

(2018) 01 BOM CK 0185
In the Bombay High Court
Case No : 14205 of 2017

Ujwal Chandrashekhar Belapurkar

APPELLANT

Vs

Kalpana Vijay Saindane (Nandedkar),

RESPONDENT

Date of Decision : 30-01-2018

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, <a href=3859 — Order 9Rule
13>Order 9Rule 13

Citation : (2018) 01 BOM CK 0185

Hon'ble Judges : Dr. Shalini Phansalkar-Joshi

Bench : Single Bench

Advocate : Sharmila U. Deshmukh, S.P. Dighe, M.S. Athalye

Final Decision : Dismissed

Judgement

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Ms. Deshmukh, learned counsel for the Petitioner, Mr. Dighe, learned counsel for Respondent No.1, and Mr. Athalye, learned counsel for Respondent Nos.2 and 3.
2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 11th January 2016 passed by the District Judge-6, Nashik, thereby dismissing the Civil Miscellaneous Appeal No.102 of 2014.
3. The said Appeal was preferred by the Petitioner challenging the order dated 14th September 2014 passed by the 3rd Joint Civil Judge, Senior Division, Nashik, thereby dismissing the Civil Miscellaneous Application No.338 of 2013.
4. Civil Miscellaneous Application No.338 of 2013 was preferred by the Petitioner for setting aside the ex-parte decree passed in Special Civil Suit No.259 of 2012 contending, inter alia, that, on account of the reason of his illness, the illness of

his son and the marriage of his daughter, he could not remain present, when the Suit came to be decided ex-parte. Thus, it was submitted that, there was sufficient reason to set aside the ex-parte decree. In support of his submission, the Petitioner has also examined himself and produced the Medical Certificate on record.

5. Both, the Trial Court and the Appellate Court, considered the reasons given by the Petitioner for condonation of delay and for setting aside the ex-parte decree and found that, there was no substance in the reasons given by the Petitioner and those reasons are not sufficient to explain satisfactorily the delay and also the cause of his absence, when the proceedings were decided ex-parte.

6. Against this concurrent finding of fact recorded by both the Courts below, the Petitioner has approached this Court by submitting that, while deciding such application for condonation of delay or for setting aside the ex-parte decree, the approach of the Court has to be liberal. It is urged that, in the present case, the dispute pertains to possession of the immovable property. Petitioner has already approached the Testamentary Court for getting probate of "Will" of his mother, under which the property is bequeathed to him. Hence, it is submitted that, as the substantial rights of the Petitioner are involved and execution of such an ex-parte decree will have the effect of dispossession of the Petitioner from the residential house, this Court should condone the delay and allow setting aside of the ex-parte decree passed by the Trial Court.

7. In support of her submission, Ms. Deshmukh, learned counsel for the Petitioner, has relied upon the Judgment of the Apex Court in the case of G.P. Srivastava Vs. R.K. Raizada and Ors., (2000) 3 SCC 54, wherein, in paragraph No.7, the well crystallized principles of law are laid down, as follows :- "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 nonappearance 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."

8. There cannot be any dispute about the legal propositions laid down in this Judgment of the Apex Court. It is true that, the term "sufficient cause" is required to be interpreted in a liberal manner, but, at the same time, the Court has to see whether there was any negligence on the part of the Petitioner and whether the explanation offered is sufficient.

9. In the present case, the impugned order passed by the Trial Court and the Appellate Court is more than sufficient to reflect that the Special Civil Suit was instituted by the Respondents against the Petitioner for the relief of partition and separate possession on 3rd May 2012. Petitioner has appeared in the said Suit on 15th June 2012. Thereafter, the order of "No WS" came to be passed against the Petitioner on 12th October 2012. Then the affidavit-in-evidence of Respondent No.1 was filed on 24th January 2013 and, ultimately, on 6th August 2013, the Suit came to be decreed ex-parte. Therefore, it is not the case where the Petitioner has not received summons of the Suit and, therefore, the Petitioner remained absent or the ex-parte decree came to be passed; but, this is a case where the Petitioner has appeared in the Suit; has very much knowledge of the Suit; but failed to file written statement to contest the said Suit, despite sufficient opportunity, and as a result, the ex-parte decree is passed in the Suit, without there being written statement filed on record.

10. What is significant to note is that, the Petitioner has admitted in his cross-examination that, he got the knowledge of the ex-parte decree passed in the Suit, on 6th August 2013, on the very next. Therefore, it follows that the Petitioner was very much keeping a watch on the proceedings, but has allowed the same to be decided without written statement or ex-parte. Thereafter also, he has not approached the Court immediately for setting aside the ex-parte decree, but, allowed the time to lapse and then filed the Petition to set it aside, without filing any separate application for condonation of delay.

11. Apart from and in addition to these factors, it is pertinent to note that, the reasons given by the Petitioner for condonation of delay and for setting aside the ex-parte decree, are also not justified. The marriage of his daughter had taken place on 13th February 2013; whereas, the Suit came to be decided ex-parte on 6th August 2013. Hence, that ground can no more be available to the Petitioner. As regards the second ground that he was suffering from illness, the Appellate Court has reproduced, in detail, the Medical Certificate produced by him and which only shows that, Petitioner had some ailment of high blood sugar or of a diabetes, but the Report shows that, at the relevant time, no sugar was detected in the blood and, therefore, it can hardly be accepted that he was bedridden in any way.

12. What is most significant and fatal to the case of the Petitioner is that, during the said period itself, the Petitioner has filed Miscellaneous Application for filing a Testamentary Petition to get the probate of "Will" of his mother. If he can do so, then, as rightly observed by the Trial Court and the Appellate Court, it can hardly lie in his mouth to say that, on account of his illness or the illness of his son, he was prevented from appearing in the Trial Court for the purpose of this Suit and to contest the said Suit.

13. The learned Trial Court and the Appellate Court, both, have considered all these factors in detail. Thereafter, having regard to the conduct of the Petitioner throughout the proceedings, that of remaining totally careless and negligent, despite knowing the consequences of his act of remaining absent, clearly indicates that the entire attempt of remaining absent on the part of the Petitioner is to frustrate the proceedings initiated by the Respondents and not to allow them to enjoy the fruits of the decree.

14. Writ Petition, therefore, being without merits, stands dismissed.

15. Rule is discharged.