

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 492 OF 2016**

Bhalchandra Annarao Chavan	..Applicant
Versus	
Dayanand Bhaurao Chavan	...Respondent

Mr. R.S. Alange, for the Applicant.
Mr. Ajay Joshi, for the Respondent.

**CORAM: N. J. JAMADAR, J.
DATED : 12th MARCH 2025**

P.C.:

1. This revision is directed against a Judgment and Order dated 5th March 2016 passed by the learned District Judge, Pandharpur in Civil Misc. Appeal No. 14 of 2015, whereby the Appeal preferred by the respondent-original defendant came to be allowed by setting aside the order passed by the Trial Court in Civil Misc. Application No. 102 of 2013 thereby setting aside the decree passed in RCS No. 391 of 2005 and restoring the said suit to the file of the learned Civil Judge for afresh adjudication.

2. In a nutshell, the background facts leading to this revision are as under:

ARUN
RAMCHANDRA
SANKPAL

Digitally signed
by ARUN
RAMCHANDRA
SANKPAL
Date: 2025.03.18
20:05:11 +0530

2.1 The defendant is the first cousin of the plaintiff, who ran a tailoring firm at Pandharpur. The defendant had come to Pandharpur from his native place Akkalkot to learn tailoring craft. As the plaintiff was in need of funds to expand his business, the plaintiff had sold 3R land out of Gat No. 123/2B/2 situated at Pandharpur (the suit property), for a consideration of Rs.78,000/- under a registered Sale Deed dated 6th June 2000. However, on the very day, there was an oral Agreement for re-conveyance of the suit property no sooner the plaintiff was in a position to repay the said consideration of Rs.78,000/-.

2.2 The plaintiff asserts in the month of September 2005, the plaintiff called upon the defendant to reconvey the suit property. A legal notice was addressed on 21st September 2005. As the defendant raised a false defence and declined to reconvey the suit property, the action by way of suit for specific performance of the Agreement for Re-conveyance.

2.3 The defendant appeared and filed Written Statement. The trial commenced. As the defendant and his Advocate did not appear repetitively, “no cross order” was passed against the defendant. The plaintiff closed his evidence. As the defendant did not appear and adduce evidence, by an Order dated 26th

September 2001, the Trial Court ordered that the suit would proceed further without evidence of the defendant.

2.4 Eventually, by a Judgment and Order of 13th October 2011, the Trial Court decreed the suit and directed the defendant to execute a conveyance in favour of the plaintiff within two months of the deposit of consideration of Rs.78,000/- by the plaintiff.

2.5 The defendant filed an application for setting aside the *ex parte* decree under Order IX Rule 13 of the Code of Civil Procedure 1908 (“the Code”) asserting *inter alia* that the defendant was a resident of Akkalkot, the defendant had appointed an Advocate, who ordinarily resided at Solapur, to represent him in the Suit, the said Advocate had not appeared before the Trial Court and also did not furnish the requisite information to the defendant and the defendant was suffering from ailments and, therefore, the defendant could not appear before the Trial Court, when the decree came to be passed.

2.6 The Application was resisted by the plaintiff. It was categorically denied that the defendant was unwell. It was contended that the decree cannot be said to have been passed *ex parte* as the defendant had filed the Written Statement and the Trial Court had taken into consideration the contentions in the Written Statement and adjudicated the matter on merits.

Therefore, an Application to set aside the decree under Order IX Rule 13 of the Code was not maintainable. At any rate, the defendant had ample opportunity to appear before the Trial Court and thus there was no sufficient cause to set aside the decree.

2.8 The Trial Court recorded evidence of the defendant and Dr. Nishikant Maske, who had allegedly treated the defendant, during the relevant period. By a Judgment and Order dated 12th October 2014, the learned Civil Judge was persuaded to reject the application primarily on the ground that the decree passed by the Trial Court cannot be said to be *ex parte* as the Court had taken into account the contentions in the Written Statement filed on behalf of the defendant and determined the issue on merits.

3. Being aggrieved the defendant preferred an Appeal before the District Court. By the impugned Judgment and Order, the learned District Judge was persuaded to interfere with the order of the Trial Court opining, *inter alia*, that the Trial Court failed to appreciate the import of the provisions contained in Order XVII Rule 2 of the Code and the decisions of the Supreme Court in the case of **Prakash Chander Manchanda & Anr Vs Janki Manchanda**¹ and this Court in the case of **M/s Regal Talkies & Ors Vs State Bank of India**,² and committed an error in holding that the decree was not *ex parte*. The learned District

1 AIR 1987 SC 42.

2 2011 2 All MR 319.

Judge was also of the view that the defendant had placed adequate material on record to show that the defendant was prevented by sufficient cause from appearing before the Court when the Suit was called on for hearing. Thus, the Application was allowed subject to payment of costs Rs. 6000/-.

4. Being aggrieved, the plaintiff has invoked the revisional jurisdiction.

5. I have heard Mr. Alange, the learned Counsel for the applicant, and Mr. Ajay Joshi, the learned Counsel for the respondent, at some length. With the assistance of the learned Counsel for the parties, I have carefully perused the material on record.

6. Mr. Alange, the learned Counsel for the applicant, canvassed a two-pronged submission.

7. Firstly, the learned District Judge committed a manifest error in holding that the decree in question was *ex parte*. It was submitted that the defendant had appeared before the Trial Court and filed Written Statement. Issues were framed. Thereafter, defendant remained persistently absent. Initially, “no cross order” was passed against the defendant. Later on, the Trial Court was constrained to pass an order that the suit would proceed without evidence of the defendant. Therefore, according to Mr. Alange, by no stretch of imagination, it can be said that the suit proceeded *ex parte*. Resultantly, the decree was

passed on merits of the matter and, thus, the only remedy available to the defendant was to file a Regular Appeal. The defendant could not have resorted to the provisions contained in Order IX Rule 13.

8. Secondly, even on the aspect of the sufficiency of cause, the learned District Judge appreciated the material on record in an over simplistic manner. The material would show that the defendant had not appeared before the Court persistently. The cause for absence ascribed by the defendant could not be substantiated. The Medical Officer candidly conceded in the cross-examination that the defendant was not bedridden. Thus, the learned District Judge could not have readily accepted the causes of absence ascribed by the defendant.

9. In opposition to this, Mr. Ajay Joshi, the learned Counsel for the respondent submitted that the case was clearly covered by the provisions contained in Order XVII Rule 2 of the Code. In terms thereof, in the absence of the defendant, the Court was required to proceed in one of the modes directed in that behalf by Order IX of the Code. Resultantly, an application for setting aside an *ex parte* decree passed under Order IX of the Code was clearly tenable.

10. Mr. Joshi would urge that the explanation to Rule 2 of Order XVII was not attracted as evidence of the defendant was not at all recorded. To bolster up this submission, Mr. Joshi placed reliance on the decisions of the Supreme Court in the case of **Prakash Chander Manchanda**

(Supra) and **Sushil Kumar Sabharwal V Gurpreet Singh & Ors³** and the decisions of this Court in the case of **Balu Alias Madhavrao Shankarrao & Ors Vs Radhakkabai Panditrao Ghorpade & Ors⁴** and **Regal Talkies(Supra)**.

11. On the aspect of the sufficiency of the cause, Mr. Ajay Joshi would urge that the defendant has put oath behind the statement that he was unwell and his Advocate had not informed the defendant the progress of the trial in the suit and the claim of the defendant that he was unwell was substantiated by the Medical Officer, who had treated the defendant during the said period. In the face of such material, according to Mr. Joshi, the learned District Judge committed no error in returning the finding that the defendant was prevented by a sufficient cause.

12. Mr Joshi further submitted that sufficiency of cause is required to be considered liberally. To lend support to this submission, Mr. Joshi placed reliance on the decision of the Supreme Court in the case of **G. P. Srivastava Vs R. K. Raizada & Ors.⁵**

13. Order IX of the Code provides various modes of the disposal of the Suit in the event one or none of the parties appear. Under Rule 6 of Order IX of the Code, where the plaintiff appears and defendant does

3 AIR 2002 SC 2370.

4 2003 4 All MR 445.

5 AIR 2000 SC 1221.

not appear when the Suit was called on for hearing, then, if it is proved that the summons was duly served, the Court may make an order that the Suit be heard *ex parte*. In this context, the provisions contained in Order XVII Rule 2 are required to be considered. Rules 2 and 3 of Order XVII of the Code read as under:

“2 . Procedure if parties fail to appear on day fixed.— Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

[Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.]

3. Court may proceed notwithstanding either party fails to produce evidence, etc.— Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,—

- (a) if the parties are present, proceed to decide the suit forthwith; or
- (b) if the parties are, or any of them is, absent, proceed under rule 2.

14. A conjoint reading of the aforesaid provisions would indicate that if on a date fixed one of the parties remains absent and up to that date,

such absentee party had not led evidence, the Court is enjoined to proceed to dispose of the matter in accordance with Order IX of the Code. The discretion to proceed under Rule 3 of Order XVII is conditioned by the fact that the absentee party must have led some evidence or a substantial portion of evidence of such party must have been recorded. In the absence thereof, in view of clause (b) of Rule 3 of Order XVII, the Court has to fallback on Rule 2 of Order XVII.

15. The aforesaid position was expounded by the Supreme Court in the case of **Prakash Chander Manchanda (Supra)**, in the following words:

“It is made clear that in cases where a party is absent only course is as mentioned in O.17(3) (b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R.2. Similarly the language of R.2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the Suit in one of the modes directed under O.9. The explanation to R.2 gives a discretion to the Court to proceed under R.3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the matter in accordance with O.17 R.2 in any one of the modes prescribed under O.9, Civil P.C. It is therefore clear that after this amendment in O.17 Rr. 2 and

3, Civil P.C. there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30-10-1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that up to the date i.e. 30-10-1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to O.17 R.2 was not applicable at all. Apparently when the defendant was absent O.17 R.2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under O.9.

It is also clear that O.17 R3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant.”

(emphasis supplied)

16. Following the aforesaid pronouncement in the case of **Balu Alias Madhavrao Shankarrao (Supra)**, a learned Single Judge of this Court held that where the defendant had filed the Written Statement but no evidence was led on behalf of the defendant, the case would be covered by Order XVII Rule 2 which requires the Court to fallback on any of the modes prescribed in Order IX. Since the plaintiff appeared and the defendant did not appear when the Suit was called on for hearing,

provisions of Order IX rule 6 would apply and, resultantly, the Judgment and Decree passed thereafter would be *ex parte*.

17. The decision of this Court in the case of **Regal Talkies(Supra)** also proceeds on the same line. The observations in paragraph 12 read as under:

“12. It is an admitted position that no written statement was filed by the appellants herein in the suit. It is also admitted position that no evidence was led on behalf of the defendants in the suit. On the date of hearing neither the defendants nor their advocate was present before the Court and therefore, in the light of law laid down by the Hon’ble Supreme Court and also by this Court, the decree which was passed by the IInd Joint C.J.S.D. Aurangabad was ex-parte decree and therefore, application under Order 9 Rule 13 was maintainable.”

18. In view of the aforesaid position in law, the Trial Court was clearly in error in holding that the application for setting aside the *ex parte* decree was not maintainable. Incontrovertibly, the defendant had not led any evidence. In fact, the Trial Court had proceeded to pass an order that the suit would proceed without evidence of the defendant. Thus, the provisions contained in Order XVII Rule 2 of the Code squarely governed the facts of this case and, resultantly, the decree was passed *ex parte*.

19. This takes me to the consideration on the aspect of the sufficiency of the cause ascribed by the defendant for setting aside the *ex parte* decree.

20. Mr. Alange, the learned Counsel for the applicant strenuously submitted that the defendant had ascribed a general cause. A bald assertion was made that the defendant was unwell and his Advocate had not apprised him about the progress of the trial. No material was placed before the Trial Court to demonstrate that the defendant was suffering from such ailment as to prevent him from appearing before the Trial Court for over months together.

21. The attendant circumstances are of material significance. Indisputably, the defendant was an ordinary resident of Akkalkot. To represent him, the defendant had appointed an Advocate, who was ordinarily residing at Solapur. The defendant had placed on record material to show that he was suffering from ailments. In addition, defendant examined Dr. Maske to substantiate his claim that he was availing treatment from Dr. Maske. It is true that Dr. Maske conceded during his cross-examination, that the defendant was not bedridden. However, the claim of the defendant and the evidence of Dr. Maske cannot be brushed aside as untrustworthy on the said count.

22. The defendant has brought material to substantiate the twin cause; one, he was unwell and, two, his Advocate had not apprised him about the progress of the trial. These causes, if considered in the light of the *inter se* relations between the parties and the nature of the dispute, cannot be thrown overboard as unsustainable.

23. It is trite that the term ‘sufficient cause’ is required to be considered liberally for the purpose of Order IX Rule 13 of the Code. Ordinarily, the Court leans in favour of the condonation of delay so as to advance the cause of substantive justice. Delay is condoned so as to promote adjudication of the dispute on merits, lest the procedure which is handmaid of justice would score a march over substantive justice. A useful reference can be made to observations of the Supreme Court in the case of **G. P. Srivastava (Supra)**, on which the reliance was placed by Mr. Joshi. They read as under:

“7. 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 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)

24. On the aforesaid touchstone, reverting the facts of the case, the cause ascribed by the defendant, in my considered view, satisfies the test of sufficiency. The learned District Judge was justified in taking into account the fact that the rights of the parties to valuable property were the subject matter of the lis. Therefore, the defendant deserves an opportunity to contest the suit on merits, especially, when the claim of the plaintiff is based on an oral agreement of re-conveyance.

25. For the forgoing reasons, I am not inclined to interfere with the impugned order in exercise of limited revisional jurisdiction. The Application, therefore, deserves to be rejected.

26. Hence the following order:

: O R D E R :

Application stands rejected.

No costs.

[N. J. JAMADAR, J.]