

FORM NO. J(2)

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

**PRESENT:
THE HON'BLE JUSTICE HARISH TANDON
And
THE HON'BLE JUSTICE APURBA SINHA RAY**

**SAT 12 OF 2023
WITH
CAN 1 OF 2023**

**KRISHNA BAHADUR THAPA
Vs.
SASHI RAI @ SASHI GURUNG & ORS.**

FOR THE APPELLANT : MR. PRATAP KHATI

FOR THE RESPONDENT : NONE

HEARD ON : SEPTEMBER 3, 2024.

JUDGMENT ON : SEPTEMBER 3, 2024.

THE COURT:

1. A recalcitrant litigant has innovatively adopted all the tactics to thwart the decree for eviction passed against him and ultimately approached this Court with the instant Second Appeal assailing the order of rejection of the

application filed under Order IX Rule 13 of the Code of Civil Procedure and an appeal filed against the said order having dismissed on the ground of delay as well as merit.

2. The suit for recovery of possession filed against the appellant stood decreed *ex parte* in the year 2019 yet no steps were taken for setting aside the *ex parte* decree within the period of limitation provided therefor. Before we proceed to deal with the points involved in the instant appeal, it would be profitable to adumbrate the salient facts discerned from the record.
3. The suit for eviction/recovery of possession against the appellant was filed before the Trial Court and upon receipt of the summons, the appellant appeared in the said suit and asked for leave to file written-statement. Despite such leave having granted and the extension of time being favoured, no written-statement was filed by the appellant. Naturally the suit is posted for *ex parte* hearing which is spanned over three months but there was no attempt on the part of the appellant to appear and intervene at the *ex parte* stage.
4. Immediately after the suit was decreed *ex parte* and taking advantage of the pandemic having struck globally, an application under Section 47 of the Code of Civil Procedure alleging fraud, coercion, undue influence, was filed but the said proceeding was not pursued, as a result whereof the said application under Section 47 of the Code

was dismissed for default. Since the execution proceeding continued, thereafter, an application under Order IX Rule 13 of the Code along with an application for condonation of delay is filed taking a plea that the appellant being a septuagenarian and suffering from various ailments was prevented by sufficient cause in not filing the said application within the prescribed period of limitation provided under the Limitation Act.

5. Not an iota of piece of evidence was produced before the Trial Court in support of the aforesaid contention and, therefore, the Trial Court proceeded to dismiss the said application, which was further carried to the First Appellate Court and the said order was affirmed.
6. It is submitted by the Counsel for the appellant that the appellant being an aged person could not file the written-statement resulting into a suit being decreed *ex parte* and, therefore, the Court should take a lenient view in this regard. It is further submitted that the appellant is occupying the suit premises as a permissive occupant since several decades and, therefore, the *ex parte* decree would harshly affect his rights unless set aside by the Court. Lastly, it is submitted that the appellant was seriously ill and could not take steps within the time limited therefor and, therefore, the Court should adopt a pragmatic approach in this regard.

7. Let us examine the facts emanating from the records in order to understand the gamut of the arguments advanced before us. We are conscious of the proposition of law that Order IX Rule 13 of the Code bestowed right upon the defendant to apply for setting aside the *ex parte* decree/order provided the ingredients enumerated therein are proved to the satisfaction of the Court. The language employed under Order IX Rule 13 of the Code can be dissected into two parts. Firstly, there was no service of summons upon the defendant yet, the Court proceeded to decree the suit *ex parte*; secondly, the defendant though served with the summons but was prevented by sufficient cause in not appearing on the day when the suit was decreed *ex parte*.
8. It is undisputed that the summons was duly served upon the appellant which would further be evident from the fact that he appeared in the suit and sought leave to file written-statement and also applied for extension of time to file the written-statement. A plea has been taken under the second component of the Order IX Rule 13 of the Code providing for an impediment on the part of the defendant in appearing on the day when the suit was decreed *ex parte*.
9. The expression “sufficient cause” is not defined in the Code of Civil Procedure but receives its recognition from different judgments passed in judicial parlance and is

construed to mean that though the defendant was vigilant and careful but because of the unforeseen circumstances he could not participate/appear in the suit on the day when the *ex parte* decree was passed.

10. We are conscious that the Court while ascertaining “sufficient cause” should not adopt a pedantic view or a stricter approach in finding the fault into the defendant leading to a rejection of an application under Order IX Rule 13 of the Code. It is consistently held that the Court should adopt a lenient approach in construing the “sufficient cause” but should bear in mind the object and purpose of promulgating the Limitation Act. In order to construe the “sufficient cause” which is also appearing under Section 5 of the Limitation Act, the Court should also take into account Section 3 thereof and an harmonization is required to be established in condoning the delay in taking steps within the statutory period of limitation. Even if the Court should adopt the lenient approach but must consider the attending circumstances in the context of the facts pleaded by the parties as equilibrium amongst the rights of the parties are required to be established and should not be used as an one way traffic.
11. The Limitation Act never destroys the right but denuded a litigant to get the relief from the Court on the basis of such right and in this regard it is held in catena of decisions

that the Court cannot shirk its responsibilities under Section 3 of the Limitation Act even if no defence of limitation is taken by the other side.

12. We are also conscious that the Court shall also bear in mind that the meritorious suit should not be defeated but while taking into consideration the aforesaid aspect the object and purpose of the Limitation Act should not be frustrated or rendered otiose. In order to constitute the “sufficient cause”, the Court is guided by the factors relatable to the human behavior, the vagaries of life, impediments beyond the conceivable thought and above all, prevention from taking a step. In this regard, discretion has to be exercised by the Court on the basis of the facts pleaded by the parties and such discretion should be exercised judiciously as opposed to capricious and arbitrary exercise of such power. The Appellate Court should be slow and circumspect in interfering with the discretionary order unless the Court finds such discretion is exercised unreasonably, irrationally and contrary to the statutory provision applicable in this regard. The Appellate Court should not interfere with the order even if it found that the other view is possible when the view expressed by the Trial Court cannot be said to be unreasonable.
13. Both the Courts have found that the appellant has miserably failed to prove the case made out under

Section 5 of the Limitation Act as well as under Order IX Rule 13 of the Code of Civil Procedure and have simply founded the aforesaid applications on the ground of the age and sufferance from various disease. The pleading is not a substitute of proof. A party has to prove the pleadings by cogent evidence which, in the instant case, does not appear to have been discharged by the appellant.

14. After the *ex parte* decree was passed, an attempt under Section 47 of the Code of Civil Procedure was restored to which ended in a dismissal and thereafter the recourse under Order IX rule 13 of the Code is taken through a circuitous route to achieve the same goal which, in our opinion, should not be encouraged.
15. From whatever angle we looked at, both on merits as well as the interference with the discretionary order, we do not find involvement of any substantial question of law in the instant appeal.
16. **SAT 12 of 2023** is thus **dismissed**. No order as to costs.
17. The connected application being CAN 1 of 2023 also stands dismissed.

(HARISH TANDON, J.)

(APURBA SINHA RAY, J.)

