

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

WRIT PETITION NO. 6282 OF 2021

The Board of Trustees of the Port of Bombay ...Petitioner
vs.
Indo Tex Export House Pvt.Ltd. & Anr. ...Respondents

Mr.Vishal Talsania with Ms.Radha H. Bhandari i/b. M/s.M.V. Kini & Co. for
Petitioner.
Mr.Amrut Joshi i/b. Mr.Sanket Mungale for Respondents.

CORAM : BHARATI DANGRE, J.

DATED : 4 OCTOBER 2021

PC. :

1. The Board of Trustees of the Port of Bombay is aggrieved by the order passed by the Civil Civil Court at Bombay below Exhibit-J on Notice of Motion No.4190/2017 on 23 March 2021. By the said order, the notice of motion filed by the defendants to set aside the ex-parte judgment and decree dated 5 February 2014 is allowed and the Short Cause Suit No.8441/1986 (High Court Suit No.3297/1986) stands restored to its file.

2. Heard learned Counsel for the Petitioner and learned Counsel for the Respondents. Rule. Rule made returnable forthwith. Heard by consent of parties.

3. The anxiety of the Petitioner in executing the decree, which they were able to obtain after 33 years, is very well understood. The suit, which was filed in the year 1986, came to be decreed by an ex-parte judgment dated 5 February 2014 and the decree was to the effect of

liability being fastened on the Respondents to pay the decretal amount at the rate of 15% per annum. The said suit was ultimately decided by the City Civil Court, since it was transferred from the High Court due to change in the pecuniary jurisdiction.

4. On the suit being decreed, a notice of motion came to be filed by the defendants seeking for setting aside of the ex-parte decree and the provisions of Order 9, Rule 13 of the Code of Civil Procedure was invoked, which was supported by an affidavit in support of the notice of motion.

Perused the affidavit, which is filed by the Director of defendant No.1, who has narrated the chronology of events after the suit was decreed. The starting point has been stated to be the receipt of a show cause notice on 19 November 2017 by the defendants asking them to show cause why decree passed by the court against the defendants on 5 February 2014 should not be executed. This is how the defendants gained knowledge about the suit being decreed. The affidavit further states that the defendants were served with the summons to answer the plaint on 16 February 2013 and, thereafter, steps were taken to engage the services of a counsel, who had addressed a letter to defendant no.1 asking them to sign vakalatnama to be produced in court authorising their appearance. The said letter is placed on record. Thereafter, the matter was listed on 3 September 2013 for appearance and further came to be listed for ex-parte evidence on 28 November 2013. On 10 March 2017, the letter addressed by counsel for the plaintiff was received by defendant no.1 intimating about the decree passed and the said letter is also produced on record.

While explaining the delay and laches, though roughly it has been attributed to the negligence and carelessness on the part of the earlier advocate of the defendants, the reasons are sought to be justified by

specifically pleading that the default cannot be attributed to the defendants and they should not suffer because of the mistake of the counsel. That, once they had engaged the services of the counsel, they distinctly rely upon their counsel and there appear to have been no diligence on the part of the counsel in prosecuting the case, though the defendants have a good case on merits and that the ex-parte decree be set aside. It is also stated that irreparable loss would be caused to the defendants, if the ex-parte decree is not set aside.

5. The notice of motion was vehemently opposed by the Petitioner before the City Civil Court and, on consideration of the statement made by the defendants on oath that they received the writ of summons and appointed an advocate, who failed to file vakalatnama and, subsequently, within a short period of six months, the entire proceedings were over, the court deemed it fit to accept the said version. Observing that, in any case, the suit had proceeded ex-parte against the defendants on 5 February 2014 and it is recorded that it took 33 years to serve the defendants, and the justification offered by the defendants was believed to be *bona fide* and was held to satisfy the test of 'sufficient cause' for setting aside the ex-parte decree, the order was passed on 23 March 2021 allowing the notice of motion subject to payment of costs of Rs.10,000/- to the plaintiff and Suit No.8441/1986 came to be restored.

6. Order 9 Rule 13 of the CPC, which empowers the court to set aside an ex-parte decree against the defendant, permits the power to be exercised if the defendant was prevented by any sufficient cause from appearing, when the suit was called on for hearing and on such sufficient cause being shown to the satisfaction of the court, the court is empowered

to make an order for setting aside the decree against him on such terms as to costs, payment into court or otherwise as it thinks fit and on the next date so appointed by the court the suit shall proceed. It is a trite position of law that the term 'sufficient cause' has been interpreted and has been subject matter of several authoritative pronouncements which toe a line that the term 'sufficient cause' has to be interpreted liberally. The Apex Court in case of **G.P. Srivastava vs R.K. Raizada & Ors**¹ has held as under :

“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 penalised 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

1 (2000) 3 SCC 54

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.”

7. The provision, relied upon by the learned Judge in setting aside ex-parte decree and restoration of the suit to its file for its fresh trial, has taken a practical view of the situation and since it can be seen now that on the summons being served, the defendants have engaged the services of a counsel, but when the vakalatnama could not be filed, the suit proceeded ex-parte, which was fixed for evidence and, thereafter, for arguments and, in the absence of the defendants participating in the suit, it came to be decreed ex-parte. Perusal of the affidavit in support of notice of motion has set out a ground which would fall in the category of ‘sufficient cause’, though learned Counsel for the Petitioner has vehemently argued that barring a bald statement, there is no proof or material brought on record for justifying that vakalatnama was handed over to the counsel. I deem it appropriate to find substance in the statement of the defendants for two reasons, firstly, it has been filed on oath and secondly, the period was too short for the defendants to realise that the suit is likely to proceed ex-parte and there was no reason which could have interrupted the proceedings in the suit, which concluded within a period of six months from the date of receipt of the summons.

In such circumstances, since the sufficient cause, which was shown in the affidavit supporting the notice of motion, which convinced the City Civil Court to set aside the ex-parte decree and restore the suit, I do not find any legal infirmity in the reasoning adopted by the City Civil Court while accepting the cause shown to be ‘sufficient cause’ for non appearance. Since the court below has adopted the liberal approach knowing that the cause shown was *bona fide* and was found to be

justifiable one, which fits in the parameters for setting aside the ex-parte decree, no fault can be found in the said order. Resultantly, the writ petition is dismissed. There shall be no order as to costs.

Needless to state that the above suit being restored to its file, the City Civil Court is expected to proceed in accordance with law.

(SMT. BHARATI DANGRE, J.)