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

WRIT PETITION NO. 12360 OF 2017.

Jaydeep Pukhraj Jain	...	Petitioner
V/s.		
Rakesh Raghunath Bidkar	...	Respondent.

ALONG WITH
WRIT PETITION NO. 13940 OF 2017.

Jaydeep Pukhraj Jain	...	Petitioner
V/s.		
Rakesh Raghunath Bidkar	...	Respondent.

Mr. R.D. Suryawanshi, i/by Sharad Patil, for the
Petitioner in W.P. No.12360 of 2017.
Mr. Shriram S. Kulkarni, for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 10TH APRIL, 2018.

P.C. :

1] Learned counsel for the respondent submits that petitioner has filed another Writ Petition No.13940 of 2017, challenging the same order, through his Power of Attorney and which is not on board today.

2] Hence the said Writ Petition is also called and taken up for

hearing, along with the present petition.

3] Heard learned counsel for the petitioner and learned counsel for the respondent.

4] By these petitions, filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 26.10.2017, passed by Ad-hoc District Judge-1, Pune, in Misc. Appeal No.301 of 2016.

5] The said Appeal was preferred by the present petitioner against the order dated 21.7.2015, passed in Misc. Application No.253 of 2010, by the Court of 9th Joint Civil Judge Junior Division, Pune. Misc. Application No.253 of 2010 was filed by the present petitioner under Order 9 Rule 9 of Code of Civil Procedure, for restoration of suit bearing Special Civil Suit No.1034 of 2004. The said suit was filed by the petitioner against respondent for specific performance of the contract. As the suit came to be dismissed for default, under Order 9 Rule 8 C.P.C. on 5.1.2010, the petitioner was constrained to file this application.

6] As per the case of the petitioner, he was suffering from the disease known as "P.V.O" (I. Enfluenza) that is Strong Viral Fever from 1.1.2010 to 10.1.2010. Therefore, he could not remain present in the trial Court when the suit was called for hearing and hence there was sufficient cause to set aside the order of dismissal of the suit for

default and for restoration of the same to the original file.

7] This application was strongly resisted by the respondent contending inter alia that the petitioner was absent not only on the date when the suit came to be dismissed for default, but even prior thereto on several dates during the trial of the suit. Hence, ultimately the trial Court had no option but to dismiss the suit. It was contended that the reason given by the petitioner for his absence in the Court on 5.1.2010 is false and manipulated, it cannot be considered as sufficient cause and therefore, his application was liable to be dismissed.

8] In support of his application, petitioner has examined himself and on appreciation of his evidence, the trial Court was pleased to hold that the medical certificate, on which the petitioner has relied upon to prove that he was prevented by sufficient cause from attending the Court on the date when the suit came to be dismissed for default, has not been properly proved by examining the Medical Professional, who has issued it to him. Hence the trial Court was of the opinion that in the absence of sufficient cause being made out, the suit cannot be restored to its original file.

9] When the petitioner has taken this matter to the Appellate Court, the Appellate Court also came to the conclusion that the petitioner's cross examination clearly goes to show that he had

knowledge about the date of the dismissal of the suit as well as previous dates. In spite of it, he was not diligent in remaining present during the trial of the suit. The Roznama of the suit indicates that in spite of the absence of the petitioner, dates were given by the trial Court, but ultimately the trial Court had no option than to dismiss the suit and hence the Appellate Court held that ground of sickness on the face of medical certificate cannot be said to be sufficient cause. The Appellate Court, therefore, refused to interfere in the impugned order passed by the trial Court and accordingly dismissed the appeal.

10] Against this concurrent finding of the fact recorded by the trial Court and the Appellate Court on appreciation of evidence of the petitioner which was led to prove the sufficient cause, the petitioner has approached this Court. Needless to state that, unless it is shown that the order of the trial Court or the Appellate Court suffers from perversity, this Court cannot interfere in the finding of fact arrived at by the trial Court and confirmed by the Appellate Court. On this aspect, it can be seen from the Roznama and as per the observations made by the trial Court and Appellate Court also, on number of dates, though the matter was appearing before the trial Court for evidence, the petitioner has remained absent and as a result, ultimately the trial Court was constrained to dismiss the suit for default. The trial Court has specifically given the date for filing evidence affidavit, but

neither the petitioner nor his advocate remained present and in view thereof, the order of dismissal of the suit for default came to be passed.

11] In this back-ground, if cross examination of the petitioner is considered, he has given some material admissions therein, by stating that he was very much aware of the previous dates and also the date on which the suit came to be dismissed. He has also admitted that he has not informed about his alleged sickness on 5.1.2010 to his advocate. He has admitted that he will not be examining his Doctor, who has issued the said certificate. According to his evidence, on the instructions of his advocate, he has gone to the Doctor and brought the medical certificate. He has further admitted that he has not preserved the prescription, which according to him, was given to him by his Doctor. Further, he has admitted that he has initially engaged Adv. Shinde, thereafter he has taken the case papers from Adv. Shinde and given to Adv. Hartalkar, he does not remember as to who was the advocate, representing him when the suit came to be dismissed for default.

12] Even a cursory glance to petitioner's cross examination is, thus, more than sufficient to show that through-out the proceeding, his approach was of thorough negligence, casual to the extent of being called as callous. Even in the prosecution of this

application for restoration of the suit, he has not been careful to examine the Doctor, who has issued the medical certificate. Unless the Doctor, who has issued the certificate is examined, the contents of certificate cannot be said to be proved to hold that the petitioner was prevented on account of his illness to attend the trial Court on that date. It is pertinent to note that petitioner has also not informed to his advocate that he was suffering from Strong Viral Fever and therefore, he was unable to attend the Court. Thus, the petitioner was careless and negligent in prosecuting the suit and therefore, now he cannot contend that the trial Court should have granted one more opportunity to him by restoration of the suit, especially in the facts of the present case.

13] The submission of learned counsel for the petitioner is that this Court should consider only the date on which due to absence of the petitioner, the suit came to be dismissed for default. According to him, the absence of petitioner on previous dates is not of relevance. To substantiate his submission, learned counsel for the petitioner has relied upon the judgment of Apex Court, in the case of *G.P. Srivastava -vs- R.K. Raizada and ors*¹; wherein in paragraph No.7, the Apex Court was pleased to observe as follows :-

1 (2000) 3 SCC 54

“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 penalized 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”.

14] According to learned counsel for the petitioner if expression “sufficient cause”, as held by the Hon’ble Supreme Court, is required to be construed liberally and it also has relevance only to the date on which the matter came to be dismissed for default on account of his absence, then in the present case, according to learned counsel for the petitioner, petitioner has given sufficient explanation for his absence on 5.1.2010, when the suit came to be dismissed for default, and there is no reason as to why his evidence that he was suffering from Strong Viral Fever should be disbelieved. It is urged that his earlier absence from the Court should not have any relevance while considering “sufficient cause”.

15] In my considered view, even if the expression, “sufficient cause”, has to be construed liberally and is to be confined to that particular date only, the question is whether the petitioner in this case has given sufficient cause for his absence on 5.1.2010, the particular date when the suit came to be dismissed for default? The only explanation offered by him is that he was suffering from Strong Viral Fever. However, he has not supported that cause by proving medical certificate, through examination of the Doctor who has issued the said certificate. There is also no other corroborating

material like the prescription or even the evidence of any other family members, to show that he was prevented on account of his illness from attending the Court. Conversely, according to him, at the instance of his advocate, he has gone to the Doctor and brought this certificate. It is also not his case that he was bed-ridden or even unable to inform his advocate on phone. He even does not know who was his advocate at the relevant time. Why he did not take this much care? He has not bothered to inform his advocate about his illness. All these questions, have remained unanswered clearly leading to the inference that the reason given by him is not genuine but manipulated and created at the instance of his advocate to get the suit restored. Hence, in view of the admissions given by the petitioner in the cross examination, in my opinion, this judgment of the Apex Court, cannot be of any help to the petitioner.

16] In this respect learned counsel for respondent has also relied upon the judgment of Apex Court in the case of *Esha Bhattacharjee -vs- Managing Committee of Raghunathpur Nafar Academy and ors* [(2013) 12 SCC 649]; wherein in paragraph No.21 the Hon'ble Supreme Court has considered various principles that can broadly be culled out, while condoning the delay and for that purpose interpreted the term, "sufficient cause". In para No.21.4 one of the principle laid down is that no presumption can be attached to

deliberate causation of delay, but gross negligence on the part of counsel or the litigant is to be taken note of. In para No.21.5 it is further held that, lack of bonafides imputable to a party seeking condonation of delay is a significant and relevant fact. In para 21.7, it was held that the concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play. In para 21.9, it was held that the conduct, behaviour and attitude of party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

17] Here in the case, the conduct of the petitioner, as stated and described above, clearly goes to prove his inaction and negligence on all the aspects. In such circumstances, therefore, he cannot be entitled for the liberal approach, which is required to be adopted by the Court, normally in such cases. Hence, though it is true that the Court has to give utmost latitude and it's approach is to ensure that substantive cause of justice does not suffer, however, in this case, such liberal attitude is not justified as it may result into miscarriage of justice.

18] Though learned counsel for the petitioner has relied upon

the judgment of this Court in the case of *Bennett Coleman and Co. Ltd. And anr -vs- Jamshed Kwasjee Vakeel and others*, [2003 1 Bom LR 712], the facts of the said case go to show that, in that case the first plaintiff had to leave India on 8.10.2003 and could not remain present, nor instruct anybody to remain present on his behalf on 9.10.2003. In view thereof, it was held that there was sufficient cause for his non appearance on the date fixed and hence there was requisite ground for restoration of the suit. Here in the case, no such sufficient reason is made out for the absence of petitioner either on that date or on any of the previous dates.

19] As regards the judgment of Punjab and Haryana High-Court, in the case of *Wattu -vs- Jaimal* [2002 0 AIHC 1110], relied upon by the learned counsel for the petitioner, the facts of the said case also show that in that case, the plaintiff was very much present in the Court room and he had gone to fetch his counsel, when case was called. However, before his advocate could come to the Court, suit came to be dismissed for default. Hence it was held that there was sufficient cause for restoration of the suit. In the present case, the petitioner was not at all present in the court either on any of the earlier dates or on the date when the suit came to be dismissed for default. The conduct of the petitioner herein, therefore, does not justify any latitude to be given.

20] At this stage, it may also be stated that order of trial Court, which is challenged by the petitioner by preferring Writ Petition No. 12360 of 2017, is again challenged by his Power of Attorney Holder, by filing another Writ Petition No.13940 of 2017. This fact was brought to the notice of this Court, by learned counsel for respondent, and not by the petitioner. The second Writ Petition is preferred through another advocate through Power of Attorney. This is clearly an abuse of process of law. Hence on this ground also, the bonafides of the petitioner are seriously in question. Such a litigant who tries to misguide the Court process cannot be entitled to latitude, liberal or benevolent approach of the Court.

21] The impugned order passed by the trial court and confirmed by the Appellate Court, hence does not call for any interference. Therefore, both these writ petitions stand dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]