

14.08.2023
Sl. No.29(DL)
srm

C.O. No. 2532 of 2023

Brajabilas Mukherjee

Versus

Ratan Debnath & Anr.

Mr. Debjit Mukherjee,
Mrs. Susmita Chatterjee

...for the Petitioner.

The revisional application has been filed challenging an order dated July 15, 2022 passed by the learned Civil Judge (Senior Division), 3rd Court at Howrah, in Misc. Case No.90 of 2018. The misc. case arose out of an *ex parte* decree passed in Title Suit No.130 of 2012.

By the order impugned, the learned court below allowed an application for amendment of the misc. case. The schedule of amendment is quoted below:

“That after the paragraph no.3 of Misc. Case No.90 of 2018 the following sentences be added:-

The petitioner no.1 who is the main tadbikar of the case could not contact his advocate due his illness because he has been suffering from low back pain with joint pain in body and other old age related problem on and from 7.08.2018, again after few days petitioner suffered the same on 30.08.2018, 31.10.2018 respectively. Thereafter the petitioner no.1 came to his Advocate and subsequently petitioner’s Advocate advised to file a Misc. Case against the ex parte order. Thereafter the leaned Advocate of the petitioner filed the Misc. Case on 12.12.2018.

That the petitioner no.1 again on 13.12.2018 suffered from low back pain. Thereafter petitioner no.1 lost his Advocate's Contact Number for that the same petitioner could not reach in time.

That the petitioner submits that medical prescription could not be found as it was misplaced in the house. Thereafter petitioner on enquiry in the house procured the same and the said prescription would be filed at the time of hearing and as such petitioner was prevented from filing the Misc. Case in time due to his illness."

Mr. Mukherjee, learned Advocate appearing on behalf of the plaintiff/decreed-holder submits that the amendment amounted to withdrawal the admission that the summons had not been received.

Mr. Mukherjee refers to one paragraph in the application under Order IX Rule 13 of the Code of Civil Procedure in support of his contention, which is quoted below:

"5. Actually the filing of that case was not known to the petitioners as neither summons nor any notices had ever served upon the petitioner and if the notice U/S 41A Cr.P.C. was not served by the police upon the petitioners they should not know the said ex-parte order and on the day of service of notice U/S 41A Cr.P.C. on 14.11.2018 the petitioner very first time came to know about the order impugned and without wasting any more time filed the instant case and there was no lacuna or laches on the part of the petitioners. "

The learned court below observed that the amendment was formal in nature and the same would not change the nature and character of the suit property.

A perusal of the schedule of amendment does not indicate that the same amounts to contradiction of the

contention that summons were not received. It has been stated in the schedule of amendment that the *tadbirkar* was suffering from illness on and from August 7, 2018. The opposite party No.1 who was the *tadbirkar* of the case could not contact his Advocate because he was suffering from low back pain and other old age related problems on and from August 7, 2018. The suffering continued up to August 30, 2018. Thereafter, the petitioner went to the Advocate and the Advocate advised that the misc. case should be filed. Accordingly, the misc. case was filed. Again, on December 13, 2018 the *tadbirkar* suffered from low back pain. Medical prescriptions were misplaced in the house and the petitioner was prevented from filing the misc. case promptly.

The amendment does not indicate that there has been any change in the date of receipt of the knowledge of the *ex parte* decree. In the schedule of amendment, it has been stated that the opposite party No.1 was suffering from back pain from August 7, 2018 to October 30, 2018. Thereafter, he went to the learned Advocate and the learned Advocate advised that a misc. case be filed. Again, the opposite party No.1 suffered from low back pain and was not prompt in his action.

This does not in any way qualify the date of knowledge, which was already indicated as November 14, 2018. The *tadbirkar* of the case has averred that he was ill between August

7, 2018 to October 31, 2018 and thereafter he contacted the learned Advocate. This no way takes away any admission which has been made in the application under Order IX Rule 13 of the Code of Civil Procedure.

With regard to Mr. Mukherjee's contention that these pleadings may be used as a plea for the delay, is not relevant as it does not appear that the application under Order IX Rule 13 was filed belatedly. There is no application for condonation of delay in filing the said misc. case. Although Mr. Mukherjee says that there has been delay in filing the application under Order IX Rule 13, but there is no document to show that any such application had been filed for condonation of delay. Such issue cannot be decided in this proceeding. The merits of the statements made in the application for amendment of the misc. case, cannot be decided at the time of disposal of the amendment application. The points raised, including the point of delay, if any, should be raised before the learned court below at the time of hearing of the misc. Case and not before this court. The learned court below will decide all the issues, strictly in accordance with law without being influenced by this order. The misc. case should be disposed of expeditiously, preferably within a period of three months after the amended petition and written objection are filed.

The revisional application is, thus, disposed of.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)