellant was more weighty than the oath of the process server. In the ordinary course of events, the court of facts should have discarded the statement of the process server and believed the statement of the appellant.

20. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 3574 / 2008 उनवान *Rabindra Singh vs Financial Commnr.Cooperation,Punjab* में दिनांक 14.05.2008 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक कारक में से प्रथम कारक (Presumption of Summon) के तहत सिविल प्रक्रिया संहिता—1908 के आदेश—05 के तहत निर्धारित प्रक्रिया की पालना में कमी को बताते हुए विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

19. In Great Punjab Auto Industries Vs. Jiji Khushian : (2005) 13 SCC 503 this Court held :-
"In view of the order that we propose to pass, it is not necessary to recite the entire facts leading to the filing of the present appeal. Suffice it to say that the suit was decreed ex parte by an order dated 16.4.1994. The application for setting aside the ex parte order has been rejected by the courts below. Hence, the present petition. The notice to the appellant is by way of

substituted service. The substituted service was published in the Tribune and the Punjab Kesari which have circulation only in the State of Punjab. Admittedly, the appellant stays at Bombay. The newspapers in which the notice was published by way of substituted service, namely, the Tribune and the Punjab Kesari have no circulation in Bombay. Order 5 Rule 20(1-A) CPC enjoins that if the service of notice is by advertisement in the newspaper, it shall be in the daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided. In the instant case, the procedure prescribed under Order 5 Rule 20(1-A) with regard to substituted service has been violated. In the premises, it cannot be said that the summons upon the defendant were effectively served. In this view of the matter, the ex parte decree dated 16-4- 1994 is set aside."

Collusion With Postman

21. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक द्वितीय कारक के तहत पक्षकार को प्रेषित सम्मन की तामिलकर्ता से मिलीभगत के आधार पर न्यायालय में विचाराधीन कार्यवाही की अज्ञानता (Knowledge of Proceding) के बारे में विवेचन किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

19. More so, it is nobody's case that respondent/wife made any attempt to establish that there had been a fraud or collusion between the appellant and the postman. Not a single document had been summoned from the post office. No attempt has been made by the respondent/wife to examine the postman. It is nobody's case that the "National Herald" daily newspaper published from Delhi did not have a wide circulation in Delhi or in the area where the respondent/wife was residing with her brother. In such a fact-situation, the impugned order of the High Court becomes liable to be set aside.

Order-9 Rule-6

22. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 5111 / 2000 उनवान *Sushil Kumar Sabharwal vs Gurpreet Singh* में दिनांक 23.04.2002 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान पर सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—06 के प्रभाव एवं संबंध की विवेचना (Interpretation) की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

The provision contained in Order 9 Rule 6 of the C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligations on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with discretion to make an order that the suit be heard ex-parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date requiring conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant

suffering an ex- parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the Trial Court would have been conscious of its obligation cast on it by Order 9 Rule 6 of the C.P.C., the case would not have proceeded ex-parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.

Factor-II (Sufficient Cause)

23. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक द्वितीय कारक (Sufficient Cause) के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

The expression "sufficient cause" has not been defined anywhere in the Code. It is a question to be determined in the facts and circumstances of each case. The words "sufficient cause" must be liberally construed to enable the court to exercise powers ex debito justitaie. A party should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part. Necessary materials should be placed on record to show that the applicant was diligent and vigilant. Improper advice of advocate may be a good ground to set aside ex parte decree but it cannot be accepted as a sufficient cause in all cases. Conversely, if "sufficient cause" is not shown, ex parte decree cannot be set aside. "The right and this duty is a sine qua non of judicial procedure. An order setting aside ex parte decree is judicial, it must be supported by reasons. (Refer: Mahesh Yadav vs. Rajeshwar Singh)

In Arjun Singh vs. Mohindra Kumar Supreme Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause".

When an application for setting aside ex parte decree is made by the defendant, the court should consider whether the defendant was prevented by "sufficient cause" from appearing before the court when the suit was called out for hearing. "Sufficient cause" is a question of fact.

Sufficient Cause

24. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक द्वितीय कारक (Sufficient Cause) के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

9. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides an adequate or platitude which when the act done suffices to [illegible] the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting

diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: Ramlal & Ors. v. Rewa Coalfields Ltd., AIR 1962 SC 361; Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi & Anr., AIR 1968 SC 222; Surinder Singh Sibia v. Vijay Kumar Sood, AIR 1992 SC 1540; and Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another, (2010) 5 SCC 459).

Knowledge of Proceding

25. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 5111/2000 उनवान *Sushil Kumar Sabharwal vs Gurpreet Singh* में दिनांक 23.04.2002 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए आवश्यक द्वितीय कारक के तहत पक्षकार को विचाराधीन न्यायिक कार्यवाहियों की जानकारी व अज्ञानता (Knowledge of Proceding) के बारे में न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार है:—

The learned counsel for the landlord-respondent submitted that there is an interpleader suit filed by the appellant because there was a dispute between the heirs of the original landlord who unfortunately died and his widow and the grandsons (who are the respondents herein), each of the two was claiming itself to be the landlord and entitled to recover rent setting up a will in its favour. The appellant has admitted in the plaint therein that he was aware of the pendency of the suit filed by the respondent in the court of the Rent Controller, Amritsar. In fact, this admission of the appellant has weighed heavily with the High Court which has opined that even if the summons was not duly served, the appellant was aware of the pendency of the suit and, therefore, the application under Order 9, Rule 13 C.P.C. did not have any merit.

The High Court has over looked the second proviso to Rule 13 of Order 9 C.P.C., added by the 1976 Amendment which provides that no court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. It is the knowledge of the 'date of hearing' and not the knowledge of 'pendency of suit' which is relevant for the purpose of the proviso above said. Then the present one is not a case of mere irregularity in service of summons; on the facts is a case of non-service of summons. The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross-examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim which he did not avail and utilise.

Laps of Advocate

26. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 484/2005 उनवान *State Of Nagaland vs Lipok Ao & Ors.* में दिनांक 01.04.2005 को दिये गये निर्णय में परिसीमा अधिनियम—1963 की धारा—05 प्रावधान देरी के उपशमन के लिए कारकों (Lapse of Advocate) के संबंध में विवेचना करते विस्तृत व्याख्या की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार है:—

What constitutes sufficient cause cannot be laid down by hard and fast rules. In New India Insurance Co. Ltd. v. Shanti Misra (1975 (2) SCC 840) this Court held that discretion given by Section 5 should not be defined or crystallised so as to convert

a discretionary matter into a rigid rule of law. The expression "sufficient cause" should receive a liberal construction. In Brij Indar Singh v. Kanshi Ram (ILR (1918) 45 Cal 94 (PC) it was observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In Shakuntala Devi Jain v. Kuntal Kumari (AIR 1969 SC 575) a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

In Concord of India Insurance Co. Ltd. v. Nirmala Devi (1979 (4) SCC 365) which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In Lala Matu Din v. A. Narayanan (1969 (2) SCC 770), this Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any mala fide motive.

In State of Kerala v. E. K. Kuriyipe (1981 Supp SCC 72), it was held that whether or not there is sufficient cause for condonation of delay is a question of fact dependant upon the facts and circumstances of the particular case. In Milavi Devi v. Dina Nath (1982 (3) SCC 366), it was held that the appellant had sufficient cause for not filing the appeal within the period of limitation. This Court under Article 136 can reassess the ground and in appropriate case set aside the order made by the High Court or the Tribunal and remit the matter for hearing on merits. It was accordingly allowed, delay was condoned and the case was remitted for decision on merits.

Due diligence

27. माननीय उच्च न्यायालय, दिल्ली द्वारा CM (M) 1030/2021 & CM APPL. 40806/2021 उनवान *Vijay Gupta vs Mr. Gagninder Kr. Gandhi & Ors* में दिनांक 04.07.2022 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—06 नियम—17 के पंरतुक में बताए गए (Due diligence) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

17. (.....)
(xii) The proviso to Order VI Rule 17 prohibits, again in absolute terms (as is apparent from the use of the word "shall"), allowing of an application for amendment after commencement of the trial, *unless* the Court finds that, in spite of due diligence, the party could not have raised the matter prior thereto. The latter part of the proviso, which excepts its application where the Court is satisfied that, despite due diligence, the amendment being sought could not have been raised before trial commenced is, of course, a matter entirely within the subjective discretion of the Court. ***Chander Kanta Bansal v. Rajinder Singh Anand12*** adopts, to understand the expression "due diligence", the following definition from Words & Phrases, Pmt Edition, 13A, o[illegible]:

> "'Due diligence' in law [illegible]ping everything reasonably [illegible]t everything possible. 'Due diligence means reasonable diligence. It means such diligence as a prudent man will exercise in the conduct [illegible]. Self-Attested

Having relied on the above definition, the Supreme Court, in ***Chander Kanta Bansal12***, defined "due diligence" as meaning

"the diligence reasonably exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation". ***Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department13***, in like terms, defined "due diligence" as "a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances". Importantly, therefore, "due diligence" connotes *reasonable* diligence, keeping in view *the circumstances of the case*. These twin considerations have, therefore, to inform the Court seized with the issue of whether a litigant, before it, had exercised "due diligence". The elasticity of the expression is self-evident. If trial has commenced, the Court would then have to examine, on facts, whether the party was unable to raise the matter before trial commenced, despite due diligence.

28. माननीय उच्चतम न्यायालय द्वारा सिविल अपील अपील 1893 / 2008 उनवान *Chander Kanta Bansal vs Rajinder Singh Anand* में दिनांक 11.03.2008 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—06 नियम—17 के परंतुक में बताए गए (Due diligence) के संबंध में विवेचन करते हुए दृष्टान्त प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

11. (.....)It was brought to our notice that both sides have closed their evidence and completed their argument, but only at this stage the defendant filed the said application for amendment of her written statement. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort.

> *"Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence"*

means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. As mentioned earlier, in the case on hand, the application itself came to be filed only after 18 years and till the death of her first son Sunit Gupta, Chartered Accountant, had not taken any step about the so-called agreement. Even after his death in the year 1998, the petition was filed only in 2004. The explanation offered by the defendant cannot be accepted since she did not mention anything when she was examined as witness.

29. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय की भूमिका एवं दृष्टिकोण (Role/Approch of Court) के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *11. While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: State of Bihar & Ors. v. Kameshwar Prasad Singh & Anr., AIR 2000 SC 2306; Madanlal v. Shyamlal, AIR 2002 SC 100; Davinder Pal Sehgal & Anr. v. M/s. Partap Steel Rolling Mills (P) Ltd. & Ors., AIR 2002 SC 451; Ram Nath Sao alias Ram Nath Sao & Ors. v. Gobardhan Sao & Ors., AIR 2002 SC 1201; Kaushalya Devi v. Prem Chand & Anr. (2005) 10 SCC 127; Srei International Finance Ltd., v. Fair growth Financial Services Ltd. & Anr., (2005) 13 SCC 95; and Reena Sadh v. Anjana Enterprises, AIR 2008 SC 2054).*

30. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 5111 / 2000 उनवान *Sushil Kumar Sabharwal vs Gurpreet Singh* में दिनांक 23.04.2002 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय की भूमिका एवं दृष्टिकोण (Role/Approch of Court) के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The provision contained in Order 9 Rule 6 of the C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligations on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex-parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex- parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the Trial Court would have been conscious of its obligation cast on it by Order 9 Rule 6 of the C.P.C., the case would not have proceeded ex-parte against the defendant-appellant and a wasteful period of 8 years would not have been added to the life of this litigation.*

31. माननीय उच्चतम न्यायालय द्वारा विशेष अनुमति याचिका 17942—43 / 1999 उनवान *G.P. Srivastava vs Shri R.K. Raizada & Ors* में दिनांक 03.03.2000 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय की भूमिका एवं दृष्टिकोण (Role/Approch of Court)

के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The 'sufficient cause' for non appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non appearance of the defendant on the date fixed for hearing when ex-parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not malafide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits. In the instant case, it is not disputed that the nephew of the counsel of the appellant had died in a road accident on the date of hearing and that the appellant himself was not at the station on account of his employment and illness. The mere fact of obtaining a certificate from a private doctor could not be made a basis for rejecting his claim of being sick. Both the Trial Court as also the High Court have adopted a very narrow and technical approach in dealing with a matter pertaining to the eviction of the appellant despite the fact that he had put a reasonable defence and had approached the Court for setting aside the ex-parte decree, admittedly, within the statutory period. Even if the appellant was found to be negligent, the other side could have been compensated by costs and the ex-parte decree set aside on such other terms and conditions as were deemed proper by the Trial Court. On account of the unrealistic and technical approach adopted by the courts, the litigation between the parties has unnecessarily been prolonged for about 17 years. The ends of justice can be met only if the appellant- defendant is allowed opportunity to prove his case within a reasonable time.*

Inherent Power of Court

32. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय में अंर्तनिहित शक्तियों (Inherent Power of Court) के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *Since the Code makes specific provision for setting aside ex parte decree, no inherent power can be exercised to set aside such decree.*
>
> *As Rankin, L.J. stated, "I entirely dissent from the view that, if no case is made out under that rule (Rule 13), it is open to the learned Judge to enlarge the rule by talking about Section 151." (Refer: Manohar Lal vs. Seth Hira Lal5, K.B. Dutt vs. Shamsuddin Shah6).*

33. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 4014/2008 उनवान *Rabindra Singh vs Financial Commnr.Cooperation, Punjab* दिनांक 14.05.2008 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय में अंर्तनिहित शक्तियों (Inherent Power of Court) के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

15. In this case there has been a clear fraudulent attempt on the part of the respondent No.4 to suppress the service of notice upon the appellant herein. The Tehsildar, in his judgment, has resorted to a peculiar logic. According to her, the provisions of Review were attracted and not under Order IX Rule 13 for setting aside the ex-parte proceeding. Even if that be so, the ex-parte decree, in our opinion, could have been set aside. She could have exercised her power of review. The commentary on which reliance was placed, was made on the basis of a decision of the Financial Commissioner in Hukam Chand & ors. v. Malak Ram & ors. [1932 (XI) The Lahore Law Times 42]. The said decision, with respect, does not lay down the correct law. All courts in a situation of this nature have the incidental power to set aside an ex parte order on the ground of violation of the principles of natural justice. We will deal with this aspect of the matter a little later.

Inherent Power vs Procedural Law

34. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 4100 / 2006 उनवान *Tea Auction Ltd vs Grace Hill Tea Industry And Anr* में दिनांक 13.09.2006 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय में अंर्तनिहित शक्तियों तथा प्रक्रियात्मक कानून के मध्य संबंध के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

Order IX Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised its discretionary jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs.37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case.

35. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 3574 / 2008 उनवान *Rabindra Singh vs Financial Commnr.Cooperation,Punjab* में दिनांक 14.05.2008 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय में अंर्तनिहित शक्तियों (Inherent Power of Court) के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

17. What matters for exercise of jurisdiction is the source of power and not the failure to mention the correct provisions of law. Even in the absence of any express provision having

regard to the principles of natural justice in such a proceeding, the courts will have ample jurisdiction to set aside an ex parte decree, subject of course to the statutory interdict.
In Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal [1980 Supp SCC 420] this Court has held that an Industrial Tribunal has the requisite jurisdiction to recall an ex parte award. [See also Sangham Tape Co. v. Hans Raj (2005) 9 SCC 331 and Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd. and Another (2005) 13 SCC 777]

O17R2 vs O9R6 vs O9R13

36. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 3543 / 2019 उनवान *Y.P. Lele vs Maharashtra State Electricity Distribution Company* में दिनांक 16.08.2023 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान एवं सिविल प्रक्रिया संहिता—1908 के आदेश—17 नियम—02 के प्रावधान के मध्य संबंध की विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

14. Before proceeding to consider the submissions, it would be appropriate to reproduce Order XVII Rule 2 CPC, which reads as follows:

> *"2. Procedure if parties fail to appear on day fixed. - 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.*
> *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."*

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16. A plain reading of Order IX Rule 13 makes it apparent that where in a case, a decree is passed ex parte against defendant, a party may apply to the Court for setting aside the same for reasons satisfying the Court regarding non-appearance.

17. Coming to Order XVII Rule 2 CPC, it would be apparent that if the parties or any one of them failed to appear on a day to which the hearing of the suit is adjourned, 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 deems fit.

18. In the present case, the defendants did not appear on 04.12.2004, nor their counsel appeared as he had already withdrawn his Vakalatnama by a written request. The Trial Court directed for the suit to proceed under Order XVII Rule 2 CPC against the defendants. The effect of the order dated 04.12.2004 was that the Trial Court could have proceeded to dispose of the suit in one of the modes directed in that behalf by Order IX CPC. Coming back to Order IX CPC, it is to be noticed that under Rule 6 thereof where summons are duly served and the defendant does not appear when the suit is called on for hearing, the Court may make an order that the suit be heard ex parte. This was the procedure adopted by the Trial Court in the present case accordingly, after the evidence of the plaintiff was concluded and the defendant continued to remain absent, the Trial Court decreed the suit ex parte, vide judgment dated 29.01.2005. The operative portion thereof clearly mentions that the suit is decreed ex parte.

19. Now coming to the explanation, what is stated therein is that 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 would be at liberty to proceed with the case as if such party were present. Two phrases are important in the explanation "any party" and "such party". "Any party" refers to the party which has led evidence or substantial evidence and "such party" refers to that very party which has led evidence or substantial evidence. What is discernible is that under Order XVII Rule 2, the Court would proceed to pass orders with respect to any of the parties being absent or both the parties being absent. Whereas the explanation is confined to record the presence of that party and that party alone, which has led evidence or substantial evidence and has thereafter failed to appear. In the present case, admittedly the suit was at the stage of plaintiff's evidence as is apparent from the order dated 04.12.2004. The evidence of the defendants had not even started and the defendants' counsel had not even cross-examined the plaintiff's evidence.

20. The explanation in the present case could have been invoked only if the plaintiff, after adducing his evidence or substantial evidence, failed to appear, the Court could have recorded his presence while disposing of the suit. But once the defendant had not led any evidence at all, the explanation could not be invoked as against the defendant/appellant. The High Court committed an error in applying the explanation to Order XVII Rule 2 CPC and based upon it holding that an application under Order IX Rule 13 CPC would not be maintainable as the presence of the defendant would be deemed to be recorded at the time of disposal of the suit.

21. As a matter of fact, once the counsel had withdrawn his Vakalatnama, in normal course, the Trial Court ought to have issued notice to the defendants to engage another counsel, which it did not do and proceeded ex parte. The Trial Court committed an error in doing so. Further, the Trial Court, in its wisdom and discretion having allowed the application under Order IX Rule 13 CPC, the High Court ought to have refrained itself from interfering with an order which advanced the cause of justice by affording opportunities to both the parties so that the suit could be decided on merits.

Conditions of Court

37. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 4100 / 2006 उनवान *Tea Auction Ltd vs Grace Hill Tea Industry And Anr* में दिनांक 13.09.2006 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय द्वारा एकतरफा कार्यवाही को सशर्त निरस्त करने पर युक्तियुक्त शर्त आरोपण के मध्य संबंध के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

Order IX Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to

put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised its discretionary jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs.37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case.

In Karumuri Surayya vs. Thadepalli Pushpavalli Thayaramma & Ors. [AIR (37) 1950 Madras 618], a learned Single Judge of the Madras High Court stated the law in the following terms :

> *"It seems to me that the wording "upon such terms as to" in the Rule should be read as applying not only to costs but to "payment into Court or otherwise as it thinks fit" as well. I do not think that the punctuation referred to above in the rule in any way lends support to the contention of the advocate for the petitioner. It looks to me that the Rule does not restrict the power of the Court to impose conditions for setting aside an ex parte decree to payment of costs only. The wording of the Rule is comprehensive enough to include conditions as to payment into Court of decretal amount or such other conditions as the Court thinks fit. Ordinarily the Court will not impose onerous conditions upon the defendant, such as the payment into Court of the whole or part of the decretal amount or as to furnishing of security therefor etc. The conditions as to deposit of decretal amount or such similar terms are imposed only under special circumstances. It is one thing to say that it is either inequitable or unjust to put the defendant to such onerous terms, but it is quite a different thing to say that the Court has no jurisdiction at all to impose such terms under any circumstances."*

In Somalal Nathalal Mistri vs. The Vasant Investment Corporation Ltd. & Anr. ILR (1954) Bom. 371, it was held :

> *"The next question is whether the condition which has been imposed by the Court below is a reasonable condition. The expression "such terms as to costs, payment into Court or otherwise as it thinks fit" suggests that the matter is one of discretion, but the discretion is to be exercised in a judicial manner. The condition to be imposed, therefore, upon a defendant should be reasonable and not oppressive. What condition should be imposed in a particular case must depend upon the facts of each case. In one case the Court may come to the conclusion that the defendant should pay into Court the amount. In another case the Court may come to the conclusion that it will be sufficient if the defendant is to pay a portion of the amount, and in a third case it is conceivable that the Court may come to the conclusion that the ends of justice will be met if*

the defendant is made to pay the amount of costs only. The true principle seem to me to be that while the Court has got power to impose conditions upon a defendant including the condition of the payment of the entire amount of the decree, the conditions to be imposed should be reasonable and should not be oppressive or at least should not be conditions which will result in the defendant not being able to defend the suit."

In B. Padmavathi Rai vs. Parvathiamma [AIR 1976 Karnataka 97], Shetty, J., as the learned Judge then was, opined :

".....The question herein is, whether the Court, while setting aside the ex parte decree under Order IX, Rule 13, is competent to impose such conditions apart from the direction to pay costs. The scope of Order IX, Rule 13, was considered in Shyam Lal Sahai v. Ram Narain Lal Seth, (1920) 57 Ind Cas 300 = (AIR 1920 Pat 660) in which Miller, Chief Justice, observed :

"The Court may, first of all, impose conditions as to the payment of costs, it may, secondly, impose conditions as to the payment into Court and, in my opinion, this covers the payment into Court of the decretal amount or some portion thereof or payment into Court of the costs. ....."

I respectfully agree with the above view. The Court is competent to ask the defendant to pay a portion of the decretal amount or of the costs while setting aside the ex parte decree, but such conditions should not be unreasonable or illegal.

In the instance case, I feel that the circumstances amply justify a direction to the defendant to deposit the admitted portion of the suit claim. The defendant does not dispute her liability to pay the balance of unpaid purchase money with 5= per cent interest from 3-6-1970. All that she prayed in the reply notice dated 15-5-1970 was that she might be given two years time for that payment."

The expression "or otherwise" is also required to be construed widely.

In Packwood vs. Union-Castle Mail Steamship Company Limited [(1903) 20 Times Law Reports 59], it was observed :

".....But the clause went on "or otherwise," and he thought that meant "in any other way," and that the clause did apply to the negligence of the butcher in allowing the dog to go loose and be lost."

In Kavalappara Kottarathil Kochuni @ Moopil Nayar etc. vs. State of Madras & Kerala & Ors. [AIR 1960 SC 1080], this Court opined:

"On the basis of this rule, it is contended, that the right or the custom mentioned in the clause is a distinct genus and the words "or otherwise" must be confined to things analogous to right or contract such as usage, grant, prescription etc. It appears to us that the words "or otherwise" in the context only means "whether or not the origin of the receipt of maintenance"... [illegible] of the objects of the legislature is obvious from the [illegible] of courts and the Privy Council that the receipt of maintenance might even be out of bounty. It is most likely that a word of the widest amplitude was used

to cover even acts of charity and bounty. If that be so, under the impugned Act even a payment of maintenance out of charity would destroy the character of an admitted sthanam which ex facie is expropriatory and unreasonable."

Payment Into court

38. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 4100/2006 उनवान *Tea Auction Ltd vs Grace Hill Tea Industry And Anr* में दिनांक 13.09.2006 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय द्वारा एकतरफा कार्यवाही को सशर्त निरस्त करने पर युक्तियुक्त शर्त आरोपण के दौरान पक्षकार द्वारा न्यायालय में शर्त की अनुपालना में राशि जमा कराने के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किये है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

We may at once notice that whereas Order IX Rule 7 postulates setting aside of orders passed by the Court upon such terms of costs or otherwise; Order IX Rule 13, inter alia, postulates "payment into Court".

What would be the meaning of "payment into Court" is the core question.

In G.P. Srivastava v. R.K. Raizada & Ors. [(2000) 3 SCC 54], a similar question came up for consideration. A Division Bench of this Court opined that the provision under Order IX Rule 13 of the Code of Civil Procedure should receive a broad construction and no hard and fast guidelines can be prescribed. The courts have a wide discretion to set aside an ex parte decree on satisfying itself as regards existence of a "sufficient cause", opining :

"The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."

In Ramesh & Ors. vs. Ratnakar Bank Ltd. [JT 2000 (10) SC 325], however, this Court, while directing that the ex parte decree be set aside, also directed deposit of a further sum of Rs.5 lakhs over and above the amount of Rs.7 lakhs directed by the Court on an earlier occasion. No law has been, however, laid down therein.

In Vijay Kumar Madan & Ors. vs. R.N. Gupta Technical Education Society & Ors. [(2002) 5 SCC 30], this Court deprecated the practice of imposing an undue condition and putting the defendant on onerous terms stating :

"Power in the court to impose costs is to put the defendant-applicant on terms is spelled out from the expression "upon such terms as the court directs as to costs or otherwise". It is settled with the decision of this Court in Arjun Singh v. Mohindra Kumar that on an adjourned hearing, in spite of the court having proceeded ex parte earlier the defendant is

entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be reflected back and reopen the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in the case of Arjun Singh the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation."
However, the interpretation of the expression "payment into Court" did not directly fall for consideration in those cases.

Effect of Ex-parte Decree

39. माननीय इलाहाबाद उच्च न्यायालय द्वारा सिविल अपील 2062 / 2009 उनवान *Vijay Singh vs Shanti Devi* में दिनांक 08.09.2017 को दिये गये निर्णय में न्यायालय द्वारा जारी की गई एकतरफा डिक्री के प्रभाव के बारे मे विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

12. We are only concerned with clause (a), which provides that if summons are duly served and the defendant does not put in appearance, the court may make an order that the suit would be heard ex parte. In this case, this was the procedure followed and an ex parte decree was passed. There is no manner of doubt that an ex parte decree is also a valid decree. It has the same force as a decree which is passed on contest. As long as the ex parte decree is not recalled or set aside, it is legal and binding upon the parties.

Effect of Set Aside

40. माननीय इलाहाबाद उच्च न्यायालय द्वारा सिविल अपील 2062 / 2009 उनवान *Vijay Singh vs Shanti Devi* में दिनांक 08.09.2017 को दिये गये निर्णय में न्यायालय द्वारा जारी की गई एकतरफा डिक्री के सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत निरस्त करने पर डिक्री एवं पक्षकार की स्थिति के बारे मे विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

14. The aforesaid provision lays down the procedure for setting aside a decree passed ex parte. The court can set aside an ex parte decree only on two grounds – firstly, that the summons was not duly served; and secondly, that the defendant was prevented by sufficient cause from appearing when the suit was called out. Once an ex parte decree is set aside, it basically means that the parties are relegated to the same position on which they stood before the passing of the ex-parte decree.

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16. In the present case, the result would be that the respondent No.1, Shanti Devi would be relegated to the position at which she was when she was proceeded against ex parte which would be the date on which the written statement was to be filed. There is no manner of doubt that effect of setting aside an ex parte decree is to restore the parties to the position at which they were prior to the passing of the decree and relegate them to the position in which they were when the defendant was proceeded against ex parte. The parties are restored to the position existing prior to the date the order proceeding against the defendant ex parte was passed. No authoritative pronouncement of this Court has been placed before us in this

regard. However, we may refer to the judgments passed by various High Courts in the case of Kumararu Narayanaru v. Padmanabha Kurup Gopala Kurup2, Beerankoya Haji v. P.P. Mohammedkutty 3, Shah Bharat Kumar v. M/s. Motilal and Bharulal 4, Aziz Ahmed Patel v. I.A. Patel 5, Mst. Lakshmi Devi v.Roongta & Co.6, Venkatasubbiah v. Lakshminarasimhan 7, which have taken this view. 2 AIR 1953 (TC) 426 3 AIR 1986 Ker 10 4 AIR 1980 Guj 50 5 AIR 1974 (A.P.) 1 6 AIR 1962 (All.) 381 7 49 Mad.L.J.273

17. It would be pertinent to mention that the mere fact that the ex parte decree has been executed does not disentitle the defendant from applying under Order IX Rule 13, CPC to get the same set aside. Reference may be made to Sm. Sankaribala Dutta v. Sm. Asita Barani Dasi and others8 and Mst. Fatima Khatoon v. Swarup Singh9. Once the decree is set aside, restitution or restoration can be ordered.

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19. An ex parte decree is passed when the court believes that the defendant has been served but is not appearing in court despite service of summons. In the present case, the appellate court while setting aside the ex parte decree, has come to the conclusion that the defendant Shanti Devi (respondent no. 1 herein) was not served and, therefore, the court had wrongly proceeded against her ex parte. That finding has been upheld till this Court. In our view, the effect of this would be that the ex parte decree, on its being set aside, would cease to exist and become non-est. After the ex parte decree is set aside, it is no decree in the eyes of law. The decree passed by the trial court on merits should be treated as the decree of the first court. We may make it clear that we are not dealing with those cases where a case has been decided on merits and the decree is set aside by the appellate court on any other ground and the matter remanded to the trial court for decision afresh. We leave that question open.

Remedy/Option

41. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में न्यायालय द्वारा एकतरफा डिक्री होने के पश्चात पक्षकार को उपलब्ध उपचार / विकल्प के बारे में विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

Remedy against an ex-parte decree has two options (1) to file a regular appeal (2) to file an appeal for setting aside the order in terms of Order 9 Rule 13. Both the proceedings are available simultaneously.

In Bhanu Kumar Jain v. Archana Kumar & Anr7 the Supreme Court held as follows:

> *"26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously. In the event the appeal is dismissed as withdrawn, the ex parte decree passed by the trial court merges with the order passed by the appellate court having regard to the Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation*

I appended to the said provision does not suggest that the converse is also true."

Allowed

42. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय द्वारा अनुमत किये जाने योग्य युक्तियुक्त कारण के बारे में कुछ विशेष परिस्थितियों की विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

When an application for setting aside ex parte decree is made by the defendant, the court should consider whether the defendant was prevented by "sufficient cause" from appearing before the court when the suit was called out for hearing. "Sufficient cause" is a question of fact.

The following causes have been held to be sufficient for the absence of the defendant;
(1)bona fide mistake as to the date of hearing;

(2)Late arrival of a train;

(3)sickness of the counsel;

(4)fraud of the opposite party;

(5)mistake of pleader in noting wrong date in diary;

(6)negligence of next friend or guardian in case of minor plaintiff or defendant;

(7)death of relative of a party;

(8)imprisonment of party;

(9)strike of advocates;

(10)no instructions pursis by a lawyer, etc.

Not Allowed

43. माननीय इलाहाबाद उच्च न्यायालय द्वारा रिट पिटीशन *54978/2014* उनवान *Raj Kumar Agrawal vs Suresh Chandra Jain* में दिनांक 10.04.2015 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के प्रावधान के अनुप्रयोग के लिए न्यायालय द्वारा अनुमत नहीं किये जाने योग्य युक्तियुक्त कारण के बारे में कुछ विशेष परिस्थितियों की विवेचना की है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

The following causes, on the other hand, have been held not to be sufficient for absence of the defendant for setting aside an ex parte decree;

(1)dilatory tactics;

(2)bald statement of noting wrong date in diary;

(3)negligence of party;

(4)counsel busy in other court;

(5)suit of high valuation;

(6)absence of defendant aft[illegible] for adjournment is refused;

(7)hardship of defendant;

(8)absence to get undue advantage;

(9)mere thinking that the case will not be called out; not taking

part in proceedings, etc.

Conduct of Party

44. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत प्रस्तुत प्रार्थना पत्र के निस्तारण के लिए प्रस्तुतकर्ता पक्षकार का संबंधित कार्यवाही पर आचरण को आधार नहीं मानने के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *24. The High Court has not set aside the material findings recorded by the trial Court in respect of service of summons by process server/registered post and substituted service. The High Court failed to discharge the obligation placed on the first appellate Court as none of the relevant aspects have been dealt with in proper perspective. It was not permissible for the High Court to take into consideration the conduct of the appellant subsequent to passing of the ex-parte decree.*
>
> *More so, the High Court did not consider the grounds on which the trial Court had dismissed the application under Order IX, Rule 13 CPC filed by the respondent/wife. The appeal has been decided in a casual manner..*

Test

45. माननीय उच्चतम न्यायालय द्वारा सिविल अपील 1467 / 2011 उनवान *Parimal vs Veena @ Bharti* में दिनांक 08.02.2011 को दिये गये निर्णय में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत प्रस्तुत प्रार्थना पत्र के परीक्षण के बारे में विवेचना करते हुए न्यायिक दृष्टांत प्रतिपादित किया है। जिसके प्रासंगिक पैरा का उद्धरण इस प्रकार हैः—

> *12. In order to determine the application under Order IX, Rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence.*
>
> *Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand.*
>
> *There cannot be a strait-jacket formula of universal application.*

46. उपरोक्त विधिक प्रावधान एवं न्यायिक दृष्टांतों के संदर्भ में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के अवलोकन से ज्ञात होता है कि किसी न्यायिक कार्यवाही के दौरान विपक्षी पक्षकार के विरूद्ध एकतरफा कार्यवाही अमल में लाई जाकर जारी की गई डिक्री को विपक्षी पक्षकार तामील के विधिवत नहीं होने अथवा न्यायालय में उपस्थित नहीं हो पाने का पर्याप्त कारण प्रस्तुत कर न्यायालय को संतुष्ट कर जारी की गई एकतरफा डिक्री को निरस्त करने हेतु अनुतोष प्राप्त कर सकता है। न्यायालय को ऐसे आवेदनों पर न्याय निर्णयन के मूल उददेश्य को ध्यान में रखते हुए [illegible] करते हुए उदार व प्रकरण के तथ्यों को ध्यान में रखते हुए यथोचित दृष्टिकोण रखने की अपेक्षा की जाती है। उक्त कानूनी प्रावधानों न्यायिक दृष्टांतों के प्रकाश में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के [illegible] उक्त प्रावधान व न्यायिक दृष्टांतों द्वारा प्रतिपादित परीक्षण पर जांचा जाना आवश्यक है।

47. प्रकरण में उक्त कानूनी प्रावधानों न्यायिक दृष्टांतों के संदर्भ में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत प्रस्तुत प्रार्थना—पत्र की उक्त प्रावधान व न्यायिक दृष्टांतों द्वारा प्रतिपादित परीक्षण पर जांच व विश्लेषण किया जाना आवश्यक है। इस हेतु प्रार्थी के प्रार्थना पत्र का अवलोकन अपेक्षित है। प्रार्थी द्वारा अपने प्रार्थना पत्र में दावा संख्या 163/2023 में अनुपस्थित रहने का एकमात्र कारण तामील का विधिवत नहीं होना बताया है। केवल इसी आधार पर प्रार्थी ने प्रार्थना पत्र प्रस्तुत किया है। इस संबंध में न्यायालय की दावा संख्या 163/2023 की आदेशिका का संक्षिप्त विवरण निम्न प्रकार है—

दिनांक	कार्यवाही	आगामी तारीख
16.08.2023	दावा संख्या 163/2023 दर्ज किया एवं प्रतिवादी को सम्मन द्वारा तलब किया गया।	06.10.2023
06.10.2023	वादी को सम्मन की रजिस्टर्ड डाक की रसीद पेश करने का अवसर दिया गया।	04.12.2023
04.12.2023	पीठासीन अधिकारी अन्य कार्य में व्यस्त।	13.12.2023
13.12.2023	वादी द्वारा रजिस्टर्ड डाक की रसीद पेश की गई। प्रतिवादीगण अनुपस्थित। प्रतिवादीगण के विरूद्ध एकतरफा कार्यवाही की गई। पत्रावली वास्ते साक्ष्य	15.12.2023
15.12.2023	वादीगण द्वारा दस्तावेज पर प्रदर्श अंकित करवाये गये। प्रतिवादी संख्या 04 की तरफ से अधिवक्ता उपस्थित।	20.12.2023
20.12.2023	प्रतिवादी संख्या 04 की तरफ से अधिवक्ता उपस्थित। आदेश—09 नियम—07 का प्रार्थना पत्र प्रस्तुत।	21.12.2023
21.12.2023	वादी द्वारा अतिरिक्त दस्तावेज प्रस्तुत। प्रतिवादीगण अनुपस्थित।	22.12.2023
22.12.2023	प्रतिवादीगण अनुपस्थित। आदेश—09 नियम—07 का प्रार्थना पत्र खारिज किया गया। पत्रावली पर अंतिम बहस हेतु कार्यवाही स्थगित।	26.12.2023
26.12.2023	पत्रावली पर एकतरफा कार्यवाही के साथ डिक्री जारी।	निर्णित
पृथक		
16.01.2024	प्रार्थी द्वारा आदेश—09 नियम—13 का प्रार्थना पत्र प्रस्तुत।	

48. उक्त दावा संख्या 2023/163 की आदेशिका का संक्षिप्त विवरण के अवलोकन के पश्चात उक्त पत्रावली पर सम्मन का अवलोकन किया जाना आवश्यक है। दावा संख्या 2023/163 पत्रावली पर सम्मन का अवलोकन से ज्ञात होता है कि प्रतिवादीगण को रजिस्टर्ड डाक से सम्मन प्रेषित किये गये। प्रतिवादीगण को रजिस्टर्ड डाक से प्रेषित सम्मन की रसीद पत्रावली पर शामिल है। सिविल प्रक्रिया संहिता—1908 के आदेश—5 के अनुसार रजिस्टर्ड डाक से प्रेषित सम्मन के 30 दिवस में अदम तामील में वापस नहीं आने पर विधिवत तामील माने जाने के प्रावधान है। प्रकरण में भी रजिस्टर्ड डाक से प्रेषित सम्मन के 30 दिवस में अदम तामील में वापस न्यायालय को प्राप्त नहीं होने से प्रकरण में रजिस्टर्ड डाक से प्रेषित सम्मन के 30 दिवस में अदम तामील में वापस न्यायालय को प्राप्त नहीं के संबंध में प्रतिवादी द्वारा कोई खंडन प्रस्तुत नहीं किया गया।

49. साथ ही प्रतिवादीगण/प्रार्थी द्वारा अपने प्रार्थना पत्र में दावा संख्या 2023/163 पर अंकित अपने पते/निवास के संबंध में कोई त्रुटि का अभिकथन नहीं किया है। इसका तात्पर्य है कि प्रतिवादीगण/प्रार्थी का पता दावा संख्या 2023/163 की पत्रावली पर सही अंकित किया गया है। दावा संख्या 2023/163 की पत्रावली पर अंकित प्रतिवादीगण/प्रार्थी के पते पर ही रजिस्टर्ड डाक से सम्मन प्रेषित किये गये। यह प्रबल एवं सुमान्य सिद्धांत है कि रजिस्टर्ड डाक से प्रेषित सम्मन अगर अदम तामील में लौटकर नहीं आते है तो उस स्थिति में विधिवत तामील मान्य की जाती है। प्रकरण में प्रार्थी/प्रतिवादीगण द्वारा रजिस्टर्ड डाक से तामील के संबंध में केवल इतना अभिकथन किया गया है कि प्रार्थी/प्रतिवादीगण को सम्मन तामील नहीं हुए। दावा संख्या 2023/163 की पत्रावली की आदेशिका दिनांक 16.08.2023 से 26.12.2023 तक का अवलोकन महत्वपूर्ण है कि उक्त अवधि में पत्रावली प्रतिवादी के इंतजार में नियत रखी गई है। परन्तु उक्त अवधि में प्रतिवादीगण उपस्थित नहीं रहे।

50. प्रकरण में इस स्थिति में दो तथ्य स्पष्ट होते हैं कि **प्रथम** प्रतिवादीगण को रजिस्टर्ड डाक से सम्मन प्रेषित किये गये। उक्त सम्मन के पश्चात भी प्रतिवादीगण हाजिर न्यायालय नहीं हुए। **द्वितीय** साथ ही न्यायालय सम्मन विधिवत रूप से तामिल होने पर प्रतिवादीगण को न्यायिक कार्यवाही का ज्ञान होना स्पष्ट है। इस आधार पर प्रकरण में प्रार्थी/प्रतिवादीगण द्वारा रजिस्टर्ड डाक से तामील के संबंध में केवल प्रार्थी/प्रतिवादीगण को सम्मन तामील नहीं होने का अभिकथन मात्र रजिस्टर्ड तामील के खंडन हेतु पर्याप्त प्रतीत नहीं है। प्रार्थी/प्रतिवादीगण रजिस्टर्ड तामील के खंडन हेतु पर्याप्त साक्ष्य व परिस्थिति प्रस्तुत करने के भार को साबित करने में असफल रहे है।

51. साथ ही प्रकरण में उक्त कानूनी प्रावधानों न्यायिक दृष्टांतों के संदर्भ में सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत प्रस्तुत प्रार्थना—पत्र की उक्त प्रावधान व न्यायिक दृष्टांतों द्वारा प्रतिपादित परीक्षण पर जांच व विश्लेषण हेतु प्रार्थी/पक्षकार के आचरण का अवलोकन अपेक्षित है। यहां उल्लेखनीय है कि दावा संख्या 163/2023 की पत्रावली की आदेशिका दिनांक 15.12.2023 व 20.12.2023 का अवलोकन महत्वपूर्ण है कि उक्त दिनांक पर प्रतिवादी जरिये अधिवक्ता न्यायालय उपस्थित होकर एकतरफा कार्यवाही निरस्त करने का प्रार्थना पत्र प्रस्तुत किया हैं। इसके पश्चात प्रार्थी/पक्षकार उक्त पत्रावली पर अनुपस्थित रहते हैं। प्रार्थी/पक्षकार का यह आचरण स्वयं के विरूद्ध विचाराधीन न्यायिक कार्यवाही के लिए लापरवाही का द्योतक है। इससे प्रार्थी/पक्षकार का वादी के द्वारा किये गये दावा की अप्रत्यक्ष स्वीकारोक्ति के समान प्रतीत होती है। साथ ही न्यायालय पर उपस्थित होने पर प्रतिवादीगण को न्यायिक कार्यवाही का ज्ञान होना स्पष्ट है। साथ ही प्रार्थी/पक्षकार द्वारा स्वयं के विरूद्ध विचाराधीन न्यायिक कार्यवाही के लिए लापरवाही के कारण अप्रार्थी/वादी के पक्ष में अधिकार सृजन हुआ है। विधि का सुमान्य सिद्धांत है कि प्रार्थी/पक्षकार द्वारा स्वयं के विरूद्ध विचाराधीन न्यायिक कार्यवाही के लिए लापरवाही के कारण अप्रार्थी/वादी के पक्ष में सृजित वैध अधिकार को बिना ठोस/पर्याप्त कारण के नकारात्मक रूप से प्रभावित नहीं किया जाना चाहिए। प्रकरण में प्रार्थी/पक्षकार का आचरण लापरवाही भरा प्रतीत होता है।

52. अतः वादी द्वारा प्रस्तुत सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 का प्रार्थना—पत्र प्रार्थी/प्रतिवादीगण रजिस्टर्ड डाक के खंडन हेतु पर्याप्त साक्ष्य व परिस्थिति प्रस्तुत करने के भार को साबित करने में असफल रहने तथा प्रार्थी/पक्षकार का आचरण लापरवाही भरा होने के आधार पर वादी का प्रार्थना—पत्र स्वीकार किया जाना उचित प्रतीत नहीं होता है। अतः

आदेश है कि

वादी द्वारा सिविल प्रक्रिया संहिता—1908 के आदेश—09 नियम—13 के तहत प्रस्तुत प्रार्थना—पत्र अस्वीकार किया जाता है।

यह निर्णय मेरे द्वारा आज दिनांक 09.01.2025 को लिखवाया जाकर हस्ताक्षर एवं मोहर युक्त जारी किया जाकर सरे इजलास सुनाया गया।

(केशव कुमार मीना आर.ए.एस)
सहायक कलक्टर
गुढ़ामालानी—बाड़मेर

Signature Not Verified

Digitally signed by Keshav Kumar Meena
Date: 2025.01.09 19:59:55 IST
Reason: SelfAttested