

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

**FMAT 24 of 2023
With
IA No.: CAN 2 of 2023**

**Usha Devi
Vs.
Fauzdar Ram Mochi @ Fauzdar Prasad & Ors.**

For the appellant :Mr. Bikramaditya Ghosh, Advocate

For the respondent no.1 :Mr. Arun Kuamr Sarkar, Advocate
Mr. Abhijit Sarkar, Advocate
Mr. S.M. Pradhan, Advocate
Mr. Satyam Lama, Advocate
Ms. Sagarika Sarkar, Advocate

For the State :Mr. Hirak Barman, Advocate
Mr. Pretam Das, Advocate

Heard & Judgment on : September 24, 2024

DEBANGSU BASAK, J.:-

1. Appeal was admitted by an order dated September 3, 2024. Requisite formalities were dispensed with.
2. Appeal is taken up for final hearing in presence of the parties.

3. Appeal is directed against an Order No. 44 dated March 31, 2023 passed in Misc. Case No. 1 of 2020 arising out of Title Suit No. 1 of 2019.
4. By the impugned order, learned Judge dismissed an application under Order IX Rule XIII of the Civil Procedure Code, 1908 of the appellant in respect of the ex parte decree dated November 29, 2019 passed in Title Suit No.1 of 2019.
5. Learned advocate appearing for the appellant submits that, the appellant is a house wife. She is working in another State. Although she received the summons of the Title Suit and engaged an advocate for the purpose of defending her in such Title Suit, such advocate did not file any vokalatnama therein. Such advocate thereafter told her that since such advocate drafted a deed of partition amongst the family members of the appellant, which included the plaintiffs of such Title Suit, such advocate would not be appearing for the appellant in such Title Suit. Such advocate returned the brief to her. Such return was some time in February 2020. On the date of hearing of the Title Suit, the appellant was prevented by sufficient cause from being represented in the Title Suit.
6. Learned advocate appearing for appellant submits that, the appellant could only arrange to be represented through Legal Aid as she could not engage any Advocate. Appellant, thereafter, applied under Order IX Rule XIII of the Code of Civil Procedure, 1908 for setting aside of the ex parte decree dated November 29, 2019.

7. Learned advocate appearing for the appellant submits that the appellant is entitled to contest the Title Suit. Appellant showed sufficient causes for not being represented at the time of hearing of such Title Suit. Appellant should be permitted one opportunity to contest the same.
8. Learned advocate appearing for the respondent no.1 submits that respondent no.1 filed the suit for eviction as against the appellant and recovery of possession. Such suit was decreed on November 29, 2019 after summons were being duly served upon the appellant.
9. Learned Advocate appearing for the respondent no.1 draws the attention of the Court to the averments made in the application under Order IX Rule 13 of the Code of Civil Procedure, 1908. He submits that, the same learned Advocate who allegedly refused to appear for the appellant before the Suit Court appeared for the respondent no.1 in the High Court on November 29, 2023 in MAT 92 of 2022. He submits that, the appellant admittedly received the summons of the suit. There are number of proceedings initiated both by the appellant as well as the respondent no.1 against each other. Appellant knew the procedure of the Court. Appellant, in fact, deposed in one of such proceedings stating that, she was aware of the Title Suit and did not appear therein.
10. Learned Advocate appearing for the respondent no.1 relies upon **AIR 2011 Supreme Court 1150 (Parimal vs. Veena @ Bharti)** for the proposition that, when a person applying under Order IX Rule 13 of the Code of Civil Procedure, 1908, does not provide sufficient reason

preventing such person from appearing at the hearing of the suit, then, such application need not be allowed.

11. Admittedly, in the Title suit where the ex parte decree dated November 29, 2019 was passed, appellant received summons on April 8, 2019. Despite receipt of such summons, appellant did not put in any appearance to the suit filed by the respondent no.1 and the same was decreed ex parte on November 29, 2019. Thereafter, appellant applied under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside of such ex parte decree dated November 29, 2019.
12. We perused the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 filed by the appellant. In such application, appellant primarily relies upon the fact that, she engaged one Advocate for the purpose of defending her in the Title Suit. Such Advocate did not file the Vokatatnama in such Title Suit. Such Advocate, however, told her in the month of February, 2020 that, he would not be able to appear in such Title Suit since he drafted a Deed of Partition amongst the parties.
13. As noted above, the decree was passed on November 29, 2019. Advocate appointed by the appellant told the appellant in February, 2020 that, he would not be appearing in the Title Suit. There is no explanation for the period from the date of the receipt of the summons of the Title Suit till the date when appellant came to know that, her Advocate would not be appearing in the Title Suit.

14. Appellant is not a litigant who is not aware of the judicial proceedings. Appellant filed several proceedings and is defending several proceedings. In such proceedings, she is represented by the same Advocate who allegedly claimed that he would not be representing the appellant in the Title Suit in the month of February, 2020. Significantly, same Advocate appeared for the appellant in an appeal in the High Court on November 29, 2023. Therefore, the contention of the appellant that, there was a breakdown of communication or that, the appellant suffered due to the alleged refusal of her Advocate to represent her in the Title Suit, cannot be accepted on the teeth of the documents available on record.
15. It is a trite law that, a litigant cannot be made suffer for the laches or negligence of an Advocate. However, in the present case, it is not a question of her Advocate being negligent. Same Advocate represented the appellant prior to the ex parte decree dated November 29, 2019 and subsequently in other proceedings.
16. In ***Parimal (supra)***, is of the view that, although Courts are required to be lenient while dealing with an application under Order IX Rule 13 of the Code of Civil Procedure, 1908, such leniency does not extend the elasticity thereof so as to allow it to be stretched beyond the fulfilment of the requirements of Order IX Rule 13 of the Code of Civil Procedure, 1908. An applicant under Order IX Rule 13 of the Code of Civil Procedure, 1908 is required to establish that such applicant was

prevented by sufficient cause for not appearing on the date of the decree, if the summons stand served.

17. In the facts and circumstances of the present case, appellant in her application under Order IX Rule 13 of the Code of Civil Procedure, 1908 did not establish that, she was prevented from sufficient cause for not appearing at the hearing of the suit despite service of the summons on her. In such circumstances, essential requirements for setting aside an ex parte decree under Order IX Rule 13 of the Code of Civil Procedure, 1908 were not satisfied by the appellant.

18. In view of the discussions above, we find no merit in the appeal.

19. **FMAT 24 of 2023** along with **IA No.: CAN 2 of 2023** are dismissed without any order as to costs.

20. Interim order stands vacated.

(Debangsu Basak, J.)

21. I agree.

(Md. Shabbar Rashidi, J.)