

APPEAL FROM ORDER NO. 35 OF 2003

Devu Naik, major,  
s/o late Shri Keshav Naik,  
r/o Madhlawada, Mencurem,  
Bardez, Goa.

... Appellant.

Versus

Santosh Korgaokar,  
r/o Karaswada, Mapusa,  
Bardez, Goa.

... Respondent.

Shri Shivan Dessai, advocate for the appellant.

Shri S. G. Bhobe, advocate for the respondent.

CORAM : F. I. REBELLO, J.

DATE : 31st July, 2003.

ORAL ORDER

The present Appeal is filed against the Order dated 4th March, 2003, whereby the learned Judge has rejected the application for condonation of delay and setting aside the ex parte decree. The present appellant is the defendant and the respondent the plaintiff before the trial Court. A suit was filed by the plaintiff for recovery of monies, which according to the plaintiff, were due and payable to him. Summons were served on the defendant. No written statement was filed and the suit proceeded ex parte. The trial Court permitted the plaintiff herein to lead his evidence on affidavit. The documents were also produced. The plaintiff did not step into the witness box. Based on the same the suit was decreed ex parte. Earlier, there were some orders passed on failure to take steps in the course of the proceedings.

2. The appellant also applied for condonation of delay and contended that he was unable to remain present when the application was posted for hearing and the ex parte decree was made, on account of his sickness. At that time the medical certificate was not produced. At the time of the hearing a xerox copy of the same was produced. From the record, it appears that the matter was adjourned from time-to-time, and finally the decree came to be passed.

This application was opposed on behalf of the respondent herein contending that no cause has been shown, least of all sufficient cause, for condoning the delay in setting aside the ex parte decree and also insofar as the ex parte decree itself is concerned. Also no cause was shown for non-appearance on the day the decree came to be passed. The trial Court disbelieved the evidence led on behalf of the appellant herein and proceeded to dismiss both the application for condonation of delay as well as the application for setting aside the ex parte decree. The Court held that there was no explanation why the advocate for the defendant remained absent and did not appear between 24th January, 2002 and 1st March, 2002. for that reason, it found no sufficient cause.

3. In the instant case, firstly what the trial Court had to consider was whether in the application for

condonation of delay sufficient cause had been shown for condoning the delay and then if the delay was condoned, proceed to consider and dispose of the application for setting aside the ex parte decree. In the instant case, the Court has disposed of both the applications by a common order. The consideration of the application for setting aside the ex parte decree would have arisen only if delay had been condoned. In support of his application for condonation of delay, it was pointed out on behalf of the appellant that he was sick on 24th January, 2002 and undergoing doctor's treatment. The xerox copy of the medical certificate produced dated 16th February, 2002, was to show that the appellant was under doctor's treatment from 22nd January, 2002 to 15th February, 2002, and that he was advised strict bed rest and also was declared not fit to resume duties and work. It is then stated that under these circumstances he did not collect the date which was fixed on 1st March, 2002 and on 14th March, 2002, when enquiry was made, he realized that ex parte orders were passed against him. He immediately applied for certified copy on 16th March, 2002, which was given to him on 17th March, 2002, and the application thereafter was filed on 1st April, 2002, alongwith supporting affidavit. The plaintiff in the application for setting aside the ex parte decree explained his non-appearance in the Court on 24th January, 2002, and also had pleaded therein his sickness and bona fide

mistake and that only on 14th March, 2002, he came to know of the passing of the ex parte decree. He, therefore, prayed for setting aside the ex parte Order dated 24th January, 2002, and the ex parte decree dated 1st March, 2002.

In the reply filed on behalf of the respondent herein, it was contended that the application filed was false, bogus, without substance in law and not tenable in law. It was denied that the appellant was sick on 24th January, 2002, or that he was undergoing treatment on the that day. It was the case of the respondent that he had seen the appellant at Mapusa on 24th January, 2002 near Hotel Suhas, near Mapusa Clinic and, as such, the claim that he was sick was false. It is then explained as to what happened in the course of the suit and that in the absence of the plaintiff or his advocate on 24th January, 2002, the Court proceeded ex parte and on 1st February, 2002 he filed his affidavit in evidence and also written arguments.

4. Reliance has been placed on the roznama as also on various judgments which will be adverted to to the extent that they are relevant. It is no doubt true that reliance has been placed on the judgment of the Apex Court in the case of **Arjun Singh vs. Mohindra Kumar & Ors.**, AIR 1964 SC 993, to point out what is the meaning of

sufficient cause and what is the effect of setting aside the ex parte order as also under Order 9 Rule 13 of the C.P.C. Reliance was also placed on the case of **Malkiat Singh & Anr. vs. Joginder Singh & Ors., (1998) 2 SCC 206.**

5. The appellant had supported his case by a medical certificate. The appellant had taken steps to engage an advocate who did appear. If the version of the appellant is to be accepted, namely that he fell sick in terms of the certificate produced, the only contrary evidence was the averment by the respondent that he had seen the appellant at Mapusa. In my opinion, that averment by itself could not have displaced the submission by the appellant coupled with the medical certificate and further, considering that the appellant had taken steps to engage an advocate to appear on his behalf. Once the appellant had taken steps to engage an advocate, he really cannot be faulted with, if his lawyer chose not to appear on the date fixed. In these circumstances, in my opinion, the trial Court misdirected itself in applying the correct test as to sufficiency of cause. Procedural laws are not to deprive a party of his rights. In the instant case cause shown amounted to sufficient cause. The trial Court ought to have condoned the delay as well as set aside the ex parte decree.

The suit is a suit for money and considering that the respondent had a decree in his favour, the appellant will have to be put to some terms to show his bona fides that he was seriously desirous of contesting the proceedings.

In the light of that the following Order:-

The impugned Order dated 4th March, 2003 dismissing Civil Miscellaneous Application no.156/2002 and Civil Miscellaneous Application no.157 of 2002, are set aside and the Civil Miscellaneous Applications are allowed, subject to the appellant depositing before the trial Court a sum of Rs.50,000/- (rupees fifty thousand only) within four weeks from today. On such sum being deposited the Civil Miscellaneous Applications no.156/2002 and 157/2002 will stand allowed. On failure to deposit, this Appeal will stand dismissed. The amount deposited will be initially invested in Fixed Deposit in a Nationalized Bank for a period of one year and thereafter for successive periods, as the trial Court may deem fit and proper. Costs quantified at Rs.1,000/- (rupees one thousand only). The Appeal stands disposed of accordingly.

F. I. REBELLO, J.

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