

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

WRIT PETITION NO. 3541 OF 2016

Dyaneshwar Madhukar Jare ... Petitioner

V/s.

Mrs. Eshwari Vellapandi Devar & Anr. ... Respondents

Mr. P. M. Mokashi for the Petitioner

Ms. Nayana Pardeshi for the Respondent No.1.

Mr. S.M. Dange for Respondent No.2.

CORAM : K. K. TATED, J.

DATED : 01/12/2016

P.C.:

1. Heard learned Counsel for the parties.
2. By this petition under Article 227 of the Constitution of India the Petitioner owner of the vehicle is challenging the order dated 27.01.2016 passed by the Commissioner for Employees Compensation and Judge, Second Labour Court at Thane, rejecting the petitioner's application for setting aside ex-party Award dated 29.05.2013 in Application (WCA) No. 105/B-22/2012 awarding a sum of Rs.4,45,420/- by way of compensation with interest @ 12% per annum to the Respondent No.1 original Applicant.
3. A few facts of the matter are as under:
 - a) In accident which occurred on 11.02.2006, Respondent No.1 lost

her son Selveakumar @ Kumar Vallapandi Devar. On that date, he was in employment of the Petitioner. He was getting monthly wages of Rs.3000/- plus Rs.1000/- Bhatta. On the date of accident, he was 21 years old. Hence, the Respondent No.1 filed application for compensation under Section 4 of Employees Compensation Act, 1923. There was delay on her part to file the application. Hence, Respondent No.1 filed application for condonation of delay. That application was allowed by 2nd Labour Court on 03.03.2012.

- b) As no one appeared on behalf of Petitioner before the Commissioner for Employees' Compensation at Thane in Application (WCA) No. 105/B-22/2012, the Petitioner allowed Respondent No.1's application for compensation. In the judgment dated 29.05.2013, the Court in paragraph 3 recorded that though the Petitioner was duly served, no one appeared on behalf of him. Hence, matter proceeded *ex-parte*. Thereafter, the Respondent No.1 issued notice dated 11.07.2013 intimating the order passed by the Commissioner for Employees Compensation at Thane. Thereafter, the Petitioner filed application for setting aside *ex-parte* judgment under Rule 41 of the Workmen's Compensation Rules, 1924. That application was filed by the Petitioner on 16.08.2013 on several grounds. It was contended by the Petitioner in their application that the summons were not duly served on the Petitioner. The summons was served by Registered Post at his residence, but the same was accepted by his brother Santosh, who was not keeping well, was also

suffering from depression. The petitioner contended in his application that the brother used to throw and destroy the documents. Hence, petitioner had no knowledge about the proceeding filed by the Respondent No.1 for compensation. Considering the reasons given by the Petitioner and his application for setting aside the *ex-parte* award and the evidence brought on record, the Trial Court by its Judgment dated 27.01.2016 dismissed the petitioner's application for setting aside the *ex-parte* award. Hence, the present petition.

4. The learned Counsel Mr. P. M. Mokashi appearing on behalf of the Petitioner submits that the Commissioner for Employees Compensation and Judge, 2nd Labour Court at Thane erred in coming to the conclusion that the Petitioner failed to show sufficient cause for setting aside the *ex-parte* judgment dated 29.05.2013. He submits that the Petitioner in their application for setting aside the *ex-parte* award specifically stated that though the summon was served on the petitioner, but the same was accepted by his brother, who was not keeping well. He was suffering from HIV and other ailments. He submits that Petitioner specifically stated in his application that his brother was also suffering from depression. His brother used to destroy the documents without understanding the importance of the same. He submits that all these facts were brought by the Petitioner on record through his evidence.

5. The learned Counsel for the petitioner submits that the Labour Court failed to appreciate that the documents at Exh.C-23 established that petitioner's brother was suffering from HIV & TB and evidence of

his father established that his brother Santosh was suffering from depression on account of the said sickness especially HIV positive. He submits that the Labour Court failed to consider these facts. He submits that Labour Court erred in coming to the conclusion that when the Petitioner's brother can accept the notice from the postman, there is no question of accepting the defence raised by the petitioner in his application for setting aside *ex-parte* decree. The learned Counsel for the petitioner raised following grounds in petition for setting aside the impugned order passed by the Labour Court dated 27.01.2016 which reads thus.

“a) *That the Ld. Labour Court has failed to appreciate that the documents at Exh C-23 established that the Petitioner's brother was suffering from HIV and TB and the evidence of the Petitioner as well as his father established that the Petitioner's brother Santosh was suffering from depression on account of the said sickness especially HIV positive.*

b) *That the Ld. Labour Court has failed to appreciate that it is very common and nothing unusual for a HIV patient to be suffering from depression and merely because no medical papers in respect of Santosh suffering from depression were produced by the Petitioner, the same can be completely disbelieved considering the other circumstances on record.*

c) *That the Ld. Labour Court has failed to appreciate that the Petitioner's brother was suffering from depression on account of being a patient of HIV and that a patient in depression need be in the same state all throughout and can be said to be suffering from mental disorder.*

d) *That the Ld. Labour Court has failed to appreciate that the Petitioner as well as his father had both deposed before the Court that Santosh on account of his depression used to tear and destroy his papers and had destroyed his personal papers like certificates and passport and hence it was all the*

more possible that no medical papers in respect of depression of Santosh were available with the Petitioner and his father.

e) That the Ld. Labour Court has failed to appreciate that the Petitioner or his father were never called upon by the Respondent no.1 to produce copy of the complaint made to the police station against Santosh and hence it is totally erroneous on the part of the Ld. Labour Court to draw any adverse inference in this regard.

f) The Ld. Labour Court has committed a grave error in observing that how could a person suffering from mental disorder can sign acknowledgement or postman deliver article to him as in the first place the Ld. Labour Court is overlooking the fact that Santosh was suffering from depression which not necessarily can be classified as mental disorder and moreover it seems that the Ld. Labour Court is presuming that the said mental disorder is like mental retardation which certain cannot allow the person to give any acknowledgement or accept delivery from postman.

g) That the Ld. Labour Court has failed to appreciate that the evidence on record establishes that the Petitioner's brother Santosh was residing with his parents and was not staying alone and being under treatment for his sickness including depression did not prevent him from receiving any delivery from postman and giving acknowledgement to that effect.

h) That the Ld. Labour Court has failed to appreciate that the Petitioner's father in his evidence has deposed that he used to go out daily in the morning and return for lunch and since Santosh was not doing any work and used to be at home, he has received the notices earlier from the Labour Court.

i) That the Ld. Labour Court has failed to appreciate that the Petitioner as well as his father had identified the signature of Santosh on the two acknowledgement cards and as there was no any document available with them to show the signature of Santosh, they had not filed it in the court

proceedings which however cannot mean that the signature of Santosh is not proved by the Petitioner as observed by the Ld. Labour Court.

j) That the Ld. Labour Court has committed a grave error in observing that why the father of the Petitioner has not received the two notices earlier when Santosh was alive, as the Ld. Labour Court has completely failed to appreciate the evidence of the Petitioner's father wherein he has deposed that he used to go out daily in the morning and return for lunch in afternoon.

k) That the Ld. Labour Court has failed to appreciate that there has been no cross-examination of the Petitioner or his father by the Respondent no.1 regarding the educational qualifications of Santosh or as to whether Santosh could write and sign in English and in absence of any challenge to the evidence of both the Petitioner and his father about Santosh having signed the two acknowledgements, there was no reason to disbelieve that the two acknowledgements are signed by Santosh.

l) That the Ld. Labour Court has committed a grave error in observing that Santosh was staying alone as that was never the case of the Petitioner and the evidence on record is otherwise.

m) That the Ld. Labour Court has committed a grave error in observing that the notice was duly served on the Petitioner but he failed to appear as the evidence on record infact overwhelmingly establishes that the notice was not served on the Petitioner and that he was ever aware of the date of hearing of the two Applications.

n) That the Ld. Labour Court has committed a grave error in assuming and presuming that the notice in respect of the two earlier Applications have not been received by the Petitioner's brother Santosh and have been infact duly served on the Petitioner.

o) *That the Ld. Labour Court has committed a grave error in observing that the Application is not maintainable as the notices were duly served on the Petitioner.*

p) *That the Ld. Labour Court has committed a grave error in assuming that the two earlier notices have been duly served on the Petitioner because the notice in respect of execution proceedings have duly served on the very same address.*

q) *That the Ld. Labour Court has committed a grave error in observing that there is no reasonable ground made out for setting aside the ex-parte order as provided under Order 9 Rule 13 of CPC.*

r) *That the Ld. Labour Court has committed a grave error in disregarding the ratio of the Judgments relied upon by the Petitioner in support of his case which infact were wholly applicable to the facts of his case.*

s) *That the impugned Order passed by the Ld. Labour Court is otherwise on the face of it perverse and there is an apparent error on the face of it and hence the same deserves to be quashed and set aside by this Hon'ble Court.*

t) *That the impugned Order passed by the Ld. Labour Court is illegal and bad in law and the same has resulted in manifest injustice to the Petitioner.*

u) *The Petitioner craves leave of this Hon'ble Court to rely on any other additional ground at the time of hearing of this Petition."*

6. The learned Counsel for the petitioner submits that whenever the application made under Order 9 Rule 13 of Code of Civil Procedure, 1908 for setting aside the *ex-parte* order, it is the duty of the Court to see that whether the sufficient cause is shown by the applicant and if sufficient cause is shown the Court should set aside the *ex-parte*

order. In support of his contention, he relies on the judgment of the Apex Court in the matter of ***G.P. Srivastava V/s. R.K. Raizada & Ors, reported in (2000)3 Supreme Court Cases 54***. In this Authority, the Apex Court held that for setting aside *ex-parte* decree, the applicant has to show that he was prevented by sufficient cause from appearing. The learned Counsel for the Petitioner relies on paragraph 7 of this Judgment, 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”.

7. The learned Counsel for the Petitioner also placed reliance on the Apex Court Judgment in the matter of ***Parimal V/s. Veena alias Bharti, reported in (2011) 3 Supreme Court Cases 545***. He submits that in this case, the Apex Court held that if the sufficient cause is made out, then the court has to allow the application under Order IX Rule 13 of Code of Civil Procedure, 1908 by setting aside the *ex-parte* decree. He relies on paragraph 13 of this Judgment, 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”

8. The learned Counsel for the Petitioner also argued the matter on the merits. He submits that at the time of passing *ex-pare* decree dated 29.05.2013, the Labour Court failed to consider the fact that the Respondent No.1 failed to prove the relationship of employer and employee between the Petitioner and the Deceased person. He also

relied on other grounds as stated in the Petition on merits.

9. On the basis of these submissions and the authorities of the Apex Court, the learned Counsel for the Petitioner submits that in the interest of justice, this Hon'ble Court be pleased to allow the Petitioner's application for setting aside the *ex-parte* judgment dated 29.05.2013 and allowed the petitioner to file his written statement for contesting claim petition on its own merits. He submits that if the Petition is not allowed, irreparable loss will be caused to the Petitioner.

10. The learned Counsel for the Respondent No.2 Insurance Company also supports the Petitioner's contention. He submits that the Court below failed to consider the fact that the petitioner made out sufficient cause for setting aside the *ex-parte* decree. He submits that in the interest of justice, this Hon'ble Court be pleased to allow the present Writ Petition by setting aside the *ex-parte* Judgment dated 29.05.2013 and also the petitioner to contest the claim petition filed by the Respondent No.1 on its own merits.

11. The learned Counsel for the Respondent No.1 Claimant vehemently opposed the present Writ Petition. She submits that the Labour Court considered the documents on record as well as evidence and held that Petitioner failed to make out sufficient cause for setting aside the *ex-parte* Judgment dated 29.05.2013. She submits that petitioner was duly served with summons of Claim Petition. She submits that the petitioner failed to disclose the fact that his brother was not in a position to intimate the petitioner about the service of summons. She submits that the Trial Court in its impugned judgment

in paragraph 16 given the reasons on the petitioner's contention about the illness of his brother why cannot be considered. She submits that considering the reasons given by the Trial Court in the impugned judgment, there is no substance in the present petition and same is required to be dismissed with costs.

12. The learned Counsel for Respondent No.1 further submits that Writ Petition as it is filed by the Petitioner is not maintainable. She submits that alternate remedy to the Petitioner is to file an appropriate appeal under Section 30(1) of the Workmen's Compensation Act. In support of her contention, she relied on judgment of Karnataka High Court in the matter of *National Insurance Co. Ltd., Rep. By its Manager, Bangalore V/s. Smt. Huligemma & Anr., reported in ILR 2005 KAR 1478*. She relies on paragraphs 6 & 7 of the Judgment which reads thus:

“6. It is true that no appeal can be filed under Order 43 Rule-1 of C.P.C., as against the order passed on the application filed under Order-IX Rule 13 of C.P.C., by the Commissioner in the proceedings arising out of the Workmens' Compensation Act. Though the provisions of Order-IX Rule 13 of C.P.C. are applicable to the proceedings initiated under the provisions of the Act, the provisions of Order-43 Rule 1 of C.P.C. are not made applicable to the proceedings under the Workmens' Compensation Act under Rule-41 of the 'Rules'. Consequently, the appeal under Order 43 Rule-1 C.P.C., as against the order passed on the application filed under Order-IX Rule 13 C.P.C., is not maintainable. However, the only course open for the parties is to file an appeal under Section 30 of the Act against the order of awarding compensation.

The Division Bench of this Court, in the decision cited supra while dealing with similar situation observed thus:

“ The only provision regarding appeal against the orders made by the Workmen's Compensation Authority is found in Section 30 of the Workmen's Compensation Act. Under clause (a) of Section 30(1) an appeal lies to this Court from the orders of the Commissioner awarding compensation. Therefore, it is clear that if an order awarding compensation has been made by the Workmen's compensation Authority and thereafter an application was made under Order IX Rule 13 praying or setting aside that order on the ground that the appellant had been placed ex parte without justification and that application is dismissed, the only course open to the party is to prefer an appeal against the order awarding compensation as provided in Section 30(1) (A) of the Act. But no appeal can be filed against an order dismissing the application for setting aside the order as there is no provision for filing such an appeal under Section 30 of the Act and under the Rule 41, the provisions of Order 43 Rule 1 C.P.C. are not made applicable.

If, for any reason, as actually happened in this case, by the time the application for setting aside the ex parte against the original order is over, the only course open for the party is to file an application under Section 5 of the Limitation Act praying for condonation of delay, as the said provision is expressly made applicable under Section 30(3) of the Workmen's compensation Act.”

7. *It is clear from the aforesaid dictum laid down by the Division Bench of this Court that under such a situation the only course open to the parties is to prefer an appeal against the order awarding compensation as provided under Section 30(1)(a) of the Act. Though the Division Bench did not specifically consider the question as to whether the writ lies against the order passed by the Commissioner on the application filed under Order IX Rule-13 of C.P.C., it has clearly held that the only course open to the parties to the proceedings before the Commissioner is to prefer an appeal against the order awarding compensation as provided in Section 30(1)(a) of the Act.”*

13. I heard both the sides at length. I have gone through the copy of order passed by the Labour Court dated 03.03.2012 by which the delay was condoned in filing the claim petition in favour of Respondent No.1, Judgment dated 29.05.2013 allowing Respondent No.1's claim petition

and directing petitioner and Respondent No.2 to pay a sum of Rs.4,45,420/- with 12% interest, Application dated 16.08.2013 filed by the Petitioner for setting aside the *ex-parte* Judgment and the impugned order.

14. It is to be noted that in the present proceeding, the summons were duly served on the Petitioner by R.P.A.D. The same was accepted by his brother who was staying with him. Though the petitioner raised several grounds in his application that his brother was suffering by HIV and TB and he was also suffering depression and in that he used to destroy the important documents without knowing the importance of the same, the same was not proved by the Petitioner by leading evidence. In any case, the Trial Court has considered all those facts on the basis of evidence on record. Even the Apex Court, in the matter of G.P. Srivastava (*supra*) and Parimal (*supra*) categorically held that if the sufficient cause is shown then only *ex-parte* decree can be set aside under Order IX Rule 13 of Code of Civil Procedure, 1908. In the present proceeding, the petitioner failed to show sufficient cause for setting aside the *ex-parte* judgment. Hence, both these citations are not applicable to the facts and circumstances of the present case.

15. It is to be noted that in the present proceeding, the Respondent No.1 lost her son who was just 21 years old on the date of accident. He was working with the petitioner and he was earning near about Rs.4000/- per month.

16. In the above mentioned facts, I do not find any substance in the Writ Petition to interfere with the well reasoned order dated

27.01.2016 passed by the Labour Court rejecting petitioner's application for setting aside the *ex-parte* Judgment.

17. Hence, Writ Petition stands rejected.

(K.K.TATED, J.)