

M/L – 48
17.12.2024
Court. No. 5
S.Kundu

C.O. 1256 of 2024

Smt. Madhumita Pal

Vs.

Sri Arun Pal

Mr. Tarun Kanti Halder

...for the petitioner.

1. The present application has been filed *inter alia*, challenging the Order No. 62 dated 13th December, 2023 passed in Misc. Case No. 104 of 2018 whereby the learned Civil Judge (Junior Division), 3rd Court, Baruipur, South – 24 Parganas was *inter alia* pleased to set aside the *ex parte* decree under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code).
2. From the records, it would transpire that the plaintiff has filed a suit for declaration of title and for permanent injunction valued at Rs.200/- and recovery of khas possession of Schedule 'B' valued at Rs.25,000/-. It appears that the above suit was decreed by judgment and decree dated 11th October, 2018. After the decree was passed a Misc. case being Case No. 104 of 2018 was filed by the defendant for setting aside the *ex parte* decree, under Order IX Rule 13 of the Code.

3. From the endorsement appearing on a copy of the aforesaid application under Order IX Rule 13 of the Code, it would transpire that the application was filed on 24th December, 2018. From the statements made in the said application, it would also transpire that from the Court's record the Vakalatnama of the defendant's advocate was misplaced and for such reason the written statement was only retained with the record. On 21st July, 2018 the learned Court was pleased to fix the next date on 3rd October, 2018 for examination of plaintiff's witness. Though 3rd October, 2018 was fixed for plaintiff's witness to be examined but prior thereto at the instance of the plaintiff the date was shifted back from 3rd October, 2018 without notice to the learned advocate for the defendant. The hearing was concluded on 27th September, 2018 and later an *ex parte* decree was passed on 11th October, 2018. It is the petitioner's case that subsequently on 21st December, 2018 when the plaintiff threatened the defendant to dispossess him from the suit property on the strength of the decree that the petitioner upon making enquiry having come to learn of the decree, the above application under Order IX Rule 13 was filed. The same culminated in the order dated 13th December, 2023.
4. Mr. Halder, learned advocate appearing in support of the aforesaid revisional application would submit that the learned Court without considering the application

under Section 5 of the Limitation Act, 1963 and without condoning the delay had allowed the application under Order IX Rule 13 of the Code. This is an irregularity in procedure committed by the learned Judge. Having regard thereto, he prays for setting aside the order impugned.

5. Heard learned advocate for the petitioner and having considered the materials on record, I find that the learned Court upon going through the materials on record had categorically come to a finding that the suit was heard *ex parte* since, the Vakalatnama of the defendant was not found on the record and was misplaced. For such reason the written statement though filed was kept on record of the case and the suit was proceeded *ex parte*. Although, the suit was fixed on 3rd October, 2018 by reasons of shift back petition which was heard and allowed *ex parte*, the defendant did not have notice of hearing on 27th September, 2018, when after conclusion of hearing the judgment was reserved.
6. Having regard thereto, the learned Court by following the principles that none should be prejudiced by an Act of Court was pleased to set aside the *ex parte* decree by condoning delay under Section 5 of the Limitation Act. In my view since, the learned Court had concluded that the petitioner had been able to demonstrate that he was prevented from sufficient cause for not causing

appearance when the suit was called on for hearing and also by observing that negligence on the part of advocate in conducting case, taking up the case not fixed for hearing, Court changing the date without notice to the defendant were sufficient grounds for setting aside the decree, had set aside the *ex parte* decree by condoning the delay. Having regard thereto and since the petitioner has not been able to identify any irregularity in the order or any jurisdictional error, I am of the view that no interference is called for, the revisional application is accordingly dismissed.

7. There shall be no order as to costs.
8. Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance with requisite formalities.

(Raja Basu Chowdhury, J.)