

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

WRIT PETITION NO. 3440 OF 2016

Incab Industries Limited	... Petitioner
V/s.	
Dr. Eddie Phiroze Barucha & Ors.	... Respondents

Mr. Gautam Gavankar for the Petitioner.
Mr. P. S. Dani, Senior Counsel with Ms. Shivani Khanna i/b FZB & Asso.
for the Respondents.

**CORAM : K. K. TATED, J.
DATED : 04/04/2016**

PC.:

. Heard learned Counsel for the parties.

2 By this petition under Article 227 of Constitution of India, the petitioner/defendant/tenant challenges the order dated 30.01.2016 passed by the Appellate Bench of the Small Causes Court at Bombay in MARJI Application No. 713 of 2011 rejecting the tenant's application for setting aside the Judgment and Decree dated 06.05.2011 in Appeal No. 653 of 2006 and for hearing the appeal on its own merits.

3 In the present proceeding, the respondent plaintiff filed T.E. & R Suit No. 583/615 of 2001 against the tenants for vacate and peaceful possession of office premises admeasuring 784 sq. mtrs. situated on first floor of building Esplanade House and the premises in the Annex Building No.29, Hazarimal Somani Marg, Mumbai- 400 001. In that suit, defendant tenants appeared and contested the same. That suit was dismissed by the Trial Court on 24.08.2006. Thereafter, the

plaintiff landlord preferred Appeal No. 653 of 2006 in the Court of Small Causes at Bombay on 10.11.2006. Notice in the Appeal was served on tenant on 19.01.2007. As no one appeared on behalf of tenant, the Appellate Bench allowed the Appeal by the Judgment and Decree dated 06.05.2011. Thereafter, the plaintiff filed Execution Application in the month of November, 2011. In the month of November, 2011 the tenant defendant learnt about Execution Application No. 411 of 2011 filed by the landlord. Hence, they preferred MARJI Application No. 713 of 2011 on 05.11.2011 for setting aside the Judgment and Decree dated 06.05.2011 and/or rehearing of the Appeal on its own merits. That application was dismissed by the Appellate Bench of the Small Causes Court by judgment dated 30.01.2016. Hence, the present Writ Petition.

4 The learned Counsel for the petitioner tenant submits that the Appellate Bench of Small Causes Court failed to consider the fact that notice in Appeal No. 653 of 2006 was not duly served on them i.e. Company tenant. Hence, when the matter called out, no one appeared on behalf of tenant and *ex-parte* decree came to be passed on 06.05.2011. He submits that for the year 1999 to 2008 in the petitioner company the interim committee was appointed by BIFR. He submits that the company was declared as sick company on 04.04.2000. Thereafter, the present board of directors were took charge of the company on 02.09.2008. He submits that from the record it seems that the notice of the Appeal No. 653 of 2006 was served by the bailiff on Mr. A.K. Malhotra, who was working in their office at that time. He submits that said Mr. Malhotra was not co-operating to the

present Board of Directors. He never informed about the Appeal filed by the respondent landlord. He submits that for want of knowledge, no one appeared on behalf of them in Appeal No. 653 of 2006. Hence, *ex-parte* decree came to be passed against them. He submits that they shown sufficient cause in their application dated 05.11.2011 (MARJI Application No. 713 of 2011) for condonation of delay and for setting aside the *ex-parte* decree in Appeal No. 653 of 2006. He submits that if sufficient cause is shown, then Court should condone the delay and matter to be heard on its own merits by setting aside the *ex-parte* decree. In support of his contention, he relies on the judgment of the Apex Court in the matter of ***Parimal V/s. Veena @ Bharti, 2011(3) SCC 545***. He particularly relies on paragraphs 8, 9 and 10, which read thus:

*“8. It is evident from the above that an ex-parte decree against a defendant has to be set aside if the party satisfies the Court that **summons had not been duly served** or he **was prevented by sufficient cause** from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.*

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

9. "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*

*10. In **Arjun Singh v. Mohindra Kumar and Ors.**: AIR 1964 SC 993, this Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: **Brij Indar Singh v. Lala Kanshi Ram and Ors.**; **Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and Ors.**: AIR 1964 SC 1336; and **Mata Din v. A. Narayanan**: AIR 1970 SC 1953)."*

5 The learned Counsel for the petitioner submits that the Apex Court held that meaning of the word "sufficient" is "adequate" or "enough" in as much as, it is necessary to answer the purpose intended. He submits that in the case in hand they specifically made a statement in their application that their officer Mr. A.K.Malhotra was not co-operating with the present Board of Directors. On the basis of these submissions and law declared by the Apex Court in the matter of Parimal (supra) the learned Counsel for the petitioner tenant submits that this Hon'ble Court be pleased to set aside the the Judgment dated 30.01.2016 passed by the Appellate Bench of Small Causes Court in

MARJI Application No. 713 of 2011 and allowed the petitioner tenant to argue the Appeal No. 653 of 2006 on its own merits. He submits that if the Writ Petition is not allowed, irreparable loss will be caused to the petitioner tenant as they are in possession of the suit premises for last more than 20 years.

6 On the other hand, the learned Senior Counsel Mr. P.S. Dani appearing on behalf of Respondent/landlord vehemently opposed the present Writ Petition. He submits that the notice of the Appeal No. 653 of 2006 was duly served on the petitioner company through the bailiff. He submits that bailiff submitted his Report dated 20.01.2007 stating that copy was served on the petitioner company. The copy of the said summons placed on record in additional affidavit dated 01.04.2016. He further submits that apart from the service through bailiff, they specifically served a letter dated 22.12.2008 on Mr. Kersi Amaria, who affirmed the present petition as well as application dated 15.11.2014 i.e. MARJI Application. He submits that inspite of knowledge about the pendency of Appeal No. 653 of 2006, the petitioner tenant failed and neglected to take appropriate action/steps for defending their interest before the Appellate Bench of Small Causes Court. Hence, there is no question of entertaining the present Writ Petition. He submits that if the present Writ Petition is allowed, the Respondent landlord will suffer irreparable loss who was succeeded in getting decree for eviction against the respondent after more than 15 years.

7 I heard both the sides at length. It is to be noted that in the present proceeding, the bailiff's report shows that service was effected on Petitioner/tenant on 19.01.2007. Thereafter, the bailiff filed his

affidavit to that effect on 20.01.2007. Apart from that, the respondent landlord by the letter dated 22.12.2008 specifically informed the deponent of the present Writ Petition Mr. Kersi N. Amaria as well as their earlier Advocate Mr. Karim Vakil about the pendency of present Appeal. In spite of that, no one appeared on behalf of them. Hence, Appellate Bench passed decree on 06.05.2011 i.e. after three years from the date of service of private letter. This itself shows that the petitioner company taken the litigation in casual manner.

8 It is to be noted that Order IX Rule 13 of Code of Civil Procedure, 1908 provides for setting aside the *ex-parte* decree passed against the defendants. The Court in terms of provisions of Order IX Rule 13 is entitled to exercise its jurisdiction subject to its being satisfied that i) summons was not duly served; or ii) the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. The second proviso appended to said order IX Rule 13 thereto which was inserted by Act 104 of 1976, which reads thus:

“ provide further that no court shall set aside the 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 defendants had notice of date of hearing and had sufficient time to appear and answer the plaintiffs claim.”

It is to be noted that if no sufficient or cogent reason has been assigned by the defendants as to why, despite of receipt of the summons/notice, they did not appear before the Court, then there is no question of setting aside the *ex-parte* decree. In support of this contention, reference can be made to the judgment of the Apex Court

in the Matter of *John Impex Pvt. Ltd. & Anr. v/s. Athul Kapur & Ors.*, (2009) 15 SCC 285.”

9 The reasons given by the Petitioner in their application dated 05.11.2011 that their Officer Mr. A.K. Malhotra was not co-operating with the company, cannot be a reason for setting aside the decree passed by the Court. Defendants' dispute with their Officer Mr. A.K. Malhotra was internal matter. Even in the judgment of the Apex Court in the matter of Parimal(supra), it is specifically stated that if the sufficient cause is shown, then only the *ex-parte* decree can be set aside. In the present proceeding the summons was duly served through bailiff and respondent landlord informed the deponent of the present petition by letter dated 22.12.2008 about the pendency of the Appeal. Petitioner defendants failed and neglected to take appropriate steps to protect their interest in the Appeal. Hence, that authority in the matter of Parimal (supra) is not applicable in the facts and circumstances of the present case.

10 In view of the above mentioned reasons, I do not find any reasons to entertain the present Writ Petition under Article 227 of Constitution of India.

11 Hence, Writ Petition stands rejected.

(K.K.TATED, J.)