

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

**FAO 279/2022, CM APPL. 47744/2022, CM APPL. 47745/2022 and
CM APPL. _____ (delay)**

Date of Decision: 09.11.2022

IN THE MATTER OF:

AJAY JAIN AND ANR

..... Appellants

Through: Mr. Sanjay Padam Jain, Advocate

versus

PREM MITTAL AND ANR

..... Respondents

**Through: Mr. Neeraj Goyal and Mr. Manish
Kumar, Advocates for respondent No.1**

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J. (ORAL)

1. The present appeal has been preferred by the appellants/defendants under Order XLIII Rule 1(D) read with Section 104 CPC read with Section 151 CPC seeking setting aside of order dated 01.09.2022 passed by learned ADJ-03, North West District, Rohini Courts, Delhi in CS No.575952/16, vide which their application under Order 9 Rule 13 CPC seeking setting aside of the *ex-parte* judgment/decreed dated 20.10.2020 was dismissed. Other ancillary reliefs are also sought.

2. Learned counsel for the appellants has defended the appellant's non-appearance in the trial by contending that the suit having been transferred twice despite best efforts, the appellants could not locate the new Court. It is additionally contended that the appellants had relied on their counsel to appear and defend the suit, in doing which he failed, and

accordingly, a complaint dated 12.09.2022 was also filed for disciplinary action before the Bar Council of Delhi.

3. On the other hand, learned counsel for respondent No.1/plaintiff has disputed the submissions made on behalf of the appellants and prayed that the appeal may be rejected. It is submitted that the appellants have been callous in defending the suit and in fact have filed the application under Order 9 Rule 13 CPC along with application seeking condonation of delay of 73 days.

4. I have heard learned counsels for the parties and perused the entire material placed on record.

5. A perusal of the records would show that the plaintiff had preferred the suit for recovery of possession, mesne profit/damages and permanent injunction in respect of *first floor of the property situated at plot No.A-103/5, Wazirpur Industrial Area, Delhi admeasuring 174.65 sq.yds.* (hereinafter, referred to as the '*suit property*'). In the suit, respondent No.1 claimed himself to be the co-owner in possession of the suit property, whereas the appellants were stated to be in possession of the remaining portion of the plot, admeasuring 245.35 sq. yds. It was further claimed that on the intervening night of 18/19.04.2012, the appellants, after breaking the dividing wall of the suit property, illegally trespassed therein though it was exclusively owned and occupied by the plaintiff. The records further reveal that the suit came to be filed on 19.07.2012, whereafter the defendants, on being served, filed their written statements.

6. The suit was pending consideration before the concerned ADJ-3, North West District, Rohini Courts, Delhi. On 01.08.2013, in pursuance of the order passed by this Court, the matter was transferred to a new

Court on account of the Court of ADJ-03 having been abolished. The next date of hearing was fixed for 18.02.2014. The appellants were duly represented through their counsel on the said date. On 18.02.2014, the matter was routinely transferred to another Court in the Rohini Court Complex itself. The appellants, despite multiple opportunities, failed to appear and eventually, on 16.05.2017, their defence was struck off.

7. On 10.09.2020, the appellants were proceeded *ex-parte* whereafter on 20.10.2020, the *ex-parte* judgment came to be passed. Thereafter, the appellants preferred an application dated 28.01.2021 under Order 9 Rule 13 read with Section 151 CPC seeking setting aside of the *ex-parte* judgment/decreed dated 20.10.2020, which was filed alongwith an application seeking condonation of delay of 73 days. Vide the impugned order, the application came to be dismissed.

8. 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.

9. The appellants have premised their case on a submission 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.”

10. 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.

11. To similar extent are the observations in G.P. Srivastava v. R.K. Raizada and Others reported as **(2000) 3 SCC 54**.

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, although the appellants have blamed their counsel for non-appearance and claimed that a complaint seeking disciplinary action has been preferred before the Bar Council of Delhi, it is noted that the said complaint came to be filed as an afterthought and that too after passing of the impugned order. The appellants failed to appear for a period of 6 years in the trial. The ground taken for non-appearance is of not being able to locate the new Court in the same Court Complex. Such a ground, in the opinion of this Court, is not fallacious but rather shows the callous attitude of the appellants in not exercising due care.

14. In the considered view of this Court, the Trial Court has correctly rejected the appellants' application, holding the grounds taken to be whimsical and flimsy. Accordingly, the appeal is dismissed alongwith the pending applications.

(MANOJ KUMAR OHRI)
JUDGE

NOVEMBER 09, 2022

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(Corrected and released on 22nd November, 2022)