LAW OF 'SETTING ASIDE EX-PARTE' DECREES IN THE PERSPECTIVE OF DOCTRINE OF LACHES

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INTRODUCTION

Ex-parte is a Latin legal term; originally it is **ex par-tay** but popularly known as **ex party** means "For one party" or "On one side only" or done by, for, or on the application of one party alone. "Principles of natural Justice" are basic canons in the dispensation of justice, an age-old adage ***Audi alteram partem (or) audiatur et altera pars*** means "listen to the other side", or "let the other side be heard as well". It is a golden rule of reason and fair play in the administration of justice. There is a tantamount tenet under the law that **Interest *Reipublicae Ut Sit Finis Litium*** which means in the interest of society as a whole, litigation must come to an end. These two dictums actuated in different arenas but leading to the same destination of substantial Justice. The present topic exclusively falls under the exception of ***Audi alteram partem*** . Generally ex-parte orders and ex-parte proceeding are interlinked with each other, in some occasions these are used as synonyms but there is a slight distinction discernible when compulsion of facts and conduct of parties are concerned, the primary is resulted by ex-party reliefs and the secondary is by ex-party proceedings. Compulsion of facts indicate the urgency of relief even without calling for the other side in protecting the rights of the petitioning party from irreparable loss. Conduct of parties as to their active prosecution is concerned, is not foreseeable but leads the court to the second maxim that there shall be an end to the litigation.

Functus officio is a Latin term where Functus means "having performed" and officio means "office." Thus, the phrase functus officio means "having performed his or her office," which in turn means that the Judge is without further authority or legal competence discharged his statutory entrustment.[1] Once the judicial order is pronounced it shall be final in all aspects except under the appellate and revisional jurisdiction of superior courts. So an order passed by

[1] Logan Vs WMC Mortg.Corp (In re Gray), 410 B.R 270,275 (Bankr.SD.Ohio 2009)

a judge can't be altered in any concern but it has its own immunity by way of Law of Review in civil as well as criminal proceedings. The present topic Law of set-aside comes under another exception of the general rule of *Functus officio*.

Meaning of ex parte

An ex parte decree is a decree passed in the absence of the defendant (in absenti) where the plaintiff appears and the defendant does not appear when the suit is called on for hearing and if the defendant is duly served, the court may hear the suit ex parte and pass a decree against him[2]. Such a decree is neither null and void nor inoperative but is merely voidable and unless and until it is annulled on legal and valid grounds, it is proper, lawful, operative and enforceable like a bi parte decree and it has all the force of a valid decree. An ex parte decree may be passed either at the first hearing or at an adjourned hearing[3].

Reasons for setting aside ex-parte decree

There are three main reasons for invoking the said provision namely:

1. Where the summons was not served on the defendant.
2. Where after service of summons the defendant appears, files written statement and thereafter he and his counsel fail to appear when the suit is called on for hearing.
3. Where the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing.

Remedies available against ex-parte decree

Basing on the aphorism that **"Vigilantibus Non Dormientibus Jura Subveniunt"** (Law assists those who are vigilant and not those who sleep over their rights), In any Law the assistance would be extended to the vigilant but not the negligent the same is vital in extending the benefit of remedy to the applicant in dealing with the cases of ex parte set asidals.

Remedies

- An application under Order-IX/ Rule-13 CPC (or)

[2] Order: IX Rule: 6 (a) of CPC
[3] Civil Procedure Code by Justice C.K Thakker, 5th Edition, EasternBook Company, Luknow,Part-II, page no : 190

- A review application U/S 114 CPC (or)
- An appeal U/S 96 CPC (or)
- Proceedings on the ground that it has been obtained by fraud etc[4]
- An application for re-hearing of the matter on the ground of principles of natural Justice[5]
- A revision may also lie[6]
- In appropriate cases the inherent powers of a court may also be invoked[7]
- Writ lies[8]

DETAILED VIEW ON ORDER-IX/ RULE-13 CPC

Prior to the incorporation of Order 9 Rule 13 with proviso thereto, section 108 of the Code of Civil Procedure 1882 contained a provision for setting aside the ex parte decree against the defendant upon satisfaction of the court that the summons was not duly served. However different words used in the said section namely "decree', "set aside the decree" and "proceeding with the suit" would suggest that the ex parte decree passed only against the applying defendant should be set aside but by insertion of the word "proceeding with the suit" requires the ex parte decree to set aside in toto as against all the defendants in the suit.

ORDER-IX; RULE 13 OF CPC

Setting aside decree ex parte against defendant

In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an Order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[4] Rupchand Vs Raghuvanshi (P) Ltd, AIR 1964 SC 1889: (1964) 7 SCR 760.
[5] PLD 1972 Lah 603 F.B
[6] 1995 CLC 516
[7] PLD 2003 SC 625
[8] 1986 CLC 2515 SCMR

Provided further 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.

Explanation: Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal; no application shall lie under this rule of setting aside the ex parte decree. In order to 'setting aside' an ex parte decree two conditions are required to be satisfied.

One is un-served summons or sufficiency clause, another one is imposition of conditions as to costs, payment into court or other condition as court thinks fit. Before going to detailed analysis the embargo of applicability of the said provision to the cases where no application to set aside decree would be maintainable where the defendant filed an appeal and the appeal was disposed of on any ground, other than the ground that the appeal has been withdrawn by the appellant.

In order to understand the above rule axiomatically, the word "sufficient cause" should be interpreted in the light of myriad rulings passed by various High Courts and Apex Court of India.

1. **"Sufficient cause"** means that party had not acted in a negligent manner or there was a want of bona fides 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".[9]
2. "The term "liberal," in the context of statutory construction and implies interpretation, is often used to signify an interpretation which produces broader coverage or more inclusive application of statutory concepts. What is called a liberal construction is ordinarily one which makes a statute apply to more situations or in more situations than would be the case under strict construction."[10]
3. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly

[9] Parimal Vs. Veena alias Bharti (2011) 3 SCC 545
[10] K.M., 274 Ill. App. 3d 189 (Ill. App. Ct. 1995),

negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."[11]

4. It is 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".[12]
5. The term **"sufficient cause"** has to receive liberal construction so as to advance substantial justice it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.[13]
6. Order IX, Rule 13 Code of Civil Procedure would be liberal and elastic rather than narrow and pedantic. However, in case the matter does not fall within the four corners of Order IX, Rule 13 CPC, the court has no jurisdiction to set aside ex-parte decree. The manner in which the language of the second proviso to Order IX, Rule 13 Code of Civil Procedure has been couched by the legislature makes it obligatory on the Superior court or appellate Court not to interfere with an ex-parte decree,much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse or does not meet the statutory requirement."[14]
7. Procedural enactments should be construed liberally in such a manner as to render the enforcement of substantive rights effective. But the requirements as to the time-Limit within which an administrative act is to be performed are to be liberally construed. Provisions ensuring the security of fundamental human rights must, unless the mandate is precise and unqualified, be construed liberally so as to uphold the right.[15]
8. It is further necessary to emphasise that even if the sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by section 5. This aspect of the matter naturally introduces the consideration of all relevant facts.[16]

[11] Vedabai v. Shantaram Baburao Patil (2001) 9 SCC 106
[12] Arjun Singh v. Mohindra Kumar & Ors., AIR 1964 SC 993
[13] Union of India v. Ram Charan AIR 1964 SC 215
[14] Parimal Vs. Veena alias Bharti (2011) 3 SCC 545
[15] Hon'ble Justice A.K Srivastava, Delhi High court on "Interpretation of Statues" in Institute's Journal Jul-Sep 1995.
[16] Randezvous Silk Industries Vs. J and K Bank Ltd.

9. Once the application has been preferred after expiry of limitation period necessarily it has to be accompanied by an application for condonation of delay which will be strictly in consonance with the provisions of Section 5 of Limitation Act. These are two independent proceedings. Any application which is beyond time has to be accompanied by an application for seeking condonation of delay by explaining sufficient cause in filing this application beyond the period of limitation. It is only after the condonation of delay application is decided that the court assumes the power to decide the main application i.e. for setting aside exparte decree.[17]
10. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. Thereafter, the learned Judges proceeded to state that this Court has justifiably advocated adoption of liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate.
11. The Law of Limitation is a substantive law and has definite consequences on the right and obligation of a party to rise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the Applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."[18]

[17] Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another (2010) 5 SCC 459
[18] Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another, MANU/SC/0141/2010: 2010 (5) SCC 459.

12. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So, a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.[19]
13. A distinction must be made between a case where the delay is inordinate and a case where the delay is of few days and whereas in the former case the consideration of prejudice to the other side will be a relevant factor, in the latter case no such consideration arises. Thereafter, the two Judge Bench ruled thus: What needs to be emphasized is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.[20]
14. Guidelines in considering applications filed under Section 5 of the Limitation Act, seeking condonation of delay to turn up the legal position –
    - The word 'sufficient cause' should receive liberal construction to do substantial justice;
    - What is 'sufficient cause' is a question of fact in a given circumstances of the case;
    - It is axiomatic that condonation of delay is discretion of the Court;

[19] N. Balakrishnan v. M. Krishnamurthy AIR 1998 SC 3222
[20] Maniben Devraj Shah v. Municipal Corporation of Brihan, Mumbai (2012) 5 SCC 157

- Length of delay is no matter, but acceptability of the explanation is the only criterion;
- One the Court accepts the explanation as 'sufficient', it is the result of positive exercise of discretion and normally the superior Court should not disturb in such finding unless the discretion was exercised on wholly untenable or perverse;
- The rules of limitation are not meant to destroy the rights of the parties but they are meant to see that the parties do not resort to dilatory tactics to seek their remedy promptly.
- Unless a party shows that he/she is put to manifest injustice or hardship, the discretion exercised by the lower Court is not liable to be revised.
- If the explanation does not smack of mala fides or it is put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor.
- If the delay was occasioned by party deliberately to gain time, then the Court should lean against acceptance of the explanation and while condoning the delay, the Court should not forget the opposite party altogether.[21]

15. **The Hon'ble Supreme Court recently in Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others, 2013 (5) CTC 547 (SC) : 2013 (5) LW 20** held that there should be a liberal, pragmatic, justice oriented, nonpedantic approach while dealing with an Application for condonation of delay. The Hon'ble Supreme Court referred to its earlier judgments in G. Ramegowda, Major and others v. Special Land Acquisition Officer, Bangalore, MANU/SC/0161/1988 : 1988 (2) SCC 142; O.P. Kathpallia v. Lakhmir Singh (dead) and others, MANU/SC/0322/1984 : 1984 (4) SCC 66; State of Nagaland v. Lipok AO and others, MANU/SC/0250/2005 : 2005 (1) MWN (Cr.) 166 (SC) : 2005 (3) SCC 752; New India Insurance Co. Ltd. v.Shanti Misra, MANU/SC/0547/1975 : 1975 (2) SCC 840; Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another, MANU/SC/0141/2010 : 2010 (5) SCC 459, which declared that the Court should be liberal in dealing with Condone Delay Petition. The principles are elucidated in the said judgment and Paragraphs 15 and 16 of the Judgment are usefully extracted as follow:

From the aforesaid authorities the principles that can broadly be culled out are:

[21] C. Subramaniam v. Tamil Nadu Housing Board rep. By its Chairman decided on Thursday, January 25,2001. In the Supreme Court of India, Petition(s) for Special Leave to Appeal (Civil) No.17862-17863/2000

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the Courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms 'sufficient cause' should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled-for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the Counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the Courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or a few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the Courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts is to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. In addition to the above some more guidelines are there taking note of the present-day scenario. They are:

(a) An Application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the Courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."[22]

17. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is a reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delays the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.[23]

[22] The Hon'ble Supreme Court recently in Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others, 2013 (5) CTC 547 (SC) : 2013 (5) LW 2016

[23] Abitha Nachi and Others Vs. K.S. Saroja and Others (Chennai)

18. On other hand it is reported that court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delays in approaching the court is always deliberate.[24]
19. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effects of the order it is going to pass upon the parties either way.[25]
20. The Court referring to earlier decisions reversed the decision of the learned single Judge who had condoned delay of 1236 days as the explanation given in the application for condonation of delay was absolutely fanciful.[26]
21. It is well settled that a liberal approach should be extended while considering the application for condonation of delay. Sufficient caution has been exhibited to note that wherever there is lack of bona fides or attempt to hood-wink the Court by the party concerned who has come forward with an application for condonation of delay, in such cases, no indulgence should be shown by condoning the delay applied for. It is also clear to the effect that it is not the number of days of delay that matters, but the attitude of the party which caused the delay. In other words, when the Court finds that the party who failed to approach the Court within the time stipulated comes forward with an explanation for condoning the delay, the Court if satisfied that the delay occasioned not

[24] Shakuntala Devi Jain v. Kuntal Kumari (1969) 1 SCR 1006
[25] N.Balakrishnan v. M.Krishnamurthy (1998) 7 Supreme Court Cases 123
[26] B. Madhuri Goud v. B. Damodar Reddy (2012) 12 SCC 693

due to the deliberate conduct of the party, but due to any other reason, then by sufficiently compensating the prejudice caused to the other side monetarily, the condonation of delay can be favourably ordered.[27]

22. Onerous conditions shall not be imposed unless there are exceptional reasons for doing so which have to be clearly stated in the order. The imposition of terms or conditions for setting aside an ex parte decree is in the exercise of judicial discretion of the Court and whether the terms or conditions imposed are reasonable or onerous is a question of fact on the circumstances of each case. No hard and fast rules can be laid down with mathematical precision to govern the exercise of judicial discretion of the Court in arriving at reasonable, equitable and just terms or conditions for setting aside an ex parte decree.[28]
23. The Court may impose such condition as it may consider necessary to set aside an ex parte decree and to restore a suit and such condition may include direction to deposit costs or the decretal amount or any portion thereof, which condition, of course, should be reasonable and not harshly excessive, which depends upon the facts and circumstances of each case.[29]

Therefore, the reference is answered in the following terms:

(a) The employment of words "upon such terms as to costs, payment into Court or otherwise as it (the Court) thinks fit" confers a power and imposes a legal obligation upon the Court to impose conditions for setting aside an ex parte decree as to costs, as to payment of the decretal amount, whole or in part or to such other conditions as the Court thinks fit, provided onerous conditions shall not be imposed except under special circumstances and for exceptional reasons which have to be stated in the order.

(b) However, imposition of conditions for depositing the costs or part or whole of the suit amount as a condition precedent for entertaining the application even before going into its merits is not permissible.

[27] Sundar Gnanaolivu vs Rajendran Gnanavolivu 2003 (1) L.W 585
[28] Gopal & Co. v. Kure Balarajaiah Siddiramulu
[29] V. Kasturi Bai v. P. Varalakshmi 1983 (1) APLJ 305

(c) The imposition of terms or conditions for setting aside an ex parte decree is in the exercise of judicial discretion of the Court and whether the terms or conditions imposed are reasonable or onerous is a question of fact in the circumstances of each case.

(d) No hard and fast rules can be laid down with mathematical precision to govern the exercise of judicial discretion of the Court in arriving at reasonable, equitable and just terms or conditions for setting aside an ex parte decree.[30]

As from this an interesting point is elicited that there is a difference between imposition of costs as condition precedent for entertaining the application for 'set aside' and imposition of costs after the application is disposed of. Here the imposition in the primary part as a condition precedent is unlawful whereas the imposition of costs as condition subsequent is allowed under law.

24. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree, not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also on other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants to terms. It is, however, trite to state that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith....".[31]
25. It has been held that while considering an application for condonation of delay no straitjacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. It has been further stated therein that each case has to be weighed from its facts and the circumstances in which the party acts and behaves.[32]
26. In Oriental Aroma Chemical Industries Limited the court came to hold as follows: "Now upon a close look at the prayer made for condonation of delay we find that

[30] Polasani Sucharitha vs Margadarsi Chit Fund Ltd. And Ors 2007 (5) ALD 293
[31] Tea Auction Limited vs. Grace Hill Tea Industry And Anr., (2006) 12 SCC 104: (2006) 9 SCALE 223
[32] Improvement Trust, Ludhiana v. Ujagar Singh and others (2010) 6 SCC 786

although the delay is substantial, the same has been sought to be explained in a manner even if it may not be full proof but is quite convincing."

APPLICABILITY OF LAW OF SET-ASIDE WITH A SPECIAL REFERENCE OF DIFFERENT SCENARIOS

Setting aside the ex-parte proceedings is purely related to question of Fact, hence there was no rigid formula or arithmetical calculation of having universal acceptance to resolve the conundrum that lies between the parties. So as to deal with the scenario unfettered judicial discretion was conferred upon the courts to decide the question of 'set-aside' in the light of emerging circumstances of each case. Here the discretion when applied to a court of Justice means sound discretion guided by Law; it must be governed by rule not by humor, it must not be arbitrary, vague and fanciful but legal and regular[33]. Undoubtedly, it means Judicial discretion and not whim, caprice or fancy of a Judge[34]**.** It should be exercised with rules of reason & Justice but not according to private opinions.

JOINT, INDIVIDUAL AND INSEVERABLE DECREES

The scenario in **"Joint and Indivisible"** or **"Joint and inseparable** or **inseverable"** decrees is indubitably different and the up-shot in such cases generally be influenced by many of the factual matrices. The word Joint and Indivisible decree is axiomatically explained by the Apex court. When there is a common and identical issue(s) involved in two or more proceedings, if there is a failure or omission or lapse to bring the legal representatives on record in time would abate all the proceedings in toto. Otherwise inconsistent or contradictory decrees would result and proper relief would not be granted. It causes confliction with the one which had already become final with the subsequent decree and vice-versa.

So, such situations should be dealt with an approach of liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party, if 'set-aside' petitions are filed by parties to the proceedings.

[33] Ramji Dayawala & Sons (P) Ltd. v. Invest Import (1981 (1) SCC 80), reliance airport developers pvt. ltd. Vs . airport authority of india (2006) 10 scc1
[34] Dhurandhar Prasad Singh v. Jai Prakash University and Ors. (2001 (6) SCC 534).

The Hon'ble apex court of India expressed its view as to Whether a contested decree by some of the defendants can be set aside while considering the application for setting aside the ex parte decree against one of the defendants. Does it not amount to jeopardizing the interests of the party in whose favour the decree is passed? Apex court explained that this would, certainly depend on the nature of reliefs claimed by the plaintiff in his plaint and the nature of the decree in question. If the decree is indivisible, the court would be at liberty to set aside the decree not only against the defendant who applied for setting aside the ex parte decree passed against him, but also as against all or any of the other defendants. In order to have a better idea the illustrations set forth below are imperative.

1) **Partial setting aside in joint decree:** A sold his property to three brothers B, C, D by way of registered sale deed. X the daughter of A filed a suit against B, C, D on the ground of pre-emption. C & D lived in London, hence there was no service of summons on them but served on B. Court passed a decree in favour of X. Latter C & D filed an application Under Order IX; Rule 13, The same is allowed and the court set aside the ex-parte decree against them but not on B.

Ratio Decidendi: There is no error of law in allowing a joint decree to stand against the person who contested throughout while setting aside the ex-parte decree passed against others over whom summons was not served. In one-word decree binds on the contesting but not on the un-served as joint decree is concerned.

2) **Joint 'Set-aside' in partial contest:** A, B and C are the coparceners of Joint Hindu undivided family, they jointly executed a mortgage in favour of X mortgagee, subsequently X filed a suit against A, B and C, here C is the minor represented by her father-in-law as a guardian. The court passed an ex-parte decree, later the same became an absolute on order, and in execution the property was sold. Minor "C" filed Order IX, rule 13 petition u/s 108 CPC. Trial court set-aside the decree against minor. Similar application filed by B is also allowed.

Ratio decidendi: 'set-aside' against one should being aside against others. Here the decree is Joint and Indivisible where substantial question of fact to be decided for advancing substantial justice is one and same in both the proceedings. In one word, if the decree is Joint and Indivisible, priority shall be given to nature of the decree instead of other reasons mentioned in the Act, otherwise substantial justice would be defeated which is the concomitant in the Law of 'set-aside'.

3) **'Set–aside' against joint possession & interest:** A comes into Court on the allegation that X and Y are in joint possession of certain immovable property and asking for a declaration that he is in joint possession along with them. X appears and defends the suit. Y does not appear. The Court finds that X and Y are in joint possession, and that A is entitled to the relief he asks for, and decrees accordingly. If Y succeeds in getting an order to set aside the decree passed ex parte, it is evident from its very nature that the whole decree must be set aside, otherwise, in the event of Y succeeding ultimately in the suit, this absurd position would arise that X and Y being in joint possession of the property, A would be in possession of a decree declaring him to be jointly in possession along with X and Y, whilst Y would have a decree in his favour that A was not in joint possession with himself and X.

Ratio decidendi: if any right or liability is to be determined against joint possession and interest, the suit as a whole is to be sat-aside in spite of whether notice served or prevented from sufficient cause. Otherwise incongruity would prevail.

4) **Set-aside' for preventing inconsistency between decrees**

A & B jointly executed a promissory note in favour of X and borrowed certain sum of amount; B paid the amount due, but not A. In a suit filed by X, summons served on A alone. None of them appear as a result suit is decreed ex-parte. B applied for set-aside. The decree must be set-aside against A also. The reason being, If B succeeds in proving the payment, then there will be two inconsistent decrees.

Ratio decidendi: When one executant discharged his liability arising from Joint liability, departing of decrees in such cases would cause inconsistency. It shall be curtailed by way of instantaneous proceedings against both of them. In other words, two inconsistent decrees should not be allowed to operate the field.

LAW OF SET-ASIDE IN DIFFERENT PROCEEDINGS

I) Set-aside in summary proceedings: if the proceedings are summary in nature, Order XXXVII/ Rule-4 will be pivotal in addition to Order IX; Rule 13 as to the matter of set aside is concerned, In other words defendant has to prove not only 'sufficient cause" which prevented his appearance before the court on the day when the suit is called-on for hearing, but also "special circumstances" of the facts that he had a good substantial; and meritorious

defense to raise and the defense which he was entitled to put up was not frivolous or vexatious or in other words, bogus. Illusory or practically moonshine.[35]

II) 'Set-aside' in absence of any express provision:

It is held that all the courts have an inherent power to set aside the ex parte decree on the ground of violation of principle of natural justice even in absence of any express provision subject of course to the statutory interdict.

Provisions of setting aside ex-parte decree stood on the substratum of Principles of Natural Justice but not on the rigour of Law.

DIFFERENCE BETWEEN NON-TRAVERSE AND NON-APPEARANCE

A traverse signifies a denial. Thus, where a defendant denies any material allegation of fact in the plaintiff's declaration, he is said to traverse it and the plea itself is thence frequently termed a "traverse." If the defendant does not deny the allegations specifically then it would be considered as admissions and it will lead to passing of a decree by the court, Order VIII/ Rule 5 and 10 come under the roof of non-traverse which are not amenable to remedy under Order IX/ Rule 13 whereas Non-appearance of defendant lead to ex parte decree which is amenable for remedy under the said rule.

***Appeal on Rejection*:** When an application is made under Order IX, Rule 13 for setting aside an ex parte decree, if such an application is rejected then alone an appeal would lie under Order XLIII, Rule 1(d).

SET-ASIDAL ON THE STREAK PLATE OF DOCTRINE OF LACHES

[35] A.R. Electronic Private Ltd. vs R.K. Graphics Pvt. Ltd. 2002 VAD Delhi 651, 97 (2002) DLT 913

Laches means "too bad" or "you are out of time" or that door is now locked". Laches (or) Lasches is an ad French word for slackness (or) Negligence (or) not doing. This doctrine is based on the maxim that equity aids the vigilant and not those who slumber on their rights. This is an equitable defense (or) remedy.

The elements of laches are:

- Unreasonable lapse of time
- Neglect to assert a right or claim
- To detriment of another

If these three elements are met, then doctrine of laches will act as a bar in court. Lache is, therefore considered as an unreasonable delay in pursuing a right or claim. In a way it prejudices the opposing party. The person invoking laches is asserting that an opposing party has slept upon his "right" and that as a result of this delay circumstances have changed such that it is no longer just to grant the petitioner's claim.

To put in other way, failure to assert one's right in a timely manner results in a claim being barred by laches.

Legal right or claim will not be enforced or allowed if a long delay in asserting the right or such claim prejudices the adverse party. Elements of laches include knowledge of a claim, unreasonable delay.

Laches is Fact-Sensitive

The Law encourages speedy resolution for every dispute. Cases in Law are governed by statutes of limitation which determines how long a person has to file a Law suit before the right to sue expires. Different types of injuries have different time periods in which to file a Law suit.

The interaction between laches and statutory limitation is still less understood. Laches always engaged with precisely those concerns which statutory limitation does not.[36] Laches is equitable equivalent of statutes of limitation, however unlike statutes of limitation, laches leaves it upto the court to determine based on the unique facts of the case, whether a petitioner has waited too long to seek the relief. Unlike statutory limitation, laches is fact-sensitive and

[36] Laches and limitation : clare stanely and Michael J Ashdown published in Trusts & Trustees advance access published August 26,2014.

responds to the conduct of the parties. In course of weighing laches actions and behavior of the plaintiff and *defendant*, in some times the impact on third parties are also to be taken on count. It is a flexible defense.[37]

Dual Consideration

Two points are having primacy in application of said doctrine.

- First, the promptness and diligence with which a claim has been brought.
- Secondly, whether the claimant has acted inequitably that the doctrine of laches is to be found.

Practical Injustice and Its View

Essential principle is that of practical injustice: The court will refuse a remedy where it would be practically unjust to give one either.

- Because by the claimants conduct he has waived the right to that remedy.
- If he has not waived his right, his delay has nevertheless prejudiced the other party.

Earlier Cases and Their Role

Aldous LJ explained this doctrine in more modern but similarly expansive terms: The more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The enquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to ascertain beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach.

Delay when Substantial Equity is Predominant

If an argument against relief which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by statute of limitation, the validity of that defense must be tried upon the principles of substantial equity. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might

[37] Laddie J in Nelson V Rye (1996) 1 WLR 1378 (ch) 1388

affect both party and cause a balance of Justice and Injustice in taking the one course or the other so far as it relates to remedy.[38]

CONCLUSION

1. Striking balance between advancement of substantial justice and fetter on onerous terms in the Law of Setting Aside Ex-parte decrees and Orders is utmost important.
2. Length of period is immaterial but strength of explanation is substantive in the Law of 'Setting aside' Ex-parte decrees and Orders
3. Pragmatic approach is required in order to uphold the substantial Justice but not the approach of dogmatic to dispose the matters in fulfilment of yardstick fixed in the jubilee of disposal drive.
4. Doctrine of Laches shall be applied to every case for deciding the maters of set-asidals by weighing facts related to conduct and circumstances of the parties.
5. When the doctrine of the laches is geared the remedy available under the law is barred.

[38] Moon Mills Ltd Vs Industrial Court AIR 1967 SC 1450