

09.01.2024  
Court No. 3  
S/L. No. 1  
Sourav/  
Suvayan

**FMAT 558 of 2023**  
**With**  
**CAN 1 of 2017 (Old No. CAN 3554 of 2017)**  
**Md. Iftekhan @ Md. Iftekhar Haque & Anr.**  
**Vs.**  
**Md. Ekram Khan & Anr.**

*Md. Farhaduddin*  
*Ms. Salina Khatoon*

*... for the appellants.*

*Mr. S. M. Saha*  
*Mr. Abdul Hamid Shaikh*

*... for the respondent no. 1.*

*Mr. Arun Kumar Sharma*

*... for the respondent no. 2.*

1. Heard learned Counsel for the parties.
2. The defendant against whom an ex parte decree was passed, filed an application under Order IX Rule 13 CPC for setting aside the ex parte decree. Being unsuccessful, the said defendants/petitioners have preferred this appeal.
3. The plaintiff in the case is stated to be a tenant under Monotona Marketing Pvt. Ltd. The Monotona Marketing Pvt. Ltd. being the landlord is stated to have not been made a party in the petition under Order IX Rule 13 CPC though he is defendant no. 1 in the suit.
4. It is settled law that the interest in a tenancy to the tenant flows from the principal and he is a necessary party in any proceeding in a suit. In the present case, however, the principal i.e.,

landlord of the property has not been made a party in the proceeding under Order IX Rule 13 CPC.

5. It is submitted by Mr. Arun Kumar Sharma, learned Counsel for the landlord that he had delivered the property in favour of the plaintiff (present opposite party no. 1) through a duly constituted tenancy and the defendant nos. 3 and 4 (present appellants) are the rank trespassers.
6. These are all facts germane to disposal of the suit which is not in our domain now when we are sitting in appeal over a decision passed under Order IX Rule 13 CPC.
7. Under Order IX Rule 13 CPC an ex parte decree can be challenged if the petitioner satisfies the Court that the summons was not duly served on him, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. In the present case, the appellants/petitioners (defendant nos. 3 and 4 in the suit) had challenged the ex parte decree on the ground that the summons was not duly served upon them.
8. From the impugned order dated 08.03.2017, it is found that the proceeding has been disposed of on the basis of petition and affidavit filed by the plaintiffs/opposite parties (respondents herein)

and the Postal Tracking Report collected by the Court. The order-sheet further shows that the Postal Tracking Report is indicative of the fact that service of notice was sufficient on the appellants (defendants in the suit).

9. On the basis of such finding, the petition under Order IX Rule 13 CPC came to be disposed of.
10. Section 141 CPC reads thus:

**141. Miscellaneous Proceedings.** – *The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.*

*[Explanation. – In this section, the expression “proceedings” includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.]*

11. A cursory reading of the provision makes it clear that all proceedings in a suit including proceeding under Order IX is to be conducted like a suit.
12. The grievance of learned Counsel for the appellants/petitioners is that though learned court below heavily relied on the Tracking Report but, in fact, the defendants/appellants were not served with any notice and they could have proved such facts if evidence could have been led. We also find fault with the defendants/appellants in so far as the landlord

(defendant nos. 1 and 2 in Title Suit No. 426 of 2013) has not been made a party in the proceeding under Order IX Rule 13 CPC.

13. In view of such fact and discussion supra, we set aside the impugned order and direct the parties as follows:

- i) The defendants/appellants shall implead the aforesaid defendant nos. 1 and 2 as a party in the proceeding under Order IX Rule 13 CPC and cause service on them within 15 days from today.
- ii) The defendants/appellants may file fresh affidavit, if so advised, within 15 days from today.
- iii) The plaintiffs/respondents may also file fresh affidavit-in-opposition within 15 days from the date of receipt of the copy of the fresh affidavit as would be filed by the defendants/appellants, if so advised.
- iv) Liberty is also given to the plaintiff nos. 3 and 4 in Title Suit No. 426 of 2013 to file their written objection against the petition under Order IX Rule 13 CPC within a period of fortnight from the day of adding them as parties in the said miscellaneous proceeding.

14. No notice needs be served on the parties. The parties are directed to appear before the learned

lower court i.e., learned Judge, 7<sup>th</sup> Bench, City Civil Court, Calcutta on 30<sup>th</sup> January, 2024. On their appearance after complying with the order as aforesaid by filing their affidavits etc., learned Court shall take up the matter **on day to day basis** and dispose of the proceeding under Order IX Rule 13 CPC within a period of three months from January 30, 2024.

15. It is needless to mention here that both the parties shall be given adequate opportunity to adduce evidence, if so advised. If any of the parties desire not to adduce evidence, he shall not be forced to adduce evidence. No further extension of time for disposal shall be given to any of the parties.
16. It is equally needless to mention here that all further proceedings in Title Execution Case No. 25 of 2017 as pending before the learned Registrar, City Civil Court, Calcutta shall remain stayed till disposal of Misc. Case No. 1347 of 2016 on remand.
17. With the aforesaid observation the appeal being **FMAT 558 of 2023** along with **CAN 1 of 2017 (Old No. CAN 3554 of 2017)** is disposed of.

**(Chitta Ranjan Dash, J.)**

**(Partha Sarathi Sen, J.)**