

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
ORDINARY ORIGINAL CIVIL JURISDICTION.**

**NOTICE OF MOTION NO. 134 OF 2014
IN
SUMMARY SUIT NO. 670 OF 2013**

Haresh Ratilal Vaghadia ... Applicant

In the matter between
Minoo F. Mehta ... Plaintiff
V/s.

Haresh Ratilal Vaghadia ... Defendant

Mr. Ajay Panicker i/b Ajay Law Asso. for the Applicant/Defendant.
Mr. Rohaan Cama a/w Ms Smriti Singh i/b Dastur Kalambi & Asso. For
the Plaintiff.

**CORAM : K. K. TATED, J.
DATED : 03/12/2015.**

PC.:

. Heard learned Counsel for the parties.

2 This Notice of Motion preferred by defendant for setting aside the ex-parte decree passed by this Court on 23rd December, 2013 in summary suit no. 670 of 2013 and dismissing the chamber summons lodging no. 1321 of 2013.

3 The few facts of the matter are as under:

a) In the present proceeding, the plaintiff filed summary suit no. 670 of 2013 against the defendant for decree of Rs.16,51,68,493/- with future compensation/interest Rs.36,00,000/- every quarter from till the realisation of entire amount.

b) The defendant was served with writ of summons in summary suit on 08.10.2013. As the defendant failed to file his appearances within 10 days, he preferred chamber summons lodging No. 1321 of 2013 for condonation of 33 days delay in filing the vakalatnama. That chamber summons was filed by the defendant on 22.11.2013. The said chamber summons along with summary suit appeared on board on 23.12.2013 before the Court. As no one appeared on behalf of defendant, when the matter called out, the Court directed the Court's Associate to call upon the office of the Advocate for the defendant i.e. M/s. Iyers Chamber and inform them that the matters were kept back upto 3.00 p.m. However, when the matters were again called out at 4.00 p.m., none appeared for defendant. Hence, the summary suit kept for ex-parte decree on 24.12.2013 along with chamber summons. On 24.12.2013 also no one appeared for defendant. The Court dismissed the chamber summons preferred by the defendant for condonation of delay in filing appearance/vakalatnama and passed ex-parte decree against the defendant. Hence, the defendant preferred present Notice of Motion on 22.01.2014 for setting aside ex-parte decree dated 24.12.2013 and for restoration of chamber summons.

4 The learned counsel Mr. Ajay Panicker appearing on behalf of defendant submits that in the present proceeding writ of summons was served upon the defendant on 08.10.2013 by Registered post at C-2, Shree Lawn C.H.S. Ltd, Nangargaon, Lonavala-410401. He submits that the service of writ of summons went unnoticed by the defendant as his office staff did not inform him, about the same immediately. At that time, he was gone to Gujarat. He submits that the defendant learnt

about the present summary suit on 20.10.2013 when his Secretary/staff informed him and handed over the writ of summons. As soon as, the defendants got knowledge about the service of the writ of summons, he immediately contacted his Advocate and handed over necessary papers to him.

5 The learned counsel for the defendant submits that, thereafter immediately defendant contacted his local Advocate and showed him writ of summons and requested him to take appropriate steps. At that time, the local Advocate informed him that in summary suit the vakalatnama/appearance have to be filed within 10 days from the service of summons for judgment. Hence, defendant visited Mumbai and contacted the present Advocate and instructed him to prepare the application for condonation of delay in filing appearance/vakalatnama.

6 The learned counsel for the defendant submits that thereafter, defendant filed chamber summons lodging no. 1321 of 2013 on 25.11.2013 for condonation of delay in filing vakalatnama/appearance.

7 The learned counsel for the defendant submits that when summary suit was listed for ex-parte hearing on 24.12.2013, the notice was not issued by the plaintiff either to the defendant or his Advocate. He submits that on 23.12.2013, his Advocate was in Pune with respect to legal work of his client. Thereafter, he attended a wedding in the evening/night on 23.12.2013 at Pune. The learned counsel for the defendant submits that defendant's Advocate returned to Mumbai from Pune on 24.12.2013 and on the way back, he attended legal work of his client at CBD Belapur. He submits that on 24.12.2013, in the office

of his Advocate except his peon Mr. Shailendra Mosamkar, no other person was available. The Secretary/Receptionist was also on leave on account of Christmas and his Junior Advocate was also on leave in December 2013 for about 15 days on account of his examination. Therefore, though there was intimation from the Court's Associate, in the Advocate's office about the matter, his Advocate was not able to attend the same, hence, the ex-parte order passed by this court. In support of this contention, the learned counsel for the defendant relied upon the affidavit dated 21.01.2014 filed by defendant's Advocate Ganesh Iyer. Paragraph 3 of the said affidavit, reads thus:

“ 3) I could not appear in the above matter before this Hon'ble Court on December 23, 2013 and December 24, 2013 for the following reasons.

a) I was not aware that the Summary Suit was listed for exparte hearing on December 23, 2013, as no notice thereof was given to me or to the Defendant.

b) On December 23, 2013 I was in Pune in relation to a legal work of the client Prasanna Purple Mobility Solutions Private Limited. Thereafter, in Pune I attended a wedding in the evening-night on December 23, 2013. Copy of the e-mail invitation card of the said wedding on December, 23, 2013 is annexed thereto and marked as Exhibit -C respectively. I say that I returned from Pune on December 24, 2013 and on the way back to Mumbai, I attended a legal work of my client at CBD Belapur.

c) I say that on December 24, 2013 except my office peon Mr. Shailesh Mosamkar, no other person was available in my office at Chembur, in Mumbai. I say that my Secretary/Receptionist Ms. Danielle D'Souza was on leave on account of Christmas and my only Junior Advocate Mr. Yogesh Bhoge, was on leave from December 14, 2013 for about 15 days, on account of his examination.

d) I say that on December 24, 2013 my office peon Mr. Shailesh Mosamkar informed me that he had received a phone call from the Department of this Honorable Court at about IST 2.15 p.m., regarding the hearing in the above suit

kept at 3.00 p.m. on December 24, 2013. I say that being at Belapur and not available on the phone immediately, my office peon mentioned to me about the said telephone call, only by about 3.10 p.m. I then immediately tried to contact some of my advocate colleagues, but could not succeed. I say that as I was in civil dress and not having the brief of the matter, I would have had to go to my home for changing the dress and after fetching the brief from my office, the journey from Belapur to Chembur and then to this Hon'ble Court would have taken more than 2 hours to reach the Honorable High Court by road or train, and by the time court would have been closed. I say that as my client was based in Lonavala, it was impossible for him to reach out to this Hon'ble Court at 3.00 p.m. on December 24, 2013 after short notice.

e) I say that on December 24, 2013 I was myself continuously out of office and the staff designated had been not available for the reasons stated above. Furthermore, my court clerk Mr. Vinod was in other court in South Mumbai and therefore, he too was unable to notice the listing of the Chamber Summons on the Court's Notice Board on December 24, 2013 for the reason that the same had been inadvertently missed out."

8 The learned counsel for the defendant submits that there was delay on the part of the defendant to file his vakalatnama in summary suit because at that time, he was out of town. He further submits that when the matter was on board before this Court for ex-parte, the defendant's Advocate was out of Mumbai. He submits that because of mistake on the part of the Advocate, the litigant should not suffer. He further submits that the defendant has made out sufficient cause for non filing of his vakalatnama within time and for non appearance when the ex-parte decree was passed. He submits that the Apex Court in the matter of ***G.P. Srivastav V/s. R. K. Raizada reported in 2000 DGLS (Soft) 454*** held that if the sufficient cause is made out for non

appearance of defendant on the date fixed for the hearing when the ex-parte proceeding initiated against him, he should not be penalised for his previous negligence and/or for the mistake on the part of the Advocate. He relies on paragraph 7 of the said authority which reads thus;

“7. 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 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.”

9 On the basis of these submissions, the learned counsel for the

defendant submits that they have good chance of success in the present matter. He submits that if delay is not condoned in filing vakalatnama and ex-parte decree dated 24.12.2013 if not set aside, irreparable loss and injury will be caused to the defendant. Hence, in the interest of justice, this Hon'ble Court be pleased to set aside the ex-parte decree dated 24.12.2013 passed by this Court and condone the delay in filing the appearance/vakalatnama in summary suit no. 670 of 2013.

10 On the other hand, the learned counsel Mr. Rohaan Cama appearing on behalf of the plaintiff vehemently opposed the present Notice of Motion. The plaintiff filed their Affidavit-in-Reply dated 11.12.2014. He submits that the Notice of Motion taken out by the defendant is bad in law and not maintainable. He submits that though the defendant was duly served with writ of summons on 08.10.2013, he failed and neglected to file vakalatnama within stipulated time. He further submits that though the defendant preferred the Chamber Summons lodging no. 1321 of 2013 on 25.11.2013, they failed and neglected to move before the court immediately for condonation of delay in filing appearance/vakalatnama. He submits that defendant intentionally not served the said Chamber Summons either on plaintiff or his Advocate till the date of passing the ex-parte decree. He submits that even though, the defendant admitted that he got knowledge of writ of summons in the month of October, 2013, he filed the Chamber Summons on 25.11.2013. There is no explanation for delay of more than than one month in filing the chamber summons for condonation of delay.

11 The learned Counsel for the plaintiff submits that on 23.12.2013,

the summary suit along with chamber summons was on board before this Court. As no one appeared on behalf of defendant, the same was kept on 24.12.2013. When the matter was called out in first session before lunch, no one appeared on behalf of the defendant. Hence, the Court directed to the Court Associate to inform in the office of the defendant. The same was done by the court Associate. In spite of intimation, no one appeared on behalf of the defendant, when the matter was called out in the second sessions after lunch time. This itself shows that the defendant had taken the present proceeding in casual manner. He further submits that though the ex-parte decree was passed by this court on 24.12.2013, the defendant preferred the present Notice of Motion on 22.01.2014. There is no explanation in the affidavit in support of Notice of Motion for delay of more than one month in preferring the Notice of Motion.

12 The learned Counsel for the plaintiff further submits that the Notice of Motion as it is filed by defendant is not maintainable in law. He submits that the defendant has not pleaded his case on merits. He submits that whether the defendant has good chance of success in the summary suit or not is not pleaded by the defendant. He submits that the Apex Court in the matter of ***Rajnikumar V/s. Suresh Kumar Malhotra & Anr. Reported in AIR 2003 SC 1322*** held that defendant had to disclose his case on merits also in the application for setting aside ex-parte decree passed under order 37 of Code of Civil Procedure, 1908. He relies on paragraphs 8 to 11, which read thus:

“8. *The expression 'special circumstances' is not defined in the C.P.C. nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes*

something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly by a special circumstances. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

9. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 C.P.C. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after entering appearance before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against defendant. If the court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting

aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But in a suit under Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enters appearance within ten days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of the decree together with costs. The plaintiff will also be entitled to judgment in terms of Sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in Court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

10. It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal

of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.

11. *Now adverting to the facts of this case, though appellant has shown sufficient cause for his absence on the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of Order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order under challenge, it appears to us that the High Court, was right in accepting existing of special circumstances justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence.”*

13 The learned Counsel for the plaintiff submits that plaintiff is a senior citizen of 85 years old. He submits that in the present proceeding, the defendant had borrowed money from the plaintiff and

had failed to honor his commitment and repay the borrowed amount as agreed with the plaintiff. He submits that defendant issued cheques for repayment of said amount. Both the cheques of Rs.10,50,00,000/- and Rs.1,50,00,000/- were returned dishonoured. He submits that the plaintiff's claim was based on admitted liability against the defendant.

14 The learned Counsel for the plaintiff submits that as the defendant failed and neglected to take appropriate steps within stipulated time as prescribed by the law to defend the summary suit and as defendant failed to disclose the sufficient cause in affidavit-in-support of Notice of Motion, no substance in the present application filed by the defendant for setting aside ex-parte decree and allowing the chamber summons. Hence, Notice of Motion is required to be dismissed with costs.

15 I heard both the sides at length. In the present proceeding there is no dispute that summons were duly served on defendant on 08.10.2013. Thereafter, the defendant preferred chamber summons lodging no. 1321 of 2013 on 25.11.2013 for condonation of delay in filing appearance/vakalatnama. The defendant neither moved before this court for condonation of delay in filing appearance/vakalatnama, nor served the chamber summons on plaintiff or their Advocate till the passing of ex-parte decree on 24.12.2013. This itself shows that the defendant prosecuted the present litigation in casual manner.

16 The defendant failed to show sufficient cause in filing the appearance/vakalatnama within stipulated time as prescribed by law nor shown sufficient cause for condonation of delay in filing chamber

summons as well as Notice of Motion. Though the ex-parte decree passed by this court was on 24.12.2013, the defendant filed Notice of Motion on 22.01.2014. The reasons given by the defendant for condonation of delay and setting aside the ex-parte decree cannot be termed as “sufficient cause”. Apart from that the defendant failed to disclose his case on merits in application for setting aside ex-parte decree as held by the Apex Court in the matter of Rajni Kumar (Supra).

17 The authority relied by the defendant in support of his contention for setting aside the ex-parte decree in the matter of G.P. Srivastava (Supra) is not applicable in the facts and circumstances of the present case in hand. In that case, there was delay because the young nephew of the Counsel for defendant met with an accident and expired which prevented the Counsel to appear in the court when the ex-parte decree was passed. In that case the principle laid down for setting aside ex-parte decree as per Order 9 Rule 13 of the Code of Civil Procedure, 1908. Whereas in the present proceeding, the defendant preferred Notice of Motion for setting aside exparte decree under Order 37 Rule 4 of the Code of Civil Procedure, 1908, where different principles are applicable to consider the matter.

18 Even the Apex court in the matter of ***TVC Skyshop Limited V/s. Reliance Communication & Infrastructure Ltd, reported in (2013)11 Supreme Court Cases 754*** rejected defendant's application for setting aside ex-parte decree as the defendant failed to show special circumstances. In that case, the decree was passed on 07.11.2006 and the application filed by the defendant on 18.12.2006 for setting aside ex-parte decree. In that authority, the Apex Court held that power

under Rule 4 of Order 37 of Code of Civil Procedure, 1908 is not confined to set aside the ex-parte decree, it extent to set aside the execution and giving leave to appear to the summons and to defend the suit. Paragraph 10 and 11 reads thus:

“10 The expression "special circumstances" appearing in Order XXXVII Rule 4 was considered by this Court in Rajni Kumar v. Suresh Kumar Malhotra (2003) 5 SCC 315 and it was observed: (SCC p. 318, paragraph 9)

“9. The expression "special circumstances" is not defined in the Code of Civil Procedure nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character; extraordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37 Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre-decree matters viz. To give leave to the Defendant to appear to the summons and to defend the suit.

11 In the same judgment, the Court considered the scope of order XXXVII Rule 4 and observed:

It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the Defendant to appear to summons and defend the suit if the court considers it reasonable so to do, on such terms as the court thinks fit in addition to setting aside the

decree. Where on an application, more than one among the specified reliefs may be granted by the court, all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the Defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to the Defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the Defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.”

19 It is crystal clear from the Judgment of the Apex Court in the matter of **TVC Sky Shop Ltd. (supra)** that defendant have to disclose his case on merits also for setting aside the ex-parte decree and same thing is not done by the defendant in the present proceeding.

20 Considering these facts and law declared by the Apex Court as stated hereinabove, I am of the opinion that defendant failed to make out any case for allowing this Notice of Motion.

21 Hence, Notice of Motion stands dismissed with costs.

(K.K.TATED, J.)