

05 **04.10.
2021**
Ct. No. 09

Ab

FMAT 276 of 2021
With
IA No. CAN 1 of 2021

Shyamlal Sukul
Vs.
Muklal Sukul and others.

Mr. Mainak Bose,
Mr. Gautam Das.

... for the appellant.

Mr. Gautam Misra.

... for the respondent no. 1.

The present appeal arises from order no. 50 dated 8th March 2021 passed by the learned Civil Judge (Senior Division), First Court, Hooghly in Miscellaneous Case No. 64 of 2015, by which an application under Order IX Rule 13 of the Code of Civil Procedure filed by the defendant no. 1/appellant for setting aside the final decree passed ex parte, is rejected.

At the time of taking up this matter on 29th September 2021, we felt that the point involved in the instant appeal being the pure question of law can be conveniently decided in presence of the other side and, therefore, we directed the appellant to serve a copy of the Memorandum of Appeal as well as the application upon the respondent no. 1.

Today, when the matter is taken up, Mr. Gautam Misra, learned Advocate, who earlier lodged caveat, appeared on behalf of the respondent no. 1. It appears that the respondent no. 1 is the main contesting party, as he has instituted the suit for partition and the other respondents are the co-defendants and have been arraigned as proforma defendants in the instant appeal. We, thus, dispense with the service upon the proforma

defendants, as they are not the persons to be prejudiced by an order, which will be passed in the instant appeal.

The point, which emerged in course of hearing, is whether the Court can take into the earlier events or the conduct of the defendants prior to the date of passing the final decree as a point of seminal consideration in determining the application under Order IX Rule 13 of the Code.

Before we proceed to deal with the points enumerated herein above, the undisputed facts are required to be adumbrated for the purpose of clarity and the better understanding of the issues involved herein.

Admittedly, the plaintiff/respondent no. 1 filed a suit for partition against the appellant and the proforma respondents for separation of shares in respect of the joint properties. The said suit was decreed in preliminary form on contest and the present appellant has challenged the said preliminary decree before the appellate forum. Ultimately, he could not succeed before the appellate forum. Thereafter, the ball rolled before the trial court in pursuit of the final decree. The Partition Commissioner was appointed and the report was filed before the trial court. Subsequently, the matter was fixed on 24th November, 2014 for passing a final decree. The trial court accepted the report filed by the Partition Commissioner and passed the final decree in the said suit.

Subsequently, the appellant filed an application under Order IX Rule 13 of the Code for setting aside the said final decree having passed ex parte. By the impugned order, the said application was dismissed by the trial court with the following findings:

“From the materials on case record, it appears that the preliminary decree in the original title suit no. 339/2005 was passed on contest. The

petitioner was present and was contesting the suit even after preliminary decree till 12.09.2012. The defendant had adopted dilatory tactics and there is lack of bonafide intention. The petitioner can not give any satisfactory answer as to why he did not take any step at the time of hearing for appointing partition commissioner. No step was taken on behalf of the petitioner/defendant stating the reasons for his non appearance on that date. The petitioner had knowledge and sufficient time to enable him to appear.

Under such circumstances, in my view the petitioner has failed to prove that he was prevented by any sufficient cause to appear before court.”

The point evolved in the instant appeal, as indicated above, is raised and required to be determined without venturing to follow the other procedures required under the Appellate Side Rules. The Order IX Rule 13 of the Code postulates thus:

“O. IX R. 13. Setting aside decree ex parte against defendants.-In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to cost, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a 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 defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]

[Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has

withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree.]”

On meaningful reading of the aforesaid provision, what is discernable therefrom that it contemplates two situations; firstly, the ex parte decree can be set aside, if the defendant satisfies the court that the summon was not duly served and, secondly, if he satisfies the court that he was prevented by sufficient cause from appearing when the suit was called on for hearing, the ex parte decree or order can be set aside. However, the second proviso restricts the first eventuality and the ex parte decree cannot be set aside if the court is satisfied that there has been an irregularity in the service of summons.

The instant case does not involve the first eventuality; rather based on second eventuality pertaining to the non-appearance on the day when the suit was fixed for passing the final decree. The language used in the Order IX Rule 13 of the Code is explicit, clear and vividly reflects the mind of the maker of law that the pivotal date would be the date on which the ex parte decree or order is passed and impliedly rules out the conduct or action of the defendant prior thereto.

The aforesaid point is fructified by a Division Bench judgement of this Court rendered in case of **Aloke Kumar Dey vs. Ashoke Kumar Dey** (FMA 427 of 1999, decided on 7th December, 2007), wherein it is held that the court shall not embark its journey on an event happened at the anterior date but must confine its scrutiny in ascertaining the sufficient cause on the day when the ex parte order/decreed is passed in these words:

“The ratio of the aforesaid decision is squarely

applicable in the facts and circumstances of the instant case, in as much as, the learned Court below while rejecting the petition under Order 9 Rule 13 C.P.C. took into consideration the circumstances prevailing prior to the date of non-appearance.”

The Division Bench took note of the judgement of the Supreme Court rendered in case of **G.P. Srivastava vs. R. K. Raizada & Ors.**, reported in **(2000) 3 SCC 54**, wherein the Apex Court held:

“7. Under Order 9 Rule 13 CPC 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 the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a 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 were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the 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.”

In a recent judgement rendered in case of **A. Murugesan vs. Jamuna Rani**, reported in **(2019) 20 SCC 803**, the court reiterated and restated the law enunciated in the earlier judgement delivered in **G.P. Srivastava (supra)** in the following:

“10. From a perusal of the order of the trial court, it is clear that the trial court has taken into consideration the past conduct of the appellant-defendant in the suit, instead of confining the consideration as to whether the appellant has shown sufficient cause or not for not appearing in the matter on 16-3-2009. It is fairly well settled that when an application is filed for setting aside ex parte decree under Order 9 Rule 13 CPC, the only aspect which is required to be considered is whether any sufficient cause is shown for absence in the matter when the matter was called. Without recording the specific finding, on the plea of the appellant that there was sufficient cause, the trial court has committed error in rejecting the application under Order 9 Rule 13 CPC. Even the appellate and the Revisional Court have not considered the matter in proper perspective and rejected the claim of the appellant. The judgment in G.P. Srivastava supports the case of the appellant. In the aforesaid judgment, the very issue had fallen for consideration before this Court. The relevant Para 7 reads as under: (SCC p. 57)

“7. Under Order 9 Rule 13 CPC 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 the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no

hard-and-fast guidelines can be prescribed. The courts have a 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 were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the 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.”

In view of the exposition of law expounded in the above noted decisions, it leaves no room for any ambiguity that the past conduct or a past incident or the event happened prior to the date on which the ex parte order/decreed is passed, cannot be taken into consideration in ascertaining the sufficiency of the cause shown for non-appearance on such date. What is *sine qua non* in terms of the relevant provision of the statute as well as the above noted decisions is the explanation offered by the defendant for his non-appearance on the date of passing the ex parte order/decreed and if the court is satisfied that the defendant was prevented by sufficient cause **on that day**, it is imperative on the court to set aside the ex parte order/decreed and permit the defendant to appear and contest the proceeding.

The learned Judge should not be swayed by the happening of the earlier events, but must travel within the peripheral of the date he passed the ex parte

order/decreed and the reasons must also travel on the circumference thereof. The extraneous factors unrelated or unconnected with the fateful day cannot be a ground to reject the application for setting aside the ex parte decree, as they cannot be considered as lapses or negligence attributable to the conduct of the defendant on the said fateful day.

We are not unmindful of the settled proposition of law that mere non-appearance on a date of hearing when the ex parte order or decree is passed, is not sufficient to get away with it unless the defendant shows and satisfies the conscience of the Court that he was prevented by sufficient reasons. The sufficiency of cause is the only factor, which has to be judged objectively and not subjectively. The discretion lies with the learned Judge in judging the sufficient cause, as no hard and fast rule can be laid down for these having dependent upon varied circumstances.

In the impugned order, there is no reflection that the explanation offered by the appellant for his non-appearance on the date when the final decree was passed ex parte, i.e. 24th November, 2014 and the entire judgement is founded upon the event happened anterior to the said date. Since the entire approach of the trial court in dealing with the application under Order IX Rule 13 of the Code is not in consonance with the provisions contained under Order IX Rule 13 of the Code, we had no option but to set aside the said order, which we hereby do.

The order impugned is hereby set aside.

The trial court is directed to rehear the application under Order IX Rule 13 of the Code filed by the appellant after giving an opportunity of hearing to the plaintiff/respondent no. 1 or any contested parties and shall dispose of the same within three weeks from the

date of reopening of this court following Puja Vacation.

The time limit given herein above is peremptory and mandatory.

All the contesting parties including their respective Counsels are directed to co-operate with the trial court in adhering the time limit and shall not ask for unnecessary adjournments except under unavoidable circumstances.

The appeal is, thus, allowed.

In view of the disposal of the appeal, the connected application being CAN 1 of 2021 has become infructuous and the same is also disposed of.

(Harish Tandon, J.)

(Bibek Chaudhuri, J.)