

(2016) 01 AHC CK 0227
In the Allahabad High Court
Case No : Matters No. 7591 of 2015

Suresh Chandra Kesarwani and Others	APPELLANT
Vs	
Ratan Kumar Chaurasiya and Others	RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 227

Citation : (2016) 3 ADJ 619 : (2016) 161 AIC 912 : (2016) 2 AllWC 2018 :
(2016) 115 ALR 674 : (2016) 1 ARC 724 : (2016) 131 RD 662 : (2016) 1 RJ 559

Hon'ble Judges : Suneet Kumar, J.

Bench : Single Bench

Advocate : Mahesh Narain Singh and Mahendra Narain Singh, for the Appellant;
Ajay Shandilya and Bachchu Lal Yadav, for the Respondent

Final Decision : Dismissed

Judgement

Suneet Kumar, J.—1. The defendant-applicant has approached this Court assailing order dated 4 September 2015 passed by the Appellate Court/ Additional District Judge, Court No. 16, Allahabad in Misc. Civil Appeal No. 162 of 2013 (Suresh Chandra Kesarwani and others vs. Ratan Kumar Chaurasiya and others) arising from an order dated 8 November 2013 passed by the Small Causes Court, Allahabad rejecting the application filed under Order 9 Rule 13 CPC.

2. I have heard learned counsel for the parties and perused the record.

3. The courts below noted in the impugned order that a suit being Original Suit No. 187 of 1999 (Chhotey Lal and others vs. Hari Shankar Tiwari and others) was instituted for cancellation of sale deed. On 23 August 1999 an order was passed to proceed ex-parte, consequently, the suit was decreed ex-parte on 20 July 2000. In an application under Order 9 Rule 13 CPC, the ex-parte decree was set aside on 13 March 2001. Upon restoration, the applicant-defendant again did not participate in the suit, as such, the trial court on 13 July 2006 directed to

proceed ex-parte, finally the suit was decreed ex-parte on 20 October 2009. Aggrieved, the applicant-defendant preferred an application under Order 9 Rule 13 CPC which was rejected, the appeal also met the same fate. The aforementioned orders are being assailed under Article 227 of the Constitution.

4. Submission of the learned counsel for the applicant is that the applicant could not appear on the date of hearing for two reasons, firstly his wife fell ill and secondly his counsel Sri Chintamani Pandey fell ill and subsequently died, therefore, the case went unattended. The court below upon examining the material on record came to the conclusion that the reasons assigned were incorrect and false; the applicant was attending the court in other proceedings but deliberately did not appear in the suit proceedings. It has been noted in the impugned order that on 15 April 2005 injunction application (64-Gha) was filed by the earlier counsel i.e. Sri Chintamani Pandey thereafter, the applicant engaged a new counsel Sri Parmanand Mishra on 20 May 2005. It is also noted that apart from Chintamani Pandey, other counsels were also appearing along with him, the power of all the counsels were available on the record. That apart, the applicant had instituted another suit being Suit No. 46 of 2006 (Suresh Chandra vs. Ratan Lal) before the Civil Judge (Junior Division), Allahabad on 7 January 2006, the suit was instituted through his subsequent counsel Sri Parmanand Mishra and in the said suit, the applicant along with his advocate were participating continuously till 22 March 2010; further, in criminal proceeding being Case No. 1894 of 2005 (State vs. Rakesh Kesharwani and others), the applicant has been continuously appearing since 3 May 2003 to 17 March 2012 as an accused. The appearance of the applicant was noted in the proceedings. The present suit was ordered to proceed ex-parte on 13 July 2006 and was subsequently decreed ex-parte on 20 October 2009. The reasons assigned by the applicant for not appearing in the suit are (1), illness of his wife, (ii), his earlier counsel Sri Chintamani Pandey who despite assuring the applicant did not participate in the proceedings, subsequently died. The courts upon considering the material available on record came to the conclusion that the applicant was participating in other proceedings, whereas, in the present suit, the applicant deliberately avoided the proceedings. The plea that his earlier counsel was not participating in the proceedings due to illness was not accepted as the applicant engaged subsequent counsel much earlier on 20 May 2005, who was perusing the cases be it civil or criminal along with the applicant, therefore, the courts below recorded that the cause assigned for being prevented in appearing on the date of hearing is absolutely false. The illness of the wife was not accepted as no medical reports were filed, further, the illness of his wife never prevented the applicant from simultaneously participating in other cases.

5. Order 9 Rule 13 provides for setting aside a decree passed ex-parte against the defendant. Proviso to the Rule would provide that no court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's

claim. By the High Court amendment after second proviso, the following proviso has been inserted which reads as follows:

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons if the Court is satisfied that the defendant knew, or but for his willful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

(emphasis added)

6. Thus, the Allahabad Amendment is much more stringent; no such decree shall be set aside merely on the ground that the defendant knew or but for his willful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

7. In *Parimal vs. Veena alias Bharti* , (2011) 3 SCC 545, Supreme Court while explaining the ambit and scope of Rule 13 held, that the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso. Paras 13 & 14 of the report is extracted:

13. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much 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 view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that 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 & Ors. v. Rewa Coalfields Ltd.* , AIR 1962 SC 361; *Sarpanch Lonand Gram panchayat v. Ramgiri Gosavi & Ant.* , AIR 1968 SC 222; *Surinder Singh Sibia v. Vijay Kumar Sood* , AIR 1992 SC 1540; and *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation & Another* , (2010) 5 SCC 459.

14. In *Arjun Singh v. Mohindra Kumar & Ors.* , AIR 1964 SC 993, This Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: *Brij Indar Singh v. Lala Kanshi Ram & Ors.* , AIR 1917 P.C. 156; *Manindra Land and*

Building Corporation Ltd. v. Bhutnath Banerjee & Ors. , AIR 1964 SC 1336, and Mata Din v. A. Narayanan. , AIR 1970 SC 1953"

8. While deciding whether there is a 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.

9. In order to determine the application under Order 9, Rule 13 CPC, the test 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 strait-jacket formula of universal application.

10. The language of the rule Order IX Rule 13 is plain, express and unambiguous and the grounds mentioned therein are exhaustive.

11. The expression "sufficient cause" has not been defined anywhere in the Code. It is a question to be determined in the facts and circumstances of each case. The words "sufficient cause" must be liberally construed to enable the court to exercise powers ex debito justitiae. A party should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part. Necessary materials should be placed on record to show that the applicant was diligent and vigilant. Improper advice of advocate may be a good ground to set aside ex-parte decree but it cannot be accepted as a sufficient cause in all cases. Conversely if "sufficient cause" is not shown, ex-parte decree cannot be set aside. The right and this duty is a sine qua non of judicial procedure. An order setting aside ex-parte decree is judicial, it must be supported by reasons. (Refer: Mahesh Yadav vs. Rajeshwar Singh , (2009) 2 SCC 205)

12. If there are delaying tactics and non-cooperation on the part of the party he cannot seek indulgence of the court. The test to be applied is whether the party honestly intended to remain present at the hearing of the suit and did his best to do so.

13. In Arjun Singh vs. Mohindra Kumar , 1964 SC 993 Supreme Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause".

"Sufficient cause" is a question of fact.

14. The following causes have been held to be sufficient for the absence of the

defendant;

1. bona fide mistake as to the date of hearing;
2. Late arrival of a train;
3. sickness of the counsel;
4. fraud of the opposite party;
5. mistake of pleader in noting wrong date in diary;
6. negligence of next friend or guardian in case of minor plaintiff or defendant;
7. death of relative of a party;
8. imprisonment of party;
9. strike of advocates;
10. no instructions pursis by a lawyer, etc.

15. The following causes, on the other hand, have been held not to be sufficient for absence of the defendant for setting aside an ex-parte decree;

1. dilatory tactics;
2. bald statement of noting wrong date in diary;
3. negligence of party;
4. counsel busy in other court;
5. suit of high valuation;
6. absence of defendant after prayer for adjournment is refused;
7. hardship of defendant;
8. absence to get undue advantage;
9. mere thinking that the case will not be called out; not taking part in proceedings, etc.

16. The Supreme Court in *Parimal vs. Veena* , (2011) 3 SCC 545 was considering the scope and ambit of an application under Order 9 Rule 13. The Court observed as follows:

"However, in case the matter does not fall within the four corners of Order 9 Rule 13 CPC, the Court has no jurisdiction to set aside an ex-parte decree. The manner in which the language of the second proviso to Order 9 Rule 13 CPC has been couched by the legislature makes it obligatory on the appellate Court not to interfere with an ex-parte decree unless it meets the statutory requirement."

17. Material date for deciding "sufficient cause" for nonappearance by the defendant is the date on which ex-parte decree was passed and not his previous

negligence or past defaults. In *G.P. Srivastava v. R.K. Raizada* , (2000) 3 SCC 54, the Supreme Court observed:

"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 circumstance anterior in time. If sufficient cause" is made out for nonappearance of the defendant on the date fixed for hearing when ex-parte proceedings initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier."

18. Since the Code makes specific provision for setting aside ex-parte decree, no inherent power can be exercised to set aside such decree.

19. As Rankin, L.J. stated, "I entirely dissent from the view that, if no case is made out under that rule (Rule 13), it is open to the learned Judge to enlarge the rule by talking about Section 151." (Refer: *Manohar Lal vs. Seth Hira Lai, K.B. Dutt vs. Shamsuddin Shah* , AIR 1930 CAL 488).

20. Defendant against an ex-parte decree has two options (1) to file a regular appeal (2) to file an appeal for setting aside the order in terms of Order 9 Rule 13. Both the proceedings are available simultaneously.

21. In *Bhanu Kumar Jain v. Archana Kumar & Anr.* , (2005) 1 SCC 787), the Supreme Court held as follows:

"26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the trial court merges with the order passed by the appellate court, having regard 9 to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

22. The applicant filed a supplementary affidavit today in the Court stating that the applicant, may be granted one last opportunity, therefore, is prepared to deposit by way of cost the entire expenses incurred by the other side during the proceedings since 1991. The applicant on oath would state that he is prepared to deposit Rs. 1 lakh towards cost payable to the respondent. The learned counsel for the respondent refused to accept the cost stating that the application under Order 9 Rule 13 cannot be allowed merely on deposit of cost despite lack of sufficient cause.

23. The proviso to Order 9 Rule 13 being mandatory the application cannot be allowed merely on an undertaking given by the opposite party to deposit cost. The courts below have noted that the reasons assigned by the applicant were incorrect therefore, rejected the application on both the counts, regarding illness

of his wife and non-participation of his earlier counsel. The entire factum was found to be incorrect, the applicant admittedly engaged a subsequent counsel much earlier, who was participating in other proceedings including the present case before the courts in the same district. The applicant, therefore, deliberately avoided appearance despite having knowledge of the date of hearing of the present suit.

24. Having considered the facts and circumstances of the case, this Court in exercise of its supervisory jurisdiction under Article 227 of the constitution, declines to interfere with the impugned orders. The applicant has failed to make out a case to show that the courts below have erred or committed illegality, irregularity or infirmity in passing the impugned orders.

25. The petition is, accordingly, dismissed.

26. No cost.