

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION

Present:

The Hon'ble Justice Biswajit Basu.

C.O. 1545 OF 2020

SMT. ASHA SINGH & ORS.
VS.
KAMAL KUMAR RATHI & ORS.

For the petitioners : Mr. Asit Baran Raut,
Mr. Tuhin Subhra Raut.

For the opposite parties: None.

Heard on : 22.01.2021

Judgement on : 03.02.2021

Biswajit Basu, J.

1. Whether an ex-parte decree passed on the failure of the defendant to file written statement within the time fixed under Order VIII Rule 1 of the Code of Civil Procedure can be set aside under Order IX Rule 13 of the Code, is the issue falls for consideration in the present revisional application under Article 227 of the Constitution of India.

2. The facts necessary to address the said issue is not in dispute which need to be recorded. The petitioners filed Ejectment Suit No. 19 of 2017 for eviction of the predecessor-in-interest of the opposite parties. The said predecessor-in-interest of the opposite parties entered appearance in the said suit at a belated stage and filed written statement with a prayer for acceptance of the same on condonation of delay. The order refusing to condone such delay was affirmed in revision in C.O. 1189 of 2010.

3. On the death of the original defendant, the present defendants, the present opposite parties herein were substituted in the said suit. The prayer of the opposite parties to allow them to contest the suit by filing written statement was turned down by the learned Trial Judge. The said order was also affirmed in revision being C.O. 2294 of 2012. The suit was ultimately decreed ex-parte on October 9, 2012.

4. The opposite parties prayed for setting aside the said ex-parte decree by resorting to the provision of Order IX Rule 13 of the Code. The said application was registered before the learned Trial Judge as Misc. Case No. 204 of 2012. The learned Trial Judge by the judgment and order dated June 06, 2014 has dismissed the said misc. case holding that the original defendant initially refused to accept the summons but later in spite of getting opportunity failed and neglected to pursue the said case. The learned Trial Judge, in view of such conduct of the said defendant held that he was not diligent in contesting the said suit.

5. The opposite parties aggrieved by the said judgment and order of the learned Trial Judge preferred the connected Misc. Appeal No. 31 of 2014. The learned Judge, 4th Bench, City Civil Court at Calcutta by the impugned judgment and order dated February 17, 2020 has allowed the said appeal thereby set aside the judgment and order of the learned Trial Judge and after setting aside the ex-parte decree has restored the said suit to its original number and file.

6. The Appeal Court below has set aside the said ex-parte decree on the ground that on the date of taking the suit for ex-parte hearing, the defendants appeared and expressed their willingness to cross-examine the plaintiff which they were entitled to but the said suit was decreed ex-parte without affording the said opportunity to the defendants.

7. Mr. Asit Baran Raut, learned Advocate appearing on behalf of the petitioner, submits that the suit was decreed ex-parte due to failure of the defendants to file written statement as such the provision of Order IX Rule 13 of the Code has got no manner of application in setting aside such a decree. He places reliance on the decision of the Hon'ble Supreme Court in case of **PARIMAL vs. VEENA** reported in **AIR 2011 SUPREME COURT 1150** to contend that a case which does not fall within the purview of Order IX Rule 13 of the Code, the Court has no jurisdiction to set aside the ex-parte decree under the said provision of the Code.

Heard Mr. Raut, perused the material on record.

8. In a case in which a decree is passed ex-parte, on the prayer of the defendant against whom such decree has been passed, the Court under Order IX Rule 13 of the Code can set aside the said decree if the said defendant satisfies the Court that the summons was not duly served, or he was prevented by any sufficient cause from appearing when the suit was called on for hearing; that is the scope of investigation in an application under Order IX Rule 13 of the Code.

9. In the present case, the suit although was posted for ex-parte hearing for non-appearance of the original defendant in spite of receipt of summons but the ex-parte decree was ultimately passed in terms of Order VIII Rule 10 of the Code for the failure of the defendant to file written statement within the time prescribed under Order VIII Rule 1 of the Code, therefore, apparently it is not a case covered under Order IX Rule 13 of the Code. Mr. Raut, therefore, has rightly relied on the decision of the Hon'ble Supreme Court reported in **AIR 2011 SUPREME COURT 1150 (supra)** as in the said report it has been held that in the case which does not fall within the four corners of Order IX Rule 13 of the Code, Court has no jurisdiction to set aside the ex-parte decree.

10. The refusal of the prayer of the substituted defendants to give them the opportunity to cross-examine the plaintiff's witness on the date fixed for ex-parte hearing of the suit is no ground for setting aside the ex-parte decree

under Order IX Rule 13 of the Code. The said ground may be a ground to assail the said decree in an appeal under Section 96 of the Code. Therefore, the Appeal Court below is not at all justified in setting aside the said ex-parte decree on the said ground.

The order impugned, for the aforesaid reasons, is not sustainable and is accordingly set aside and the order of the learned Trial Judge is restored.

C.O. 1545 of 2020 is allowed with the above terms. No order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(BISWAJIT BASU, J.)