

Sumera Vs. Madanlal and ors.

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Court : Madhya Pradesh

Decided On : Oct-05-1988

Reported in : AIR1989MP224

Judge : T.N. Singh and ;R.C. Lahoti, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : M.P. No. 672 of 1988

Appellant : Sumera

Respondent : Madanlal and ors.

Advocate for Def. : Ramji Sharma, Adv.

Advocate for Pet/Ap. : K.S. Agarwal, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

1. Heard counsel.

2. The following passage is read out to us by Shri Ramji Sharma appearing for Respondent No. 1, from the judgment of their Lordships of the Supreme Court in the case of Rani Choudhury, AIR 1982 SC 1397 from para 3 of the report : --

'By enacting the Explanation, Parliament left it open to the defendant to apply under Rule 13 of Order 9 for setting aside an ex parte decree only if the defendant had opted not to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer an adjudication by the appellate Court on the merits of the decree or have the decree set aside by the trial Court under Rule 13, Order 9. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under Rule 13 of Order 9. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation.'

3. Counsel has submitted that in the instant case the petitioner having already availed the relief contemplated under Order Rule 13 he had exhausted the remedy to challenge ex parte decree and therefore the instant petition is not maintainable as in this petition the petitioner has challenged the order passed in the appeal.

4. Reading their Lordships' holding aforesaid we are tied hands and feet to say anything further in the matter. However, we make it clear if there is any subsequent judgment of their Lordships clarifying the position or modifying the law in any manner it shall be open for the petitioner to apply for review of this order.

5. For the present we are of the view that the instant petition is not maintainable because the appeal itself was not maintainable on the holding aforesaid.

6. The petition is disposed with the above observation.