



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

FAO 153/2022 & CM. APPL. No.25757/2022

Reserved on : 27.09.2022

Date of Decision : 14.10.2022

IN THE MATTER OF:

DEPUTY COMMISSIONER OF POLICE & ANR

..... Appellants

Through: Mr.Anupam Srivastava, ASC for GNCTD
with Ms.Sarita Pandey, Advocate alongwith SI Vikas
Kumar, P.S. Gandhi Nagar

Versus

SMT. NEELAM RANI & ORS.

..... Respondents

Through: Mr.Kirti Uppal, Sr.Advocate with
Mr.Randeep Singh, Ms.Ujala Vishnoi, Ms.Riya Gulati
and Mr.Chandan Singh, Advocates for respondents
No.1 to 3
Mr.Arun Panwar and Ms.Mahak Rankawat, Advocates
for respondent No.4

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of the present appeal filed under Section 104 read with Order XLIII Rule 1(d) CPC, the appellants/defendants have assailed the order dated 06.05.2022 passed by the learned ADJ-02, Shahdara, Karkardooma Courts, Delhi in Misc DJ No. 731/2021, whereby application filed on behalf of the appellants under Order 9 Rule 13 CPC and Section 5 of Limitation Act, 1963 was dismissed.



2. Before proceeding to deal with the contentions, the facts in a nutshell are that respondents No.1 to 3/plaintiffs, while claiming themselves to be co-owners and shareholders of property bearing *No. 148, Gandhi Nagar, Delhi part of Khasra No.690/605/326/62/7/1/8/14/6/7/5/1 in the area of village Seelampur, in the abadi of Gandhi Nagar, Delhi*, had filed a suit bearing CS No. 626/2018 against the defendants for possession, mesne profits and permanent injunction. The plaintiffs claimed that they had purchased their respective shares by virtue of separate sale deeds and that the Suit Property being adjacent to *Gandhi Nagar* Police Station had been illegally trespassed in the year 2008 by police officials, who were using it for parking junk/unused and confiscated vehicles.

3. Records reveal that the appellants were served with the summons of the Suit. One *SI Deshpal* had appeared on 17.01.2019. As no written statement came to be filed, the appellants were proceeded *ex-parte* on 20.08.2019. The plaintiffs led evidence and after conclusion of the trial, an *ex-parte* judgment came to be passed on 16.03.2021. On an execution petition being filed, the appellants received summons on 06.09.2021 whereafter they preferred an application under Order 9 Rule 13 CPC read with Section 5 of Limitation Act on 30.11.2021, resulting in passing of the impugned order.

4. Mr. Anupam Srivastava, learned ASC for the appellants, assailed the impugned order by contending that the Trial Court failed to appreciate that the appellants had shown *sufficient cause* for not appearing in the Suit as well as for condonation of delay in filing the application under Order 9 Rule 13 CPC. Insofar as non-appearance in the Suit is concerned, it was contended that although *SI Deshpal* appeared on 17.01.2019, the Presiding Officer was on leave and as such, the officer could not understand the proceedings, resulting in failure to communicate the same to the senior officers.



It was also submitted that having received the summons, the appellants acted diligently in issuing Brief Transmission Form (BTF) on 07.08.2019 in favour of the Government counsel appointed for appearing in the suit proceedings. The Government counsel, however, could not appear as he did not receive the BTF or any other instructions. It is urged that in this backdrop, the appellants were proceeded *ex-parte* resulting in passing of the impugned order/judgment.

Learned counsel for the appellants also argued that the appellants acquired knowledge of the passing of the impugned judgment only on 06.09.2021, when summons in the execution petition were received by them. Lastly, it was submitted that the expression *sufficient cause* in Order 9 Rule 13 CPC is to be construed liberally, as no negligence is imputable to the appellants and the appellants were rather vigilant enough to not only send the concerned SI, but also to appoint a counsel by issuing a BTF prior to even passing of the order, whereby the appellants were proceeded *ex-parte*.

5. Insofar as the dismissal of the application under Section 5 of the Limitation Act is concerned, learned ASC referred to the orders passed by the Supreme Court in **Suo Motu W.P. (C) No. 3/2020** to submit that the application under Order 9 Rule 13 CPC was filed within limitation.

6. Mr. Kirti Uppal, learned Senior Counsel appearing for respondents No.1 to 3, on the other hand, contended that the appellants had been callous in their conduct, inasmuch as none appeared on their behalf in the Suit despite service of summons. He further contended that the explanation offered that *SI Deshpal* could not understand the proceedings and that the Government counsel appointed did not receive BTF/instructions, does not sufficiently explain as to why the appellants failed to appear on the relevant dates.



Learned Senior Counsel submitted that while the captioned suit was filed with respect to one portion of the plot, the owners of the other three portions have preferred another suit, which came to be decreed on 11.02.2020. He also argued that the appellants would not gain any advantage in contesting the present suit as the decree in the other suit has remained unchallenged.

Alternatively, it was contended that the appellants cannot be relegated to the stage prior to the passing of the order dated 20.08.2019, whereby they were proceeded *ex-parte*. Learned Senior Counsel also submitted that the appellants in the present case have not challenged the *ex-parte* judgment on merits till date.

7. I have heard learned counsels for the parties and have also gone through the case records.

8. Although a contention has been raised on behalf of respondent Nos. 1 to 3 to the effect that the *ex-parte* judgment remains unchallenged on merits, the law in this regard is well settled. A defendant who has suffered an *ex-parte* decree can either file a regular appeal from the decree challenging the same on merits, or alternatively, he can file an application under Order 9 Rule 13 CPC to seek setting aside of the decree on the ground that (i) the summons were not duly served or; (ii) the person who was served was prevented by sufficient cause from appearing in the suit when the suit was called for hearing.

The appellants have premised their case on the alternative, by submitting that after being summoned, they were prevented by *sufficient cause* from appearing in the Suit when it came up for hearing. While underlining the availability of remedies to defendants such as those in the present case, the



Supreme Court in Bhivchandra Shankar More v. Balu Gangaram More and Others reported as (2019) 6 SCC 387 has held as under:-

“11. It is to be pointed out that the scope of Order 9 Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any “sufficient cause” from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for “sufficient cause”, the court may set aside the ex parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order 9 Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order 9 Rule 13 CPC is dismissed.”

9. The expression ‘was prevented by any sufficient cause from appearing’ as mentioned in Order 9 Rule 13 CPC has to be construed in the facts and circumstances of each case. Indeed, it has to be construed liberally, especially if the explanation offered is justifiable. In this regard, the Supreme Court in Bhivchandra Shankar More (Supra) has opined that the term *sufficient cause* should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of *bonafide* on the part of the appellant.

10. To similar extent are the observations in G.P. Srivastava v. R.K. Raizada and Others reported as (2000) 3 SCC 54, where the Supreme Court while



considering the scope of *sufficient cause* under Order 9 Rule 13 CPC observed thus:-

“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.”

11. Again, in Secretary, Department of Horticulture, Chandigarh and Another v. Raghu Raj reported as **(2008) 13 SCC 395**, it was held by the Supreme Court that a party should normally not suffer on account of default or non-appearance



on behalf of its counsel. Relevant extract from the decision is reproduced hereunder:-

“28. From the case law referred to above, it is clear that this Court has always insisted on advocates to appear and argue the case as and when it is called out for hearing. Failure to do so would be unfair to the client and discourteous to the court and must be severely discountenanced. At the same time, the Court has also emphasized doing justice to the cause wherein it is appropriate that both the parties are present before the court and they are heard. It has been noted by the Court that once a party engages a counsel, he thinks that his advocate will appear when the case will be taken up for hearing and the court calls upon the counsel to make submissions. It is keeping in view these principles that the Court does not proceed to hear the matter in absence of the counsel.”

12. Recently, this Court, in Hira Sweets & Confectionary Pvt. Ltd. and Others v. Hira Confectioners reported as **2021 SCC OnLine Del 1823** also reiterated the above legal position and held:-

“11. Insofar as the scope of an application under Order IX Rule 13 CPC is concerned, the Court has to see whether the summons in the suit were duly served or not and/or whether the defendant was prevented by any “sufficient cause” from appearing when the suit was called for hearing. In the present case, the defendant was duly served with the summons in the suit and had appeared.

12. “Sufficient Cause” is an elastic expression and no hard and fast guidelines are prescribed. The Court, in its discretion, has to consider the “sufficient cause” in the facts and circumstances of every individual case. Although in interpreting the words “sufficient cause”, the Court has wide discretion but the same has to be exercised in the particular facts of the case.

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14. In Sudarshan Sareen (Supra), a Division Bench of this Court while holding that the appellant therein, was wilfully negligent in not appearing and thus rejecting his prayer for setting aside of an ex-parte decree, relied on the following passage in the case of Parimal



v. *Veena* reported as (2011) 3 SCC 545, where the expression “sufficient cause” was interpreted as under:

“13. “Sufficient cause” is an expression which has been used in a large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, inasmuch as may be necessary to answer the purpose intended. Therefore, word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, “sufficient cause” means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive”. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide *Ramial v. Rewa Coalfields Ltd.* [AIR 1962 SC 361], *Lonand Grampanchayat v. Ramgiri Gosavi* [AIR 1968 SC 222], *Surinder Singh Sibia v. Vijay Kumar Sood* [(1992) 1 SCC 70] and *Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn.* [(2010) 5 SCC 459].)

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15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide *State of Bihar v. Kameshwar Prasad Singh* [(2000) 9 SCC 94], *Madanlal v. Shyamlal* [(2002) 1 SCC 535], *Davinder Pal Sehgal v. Partap Steel Rolling Mills (P) Ltd.* [(2002) 3 SCC 156], *Ram Nath Sao v. Gobardhan Sao* [(2002) 3 SCC 195], *Kaushalya Devi v. Prem Chand* [(2005) 10 SCC 127], *Srei International Finance Ltd. v. Fairgrowth Financial Services Ltd.* [(2005) 13 SCC 95] and *Reena Sadh v. Aniana Enterprises* [(2008) 12 SCC 589].)



16. *In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application.*”

15. *Recently, the Supreme Court in A. Murugesan v. Jamuna Rani reported as (2019) 20 SCC 803 affirmed its earlier view in G.P. Srivastava v. R.K. Raizada reported as (2000) 3 SCC 54, which is reproduced as under:*

“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.”

13. In the present case, it is apparent that the appellants put an appearance through *SI Deshpal* on 17.01.2019, however, the Presiding Officer was on leave that day. The appellants did not appear on next three dates, however, they had taken sufficient steps of appointing Government counsel to represent them in the said proceedings. The counsel engaged could not appear for want of BTF and necessary instructions, resulting eventually in passing of the *ex-parte* judgment/decreed.

14. Keeping in view the facts and circumstances of the case and the position of law as discussed hereinabove, the present appeal is allowed and the matter is remanded back to the concerned Court for proceeding with the Suit in accordance with law. Miscellaneous application is disposed of as infructuous.

15. A copy of this judgment be communicated to the concerned Court for information.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 14, 2022