

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 2661 of 2022

Balaram Santra

VERSUS

Tanushree Ash & Ors.

For the Petitioner

: Mr. Abhishek Banerjee, Adv.

Last Heard on : December 02, 2022

Judgment on : December 16, 2022

Biswaroop Chowdhury.:

This application is directed against the Order dated 17-08-2022 passed by the Learned Civil Judge (Junior Division) 2nd Court Chandernagore at Hooghly in Pre-emption Misc. Case No. 10 of 2019. The petitioner being aggrieved by the said Order has come up with the present application.

The case of the petitioner may be summed up thus;

1. An application under Section 8 of the West Bengal Land Reforms Act 1955 was filed by the petitioner against the opposite parties before the Court of the Learned Civil Judge (Junior Division) 2nd Court Chandernagore at Hooghly being Misc Case No-10 of 2019.
2. After issuance of summons the opposite party no-1 appeared before the Learned Court on 26-08-2019 and filed his vokalatnama along with a petition for time for filing written objection and opposite party no. 2,3 and 4, appeared before the Learned Court below on 30-09-2019, and filed their vokalotnama along with petition for time to submit written objection .
3. As the opposite party no-2, 3 and 4 did not appear on 5-12-2019 and 13-01-2020 the case was fixed by the Learned Court below for ex-parte hearing.
4. The opposite party no-2, 3 and 4 appeared on 7-03-2020 before the Learned Court below and filed their petition for setting aside the order fixing the case for ex-parte hearing for previous non-appearance but did not file the setting aside petition in proper form as it was filed without any Affidavit and also filed their written objection against the pre-emption application filed by the petitioner.

5. On 24th March 2020 the Government of India Ordered a nation wide lockdown for 21 days, which was extended from time to time till 30th June 2020. Thus the Court proceeding was adjourned on 21-04-2020, 04-07-2020, 09-09-2020, 15-10-2020, 2-01-2021, 4-02-2021, 23-04-2021, 3-07-2021 and also on 9-09-2021, and the matter was fixed on 13-12-2021 for further hearing.
6. On 13-12-2021 the opposite party no 2, 3 and 4 had appeared in the said proceedings and the petitioner filed written objection against the application filed by the opposite party no-2, 3 and 4 herein on 7-3-2020 for expunging the order fixing the case for ex-parte hearing of the suit.
7. Though there was direction upon the opposite party to file petition for setting aside order fixing case for ex-parte hearing but the same was not filed in proper form for which a direction was issued on 13/12/2021 by Learned Court below.
8. On 11/03/2022 when the case was fixed for hearing of application for setting aside order fixing the case for ex-parte hearing and acceptance of written statement submitted by opposite party no-2, 3 and 4 none appeared on behalf of the opposite party no-2, 3 and 4 nor was the earlier Order passed by Learned Court below to file setting aside petition in proper form complied with. Thus the case was fixed for ex-parte hearing on 11/04/2022.

9. On 11/04/2022 the petitioner adduced evidence and 20-05-2022 was fixed for further evidence of P.W. On 20/05/2022, the opposite parties no-2, 3 and 4 appeared and filed petitions for setting aside order fixing the case for ex-parte hearing and another application for shifting the case from P.H. board to hearing of the petition filed by the opposite party no-2, 3 and 4 on 13-12-2021 about maintainability of the suit. The Learned Court below fixed 17/08/2022 for hearing of the petition for setting aside order fixing the case for ex-parte hearing.
10. By Order no-21 dated 17-08-2022 Learned Court below allowed the prayer of the opposite party no – 2, 3 and 4 for setting aside the order fixing the case for ex-parte hearing with cost of Rs. 200/- to be paid by the opposite parties to the petitioner. The petitioner being aggrieved by the said order has come up with the instant application.

None appeared for the opposite parties inspite of service of notice. Heard Learned Advocate for the petitioner. Perused the petition filed and materials on record. It is the contention of the petitioner that the Learned Judge in the Court below erred in law and fact in not considering that the application filed by the opposite party no-2,3 and 4 ought to have been allowed by considering from the application made by the said opposite

parties as to whether they have shown sufficient cause for their non-appearance before the Learned Court below or not and the opposite parties no-2, 3 and 4 neither made any submission for their nonappearance on the date fixed for hearing nor shown any document wherefrom it can be ascertained as to why they had not appeared on the said date.

Learned Advocate for the petitioner draws attention to the order dated 17-08-2022 and submits that the Learned Judge failed to give reasons required under law to set aside order fixing the case for ex-parte hearing. Learned Advocate further submits that in the absence of reasons the order passed by Learned Court below is liable to be set aside.

Upon hearing the Learned Advocate for the petitioner and considering the facts of the case this Court is of the view that as the application for setting aside order fixing the case for ex-parte hearing involves prayer of acceptance of written statement on the said date as well as setting aside order fixing the case for ex-parte hearing due to non-appearance, it is necessary to consider provisions contained in Order V Rule 1 and order IX. Rule 7 of the Code of Civil Procedure.

Rule 1 of Order V of the Code of Civil Procedure provides as follows:

1. When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim and to file the written statement of defence if any within thirty days from the date of service of summons on that defendant:

Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim:

Provided further that where the defendant fails to file the written statement within the said period of thirty days he shall be allowed to file the same on such day as may be specified by the Court, for reasons to be recorded in writing but which shall not be later than ninety days from the date of service of summons.

As per provisions contained in order IX Rule 7 of the code of Civil Procedure where the Court has adjourned the hearing of the suit ex-parte, and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

It appears from record that although summons was duly served but the opposite party no. 2 to 4 did not appear on 30-09-2019. However the Learned Court below suo-moto granted an opportunity to file written statement as last chance and 5-12-2019 was fixed for filing the same although it is not available from record as to when the summons was served on the defendant no-2, 3 and 4. Even if it is presumed that on 30-09-2019 the opposite parties no 2 to 4 ought to have appeared and filed written statement, but written statement was not filed on the said day nor any

prayer for time was made by appearing on the date fixed. However Learned Court below granted about 65 days time to submit written statement. On 5-12-2019, the said opposite parties were absent and they were directed to file show cause as to why the case shall not proceed ex-parte and 13-01-2020 was fixed for filing show cause. The opposite parties were absent on 13-01-2020 without steps and 7-03-2020 was fixed for hearing of the case ex-parte. Thus upon perusal of the case record it will appear that even after expiry of 115 days from receiving report of due service of summons the opposite parties no – 2,3 and 4 failed to appear and file written statement. It is only after the case was fixed for ex-parte hearing on 7/03/2020 the opposite party no – 2, 3 and 4 filed written statement on the said day which is about 165 days after service of summons. Although as per rule 1 of order V of the Code of Civil Procedure, the defendant loses the right to file written statement if the same is not filed within the stipulated period but the court's power to receive it at a later date is not curtailed. However in order to accept the written statement beyond the stipulated period sufficient reasons must be furnished by the defendant, and recorded by the Court in the Order.

Now upon reading the provisions contained in Order IX Rule 7, it appears that where the Court has adjourned the hearing of the suit ex-parte, and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance, he may upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. In the instant matter the defendants/opposite parties no 2,3 and 4 appeared not on the

adjourned date when the suit was fixed for ex-parte hearing but after the hearing commenced and after one witness was already examined.

Upon perusing the prayer of the opposite parties no-2 to 4 for accepting the written statement it will appear that the ground made by the opposite party no 2,3 and 4 was to accept the written statement and re-call ex-parte hearing order as they intend to contest the case. No reasons were furnished for filing written statement after 165 days from date of report of service of summons which is beyond the stipulated period as provided under Order V Rule 1 of the Code of Civil Procedure. Secondly when the prayer for acceptance of written statement and setting aside Order fixing the case for ex-parte hearing was pending consideration and liberty was granted to the opposite parties to remove the defect existing in the application on a particular date the opposite parties failed to appear on the said date and also on the subsequent date, when the case was for fixed for ex-parte hearing. It is only after the evidence of the petitioner commenced the opposite parties no 2, 3 and 4 appeared and filed petition for setting aside order fixing the case for ex-parte hearing. No reasons were furnished for not appearing and taking steps on the date fixed save and except the plea that written objection and maintainability petition is already filed. It is undoubtedly a right of a party to suit or any other proceedings to challenge maintainability of suit or proceeding but the same should be done within the stipulated period as provided in the statute. Merely raising the issue of maintainability of suit or proceedings does not automatically create a right to file written statement beyond stipulated period. Upon perusal of the

record it appears that the opposite party no 2,3 and 4 did not furnish any reason for acceptance of written statement beyond stipulated period nor any reason for non-appearance on the dates fixed. Thus upon considering the applications of the opposite parties no – 2 to 4 with regard to submission of written statement beyond stipulated period and prayer for setting aside order fixing the case for ex-parte hearing and the provisions contained in Order V Rule 1 and Order IX Rule 7 of the Code of Civil Procedure it is clear that the said opposite Parties have not furnished any grounds for allowing the said prayers. However considering the fact that written objection is already filed and considering the nature of the case this Court is of the view that in the interest of justice the opposite parties no 2 to 4 should be permitted to contest the case pending before Learned Civil Judge (Junior Division) 2nd Court Chandannagore at Hooghly being pre-emption Misc. Case No. 10 of 2019, subject to payment of reasonable costs. Considering the delay caused on the ground of laches of the opposite parties no-2 to 4 Rs. 2000/-in the view of this Court is just and reasonable. Hence Rs. 2,000/- shall be paid by the opposite parties to the petitioner on the next date fixed before the Learned Court below. As an application with regard to maintainability is pending the said application shall be decided at an early date preferably within four weeks from the next date fixed.

This revisional application stands disposed.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)