

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Prasenjit Biswas

C.O. No. 634 of 2005

Sandhya Ghosh (Since Deceased) Substituted by Sankar Ghosh & Ors.

-Versus-

Aloke Das (Since Deceased) Substituted by Smt. Bela Das & Ors.

For the Petitioners : **Mr. Mainak Bose,
Mr. Gautam Das.**

For the Opposite Party
Nos. 2,4,6 and 7 : **Mr. Saunak Bhattacharya,
Mr. Chandra Nath Sarkar,
Mr. Sounak Mondal.**

Hearing concluded on : **31.01.2024**

Judgment On : **21.02.2024**

Prasenjit Biswas, J:-

1. In this revision petition, the assail is to the order dated September 30, 2004 passed by the learned Additional District Judge, 1st Court, II, Sealdah in Miscellaneous Appeal No. 108 of 2000 by which the order passed by the learned Civil Judge (Junior Division), 1st Court, Sealdah dated August 22, 2000 passed in Miscellaneous Case No. 48 of 1999 is affirmed.

2. Being aggrieved by and dissatisfied with the order passed by the First Appellate Court, the present petitioners have filed this application under Article 227 of the Constitution of India.

3. Filtering the unnecessary details, the facts which are requisite to be frescoed for the purpose of disposal of the present revision petitions are that- the opposite parties filed a Title Suit Being No. 312 of 1986 against the present petitioners before the Trial Court with a prayer for getting a decree for declaration that they are entitled to 63/200 shares in respect of the case property and for partition of the suit property by metes and bounds according to their shares. After getting summon the petitioner no. 2 entered appearance in that suit and filed written statement denying the averments as made out in the plaint. The said suit was heard ex-parte and a preliminary decree for partition was passed on September 7, 1998. The petitioners after coming to note of the said decree filed an application under Order IX Rule 13 of CPC in the Trial Court which was registered as Miscellaneous Case No. 48 of 1999 interalia praying for setting aside the said ex-parte decree of partition.

4. It is the contention of the petitioners that the suit property is a thika tenanted property and the superior land lord of the property filed a Title Suit being No. 546 of 1957 which was subsequently renumbered as Title Suit No. 83 of 1992 praying for establishment of title and khas possession in respect of the suit property involved in the suit filed by the present opposite parties. In the Title Suit filed by the superior land lord both the parties of the present suit appeared but only the present petitioners contested the same and the

said suit was finally decreed in favour of the said superior land lord. Against the said judgment and decree the present petitioners preferred an appeal being no. T.A. 53 of 2002 which is still pending before the Court of learned Civil Judge (Senior Division) at Sealdah.

5. It is the specific stand point of the present petitioners that a talk was held between the plaintiff nos. 1 and 7 and these present petitioners that the suit filed by the opposite parties being no. 312 of 1986 will not be continued until finalization of the Title Appeal Being No. 53 of 2002 sometimes in the month of April 1995. It is stated by the petitioners that due to talk of compromise between the parties of the above-mentioned partition suit they did not take any step with hope that the said compromise would be affected very soon. Relying on such talk of compromise the present petitioners did not contest the partition suit and by taking advantage of such situation the opposite parties got ex-parte decree on 14.09.1998 and they were totally in dark about the ex-parte decree passed by the Trial Court. The present petitioners firstly came to know about the ex-parte preliminary decree on 02.06.1998 and as such they filed an application under Order IX Rule 13 of CPC with a prayer for setting aside the ex parte decree against them.

6. It appears that in earlier round of litigation the present petitioners as appellants preferred a similar appeal being no. 108 of 2000 before the S.C.C Court, Sealdah and the learned Court allowed the said Miscellaneous Appeal on contest directing the learned Trial Court to examine the impugned Misc. Case in the real perspective as the allegations of material irregularity in the

service of summon in connection with original suit and pass a fresh order. Against the said order the present opposite parties/plaintiffs preferred a revision before this Court being no. C.O. 530 of 2002 and the said revisional application was disposed of by this Court setting aside the order of the First Appellate Court and direction was given to dispose of the said Miscellaneous Appeal on merits without going into the question as to the regularity and/or irregularity of service of summon of the suit upon the defendants/present petitioners. In compliance with the said order passed by the Hon'ble Court, the First Appellate Court disposed of the Misc. Appeal No. 108 of 2000 by dismissing the same on contest and affirmed the order passed by the learned Trial Court.

7. Mr. Mainak Bose, learned Senior Counsel appearing on behalf of the petitioners assailed that due to talk of compromise between the parties to the suit for partition filed by the opposite parties, the petitioners (herein) did not take any step with hope that the said compromise would be affected very soon. It was discussed between the parties that until the suit filed by the superior land lord is disposed of the parties to the partition suit would not proceed further but taking this advantageous situation, the opposite parties somehow got the ex-parte decree for partition in preliminary form. It is further submitted that the present petitioner firstly came to know about the ex-parte decree from the whisper of the inmates of the opposite parties/plaintiffs that a commission will very soon take place in respect of the scheduled property and thereafter they rushed to the Court and met with their lawyer and then came

to know about the fate of the case. These petitioners have no intentional latches or negligence on their part in the matter of non taking steps as they were clearly deceived by the opposite parties and if they have/had any knowledge about the proceeding of the suit they must have taken proper step in time. Learned Counsel further submitted that the Trial Court as well as the First Appellate Court acted illegally and with material irregularity in exercise of the jurisdiction vested in him for not considering the fact that the application under Section 5 of the Limitation Act filed by the petitioners was allowed on the self-same ground which has been in the application for setting aside the ex-parte decree. The learned Trial Court committed error in not allowing the said application for setting aside the ex-parte decree.

8. Reliance has been placed by the learned Counsel appearing on behalf of the petitioners upon the decision rendered by the Hon'ble Apex Court in case of **A. Murugesan Vs. Jamuna Rani** reported in **(2019) 20 Supreme Court Cases 803**.

9. In **A. Murugesan** case (supra) Hon'ble Court observed interalia at paragraph 4 which says as-

“The Trial Court, while considering the application filed by the appellant herein, under Order 9 Rule 13 of CPC, has considered the past events in the suit stating that the appellant is trying to protract the litigation dismissed the application by order dated 30.06.2009. Aggrieved by the said order, the appellant-defendant has filed Civil Miscellaneous Appeal No. 15/2009 before the Additional District Court/Fast Track Court No.1, Chidambaram.

Same was dismissed by order dated 13.07.2010. The matter was further carried by way of Civil Revision Petition No. 1202 of 2014 before the High Court, which also ended in dismissal by order dated 17.04.2014”

The language used in the Order IX Rule 13 of the Code is explicit and clear that the pivotal date would be the date on which the ex parte decree or order was passed. It rules out the conduct or action of the defendant prior thereto and if the court is satisfied that the defendant was prevented by sufficient cause on that day, it is imperative on the court to set aside the ex parte order/decree and permit the defendant to appear and contest the proceeding.

10. Banking upon the said decision rendered by the Hon'ble Apex Court, learned Counsel appearing for the petitioners submitted that at the time of consideration of the application filed under Order IX Rule 13 CPC the past events in the suit cannot be considered. He also referred the provision of Order IX Rule 13 of CPC which says that a decree passed ex-parte against the defendant is to be set aside if the applicant satisfies the Court that the summon was not duly served and he was prevented by any sufficient cause from appearing when the suit was called on for hearing. As per his submission learned Trial Court as well as the learned First Appellate Court without recording the specific finding on the plea of the petitioners that there was sufficient cause dismissed the application. The Trial Court committed error and illegality in rejecting the application filed by the petitioners.

11. Reliance has also been made upon the decisions rendered by the Hon'ble Apex Court in case of **Vijay Sing Vs. Shanti Devi And Another** reported in **(2017) 8 Supreme Court Cases 837**. The attention of this Court is drawn about the paragraph no. 17 of the above referred decision which entails that:-

“It would be pertinent to mention that the mere fact that the ex parte decree has been executed does not disentitle the defendant from applying under Order 9 Rule 13 CPC to get the same set aside. Reference may be made to Sankaribala Dutta v. Asita Barani Dasi and Fatima Khatoon v. Swarup Sing. Once the decree is set aside, restitution or restoration can be ordered.”

12. Relying on the said decision learned Counsel appearing on behalf of the petitioners submitted that there is no bar in entertaining the application filed under Order IX Rule 13 CPC by the Court if it is found that the ex-parte decree has been executed and it does not disentitle the petitioner from applying the application with a prayer for setting aside the ex-parte decree.

13. Learned Counsel also referred the decision rendered by a Division Bench of this Court in connection with FMAT 276 of 2021 (**Shyamlal Sukul Vs. Muklal Sukul And Others**). In **Shyamlal Sukla (supra)** the Hon'ble Division Bench of this Court held interalia that mere non-appearance on a date of hearing when the ex-parte order or decree is passed, is not sufficient to get away with it unless the defendant shows and satisfies the conscience of

the Court that he was prevented by sufficient reasons and the sufficiency of cause is the only factor which has to be judged objectively and not subjectively.

14. In relying upon the above decisions learned Counsel submitted that there was sufficient cause which prevented the petitioners from appearing when the suit was called on for hearing. As per submissions of the learned Counsel the sufficient cause is that there was a talk of compromise in between the parties that the opposite parties would not continue the suit for partition until finalization of the Title Appeal No. 53 of 2002. The present petitioners relied on the assurance given by the opposite parties and as such they did not proceed further in that case. The learned Trial Court as well as the First Appellate Court did not consider it as sufficient cause and rejected the application filed by them under Order IX Rule 13 of CPC with a prayer for setting aside the ex-parte decree.

15. Mr. Saunak Bhattacharya, learned Counsel appearing for the opposite parties nos. 2, 4, 6 and 7 submitted before the Court interalia that there is no illegality or irregularity in the order passed by the First Appellate Court. It is submitted at the behest of the opposite parties that the present petitioners were all along aware of the proceeding of the suit filed by them but they did not venture to contest the case further. At the time of hearing a photocopy of the order sheet dated 08.10.1996 passed in connection with T.S. No. 312/1986 and photocopy of final decree passed in Title Suit No. 312 of 1986 have been filed by the opposite parties. It is submitted by the learned Counsel

that on 08.10.1996 as it appears from the order sheet that copy of petition praying for amendment filed under Order 6 Rule 17 read with Section 151 CPC was served upon the petitioners/defendants and they received it with endorsement on the application as 'objected' and the date was fixed on 13.12.1996 with giving opportunity to the present petitioners to file written objection against the said application. The attention of the Court is further drawn about the photocopy of final decree passed by the learned Trial Court and from which it also appears that final decree has already been passed after acceptance of the report submitted by the partition commissioner. So, as per the submission of the learned Counsel appearing on behalf of the opposite parties that the matter in dispute has already been reached its finality and sufficient opportunities were given upon the present petitioners/defendants but they did not avail so. As per submission of the learned Counsel the present revisional application has become otiose and in fructuous due to finality of the suit and there is no scope/room kept open to entertain the frivolous application as filed by the present petitioners under Order IX Rule 13 of CPC and this revisional application may be rejected outright.

16. It is undisputed that the opposite parties filed a Title Suit being No. 312 of 1986 arraying these present petitioners as defendants in that case. It is also undisputed the summons were duly served upon the petitioners (defendants) and they entered appearance in the said case. It appears from the photocopy of the order sheet dated 08.10.1996 that copy of the amendment application was served upon the petitioners/defendants. So, it

can be presumably held that they were aware about the proceeding of the Title Suit No. 312/1986. As the present petitioners did not take any step the suit was decreed ex-parte and thereafter the petitioners (herein) filed application under Order IX Rule 13 of CPC with a prayer for setting aside the ex-parte decree before the Trial Court. Both the parties adduced evidences in their favour. It appears that P.W. 1 of Misc. Case filed by these petitioners deposed that the talk of settlement took place in between the parties in the month of April 1995. Opposite party's witness in that Misc. Case at the time of giving evidence denied the said talk of settlement. So, virtually it is an oath versus oath statement as no document is filed in supporting the claim of settlement by the petitioner. It further appears that in the said suit for partition an application praying for injunction was also filed by the opposite parties/plaintiffs and the defendant no. 4 contested the said application by filing written objection therein. In the said written objection the present petitioners put blame upon the opposite parties that with the help of anti-social elements they tried to oust the present petitioners from the case property. It appears from the said impugned order that the present opposite parties also filed a criminal case against the present petitioners before the learned Judicial Magistrate, Sealdah and from which the present petitioners were acquitted. An application under Order 39 Rule 7 was also filed by the opposite parties (herein) for appointment of an advocate commissioner to see whether the order of status-quo passed by the Court was violated or not.

17. So, it emerges that there was a continuous litigation in between the parties and virtually they were at logger heads. Considering the above circumstances and situation it is difficult to accept the story of settlement in between the parties which as per case of the petitioners took place in the year 1995. It is the stand point of the present petitioner that they firstly came to know about the ex-parte decree on 02.06.1999. It appears from the report submitted by the partition commissioner for affecting the preliminary decree of partition that the defendant no. 4 resisted the advocate commissioner from holding commission work on 06.04.1999 and for that reason an application with a prayer for police help was taken out at the behest of the opposite parties.

18. In **A. Murugesan v. Jamuna Rani** reported in **(2019) 20 SCC 803** wherein it affirmed its earlier view in *G.P.Srivastava v. R.K. Raizada* (2000) 3 SCC 54 that under Order IX Rule 13 CPC an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any “sufficient cause” from appearing when the suit was called on for hearing and unless “sufficient cause” is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex-parte decree.

19. It is well settled that sufficient cause in each case is a question of fact and have got to be construed with regard to facts and circumstances of each case. Virtually there is no difference at all between sufficient cause and good

cause. In cases of discretion, it is very much undesirable to act on precedent as every court has to deal with particular facts of each case. So, the question cannot be decided with aid of decisions unless they lay down any principle of universal application.

20. It is profitable to quote the observation of Hon'ble Apex Court in case of **Parimal v. Veena, (2011) 3 SCC 545** -

13. "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide 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". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

21. In order to determine the application under Order IX Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and in his

best to do so, Sufficient cause is thus the cause for which the defendant could not be blamed for his absence and the applicant must approach the court with a reasonable cause. The question is whether the present petitioners have given proper explanation for their failure to appear before the court on 14.09.1998 when the ex parte order was passed. Though learned senior counsel for the petitioners contended that all through they were diligent and as there was a talk of settlement between the parties no blame could be laid on the petitioners' door. Unfortunately, no material was placed on the record either in the trial court or in the First Appellate Court to show that they were diligently prosecuting the suits. On the other hand, the trial court observed as follows-

“It is pertinent to note, both the plff. and defdt. live in the same premises. So, the progress of case should be known to all. Moreover, in partition suit, where commissioner shall decide the share as per law, it is immaterial if it ex-parte or contested.

After paying attention on the deposition of P.W.1 about his not coming in court on ground of compromise is absolutely false concocted story. This sufficient cause is not proved by sufficient trustworthy evidence.” On these findings, the trial court declined to allow the application to set aside the ex parte order.

22. In Renuka Das v. Maya Ganguly, (2009) 9 SCC 413 Hon'ble Apex Court observed inter alia that-

“4. We have heard the learned counsel for the parties and examined the impugned order as well as the orders of the appellate court and the trial court. From a plain reading of the impugned order, it would be evident that the High Court in its revisional jurisdiction had interfered with the findings of fact arrived at by the appellate court restoring the suit for eviction. It is well settled that the High Court, in revision, is not entitled to interfere with the findings of the appellate court, until and unless it is found that such findings are perverse and arbitrary.

5. We have carefully examined the impugned order of the High Court as well as the order of the appellate court. From a reading of the order of the appellate court and the order of the High Court, we cannot come to this conclusion that it was open for the High Court to interfere with the order of the appellate court when no perversity or arbitrariness could be found in the findings of the appellate court. In view of the discussions made hereinabove, we are, therefore, of the view that the High Court was not justified in interfering with the findings of the appellate court restoring the suit in the exercise of its revisional power.”

23. In view of above decision, the High Court is required to consider whether the trial court properly considered the facts to set aside the ex parte decree and the case is called for any interference. It is settled proposition of law that mere non-appearance on a date of hearing when the ex parte order or decree was passed is not sufficient to get away with it unless the defendant satisfies the conscience of the court that he was prevented by sufficient reasons. There is nothing in the record from which it can be said that the

defendants were prevented by sufficient reasons from appearing on the date of hearing when the ex parte order was passed.

24. The petitioners/defendants are not rustic ignorant villagers and they know where their interest lies. It is evident from order dated 08.10.96 when the application filed by the plaintiff was not disposed of before giving opportunity to them to file written objection against the said application for amendment but they felt piqued and refused to appear before the court. Maybe, it was part of their delaying tactics or maybe not. But one thing is clear that they chose to be not present before the court. Having adopted such a stand, the defendants have no right to ask for indulgence. Putting the entire blame upon the plaintiff and trying to make it out as if they were totally unaware about further proceedings is a story which cannot be accepted and ought not to have been accepted.

25. The question is whether this is a fit case for this Court to interfere under Article 227 of the Constitution of India. In view of the categorical finding recorded by the trial court, I think that it is not an appropriate case for me to interdict and put the clock back to further prolong the matter. I am of the opinion that the findings of the learned Trial Court and the First Appellate Court are not perverse and arbitrary and as such it should not be interfered.

26. In view of above facts and circumstances and discussions made above I find that the ground taken by the petitioner for setting aside the ex-parte decree passed by the learned Trial Court can not to be termed as sufficient

cause as per provision of Order IX Rule 13 of CPC. It cannot be said that the defendants were prevented by sufficient cause from appearing when the suit was called on for hearing.

27. In view of that I find there is no illegality or material irregularity in the impugned order dated September 30, 2004 passed by the learned Additional District Judge, 1st Court, II, Sealdah and accordingly there is nothing to interfere in the said impugned order.

28. Accordingly, C.O. 634 of 2005 is hereby dismissed on contest and the impugned order dated September 30, 2004 passed by the learned Additional District Judge, 1st Court, II, Sealdah in Misc. Appeal No. 102 of 2000 is hereby affirmed.

29. Interim order if any stands vacated.

30. There will be no order as to costs.

Urgent Photostat certified copy of this order, if applied for be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)