

09    22.02.2021

Ct. No. 02

ab

**F.M.A.T. 1321 of 2019**

**With**

**CAN 1 of 2019 (Old No. CAN 12354 of 2019)**

***Kabra Marble Corporation & Anr.***

***Vs.***

***Sudipto Mukerjee & Anr.***

-----

**Mr. Haradhan Banerjee,**

**Mr. P.P. Mukhopadhyay.**

**... for the appellants.**

It is no doubt true that the respondents have suffered because of the conduct and attitude of the appellants surfaced in course of the proceeding before the Trial Court. At the first blush, we thought that such recalcitrant litigant should not be shown any leniency, but after pondering upon the facts emanate from the record, we feel that he should be allowed to be heard and the matter should be decided without being swayed by emotions but purely on the proposition of law.

Undoubtedly a suit for eviction filed way back in the year 2008 was lingered on for a pretty long time until the same was decreed ex parte against the appellants. An application for setting aside the ex parte decree was taken out, which was eventually allowed and the suit was restored to its original file and number. In spite of having blessed with the restoration of the suit upon setting aside the ex parte decree the appellants did not show any diligence in proceeding with the said suit, which was again decreed ex parte.

For the purpose of record we hereby make it clear that the execution proceeding is pending in the

docket of the Court and the reality is that the possession has not been recovered. Another application for setting aside the ex parte decree was filed, which was again pending for a long time which constrained the respondents to approach this Court under Article 227 of the Constitution of India for a direction to dispose of the same expeditiously.

The revisional application so registered on the basis of the said application was disposed of directing the proceeding under Order IX Rule 13 of the Code of Civil Procedure to be disposed of within three months. There was further delay in disposal of the said application, as adjournment was sought for on the ground that the file containing all the relevant documents are lying with an Advocate appearing in the High Court. Ultimately the Trial Court fixed the date for evidence on 6<sup>th</sup> July 2019.

An adjournment petition was filed on the ground that the papers could not be collected from the learned Advocate, which was eventually dismissed by the Trial Court; as a result whereof the application under Order IX Rule 13 of the Code was dismissed for default. Subsequently another application under Order IX Rule 9 of the Code was filed which gave rise to the registration of Miscellaneous Case No. 92 of 2019 for restoration of the Miscellaneous Case No. 119 of 2017 registered on an application under Order IX Rule 13 of the Code.

It has been contended in the said application that the person, who was looking after the said legal proceeding, suddenly fell sick on 30<sup>th</sup> June, 2019 and was advised by attending Doctor to take rest till 10<sup>th</sup>

July, 2019. The medical certificate was also produced in support of the aforesaid averments for the purpose of showing sufficient cause for non-appearance on the said fateful day.

The opposite parties contested the said application taking multiple grounds including that the appellants are in habit of adopting dilatory tactics and do not want the decree to be executed or passed. It is further contended that the adjournment petition filed does not reflect any illness and, therefore, the story made out in the said application under Order IX Rule 9 of the Code is concocted and manufactured for such purposes. Apart from the same it is further stated in the objection that the appellants have not complied with the order passed by the High Court concerning the deposit of the occupational charges and are merrily enjoying the decretal property making huge profit therefrom.

The plaintiffs cited two witnesses. The second witness happens to be the medical practitioner, who proved the medical certificate issued by him. It is categorically stated in the deposition by the said second witness that the person, who was looking after the case, was under his treatment for such a period and he advised him to take bed rest.

The Trial Court disbelieved the medical certificate issued by the second witness, which was not supported by any incidental documents viz. prescription and the medicine advised to have been administered for such ailment. The Trial Court has further taken into account the past conduct of the appellants and held that the cause shown is not

sufficient so as to invite the Court to exercise discretion in their favour.

Mr. Haradhan Banerjee, learned Advocate appearing for the appellants, challenges the impugned order firstly on the ground that once the medical practitioner has himself deposed and proved the medical certificate, there was no reason to disbelieve such a noble person. Mr. Banerjee further submits that the past conduct should not be looked into for the purpose of finding out the sufficient cause under Order IX Rule 9 of the Code and the Court should confine its scrutiny to the cause for non-appearance on the date when the proceeding was dismissed for default.

On the other hand, the learned Advocate for the respondents opposes the instant appeal and contended that this is second round of litigation at the instance of the errant litigant, who was once blessed with the order setting aside the ex parte decree. It is vehemently submitted that the appellants have engineered tactics in allowing the suit to be decreed ex parte and then protracted the same by a supplemental proceeding so that the decree is not executed. It is further submitted that the appellants have not complied with the order passed by this Court in the revisional application for deposit of the occupational charges and are merrily enjoying the same.

On the conspectus of the aforesaid facts emanating from the record and the submissions so advanced, the question, which requires consideration before us, is whether the past conduct of the litigant can be a sole factor for ascertaining sufficient cause under Order IX Rule 9 of the Code.

Indubitably, the conduct of the appellants is reprimandable and the protraction of the litigation can be visible from the facts narrated hereinbefore. It is no doubt true that the suit for eviction of a tenant stood decreed ex parte twice. On the first occasion the appellants were successful in getting the ex parte decree set aside, but even thereafter the same was decreed ex parte, as the appellants did not appear on the date when the suit was fixed for such purpose.

Does those facts are relevant factors in deciding an application under Order IX Rule 9 of the Code is a question, which we feel need to be addressed.

The language employed in Order IX Rule 9 of the Code can be manifestly seen that the plaintiff may apply for an order to set aside the dismissal provided he satisfies the Court that he was prevented by sufficient cause for non-appearance when the suit was called for hearing. It is no gainsaying that unless the cause is found to be sufficient a litigant should not succeed. The expression “sufficient cause” is not only subjective but also to be seen objectively. The word “sufficient” prefixing the word “cause” must receive its proper meaning and interpretation in a given case and cannot be squeezed within a straitjacket formula. There cannot be any hard and fast rule for interpreting the expression “sufficient cause” appearing in the said provision and, therefore, depends upon various factors.

In order to ascertain sufficient cause the consideration must be made on the date when the suit was called on for hearing. If the litigant has shown the cause, which is sufficient for a day when the proceeding was dismissed, we do not find any

impediment on the part of the Court to allow the application setting aside the order of dismissal.

The learned Judge in the Trial Court have segregated the words appearing in the said provision and the stress appears to have been made on the sufficiency of the cause, which must be relatable to the date when the suit was called on for hearing and not prior thereto. The support can be lend in this regard to a judgement of the Apex Court in case of *G.P. Srivastava vs. R. K. Raizada & Ors.* reported in (2000) 3 SCC 54, wherein it is held:

*“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.”

*(emphasis supplied)*

It is axiomatic to record that the sufficient cause must be referable to a date on which the suit was called on for hearing and dismissed for default and not the date anterior thereto. If the litigant has shown sufficient cause which prevented him to appear on the date when the suit or proceeding was dismissed for default, there is no occasion on the part of the Court to consider the past conduct and negate the relief despite the cause for non-appearance on such fateful day having found sufficient.

This part of the observations of the Trial Court cannot be supported as it travels counter to the ratio laid down in the judgement of the Apex Court rendered in *G.P. Srivastava (supra)*.

So far as the believe and disbelieve of the medical certificate issued by the medical practitioner is concerned, we find that the approach of the Trial Court appears to be too technical. The medical practitioner himself deposed and proved the medical certificate, meaning thereby the ailment suffered by the person, who was under his treatment. In absence of any prescription or administration of medicine for such treatment, such evidence should not be disregarded. Furthermore, the respondents had an opportunity to cross-examine the second witness, which, in fact, had been done, and if nothing can be culled out adversely the approach of the Trial Court in disbelieving the veracity, genuinity and authenticity of the medical certificate cannot be accepted.

Though we find that the approach of the Trial Court is hyper-technical having stretched to the past conduct, which is contrary to the provisions of Order IX Rule 9 of the Code, yet for the purpose of compensating the respondents, who suffered because of such lackadaisical attitude, it is a fit case where the Court should impose costs. The past conduct may be relevant for the purpose of quantifying the costs in order to bring the equilibrium to the rights of the parties. There is a variance in the statements made in the adjournment petition on the said fateful day and the facts pleaded in an application under Order IX Rule 9 of the Code.

We, therefore, feel that it is a fit case where an exemplary costs of Rs.5,00,000/- to be imposed upon the appellants.

The order impugned is set aside subject to the payment of costs assessed at Rs.5,00,000/- to be paid

to the respondents within four weeks from date. In default of payment of the costs within the time as indicated above, this order shall automatically stand recalled and the order of the Trial Court shall revive.

In the event of compliance, since the proceeding under Order IX Rule 13 of the Code was restored to its original file and number, the same shall be decided and disposed of by the Trial Court within three months from the date of the communication of this order.

The appellants shall co-operate and assist the Court in adhering the time limit for disposing of the said proceeding and shall not ask for any unnecessary adjournment.

With the above observations, the appeal and the connected application are disposed of.

**(Harish Tandon, J.)**

**(Kausik Chanda, J.)**

