

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

WRIT PETITION NO. 7213 OF 2018

1. Umar Abdul Majid Khan ...Petitioners
R/a. At Suraj Apartment, 3rd Floor,
Mahagiri, Thane (w) 400 601.

2. Abdul Malik Shaikh
Residing at New Thane Bakery,
Mahagiri Jumma Masjid
Near Anjuman Khairul Islam
Urdu High School, Mahagiri,
Thane (W) – 400 601.

Versus

1. Parvez Nariman Dhatigara ...Respondents
2. Eric Nariman Dhatigara
Both adults residing at 6/13,
Jumma Masjid Lane, Choudhari
Mohalla, Kalyan (w) – 421 301,
District Thane.

Mr.Rajesh S. Datar for the petitioner.
Mr.Santosh S. Kyadiguppi i/b. Ms.Smita Kalhe & Ms.Sheetal Mhatre
for respondent nos.1 and 2.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 26th AUGUST 2019

JUDGMENT :

Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. The 1st petitioner is the original tenant, and the 2nd petitioner

the alleged sub-tenant. The respondents 1 and 2 are the landlords. Indeed, the second petitioner's status is disputed for the landlords maintain that he is an illegal sub-lessee. Only for the ease of reference do I prefer to refer to both the petitioners as tenants, instead of tenant and sub-tenant. That compendious reference should not prejudice the landlords, and their plea on sub-letting remains intact, though.

3. In October 2010, the landlords sued the tenants on the grounds of subletting and arrears of rent. The tenants were served the suit summons in November 2010. Later, on 26th November 2011, an advocate appeared before the trial Court and undertook to file a vakalatnama for the tenants. But he did not file any. In July 2012, the trial Court decreed the suit *ex parte*.

4. Then, on 25th September 2012, the tenants applied under Order 9 Rule 13 to have the *ex parte* decree set aside. As there was a delay of 34 days, they also applied under Section 5 of the Limitation Act, to have the delay condoned.

5. The trial Court first took up the delay condonation application and dismissed it in October 2013. Aggrieved, the tenants filed Writ Petition No.1189 of 2013. This Court, through its order dated 5th March 2014, allowed the writ petition: it condoned the delay. In that backdrop, the trial Court took up the tenants' application under Order 9 Rule 13. In that application, the tenants led evidence, but the trial Court, through its order dated 23rd August 2016, refused to set aside the *ex parte* decree.

6. Aggrieved, the tenants filed Miscellaneous Application No.240 of 2016, before the District Court. The Appellate Court, too,

through its order dated 3rd April 2018, refused to interfere. Then, the tenants have filed this Writ Petition.

Submissions:

Petitioners':

7. Shri Rajesh Datar, the learned counsel for the tenants, has submitted that the tenants as the defendants had been diligent throughout. To elaborate on this assertion, he has submitted that as soon as the tenants received the suit summons, they engaged a counsel. But unfortunately, the counsel failed to represent them before the trial Court. In fact, he has not even filed the vakalat. By the time the tenants came to know about the *ex parte* decree, there occurred a delay of 34 days. And, that delay already stood condoned by this Court.

8. Shri Datar has a two-fold contention. To begin with, the first tenant has been physically challenged, and that fact stands medically established. According to him, the first tenant's disability is 40%. As he had been visiting the doctor continually, he could not pay attention to the pending suit. Besides, both the tenants in good faith believed that the counsel they engaged had been prosecuting the matter. Second, the cause for the tenants' absence before the trial Court (as explained in the application under Order 9, Rule 13 of CPC), and that for the delay in applying for having the *ex parte* decree set aside (as explained in the application under Section 5 of Limitation Act) are the same. This Court, while condoning the delay, has accepted the tenants' explanation. It has also observed that the same explanation amounts to sufficient cause for the tenants' absence before the trial Court. So the trial Court should not have taken a contrary stand. To support his

contention, Shri Datar relies on *Prahlad Singh v. Col. Sukhdev Singh*¹.

Respondents:

9. On the contrary, Shri Santosh Kyadiguppi, the learned counsel for the landlords, has submitted that the judgment the tenants' counsel has relied on is clearly distinguishable. Besides, Shri Kyadiguppi has also submitted that in an application under Section 5 of the Limitation Act, which this Court allowed, the explanation concerned only the delay post-decree. Therefore, this Court's order only confined itself to the delay of 34 days. On the other hand, the application under Order 9, Rule 13 CPC must explain the delay pre-decree: why the tenants did not prosecute their case. So this Court's observations, if any, on the tenants' conduct pre-decree are gratuitous and cannot be taken as *res judicata*.

10. Shri Kyadiguppi has taken me through the record to emphasize that the petitioners filed the documentary evidence in their application under Order 9 Rule 13, besides leading oral evidence. But both the courts below concurrently disbelieved the first tenant's version about his failure to prosecute the case. He has also submitted that the courts below noted the fact that the first tenant had allegedly been visiting the Doctor at a far-off place. And it had also concluded that the first tenant could have, by the same reckoning, visited the court, at a shorter distance.

11. Mere bald assertions and blame-game involving the counsel, Shri Kyadiguppi stresses, will not help the tenants in any manner. That is, the petitioners' blaming their counsel, who never came on record

¹ (1987) 1 Supreme Court Cases 727

would not absolve them of their latches. Therefore, in the end, Shri Kyadiguppi has urged this Court not to interfere with the concurrent findings on an interlocutory application. To support his contention, he has relied on *J. H. Industrial Corporation v. Vijendra Kumar Goel*². According to him, that judgment of the Calcutta High Court accords on all fours with this case.

12. Heard Shri Rajesh Datar for the petitioner and Shri Santosh Kyadiguppi for respondent nos.1 and 2.

Discussion:

13. The petitioners are the tenants; of course, the second petitioner is alleged to be a sub-tenant. That controversy does not concern us, for it is a matter of merit; but we are at an interlocutory stage. In a suit for eviction, the tenants were summoned to defend themselves.

14. In response to those summonses, a counsel appeared for the tenants before the trial Court and represented that he had the instructions from them to appear on their behalf. He offered to file vakalatnama soon. Thereafter, nothing happened. The tenants, as the defendants, remained unrepresented before the trial Court. After waiting for about nine months, the trial Court decreed the suit. Then, the tenants applied under Order 9 Rule 13 of CPC to have that *ex parte* decree set aside. But, by then, there was a delay of 34 days. So, the tenants also applied under Section 5 of the Limitation Act, to have that delay condoned.

15. The trial Court refused to condone the delay of 34 days.

Their application under Section 5 of the Limitation Act dismissed, the tenants filed Writ Petition No.11589 of 2013. Through its order dated 5th March 2014, this Court condoned the delay. It has, in that process, observed that “the petitioners have acted diligently and with sufficient speed after learning about the *ex parte* decree against them on 11th September 2012”. About the tenants’ justification, for their not prosecuting the case when it was pending, this Court has also observed that “soon after receipt of the summons in the suit, [petitioners] engaged a lawyer to represent them and signed vakalatnama in his favour. After signing the vakalatnama in favour of an advocate, the petitioners reasonably expected him to attend to the matter”. Thus observing, this Court concluded that the petitioners made out a reasonable cause for having the delay condoned.

16. Then, the trial Court took up the tenants’ application under Order 9, Rule 13 of CPC. The tenants led evidence. Unimpressed, the trial Court dismissed the application. So did the Appellate Bench of the Small Cause Court. The tenants’ substantial contention is that this Court had condoned the delay under Section 5 of the Limitation Act. So the courts below ought to have adopted the same yardstick and allowed their application under Order 9, Rule 13.

17. The tenants’ have relied on *Prahlad Singh*. Let us examine it. The landlord in that case sued the tenant for eviction, on the grounds of rent-default. On the first hearing day, the tenant deposited some amount, said to be the arrears of rent. In the written statement, the tenant also took the stand that he had paid rent for the remaining months, too. Later, the tenant absented himself; so the trial court

decreed the suit *ex parte*. Then, the tenant filed a petition to have the *ex parte* decree set aside. He pleaded that the landlord had met him one day and told him that he would withdraw the eviction case. The landlord is also said to have received the cheques from him towards rent. Only because of that did the tenant not appear before the court for he had believed the landlord in good faith.

18. The trial court concluded that the tenant acted on the landlord's misrepresentation and did not attend the court. So the court found it sufficient ground; it set aside the *ex parte* decree. After it set aside the decree, the trial court once again, on merits, ordered the eviction on the ground of default. The appellate authority and the High Court, too, confirmed the order of eviction. The tenant's plea that the eviction petition should not have survived was disregarded.

19. In that factual background, *Prahlad Singh* has observed that in the proceeding to set aside an *ex parte* order, the trial court recorded an express finding that the landlord had agreed to withdraw the suit and receive the rent from the tenant. That was a finding binding on the landlord at later stages of the proceeding. He could have questioned the finding before the appellate authority and the High Court, in the appeals preferred by the tenant. He did not do so. In other words, *Prahlad Singh* has held the trial court's earlier observations to be non-interlocutory.

20. On the other hand, Shri Kyadiguppi, the counsel for the landlords, has submitted that the reasonable cause shown in an application under Section 5 of the Limitation Act by the petitioners varies from that shown in the application under Order 9 Rule 13. This

Court's observation in the order dated 5th March 2014, according to him, will bind the courts below only to the extent of post-decretal delay. The remaining observations, he stresses, are *obiter dicta*.

21. We need not get into that thicket of precedential controversy—that is, about the binding nature of this Court's observation in its order dated 5th March 2014. Granted, those observations were made in the context of an application under Section 5 of the Limitation Act. I reckon whether those observations are gratuitous, or *obiter dicta*, or binding is besides the point. Independent of those observations, I may examine this petition on merits.

22. First, we cannot lose sight of the fact the petition is under Article 227 of the Constitution of India; second, the challenge is against the concurrent findings. Yet the impugned order has resulted in non-suited the parties to a lis; that is, they were made to suffer a decree on the grounds of their not prosecuting the case, rather than on merits. Adjudication on merits is the norm and adjudication on technicalities, such as *ex parte* proceedings, is an exception. Unless the conduct of the party non-suited is gross, bordering on apathy, usually the courts let the parties have the judgment on the merit of their cause.

23. Indeed, the tenants have led evidence before the trial Court to support their contention about their inability to appear before the Court when the case was pending. But both the courts below disbelieved their plea.

24. If we examine the tenants' efforts before the trial Court, the first tenant submitted a medical certificate showing his physical disability at 40%. That said, it has also noticed that the first petitioner's

assertion that he had been visiting his doctor at some other place. According to the Appellate Court, a person capable of travelling to another corner of the City to see his doctor could have travelled to the trial court as well. For the trial Court was noticed to be nearer to his house than the hospital. I am afraid the courts below have taken too literal or too technical an approach to a problem of illness.

25. Let us consider the second petitioner's role. He has, as seen from the record, faces the allegations of being a sublessee. Essentially, his legitimacy depends on what the first petitioner pleads. He has no independent defence, except toeing the first petitioner's line. He has, *prima facie*, no privity of contract with the landlords. Therefore, his passive role in the proceedings may not be fatal. In other words, his not supplying an independent explanation why he could not prosecute the case matters little.

26. Time and time again, courts have asserted that the best course in any litigation is to adjudicate the lis on merits; exceptions are when the cases are allowed or dismissed on technicalities. To be non-suited, a party must lack *bona fides*, and his conduct should border on indifferent disregard for the judicial directives or procedural requirements.

27. Besides that, in any application for setting aside the *ex parte* decree, the lapse of time ought to be inordinate, and that must have given rise to, say, a third-party interest. Besides, the courts may also consider the relative hardship.

28. As I set out above, the tenants' conduct can be termed neither callous nor contumacious. Nor does it border on sheer apathy.

True, they did allege that their counsel had to be blamed for their debacle. Yet they have failed to convince the courts below on that count. It is perhaps a bald allegation, but the totality of circumstances does establish that the first petitioner has been under a physical disability that required treatment. He may have been travelling to a place farther than the trial Court, but it is a question of priorities. A person will readily brave hardship and physical discomfort when faced with illness. I wonder whether we can apply the same standard vis-à-vis the civil court proceedings he may have called upon to answer. Survival trumps everything else.

29. Nor can the respondents assert that the delay was inordinate and that, in the meanwhile, they had certain indefeasible right accrued to them. I reckon it is nobody's case that the delay has engendered any third party interest, either. So, to balance the interests of the competing parties to the lis, and to compensate the parties who successfully secured a decree and who now have to face a roll-back, the petitioner-defendants can be put on terms. And, then, it only results in one thing: the dispute getting decided on the merits.

30. Therefore, I set aside the impugned order, dated 3rd April 2018, subject to these conditions:

- (i) The petitioners must directly pay, in sixty days from today, to the respondents the entire arrears of rent, accumulated to this date, after excluding any amount so far they have paid before this Court or the Courts below.
- (ii) The respondents may withdraw the amount, if any,

the petitioners deposited with this Court or the Courts below.

- (iii) This Court's direction about the petitioners' paying the arrears of rent does not prejudice the respondents' claim of the alleged default the petitioners committed.
- (iv) The petitioners, as the defendants in the suit, shall not seek any adjournment except those granted by the trial Court for its own convenience.
- (v) The trial Court will make every endeavour to dispose of the suit expeditiously, if possible, in one year.
- (vi) To recompense, the petitioners will pay Rs.15,000/- as costs to the respondents in two weeks from the day this judgment is uploaded.

[DAMA SESHADRI NAIDU, J.]