

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

+ **FAO 202/2015 and CM APPL. 11616/2015**

Date of Decision: 13.04.2023

IN THE MATTER OF:

STATE BANK OF INDIA Appellant

Through: Mr. Shiv K. Tyagi, Advocate.

versus

M/S ARIZONA PRINTERS & PACKERS LTD &
ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J. (ORAL)

1. By way of present appeal, the appellant seeks setting aside of the order dated 06.06.2015 passed by learned ADJ-II, Central, Tis Hazari Court, Delhi in M. NO. 46 OF 2013 filed in Suit No. 190 of 2006 whereby its application under Order IX Rule 13 read with Section 151 CPC was dismissed. Ancillary prayer seeking directions to the Executing Court to retain/withhold the banker's cheque for Rs.19,27,693.94 has also been made.

2. Mr. Shiv. K. Tyagi, learned counsel for the appellant submits that alongwith the subject application, the appellant also preferred an application under Section 5 of the Limitation Act seeking condonation of

delay of about 4 years in filing the captioned application. It is submitted that though the delay application was allowed but the captioned application under Order IX Rule 13 CPC was dismissed by incorrectly recording that the application has been filed at a belated stage despite being aware of the proceedings. Learned counsel for the appellant submits that the appellant made out a good case for sufficient cause for its non-appearance before the Trial Court.

3. Before proceeding further, it is noted that in the present appeal, while respondent Nos. 1 and 2 were served and represented through a counsel however, they did not file any reply. Further, they have remained unrepresented since the last two dates of hearing. Accordingly, they are proceeded *ex-parte*. Insofar as respondent No. 3 is concerned, it was served through publication and was already proceeded *ex-parte* vide order dated 19.09.2016.

4. The facts, in a nutshell, are that respondent Nos. 1 and 2 filed a complaint seeking recovery of Rs.19,92,325.33 against respondent No. 3. It was claimed that respondent No. 3 had approached respondent Nos. 1 and 2 for placing an order for supply of 10 lac empty glass bottles. A letter of credit was taken by respondent No. 3 from the present appellant. Though respondent Nos. 1 and 2 honoured the contract by supplying the glass bottles, however the amounts remained outstanding. A suit was initially filed before this Court whereafter on account of change in pecuniary jurisdiction, it was transferred to the District Court. On said transfer, the suit was listed in the district court on 26.02.2004, and on that date notice was issued to the parties and the matter was adjourned for 17.03.2004. On the said date, the appellant was represented through one Mr. Narender Pal, Advocate however, thereafter appellant remained

unrepresented resulting in passing of the *ex-parte* order dated 20.07.2004 as well as passing of *ex-parte* judgment dated 24.08.2006.

As per the appellant's case, it became aware of the *ex-parte* proceedings only on 15.09.2008 when a *bailiff* appointed by the Executing Court visited the appellant's premises. The appellant immediately appointed one Mr. Shiv K. Tyagi, Advocate who inspected the case records on 18.09.2008 and came to know about the passing of *ex-parte* proceedings. On 08.10.2008, the captioned application was filed alongwith an application under Section 5 of the Limitation Act seeking condonation of delay of about 4 years. The common grounds alleged in the said applications were that the appellant, after instructing Mr. Narender Pal to appear, was under a bonafide belief that it was regularly represented. It was further averred that Mr. Narender Pal however did not appear after 17.03.2004 as he had sought a Power of Attorney to appear on subsequent dates. The said communication statedly was misplaced. Resultantly, neither any reply was filed nor any Power of Attorney could be given to Mr. Narender Pal. The said averments in the application were coupled with a duly sworn affidavit of Mr. Narender Pal who explained his non-appearance by stating that, in absence of execution of power of attorney in his favour, he was under the impression that some other counsel was appointed by the Bank/appellant to represent it. The Trial Court while noting the aforesaid facts came to the conclusion that the explanation offered by the appellant was justifiable and subject to payment of cost of Rs.5,000/- allowed the application under Section 5 of the Limitation Act. The said order was challenged before this Court by way of CRP 118/2009 wherein a Coordinate Bench of this Court vide order dated 08.03.2010 also noted the aforesaid facts and finding the

explanation given for lack of communication between the client and the counsel to be justified, upheld the order though subject to payment of further cost of Rs.5,000/-. The order passed by this Court was challenged by way of SLP 30333/2009 by respondent Nos. 1 and 2 which was dismissed on 30.11.2019. Subsequently, when the matter was listed before the Trial Court, the impugned order came to be passed.

5. As noted above, the grounds urged in the captioned application as well as in the application under Section 5 of the Limitation Act were one and the same. Appellant had explained reasons for its non-appearance before the Trial Court. The application was coupled by the affidavit of Mr. Narender Pal, Advocate, which reads as under :-

"I, the aforesaid deponent, do hereby solemnly declare and affirm as under :-

1. That I am on the list of panel lawyers of the State Bank of Patiala. which has been arrayed as the defendant No. 2 in the above case.

2. That, on telephonic instructions from the then Manager (Advances) of the State Bank of Patiala at its Parliament Street, New Delhi, I appeared in the above case on 17-3-2004 by filing a memorandum of appearance.

3. That, thereafter, as usual, I sent my report to the above Branch of the defendant No. 2, by ordinary post, along with the Vakalatnama form, requesting for sending me the Vakalatnama and the case file if I had to attend to the above case on the next date of hearing, which was fixed for 21-4-2004.

4. That I did not appear in the above case on the next date of hearing and thereafter as I did not receive any further instructions from the Branch and was under the impression that the case had been assigned to some other panel advocate of the defendant Bank.

5. *That it now appears that my above report was misplaced in transit as I received a letter dated 26-9-2008 from the defendant bank informing me that it had come to know that the above suit had been decreed on 24-8-2006 ex-parte since I did not appear on and after 21-4-2004 in the above case. I have already explained to the defendant bank the above facts and the defendant bank has informed me that it has checked its records and my above report did not reach it.*

6. *That non-appearance of the deponent on behalf of the defendant bank on 21-4-2004 and thereafter was nor deliberate and it was only due to the aforesaid circumstances."*

6. Before proceeding further, reference in connection with the scope of present appeal is made to decision of this Court in H. P. Singh (Harvinder Pal Singh) v. Sh. Jasbir Singh & Ors., FAO 64/2022 rendered on 10.03.2023. Relevant paras of the said judgment read as follows:

"7. *The short question which arises for consideration before this Court is whether the appellant has been able to make out a case of "sufficient cause" for non-appearance, as required in terms of Order 9 Rule 13 CPC.*

8. *Insofar as the scope of an application under Order 9 Rule 13 CPC is concerned, it is now well-settled that 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.*

9. *"Sufficient cause" is an elastic expression and no hard and fast guidelines are prescribed to define it. Although the Court has wide discretion in interpreting the words "sufficient cause", the same has to be exercised according to the particular facts and circumstances of the case.*

10. At this stage, reference may profitably be made to Sudarshan Sareen v. National Small Industries Corporation Ltd. and Anr. reported as **2013 SCC OnLine Del 4412**, where a Division Bench of this Court held the appellant therein to have been willfully negligent in not appearing and rejected his prayer for setting aside dismissal of his application under Order 9 Rule 13 CPC. The Court relied on a passage from Parimal v. Veena alias Bharti 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 Ramlal v. Rewa Coalfields Ltd., Lonand Grampanchayat v. Ramgiri Gosavi, Surinder Singh Sibia v. Vijay Kumar Sood and Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn.)

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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, Madanlal v. Shyamlal, Davinder Pal Sehgal v. Partap Steel Rolling Mills (P) Ltd., Ram Nath Sao v. Gobardhan Sao, Kaushalya Devi v. Prem Chand, Srei International Finance Ltd. v. Fairgrowth Financial Services Ltd. and Reena Sadh v. Anjana Enterprises.)

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 defense. 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.”

11. It would be apposite to also advert to A. Murugesan v. Jamuna Rani reported as (2019) 20 SCC 803. In the said case, the Supreme Court affirmed its earlier view taken in G.P. Srivastava v. R.K. Raizada and Others reported as (2000) 3 SCC 54, which is reproduced hereunder:

“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.””

7. Coming back to the facts of the present case, this Court is of the considered opinion that the appellant has been able to explain that it was prevented by sufficient cause for its non-appearance before the Trial Court. The explanation has found favour not only from this Court but also from the Supreme Court albeit for application filed under Section 5 of the Limitation Act. The explanation being common for both the applications ought to have been considered by the Trial Court in the appellant’s favour. Accordingly, the appeal is allowed and impugned order is set aside however, the same shall be subject to payment of cost

of Rs.20,000/- to be deposited by the appellant with the *Delhi State Legal Services Authority* within four weeks from today. The amount so deposited shall be utilized towards providing counselling/ psychological support to the POCSO victims requiring such assistance. It is informed that the appellant has already deposited the decretal amount of Rs.19,27,693.94 with the Trial Court. The same shall remain subject to outcome of the Trial for which purpose the matter at the first instance be listed before the Trial Court on 19.05.2023.

(MANOJ KUMAR OHRI)
JUDGE

APRIL 13, 2023

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