



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6872 OF 2023

Mahendra Balbhadra Thakkar
Age – 73 yrs, Occu – Service,
Residing at 28-A, Maheshwari
Mansion, 4th floor, 34, Nepean Sea Road,
Mumbai – 400 026.

....Petitioner
(Original
Plaintiff)

v/s.

- | | | |
|----|---|---|
| 1. | Abdul Ali Chinwala
Adult, Indian Inhabitant,
age not known | .Respondents |
| 2. | M/s. Hatimi Prints,
A Prop. firm through
Mrs. Rehana Abdulali Chinwala
Adult, Indian Inhabitant, age not known
Both having address at Gala No. 1,
2 nd Floor, Thakkar Industrial Estate,
34-C, Champsey Bhimji Road,
Anjirwadi, Mazgaon,
Mumbai – 400 010. | .Original
Deft. Nos.
1 & 2/
Applicants |
| 3. | Hatim Chinwala (deleted) | .Respondent |

Mr. Nagendra Dube a/w. Mr. Pankaj Mishra i/b. Lexi Conveniens
for the Petitioner.
Mr. Y. S. Palve for Respondent Nos.1 and 2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 25th AUGUST, 2023.

P.C. :-

1. Heard finally with consent of the parties.

2. By this Petition filed under Article 227 of the Constitution of India, the Petitioner impugns an order dated 11.04.2023 passed by

the Appellate Bench of the Small Causes Court, Mumbai in Revision Application No. 2 of 2023. By the impugned order, the Appellate Bench dismissed the Revision Application and confirmed the order dated 30.11.2022 in Marji Application No.82 of 2020 in Suit No.291/480 of 2011, and thereby set aside the ex-parte decree dated 22/01/2020 in R.A.E. and R. Suit No.291 /480/2011.

3. The brief facts necessary to decide this petition are as under:-

The Petitioner-landlord had filed a suit for eviction against the Respondents-tenants on the ground of subletting, arrears of rent, bonafide use, etc. The Respondents-tenants were duly served with summons, pursuant to which they put in their appearance through Advocate Dudhane. The Respondent No.1 filed the written statement on his own behalf and as a Power of Attorney of his wife-Rehana Chinwala, the proprietor of Respondent No.2. The trial court framed issues on 20/03/2018, subsequent thereto the Petitioner filed his affidavit in evidence. The Advocate for the Respondents sought discharge for want of instructions despite issuance of several notices. The Respondents failed to remain present despite service of Court notice. Hence, by order dated 21/06/2019, the Advocate for the Respondent was discharged and subsequently by order dated 03/12/2019, the cross-examination of

the Petitioner was closed and upon hearing the Petitioner, the suit was decreed by judgment and decree dated 22/01/2020.

4. Mr. Alimohammed Chinwala, the son/Power of Attorney holder of the Respondents filed a Marji Application on 21.01.2020, purportedly under Section 151 of the CPC, for setting aside the ex-parte decree mainly on the ground that Respondent No. 1 who was pursuing the suit was suffering from bipolar disorder since 2006, which was diagnosed in the year 2018. It is stated that the entire family was disturbed because of the sickness of Respondent No.1. The son of the Respondents further stated that he was engaged in his own independent business and he started looking after the affairs of his parents only after the diagnosis of the mental condition of Respondent No. 1. He contended that the suit premises required urgent repairs and renovation. Hence, on 10/02/2020, he contacted the Petitioner in the office of his Advocate to seek permission for repairs. He states that the Advocate for the Petitioner handed over to him a copy of the ex-parte Judgment and Decree dated 22.01.2020, pursuant to which he came to know about the ex-parte decree. He immediately contacted Advocate Dudhane, who brought to his notice letter dated 12.10.2018 addressed to him by the Respondent No.1 and informed him that he had withdrawn his appearance from the suit.

The son of the Respondent acknowledged that the Respondent No.1 had in fact received the letters addressed by his Advocate but contended that the Respondent No.1 was unable to understand the gravity of the situation due to his mental condition. He therefore filed an application under section 151 of the Code of Civil Procedure for setting aside the ex-parte Decree and judgment dated 22/01/2020 in R.A.E.and R. Suit No.291/480 of 2011.

5. The Petitioner challenged maintainability of the application under section 151 in view of the specific provision under Order IX Rule 13 of the Code of Civil Procedure. The Petitioner denied that the Respondent No. 1 was suffering from bipolar disorder. He further contended that the son of the Respondents was pursuing the proceedings since inception. It is further stated that the matter was adjourned time and again and that the Advocate representing the Respondents had sent several notices expressing his inability to appear in the Court for want of instructions. It is stated that the Advocate on record was compelled to withdraw his appearance for want of instructions. The Petitioner also denied that the son of the Respondents had contacted him or his Advocate and further denied having handed over to him a copy of the Judgment. The Petitioner claimed that

the suit proceeded ex-parte solely due to the negligence of the Respondents and that no sufficient cause was made out for setting aside the ex-parte decree.

6. The trial Court relied upon the prescription and medical certificate issued by Dr. Nirmala Rao and held that Respondent No. 1 was suffering from bipolar disorder since long and that it was diagnosed only in the year 2018. The trial court observed that the Respondent No. 1 who was also a Power of Attorney of his wife (Respondent No.2) was unable to appear before the Court due to bipolar disorder and held that the Respondents had made out sufficient cause for setting aside ex-parte decree. Hence, by order dated 30/11/2022, the learned Judge allowed the Marji Application and set-aside the judgment and decree subject to costs of Rs.15,000/-.

7. The Petitioner challenged the said order in Revision Application No.02/2023, before the Appellate Bench of Small Causes Court, Mumbai. The Appellate Court confirmed the findings that Respondent No. 1 was unable to appear before the Court due to the bipolar disorder. Accordingly, the Appellate Bench dismissed the Revision Application and thereby confirmed the order passed by the trial court. Hence, this Petition.

8. Mr. Nagendra Dube, learned counsel for the Petitioner contends that the learned Judge is in complete error in setting-aside the ex-parte decree by allowing Marji application filed under Section 151 of CPC despite there being a specific provision under Order IX Rule 13 of the CPC. He submits that it was a clear case of negligence as the records reveal that the Respondents had failed to appear or instruct their Advocate despite receipt of notices sent by the advocate as well as by the Court. Learned counsel for the Petitioner contends that the Medical Certificate was issued by the Doctor without conducting any test to diagnose bipolar disorder. He submits that the learned Judge relied upon affidavit of Doctor filed in a separate proceedings under section 340 of Cr.P.C., without affording an opportunity to the Petitioner to cross examine the witnesses. He submits that the Respondents having failed to show sufficient cause, the trial Court as well as the Appellate Court were not justified in allowing the Marji Application.

9. Per contra, learned counsel for the Respondents submits that Respondent No. 1 had been contesting the suit since the year 2011 on his behalf and as a Power of Attorney of his wife (Respondent No.2). He submits that the Medical Certificate amply proves that Respondent No. 1 was suffering from bipolar disorder

since long and his condition aggravated in the year 2018. Though Respondent No. 1 had received notices issued by his Advocate, he was unable to understand the nature of the contents due to his mental condition. The entire family was disturbed and was unable to give instructions to the Advocate. He submits that it was only when the son of the Respondents took over and contacted the Petitioner to seek permission to carry out the repairs/renovation that he learnt about the ex-parte decree. Learned counsel for the Respondents submits that the term 'sufficient cause' has to be construed liberally. In the absence of any prejudice being shown, the impugned order need not be set-aside.

10. I have perused the records and considered the submissions advanced by learned counsel for the respective parties.

11. The impugned order is assailed mainly on the ground that the Application under section 151 of the Code of Civil Procedure was not maintainable and further that the Respondent-defendant had not made out sufficient ground to set-aside the ex-parte decree.

12. The records reveal that though the Marji Application was styled as an application under section 151 of CPC., the averments and the prayers were essentially to set-aside the ex-parte judgment. It is well-settled that mere nomenclature of the application or the provisions invoked by the party under which the application is filed, is of no relevance and what is relevant is the nature and substance of the application. The averments in the Application, particularly the grounds mentioned therein clearly indicate that it was in fact an application under Order IX Rule 13 CPC. Hence, the challenge to the maintainability of the application is devoid of merits.

13. The next question for consideration is whether the Respondents had made out sufficient cause for setting aside the ex-parte decree. Order IX Rule 13 of the Code of Civil Procedure, as is applicable to the State of Maharashtra reads thus :-

“ Order 9 Rule 13 CPC : 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 there was sufficient cause for his failure to appear 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 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 also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew or but for his willful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation I. - where a summons has been served under Order 5 Rule 5, on an adult male member having an interest to that the defendant in the subject matter of the suit, it shall not be deemed to have been duly served within the meaning of this Rule.

Explanation II. - Where there has been an appeal against a decree passed ex-parte under this Rule, and the appeal has been disposed of on 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. "

14. A plain reading of the aforesaid provision would indicate that a decree can be set-aside under Order IX Rule 13 of CPC only upon satisfaction of the Court that the summons was not duly served on the defendant or that his absence was for sufficient cause. In **G.P. Srivastava v/s. R.K. Raizada and others (2000) 3 SCC 54**, the Apex Court has observed that - *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 in action is imputable to erring party. Sufficient cause for the purpose of Order IX 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 has been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the 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 least decided on merits. "

15. In **Parimal v/s. Veena @ Bharti (2011) 3 SCC 545**, the Apex Court has observed that - '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 a platitude which when the act done suffices to

accomplish the purpose intended in the facts and circumstances existing in the 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 bonafide 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. ... In order to determine the application under Order IX Rule XIII 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 straight jacket formula of universal application."

16. In this backdrop, the question for consideration is whether the Respondents were unable to appear despite diligent action and honest and sincere intention. That their absence was

for genuine, reasonable and adequate reasons and not for want of bonafides or due to negligence or inaction.

17. Reverting to the facts of the case, it is not in dispute that both the Respondents were duly served with summons. They had put in their appearance and filed the written statement. The issues were framed and the Petitioner had filed his affidavit-in-evidence. The Advocate for the Respondents sought several adjournments to cross examine the witness and on 07/08/2018 he filed a praecipe for withdrawal of his appearance for want of instructions despite notice dated 16/07/2018 addressed to both the Respondents. He had placed on record, copy of the said notice dated 16/07/2018 which states that despite repeated reminders and communications, the Respondents had failed to contact him and give him suitable instructions in the matter. By the said notice the Advocate on record had called upon the Respondents to contact him immediately, failing which, he would be constrained to withdraw his appearance.

18. The Advocate filed another praecipe on 15/11/2018 seeking his discharge stating that the Respondents were informed to collect the papers in the matter. Copy of the notice dated 20/10/2018, which was addressed to both the Respondents, was

annexed to the said praecipe. The said notice indicates that by letter dated 12/10/2018, the Respondents had requested the Advocate to bring the case papers in the Library of the Court as it would be convenient for them to collect the same. The Advocate had informed the Respondents to collect the case papers from the Library within seven days. The Respondents did not appear despite receipt of the notices issued by the Advocate. Hence, notices were issued and served on the Respondents on Court motion. It is only when the Respondents failed to remain present despite service of Court notice that the trial court discharged the Advocate and proceeded ex-parte against the Respondents.

19. The only ground raised by the Respondents to justify their absence is that the Respondent No.1 was suffering from bipolar disorder since 2006 and the same was diagnosed in the year 2018. It is alleged that the entire family was disturbed because of the mental condition of the Respondent No.1. The records reveal that the Respondent No. 2, who is a proprietor of M/s. Hatimi Prints had executed a Power of Attorney in favour of her husband-Respondent No.1, since she was busy with her business activity. The Respondent No. 1 was pursuing the matter on his behalf as well as on behalf of Respondent No. 2, though he was allegedly suffering from bipolar disorder since the year 2006.

Though it is urged that the mental condition of the Respondent No.1 had worsened in the year 2018, the medical certificate as well as the Marji Application does not conform the said fact. In fact, the averments in Marji Application indicate that the pre-existing bipolar disorder was diagnosed in the year 2018. In such circumstances, the fact that the Respondent No.1 was suffering from bipolar disorder cannot be a sufficient cause for his absence.

20. As noted above, Respondent No. 2 had executed a Power of Attorney in favour of Respondent No. 1, since she was unable to pursue the proceedings due to her business activities. Respondent No. 2 neither revoked the Power of Attorney on the ground of sickness of Respondent No.1 nor did she contact the Advocate and tried to know about the progress of the case for over four years, despite knowledge of the proceedings, and receipt of notice from the Advocate as well as Court notice. There is no plausible explanation for such inaction.

21. Being conscious of the fact that the expression 'sufficient cause' should be given liberal construction as to advance substantial cause of justice, the explanation given by the Respondents could have been considered as sufficient cause, if not for letter dated 12/10/2018 referred to in notice dated 20/10/2018.

The said notice clearly states that by letter dated 12/10/2018 the Respondents had called upon the Advocate to return the case papers and to keep the same in the court library. Accordingly, the Advocate on record had instructed the Respondents to collect the case papers from the library within 7 days and had thereafter sought withdrawal of his appearance. This letter clearly falsifies the contention that the Respondent No.1 was unable to understand contents of the previous notices sent by his Advocate or that he was unable to pursue the matter because of bipolar disorder. The explanation which is false and lacks bonafides cannot be construed as sufficient cause and does not deserve liberal approach.

22. It would be relevant to refer to the decision of the Apex Court in ***Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Ors. (2013) 12 SCC 649*** wherein it is held that the conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the balance of scale of justice in respect of both the parties, and the said principal cannot be given a total go by in the name of liberal approach. In the instant case, the Respondents had not responded to the notices

issued by the Advocate, hence they were served with court notices, despite which they failed to appear before the Court. The Respondents have not furnished any satisfactory explanation to justify their absence, as well as the delay in filing the application under consideration. In the absence of such explanation the ex-parte decree cannot be set aside in a routine manner or as a matter of judicial generosity. Furthermore, the rights accrued in favour of the Petitioner cannot be lightly interfered with and his interest cannot be prejudiced when the records reveal that the absence of the Respondents was due to gross negligence and total inaction. The Respondents having failed to make out any cause, much less a sufficient cause, in my considered view, the Courts below were not justified in setting aside the decree passed in favour of the Petitioner.

20. Hence the petition is allowed. The impugned order dated 11.04.2023 passed by the Appellate Bench of the Small Causes Court, Mumbai is hereby quashed & set aside.

. Rule is made absolute in the aforesaid terms.

18. Learned counsel for the Respondents seeks stay of the order for a period of four weeks from today.

19. The order shall stand stayed for a period of four weeks from the date the order is uploaded.

(SMT. ANUJA PRABHUDESSAI, J.)