

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**WRIT PETITION NO. 11553 OF 2017**

Ramjibhai Pannalal Sharma

...Petitioner

*Versus*

Shrikant Krishnadatta Bajpai & Anr

...Respondents

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**Mr Haridas R Madhurkar, for the Petitioner.**

**Mr CN Chavan, for the Respondent No. 1.**

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**CORAM: G.S. PATEL, J**

**DATED: 13th November 2017**

**PC:-**

1. This is a classic case of a Defendant repeatedly abusing indulgence shown not once but twice by the Courts below and then seeking it a third time almost as of right.

2. The Writ Petition is directed against an order dated 3rd October 2017 dismissing an appeal filed by the Petitioner against an order of 12th June 2015 in Marji Application 729 of 2013. In that application the Petitioner sought to set aside an *ex parte* decree in the Respondent's Eviction Suit No. 305/473 of 2007.

3. The Petitioner resisted the suit and filed a written statement. He did not appear thereafter. The suit proceeded *ex parte*. It was decided against the Defendant Petitioner on 15th March 2010. He then filed an application under Order 9 Rule 13 on 7th January 2012 to set aside that

*ex parte* decree. The application was allowed and the *ex parte* decree was set aside. The suit was, therefore, restored. Issues were then settled. Parties were directed to lead evidence. The Plaintiffs filed their Affidavit in lieu of examination in chief. The Defendant's Advocate conducted a cross-examination on two dates but did not complete it. The Defendant was said to be suffering from fever and could not attend Court for apparently a month and half between 1st August 2013 to 20th September 2013. The Petitioner says that he learned on 17th October 2013 that the suit had once again proceeded against him, the cross-examination being closed and the suit being decreed. This was therefore a second application under Order 9 Rule 13. The application to set aside the decree was contested by the Plaintiff. He pointed out that the written statement had been delayed and that in fact a "no written statement" order had earlier been passed and even that was set aside, indulgence being shown even then to the Defendant. This was, the Plaintiff pointed out, the second such decree and the Defendant could not constantly delay decrees by letting them be passed and then approaching the Court to set them aside.

4. Before the Trial Court and before the Appeal Court, the usual two grounds were made out. The first was to say that no party should suffer for the fault of the Advocate. This argument is pointless because it assumes that the Advocate was at fault in the first place. Not everything that every Advocate does is faulty. This is no excuse for the lack of diligence of the party himself and in any case that negligence of the advocate must be established. It is not something that is to be lightly assumed. The facts here show that the Defendant's Advocate did in fact conduct a cross-examination but that it was Defendant who said that he was unwell and never attended Court. The question would be whether the medical ground was sufficient. The period of illness

was from 2nd April 2013 to 31st July 2013, a quite considerable period by any standards. But it is not as if the suit was decreed then. The Trial Court enquired why he did not proceed with the suit on dates after 31st July 2013, and to this there was simply no answer.

5. The Appeal Court found as a matter of fact that there was no explanation for the lack of participation at that trial after the recovery from the so-called or alleged illness and that the inaction continued. The Appellate Court correctly held that the Defendant was expected to be more vigilant having twice suffered decrees. It held that the law does not allow a Defendant to say that the Plaintiff may proceed with the suit, the Court may pass whatever judgment and decree it wants but that this will be frustrated by the Defendant merely remaining absent. Proof of sufficient cause is always a legal requirement. The words of the Appellate Court that a liberal approach, though to be commended, does not mean adopting an approach that would defeat the rights of an honest litigant to assist a negligent litigant are correct and are to be endorsed. The Petitioner claims sincerity, but sincerity demands proof. This is not a case of a single default. It is a case of repeated, and perhaps deliberate, defaults.

6. It is impossible to find any infirmity in the impugned order. Other than claiming clemency and seeking indulgence, no ground whatsoever is made out to entertain this Writ Petition.

7. The Writ Petition is rejected. No costs.

**(G. S. PATEL, J.)**