

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.893 OF 2012
IN
SUIT NO.1755 OF 2006

Narendra Kumar Ram Achal Sharma and Anr. .. Plaintiffs

vs.

Harish Ramkrishna Prabhu and Anr. .. Defendants

Mr.Sanjay Jain a/w Mr.Zal Andhyarujina a/w Ms.Krishna Raja i/b
M/s.L.J.Law for the plaintiffs

Mr.Rajendra N. Bhagattjee for the defendant no.1

Mr.G.N.Salunke for the defendant no.2

Mr.A.S.Tammannavar, Officer from the Office of the Court Receiver

CORAM : K.K.TATED, J.
DATED : 11/12/2015

P.C.:

1 Heard the learned counsel for the parties.

2 This motion is preferred by defendant to set aside the ex-parte order and decree dated 21.12.2011 passed by this court (CORAM: S.J.Kathawalla, J.) in Suit No.1755 of 2006.

3 During the pendency of the present Notice of Motion original defendant Ramkrishna Ganpayya Prabhu expired on 10.10.2012. Thereafter the legal heirs of defendant preferred Chamber Summons

No.140 of 2014 for bringing legal heirs of deceased. That Chamber Summons was allowed by this court.

4 In the present proceeding, plaintiff filed Suit No.1755 of 2006 for specific performance of defendant's obligation in agreement / contract dated 30.6.2005 and for possession of the suit flat i.e. Flat No.1755, Building No.32 in Kher Nagar, Bandra (East), Mumbai 400 051. Following are the prayers in the said plaint:

“(A) That the defendant No.1 be directed to specifically perform his further part of the obligation in the agreement/Contract dated 30th June, 2005 at Exhibit “C” to this Suit by executing the registered sale Deed as per the said agreement.

(B) That the Hon'ble court be pleased to direct the defendant no.1 to hand over the vacant and peaceful use, occupation and possession of the suit premises to the plaintiffs in Kher Nagar “SAHA-JEEVAN” Co-operative Hsg.Society Ltd., Building No.32, Flat No.1755, Kher Nagar, Bandra (E), Mumbai 400 051.

(C) That, pending the hearing and final disposal of the Suit, the Court Receiver, High court, Bombay or some other fit and proper person be appointed as Receiver of the suit premises situated in Kher Nagar “SAHA-JEEVAN” Co-operative Hsg.Society Ltd. Building No.32, Flat No.1755, Kher Nagar, Bandra (E), Mumbai 400 051, with all power under Order 40, Rule 1 of C.P.C. 1908.

(D) That the Defendant No.1 be directed to pay the compensation amount as per the discretion and rule of this Hon'ble Court in the terms of the rent of the suit premises from the date of sanctioning of the loan till the performance of the contract by the Defendant No.1, as deem fit and proper.

(E) That pending the hearing and final disposal of the Suit, the Defenadants, their agents, servants, family members or any person/s under them from transferring, alienating or selling the rights, titles and interest in the said suit premises to any other person or third party, or from creating any third party, or from creating any third parties right in the said suit premises.

(F) That pending the hearing and final disposal of the suit, the Defendant No.1 be directed to deposit the amount of Rs.2,25,000/- [Two lacs and Twenty Thousands Only] before this Hon'ble court, received by the plaintiffs at the time of executing of agreement for sale.

(G) Ad-interim and interim reliefs in terms of prayer Clause (C-D) prayed as above.

(H) Cost of this suit may be awarded for.

(I) Add, alter or amend the Suit, if required.”

5 As the defendants failed to file their written statement within stipulated time, matter was placed for ex-parte decree. On the date of ex-parte decree also, no one appeared on behalf of defendants. The court after examining three witness P.W.No.1, P.W.No.2 and P.W.No.3 passed ex-parte decree dated 21.12.2011. Pursuant to the said ex-parte

decree, the Court Receiver was appointed in respect of the suit flat and issued notice to the defendant calling upon him to hand over possession of the suit property. At that time, defendant learnt about the ex-parte decree passed by this court on 21.12.2011. Thereafter, immediately preferred the present Notice of Motion on 20.3.2012.

6 The learned counsel for the defendants submits that as soon as the defendant learnt about the ex-parte decree passed by this court on 21.12.2011, they immediately preferred the present Motion on 20.3.2012 for setting aside the ex-parte decree and to allow the defendant to file written statement and contest the present Suit on merits. He further submits that they also prayed for stay of the operation and implementation of the ex-parte decree.

7 The learned counsel for the defendant submits that in the suit premises the deceased defendant was staying with his daughter who had mental disorder. He submits that in the present proceeding, defendant initially appointed Adv. D.G.Shanbhag. The said Advocate neither appeared nor filed his Vakalatnama. Hence, on 7.6.2006 defendant appointed advocate Mr.M.N.Havnur to oppose the Notice of Motion No.1952 of 2006 preferred by the plaintiff for appointment of Court Receiver. He submits that after hearing both the sides, Court Receiver was appointed by this court by order dated 7.12.2008. During the pendency of the present proceeding Advocate Mr.M.N.Havnur expired in the year 2007. Hence, the defendant appointed another Advocate Janardhanan who filed his Vakalatnama on 18.12.2007. He submits that the said Advocate appeared on behalf of defendant only

on 27.4.2009. As no one appeared on behalf of defendant, this Hon'ble Court on 7.9.2006 confirmed the ad-interim relief passed in Notice of Motion No.1952 of 2006 i.e about appointment of Court Receiver. Pursuant to the said order, Court Receiver took formal possession of the suit premises on 7.12.2006 and thereafter, the defendant executed the agreement on 5.12.2008. He submits that the defendant at the time of appointing advocate gave instructions for filing written statement. He submits that since both the advocates failed to file written statement, defendant should not suffer.

8 The learned counsel for the defendant submits that when the ex-decree was passed, the defendant was 82 years old. He was not keeping well. He was suffering by several ailments. To that effect, relevant documents are placed on record. He further submits that the defendant was staying in the suit premises along with his daughter who was mentally retarded. There was no one in his family to look after the said mentally disordered daughter. He submits that defendant's son was staying in Goa for the purpose of service. Therefore, it was very difficult for the defendant to attend the day to day hearing in the present proceeding. The defendant was solely relied on his advocates.

9 The learned counsel for the defendant submits that they have good chance of success in the present matter on merits. He submits that as per agreement for sale dated 30.6.2005 plaintiff agreed to purchase the defendant's suit flat for Rs.12,50,000/-. Out of that he has paid only Rs.2,50,000/-. He submits that it was specifically stated in the said agreement that they have to complete the said transaction

within 30 days. He submits that as plaintiff failed to comply the said agreement within stipulated time, the defendant by letter dated 1.9.2005 terminated the said agreement. He submits that the defendant may be granted liberty to bring all these material on record. That can be done by setting aside the ex-parte decree passed by this court. He submits that if ex-parte decree is not set aside, irreparable loss will be caused to the defendant.

10 Advocate for the defendant submits that because of the mistake on the part of advocate, litigant should not suffer. He submits that defendant as a litigant, provided all information to their advocate for filing of written statement as well as taking appropriate steps to defend on his behalf. This Hon'ble Court be pleased to set aside the ex-parte decree passed on 21.12.2011 allowing the defendant to file written statement and defend the suit on its own merits.

11 On the other hand the learned counsel for the plaintiff vehemently opposed the present Notice of Motion. He submits that the defendant has made incorrect statement in the present proceeding for setting aside the ex-parte decree. Hence, he is not entitled to any relief from this court. He submits that the deceased original defendant never disputed the agreement for sale dated 30.6.2005 including the payment of Rs.2,50,000/-. He further submits that the deceased defendant had never disputed his signature on other documents whereas the legal heirs of defendant who were brought on record in the present proceeding filed an additional affidavit and disputed the execution of

agreement for sale as well as the other documents. Hence, the defendant is not entitled any relief from this court.

12 The learned counsel for the plaintiff submits that the present matter appeared before this court on several occasions. In spite of the notice to the defendant no one remained present on behalf of him. Advocate for the plaintiff handed over list of events in the present matter which reads thus:

LIST OF DATES AND EVENTS

SR NO	DATE	PARTICULARS
1.	17.04.2006	Plaintiffs filed the above Suit for Specific Performance of the Agreement dated 30th June 2005
2.	04.04.2006	Plaintiffs took out Notice of Motion No. <u>1952 of 2006</u> for interim reliefs.
3.	14.08.2006	Notice of Motion was listed before this Hon'ble Court where none appeared for the Defendants. The matter adjourned to 21st August 2006.
4.	21.08.2006	Original Defendant No. 1 appointed Mr. H. V. Havnur and Mr. P. M. Havnur as his Advocates.
5.	04.09.2006	The Notice of Motion was listed before this Hon'ble Court. None appeared for the Original Defendant No. 1. The matter adjourned to 7th September 2006.
6.	07.09.2006	This Hon'ble Court granted interim/ ad-reliefs in favour of the Plaintiff. <u>The Original Defendant No. 1 appeared through his Advocate, Mr. P. M. Havnur.</u>
7.	09.11.2006	The Writ of Summons was served upon the Defendants and the Affidavit of Service dated 16th November 2006 was filed.
8.	07.12.2006	This Hon'ble Court appointed a Court Receiver for the Suit Premises and directed the Court Receiver to take formal possession of the Suit premises. None appeared for the Original Defendant No. 1.
9.	03.04.2007	The Court Receiver had fixed an appointment for taking formal possession of the Suit Premises. The daughter of the Original Defendant No. 1 refused

		to give possession of the Suit Premises.
10.	08.05.2007	The Court Receiver submitted his Report, bearing No. 179 of 2007.
11.	<u>12.07.2007</u>	The Hon'ble Court granted reliefs in terms of prayer clause (a), (b) and (d) of the Court Receivers Report. None appeared for the Original Defendant No. 1.
12.	<u>17.07.2007</u>	Notice of Motion No. 1952 of 2006 was listed before the Hon'ble Court. <u>Original Defendant No. 1 appeared through his Advocate i.e.Mr.P.M.Havnur. The matter adjourned to 30th August 2007.</u>
13.	<u>01.08.2007</u>	The Original Defendant No. 1 handed over symbolic possession of the Suit Premises. The site report was prepared, which was read over to and confirmed by the Original Defendant No. 1.
14.	27.08.2007 06.09.2007 and 05.10.2007	Court Receiver fixed several meetings but Original Defendant No. 1 failed to submit his Draft Agency Agreement.
15.	11.09.2007	Notice of Motion was listed before this Hon'ble Court. None appeared for Original Defendant No. 1. The matter adjourned to 13th September 2007.
16.	13.09.2007	The Notice of Motion was listed before this Hon'ble Court where the said Mr. Havnur appeared for the Original Defendant No. 1. The matter adjourned to 26th September 2007.
17.	01.10.2007	The Notice of Motion was listed before this Hon'ble Court where the said Mr. Havnur appeared for the Original Defendant No. 1. The matter adjourned to 3rd September 2007.
18.	03.10.2007	Matter did not appear on Board.
19.	04.10.2007	The Notice of Motion was listed before this Hon'ble Court where the said Mr. Havnur appeared for the Original Defendant No. 1. The matter adjourned to 5th October 2007.
20.	05.10.2007	The Notice of Motion was listed before this Hon'ble Court where the said Mr. Havnur appeared for the Original Defendant No. 1. The matter adjourned to 9th October 2007.
21.	29.10.2007	The Notice of Motion was listed before this Hon'ble Court where the said Mr. Havnur appeared for the Original Defendant No. 1. Matter adjourned to 31st October 2007.
22.	31.10.2007	The Notice of Motion was listed before this Hon'ble Court where the said Mr. Havnur appeared for the Original Defendant No. 1.
23.	18.12.2007	Defendant No. 1 obtained a no - objection from the said M. N. Havnur and P. M. Havnur and

		appointed Mr. M. Janadardhan as his Advocate.
24.	19.12.2007	The Original Defendant No. 1 submitted Draft <u>Agency Agreement and Undertaking to the Court Receiver</u> and Original Defendant No. 1 was directed to execute the Agency Agreement and submit the same within four weeks.
25.	30.01.2008 10.08.2008 28.03.2008 23.04.2008 06.06.2008 02.07.2008 05.08.2008 05.09.2008 and 10.10.2008	The Court Receiver fixed several meetings and directed Original Defendant No. 1 to execute the Agency Agreement.
26.	25.07.2008	The Order passed by Prothonotary & Senior Master, High Court, Bombay - matter transferred to undefended Suit
27.	11.11.2008	The Court Receiver filed a Report No. 391 of 2008 praying for, inter alia, appropriate directions against Original Defendant No. 1 to execute the Agency Agreement and, in the alternate, to take forcible physical possession of the Suit Premises.
28.	<u>25.11.2008</u>	The Court Receiver's Report No. 391 of 2008 was listed before this Hon'ble Court where Original Defendant No. 1 appeared in person. The Original Defendant No. 1 was directed to execute the Agency Agreement with Court Receiver on or before 10th December 2008.
29.	<u>05.12.2008</u>	The Original Defendant No. 1 executed the Agency Agreement.
30.	17.03.2009	The Advocate for the Plaintiff by letter addressed to the Original Defendant No. 1 and the Advocate of the Original Defendant No. 1 intimidated them that the matter would appear on 20th March 2009. Note: The Advocate appearing on behalf of defendant No. 1 endorsed the office copy of the letter by writing " <u>We have already handed over all the papers along with our No - Objection to the Original Defendant No. 1. You may contact Original Defendant No. 1 directly and proceed with the matter</u> ".
31.	20.03.2009	The matter did not appear on board.
32.	29.03.2009	The matter was listed before this Hon'ble Court. None appeared for Original Defendant No. 1.
33.	27.04.2009	The matter where listed before this Hon'ble High

		Court where Original Defendant No. 1 appeared through his Advocate. <u>The Advocate appearing for Original Defendant No. 1 informed this Hon'ble Court that Defendant had taken away the brief and no objection was issued.</u>
34.	30.06.2009	The above matter was listed before this Hon'ble Court. None appeared for the Original Defendant No.1 and the matter adjourned to 21st July 2009. This Hon'ble Court directed the Court Department to issue notice to the Original Defendant No. 1 intimidating him about the next date of the matter.
35.	14.07.2009	The Advocate appearing for the Plaintiffs by letter addressed to the Original Defendant No. 1 intimidated him that the matter would appear on 21st July 2009.
36.	21.07.2009	The matter was listed before this Hon'ble Court. None appeared for Original Defendant No. 1. The office attached to the Court Department filed a Service Report bearing Ref No. B/31/8777 placing on record that the daughter of Original Defendant No. 1 refused to accept service.
37.	06.08.2009 (wrongly dated as 08.08.2009)	The Advocate for the Plaintiff intimated the Original Defendant No. 1 that the matter was scheduled to be listed on 7th August 2009.
38.	07.08.2009	The Notice of Motion No. 1952 of 2006 appealed on board where the Ad - Interim Order dated 7th December 2006 was confirmed. <u>None appeared for the Original Defendant No. 1.</u>
39.	31.03.2010 and 30.04.2010	The matter was listed before this Hon'ble Court and the Examination in Chief of the PW1 was complete.
40.	07.06.2010	The matter was listed before this Hon'ble Court. Defendant No. 1 did not appear. Evidence of PW1 was fully recorded. Matter adjourned to 28th June 2010 for examination in chief of the next witness of the Plaintiff.
41.	<u>04.09.2010</u>	<u>The Plaintiff served a copy of the Affidavit of Examination in Chief of the PW2 and PW3 upon the Original Defendant No. 1</u> and intimidated the Plaintiff that the next date of hearing was 7th September 2010.
42.	30.09.2010	The matter listed before this Hon'ble Court, when none appeared for the original Defendant No. 1. The Suit Agreement was marked as Exh. "V". The stage of evidence was closed and the matter adjourned to 12th October 2010 for Hearing.

43.	12.10.2010	The matter was listed before this Hon'ble Court under the caption of "Final Hearing". The matter did not reach.
44.	13.10.2010	The Advocates for the Plaintiff intimated the Original Defendant No.1 that the matter will be listed in the coming week
45.	21.10.2010	The matter was listed before this Hon'ble Court where none appeared for the Original Defendant No. 1. The Affidavit of Service dated 21st October 2010 proving service of the letter dated 13th October 2010 was filed.
46.	<u>05.04.2011</u>	The Plaintiff through their Advocates letter intimated the Original Defendant No. 1 that the matter is listed on board on 7th April 2011 and requested to remain present. Note: An Affidavit of Service dated 6th April 2011 was filed before this Hon'ble Court proving service of the aforesaid letter.
47.	05.05.2011	The matter was listed before this Hon'ble Court where none appeared for the Original Defendant No. 1. Matter adjourned to 1st July 2011.
48.	12.08.2011	The matter was listed before this Hon'ble Court where none appeared for the Original Defendant No. 1. The matter adjourned to 26th August 2011 for "Directions".
49.	26.08.2011	The matter did not appear on Board.
50.	12.09.2011	The matter was listed before this Hon'ble Court where none appeared for the Defendants. Matter adjourned to 3rd September 2011.
51.	10.10.2011	The matter was listed before this Hon'ble Court for "Hearing" where none appeared for the Original defendant No. 1. The matter adjourned to 17th October 2011.
52.	17.10.2011	The matter was listed before this Hon'ble Court where none appeared for the Original Defendant No. 1. The matter adjourned to 14th December 2011.
53.	14.12.2011	The matter was listed before this Hon'ble Court where none appeared for the Defendants. The matter adjourned to 21st December 2011.
54.	21.12.2011	Final Judgment was passed in the present Suit.
55.	15.02.2012	The Court Receiver visited the Suit Premises to take possession of the same.
56.	28.03.2012	Defendant No. 1 appointed one, Mr. Hemant Ghadigaonkar as his Advocate.
57.	28.03.2012	The Defendant filed Notice of Motion No. 893 of 2012 praying for, inter alia, setting aside the ex -

		parte judgment dated 21st December 2011.
58.	10.10.2012	The Original Defendant No. 1 expired.
59.	04.2013	Respondent No.1 took out Execution Application No. 590 of 2013 before the Hon'ble City Civil Court to execute the said Judgment.
60.	05.12.2013	The applicant/Legal Heir of Defendant No.1 appointed one, Mrs. Sumeda Rao as his Advocate.
61.	05.12.2013	The applicant/Legal Heir of Defendant No.1 took out a Chamber Summons, being Chamber Summons No. 140 of 2014 to be impleaded as a party to the above Suit in place of the said deceased father.
62.	01.04.2014	This Hon'ble Court by Order dated 1st April 2014 allowed the above Chamber Summons.
63.	24.02.2015	Notice was issued to the Appellants under Order XXI Rule 22 of the CPC.
64.	13.08.2015	The Execution Application was listed before the Hon'ble City Civil Court. The Hon'ble City Civil Court by order directed the Court Receiver to take possession of the Suit Premises and submit his Report on or before 28 th August, 2015.
65.	27.08.2015	The Court Receiver visited the Suit Premises and was obstructed by the Appellant and his sisters from taking possession of the Suit Premises.
66.	28.08.2015	The Execution Application was listed before the Hon'ble City Civil Court directed the Court Receiver to take appropriate steps for taking possession of the Suit Premises and submit his report on or before 7 th September, 2015.
67.		The Court Receiver submitted his Report, being Court Receiver Report dated 568 of 2015.
68.	07.09.2015	The Hon'ble City Civil Court by Order allowed the Court Receiver Report in terms of prayer clause (a) i.e. permission to take forcible possession of the Suit Premises after 15 days from the date of the Order to enable the Appellant to obtain appropriate orders from this Hon'ble Court.
69.	08.09.2015	The Notice of Motion was listed before this Hon'ble High Court where it was directed to place the matter before the appropriate bench.
70.	16.09.2015	The Notice of Motion was listed before this Hon'ble court. The matter adjourned to 23 rd September, 2015 as the Plaintiff sought time to file an Additional Affidavit.
71.	23.09.2015	The Notice of Motion was listed before this Hon'ble Court. Due to paucity of time, the matter did not reach. The Counsel appearing on behalf of Appellant mentioned the matter at 5.00 pm where the Court did not grant any stay to the Execution of the said Judgment.

72.	23.09.2015	The Hon'ble City Civil Court by Order stayed the execution of the Order dated 7 th September, 2015 till 3 rd October, 2015.
73.	30.09.2015	The Notice of Motion was listed before this Hon'ble High Court. Due to paucity of time, the matter did not reach.
74.	03.10.2015	The Execution Application was listed before the Hon'ble City Civil Court where Appellant applied for stay of the Order dated 7 th September, 2015. The Hon'ble City Civil refused to grant any relief to the Appellant.

13 He submits that bare reading of the list of dates and events shows that the matter appeared before this court on several occasions for ex-parte decree. In spite of the notice to the defendant as well as their advocate, no one appeared on behalf of them. He further submits that in the present proceeding, this court passed ex-parte decree dated 21.12.2011 after recording evidence of three witnesses P.W.No.1, P.W.No.2 and P.W.No.3. He submits that on each occasion court directed plaintiff to intimate to the defendant or their advocate in writing. In spite of the said intimation, no one appeared on behalf of them before this court. Hence, this court passed ex-parte decree on 21.12.2011.

14 The learned counsel for the plaintiff submits that the Apex Court in the matter of *Parimal v. Veena Alias Bharti*¹ held that if a party fails to show sufficient cause for setting aside ex-parte decree under Order 9 Rule 13 of the Civil Procedure code, court should not allow such type of applications. The Apex Court held that 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

1 (2011) 3 SCC 545

called on for hearing and did his best to do so. He relies on paragraph 13, 16 and 27 which reads thus:

“13 "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 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 and Ors. v. Rewa Coalfields Ltd.**: AIR 1962 SC 361; **Sarpanch, Lonand Gram Panchayat v. Ramgiri Gosavi and 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 and Anr.**: (2010) 5 SCC 459.

16 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.

27 In view of the aforesaid statutory requirements, the High Court was duty bound to set aside at least the material findings on the issues, in spite of the fact that approach of the court while dealing with such an application under Order IX, Rule 13 Code of Civil Procedure would be liberal and elastic rather than narrow and pedantic. However, in case the matter does not fall within the four corners of Order IX, Rule 13 CPC, the court has no jurisdiction to set aside ex-parte 1 decree. The manner in which the language of the second proviso to Order IX, Rule 13 Code of Civil Procedure has been couched by the legislature makes it obligatory on the appellate Court not to interfere with an ex-parte decree unless it meets the statutory requirement.”

15 Counsel for the plaintiff further submits that the Apex Court in the matter of *Balwant Singh (Dead) vs. Jagdish Singh and Others*² held that sufficient cause has to receive liberal construction. It must squarely fall within the concept of reasonable time and proper conduct of the party concerned. He further submits that in the said authority Apex Court held that at the time of deciding application Order 9 Rule 13 court should see that justice must be done to both the parties equally. In support of this contention the learned counsel for the plaintiff relies on paragraph 25, 26, 34 and 35 which reads thus:

“25. We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.”

“26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party

2 (2010) 8 SCC 685

to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.”

“34. Liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect 'sufficient cause' as understood in law. [Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edition, 1997].”

“35. The expression 'sufficient cause' implies the presence of legal and adequate reasons. The word 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plenitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.”

“39. On an analysis of the above principles, we now revert to the merits of the application in hand. As already noticed, except for a vague averment that the legal representatives were not aware of the pendency of the appeal before this Court, there is no other justifiable reason stated in the one page application. We have already held that the application does not contain correct and true facts. Thus, want of bona fides is imputable to the applicant. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken by the applicant, even after they admittedly came to know of the pendency of the appeal before this Court.”

16 On the basis of these submissions and the authority of the Apex Court, the learned counsel for the plaintiff submits that in the interest of Justice, this Hon’ble Court be pleased to dismiss the present Notice of Motion preferred by the defendant for setting aside ex-parte decree. He submits that if the present Notice of Motion is allowed, irreparable loss and injury will be caused to the plaintiff.

17 I have heard both the sides. A short question arises in the present Notice of Motion is whether the defendant has shown sufficient cause for setting aside ex-parte decree dated 21.3.2011 passed by this Court by condoning the delay in preferring the Notice of Motion. For setting aside Motion, the Order 9 Rule 13 of the Civil Procedure Code reads as under:

“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 sent aside as against all or any of the other defendant also:

Provided further 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.

Explanation : 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 of setting aside the ex parte decree.”

18 Bare reading of the Order 9 Rule 13 of Civil Procedure Code, 1908 shows that for setting aside ex-parte decree defendant has to show that he was prevented by sufficient cause from appearing when the matter was called for hearing. If the court is satisfied with the reasons given by the defendant, court can set aside ex-parte decree on terms and conditions and costs considering the facts and circumstances of the present case.

19 In the present proceeding, the defendant to protect his interest appointed earlier advocate Mr.D.G.Shanbag, but he neither filed his Vakalatnama nor did he appear in court. Thereafter the defendant appointed Advocate M.H.Havnur who filed his Vakalatnama but remained absent on several occasions. Thereafter the said Advocate died in the year 2007. Hence, the defendant appointed Advocate Mr.Janardhanan who filed his Vakalatnama on 18.12.2007. He appeared on behalf of defendant only on 27.4.2009. Though the defendant appointed advocates to protect his interest in the matter, they failed to take appropriate steps. Hence, ex-parte decree passed against the defendant on 21.12.2011. The defendants specifically stated in his affidavit in support of Notice of Motion that the written statement was duly signed by him but the same was not filed by his Advocate in the court.

20 Considering these facts, whether the defendant can be penalized because of mistake on the part of advocates to whom he appointed to protect his interest. It should be noted that the Apex court in the matter of **State of Haryana Vs. Chandra Mani & Ors.**³ held that because of mistake on the part of the advocate, a litigant should not suffer.

21 In the present proceeding, defendant learnt about the ex-parte decree on 13.2.2012 when the Officer from the Court Receiver's Office visited the suit premises. He immediately filed the present Notice of Motion on 20.2.2012. It is specifically stated in the affidavit in support

3 JT 1996 (3) SC 371

of Notice of Motion that he was not keeping well. He was suffering by several ailments. Apart from that, he has to look after his mentally retarded daughter. Hence, there was a delay on his part to take appropriate steps immediately in the present matter. This itself shows sufficient cause for setting aside ex parte decree under Order 9 Rule 13. The authority cited by the counsel for the plaintiff in the matter of *Parimal v. Veena Alias Bharti (Supra)* it is not applicable in the facts and circumstances of the present case. In that case, there was delay of more than 4 years in making application for setting aside ex-parte decree. It is to be noted that each case is required to be decided on facts and circumstances of that matter. In similar way, the authority cited by the plaintiff in the matter of *Balwant Singh (Dead) vs. Jagdish Singh and Others (Supra)* is also not applicable in the facts and circumstances of the present case. In that case, the Supreme Court specifically stated that at the time of deciding application under Order 9 Rule 13 of the Civil Procedure code, the court should take liberal view and justice be done to both the parties equally.

22 In the case in hand, if ex-parte decree is not set aside, irreparable loss and injury will be caused to the defendant. It is to be noted that our High Court in the matter of **Baburao Deorao Wankhede v. Sewa Sahakari Sanstha and others**⁴ held that court should take liberal approach. In that case, our High Court condoned the delay of more than 10 years. It is to be noted that the Apex Court in the matter of *N.Balkrishnan Vs. M. Krishnamurthy*⁵ held that the object of fixing the time limit is not meant to destroy the rights. The law of limitation

4 1989 Mah LR 1144

5 (1998) 7 SCC 123

fixes a lifespan for such legal remedy for the general welfare. The Apex court in the matter of **Annappa @ Appanna v. Special Land Acquisition Officer**⁶ condoned the delay of 872 days on payment of cost of Rs.10,000/-. The Apex Court held that the merits of the matter should not be defeated on technical ground i.e. delay.

23 Considering the above mentioned facts and the law declared by the Apex Court, I am of the opinion that defendant has made out a case for allowing this Notice of Motion for setting aside the ex-parte decree but at the same time, he has to pay cost of Rs.25,000/- to the plaintiff or their advocate within two weeks from today, failing which Notice of Motion shall stand dismissed.

24 At this stage, the learned counsel for the defendant tenders written statement dated 22.9.2015. Advocate for the plaintiff submits that they have no objection if same is taken on record without prejudice to their rights and contentions. Hence, written statement filed by the defendant dated 22.9.2015 is taken on record and the defendant to serve copy of the same on plaintiff or his advocate within one week from today.

25 The learned counsel for the plaintiff submits that the defendant in their affidavit, disclosed the names of other two legal heirs. He submits that the plaintiff may be permitted to carry out appropriate amendment in plaint by joining them as defendant nos.1b and defendant no.1c. Advocate for the defendant no.1a submits that they

⁶ JT 2009 (1) SC 274(1)

have no objection if plaintiff is permitted to carry out amendment in cause title of the plaintiff as well as pending proceedings. Same is allowed. Amendment be carried out within eight weeks from today and amended copy of plaint with other proceedings be served on added defendants.

26 Advocate for the defendant undertakes to provide the present correct address of other two legal heirs of the deceased defendant to the advocate for the plaintiff within two weeks from today. Same is accepted.

27 At this stage the learned counsel for the plaintiff submits that they deposited sum of Rs.10.0 lacs in the Registry of this court pursuant to the decree. He submits that as ex-parte decree is set aside by this court. They may be permitted to withdraw the same with accrued interest without furnishing any security. The learned counsel for the defendant submits that they have no objection for the same. Hence, following order:

- a) Delay in preferring Notice of Motion is condoned.
- b) Ex-parte decree passed by this court on 21.12.2011 in Suit No.1755 of 2006 is set aside.
- c) Written statement filed by the defendant (i.e.defendant no.1a) is taken on record.

- d) Plaintiff is permitted to carry out appropriate amendment in cause title of suit and pending application if any by adding defendant no.1b and 1c, the legal heirs of deceased defendant, Ramkrishna Ganpayya Prabhu, within eight weeks.
- e) If amendment is carried out within stipulated time, plaintiff is permitted to serve writ of summons on added defendants thereafter according to law.
- f) Court Receiver appointed in respect of suit flat be continued on same terms and conditions as per order dated 7.12.2006 in Notice of Motion No.1952 of 2006 till further orders by appropriate court.
- g) Cost of Rs.25,000/- be paid to the plaintiff or their advocate within two weeks from today, failing which Notice of Motion shall stand dismissed without referring back to the court.
- h) Plaintiff is entitled to withdraw sum of Rs.10.0 lacs deposited by them along with accrued interest if any without furnishing any security in the present proceeding.
- i) Office to take appropriate steps to transfer the matter to the Bombay City Civil court at Bombay as the claim is less than Rs.1 crores after the appropriate amendment is carried out by plaintiff as stated hereinaove.
- j) Considering the facts and circumstances of the present case, hearing of the suit is expedited. This court expects that Bombay City Civil Court at Bombay, court to dispose of the Suit as early as possible but in any case within one year from the receipt of papers and proceedings.

k) Motion stands disposed of accordingly.

(K.K.TATED, J.)