

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

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 354 of 2025

Urbashi Barat

VS.

Dalmia Bharat Developer Ltd.

For the Petitioner : Mr. Sukanta Chakrabarty
Mr. Anindya Halder
..... advocates

For the Opposite Party : Mr. Saptanshu Basu ... Sr. Advocate
Mr. Avinash Kankani
Mr. Suman Majumder
.... advocates

Reserved on : 26.02.2025

Judgment on : 13.03.2025

Hiranmay Bhattacharyya, J.:-

1. This application under Article 227 of the Constitution of India is at the instance of an unsuccessful applicant in a proceeding under Order IX Rule 13 of the Code of Civil Procedure and is directed against the order being No.22 dated 02.12.2024 passed by the learned Chief Judge, City Civil Court at Calcutta in Miscellaneous Appeal No. 103 of 2022 affirming the order being No. 53 dated 18.07.2022 passed by the learned Judge, 5th Bench Presidency Small Causes Court at Calcutta in Miscellaneous Case No. 298 of 2015.
2. By the order dated July 18, 2022, the application under Section 5 of the Limitation Act praying for condonation of delay in filing the Misc. Case stood rejected. Petitioner preferred the Misc. Appeal against the aforesaid order, which stood rejected by the order dated December, 2, 2024.
3. The Opposite Party herein filed a suit for eviction under Section 6 of the West Bengal Premises Tenancy Act, 1997 against one Lila Dasgupta, since

deceased before the learned Judge 5th Bench, Presidency Small Causes Court at Calcutta which was registered as Ejectment Suit No. 103 of 2005. Lila Dasgupta, since deceased entered appearance in the said suit but did not take any steps thereafter. The said suit was decreed ex parte by a judgment and decree dated 29.04.2006. The decree was put into execution giving rise to Ejectment Execution Case No. 59 of 2011. The said Lila Dasgupta died on 15.03.2015. Thereafter, the daughter of the said Lila Dasgupta/ petitioner herein filed the Misc. Case under Order IX Rule 13 of the Code of Civil Procedure (for short “the Code”) being Misc. Case No. 298 of 2015 on 18.09.2015 praying for setting aside the ex parte decree dated 29.04.2006. Petitioner also filed an application under Section 5 of the Limitation Act for condonation of the aforesaid delay in filing the Misc Case.

4. The case made out by the petitioner in the application under Section 5 of the Limitation Act is summarized hereunder as follows.
5. After the death of her mother on 15.03.2015, petitioner enquired about the case through the lawyers who was entrusted by her mother to look after the eviction suit. Monthly rent was paid month by month to the lawyer and the petitioner has got the receipts for such payment. During puja in 2014, petitioner was informed that she has to vacate the premises. Since the previous learned advocate did not give any positive answer, she engaged another advocate and applied for the certified copy of the order and decree on 07.05.2015 and received the same on 19.08.2015 and thereafter filed the Misc. Case along with the application for condonation of delay.
6. Mr. Chakraborty, learned advocate appearing in support of the civil revision application contended that the petitioner paid rent month by month through the learned advocate and obtained receipts in support of such payment. He further contended that the mother of the petitioner discharged all her obligations as a tenant. He submitted that the petitioner suffered an ex parte decree due to the negligence, inaction and laches on the part of the petitioners learned advocate and immediately after being made aware of the ex parte decree, petitioner took steps for setting aside the ex parte decree.
7. Mr. Chakraborty contended that the mother of the petitioner engaged a lawyer and she was confident that the lawyer will took after his interest. He contended that the petitioner should not be made to suffer for the inaction and negligence of the learned advocate. In support of such contention, Mr. Chakraborty placed reliance upon a decision of the Hon’ble Supreme Court in the case of ***N. Balakrishnan vs. M. Krishnamurthy reported at (1998) 7 SCC 123*** and an unreported judgment of the Hon’ble Supreme Court delivered in 31.01.2025 in ***SLP(Civil) No. (s)(c) 24443 of 2024*** in the case of

Kumari Sahu vs. Bhubanananda Sahu & Ors. Mr. Chakraborty submitted that the learned Judge of the Appellate Court considered the merit of the case while deciding a Misc. Appeal arising out of an order rejecting the prayer for condonation of delay which is contrary to the proposition of law laid down by the Hon'ble Supreme Court in the case of **Pathapati Subba Reddy vs. Special Deputy Collector** reported at **2024 SCC Online SC 513**.

8. Mr. Basu, learned Senior Advocate appearing for the opposite party seriously disputed the contentions raised by Mr. Chakraborty. He contended that there has been an inordinate delay in filing the Misc. Case which has not been satisfactorily explained in the application under Section 5 of the Limitation Act. He contended that the ex parte decree was passed against Lila Dasgupta but the defendant did not apply for setting aside the ex parte decree during her life time. Mr. Basu contended that a Misc Case under Order IX Rule 13 of the Code at the behest of a stranger is not maintainable in the absence of a plea of fraud being raised. In support of such contention, Mr. Basu placed reliance upon a decision of the Hon'ble High Court at Uttarakhand **Furkan Ali and Others vs. Hashim Ali and others** reported at **2010 SCC Online Utt 3288**. He submitted that the petitioner has not raised any plea of fraud in the Misc. Case.
9. Heard the learned advocates for the respective parties and perused the materials placed.
10. The ex parte decree was passed on 29.04.2006 against Lila Dasgupta. The said Lila Dasgupta died only on 15.03.2015 and the Misc. Case under Order IX Rule 13 of the Code was filed on 18.09.2015 by the daughter of the defendant.
11. Since an objection as to the maintainability of the Misc. Case at the instance of the petitioner herein has been raised, this Court shall first decide such issue before deciding the other issue(s).
12. In order to decide the aforesaid issue, it will be profitable to recapitulate the provisions of Order IX Rule 13 of the Code for which the same is extracted hereinafter.

“13. Setting aside decree ex parte against defendant— In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms

as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

[Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]”

13. Mr. Basu would contend that the expression “he may apply” used after the word “defendant” necessarily implies that it is only the defendant and no one-else who can apply for setting aside the ex-parte decree.
14. In the case on hand, the ex-parte decree was passed against the mother of the petitioner herein, who died subsequent to the passing of the ex-parte decree and after her death the petitioner herein applied under Order 9 Rule 13 of the Code for setting aside the ex-parte decree.
15. Section 146 of the Code of Civil Procedure deals with proceedings by or against the representatives. Section 146 of the Code states that save as otherwise provided by the Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.
16. Order IX Rule 13 of the Code gives a right to a defendant against whom an ex-parte decree is passed to apply to the Court by which the decree was passed for an order to set it aside. Therefore, a proceeding under Order 9 Rule 13 of the Code which can be initiated by the defendant may be taken or the application may be made by any person claiming under him in view of the expression “where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him” used in Section 146 of the Code.

17. To the mind of this Court, any person claiming under the defendant may apply to the Court by which the decree was passed for an order to set aside the ex parte decree in view of the provisions laid down under Order 9 Rule 13 read with Section 146 of the Code.
18. The question that now arises is whether the petitioner is claiming under the defendant against whom an ex-parte decree has been passed.
19. The petitioner herein is the daughter of the original tenant namely, Lila Dasgupta and claims to have become a tenant after the death of her mother. In view thereof, this Court is of the considered view that the petitioner herein satisfies the expression “any person claiming under him” used in Section 146 of the Code. This Court accordingly holds that the application under Order IX Rule 13 of the Code at the instance of the petitioner is maintainable.
20. In **Furkan Ali** (supra), the applicant under Order 9 Rule 13 claimed that he was a necessary party in the suit. On such facts it was held that in the absence of any fraud being alleged and in view of the fact that the predecessor of the petitioner had knowledge of an ex-parte decree, the application under Order 9 Rule 13 was not maintainable. The said decision being distinguishable on facts cannot come to the aid of the Opposite Party herein.
21. Now this Court shall proceed to decide whether the petitioner could make out a sufficient cause for condonation of delay in filing Misc. case under Order 9 Rule 13 of the Code.
22. Before entering into the factual dispute it would be profitable to take note of the proposition of law laid down by the Hon’ble Supreme Court in this regard.
23. Mr. Chakraborty would contend that the learned Judge of the First Appellate Court while deciding the application under Section 5 of the Limitation Act entered into the merits of the case which is against the well settled proposition of law. He further contended that even if a party is found to be negligent or there is want of *bona fide*, then also an inordinate delay can be condoned by imposing any condition.
24. In this regard it would be beneficial to take note of the decision of the Hon’ble Supreme Court in the case of **Pathapati Subba Reddy** (supra), wherein the Hon’ble Supreme Court laid down certain principles. It has been held that condoning the delay by imposing condition tantamounts to disregarding the statutory provision when sufficient cause has not been shown for condoning the delay. It was further held in the said reported

decision that the Court may not exercise discretion to condone the delay even if sufficient cause is established for various factors such as where there is inordinate delay, negligence and want of due diligence. The Hon'ble Supreme Court held thus.

“26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;

(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision.”

(emphasis supplied)

25. Thus, the Courts have the discretion either to condone the delay if sufficient cause had been explained and may also refuse to exercise such discretion even if sufficient cause is established where there is inordinate delay, negligence and want of due diligence. Therefore, inordinate delay, negligence and want of due diligence plays an important role in the matter of exercise of discretion by the Courts while deciding an application under Section 5 of the Limitation Act.
26. Turning back to the facts of the case in hand, this Court finds that the ex-parte decree was passed on 29.04.2006. During Durga Puja in the year 2014, the petitioner was informed that she has to vacate the premises. It is only after the death of the mother sometimes in the month of March, 2015, the petitioner inquired about the case through her lawyer and applied for the certified copy of the ex-parte decree only in the month of May, 2015 and filed application under Order 9 Rule 13 of the Code on 18.09.2015. Thus the Misc. case under Order 9 Rule 13 of the Code was filed more than 9 years after the ex-parte decree was passed. Such delay is undoubtedly an inordinate one. That apart the conduct of the petitioner as would be evident from the statements made in the application under Section 5 of the Limitation Act would go to show that there was want of bonafide on the part of the petitioner and the petitioner did not act diligently and also remained inactive for a considerable period of time.
27. By applying the principles laid down by the Hon'ble Supreme Court in ***Pathapati Subba Reddy*** (supra), to the facts of the case on hand this Court holds that the learned Trial Judge was right in not exercising its discretion to condone the inordinate delay of more than 9 years in filing the Misc. case.
28. Imposition of conditions for condoning the delay tantamounts to disregarding the statutory provision as held by the Hon'ble Supreme Court in ***Pathapati Subba Reddy*** (supra). For such reason, this Court is not inclined to accept the contention of Mr. Chakraborty that an inordinate delay can be condoned by imposing condition.
29. In the application under Section 5 of the Limitation Act, the petitioner has alleged that the reasons for such delay is attributable to the learned Advocate who was engaged by her mother to conduct her case. It would be relevant to note that mere allegations against the Advocate without making any attempt to prove such allegations cannot be said to be a sufficient cause for condonation of such an inordinate delay. No step was taken by the petitioner herein against such learned Advocate before appropriate forum. The petitioner herein also did not make any endeavor to call such learned Advocate as a witness in accordance with law. This Court, therefore, holds

that unsubstantiated allegations against the advocate cannot fall within the expression “sufficient cause” used in Section 5 of the Limitation Act.

30. In **N. Balakrishnan** (supra), the applicant under Order IX Rule 13 of the Code lodged a complaint against the advocate before the Consumer Redressal Forum ventilating the grievance and claiming compensation against learned Advocate and such forum passed an order directing payment of compensation along with cost to be paid by the Advocate to the aggrieved party. The said decision being distinguishable on facts cannot come to the aid of the petitioner in the case on hand as the petitioner did not take any step against the learned advocate.
31. In **Kumari Sahu** (supra), there was a delay of only 225 days in filing the second appeal and the ground for such delay was that the appellant who was a homemaker and a rustic woman, was not informed by her Counsel promptly and immediately after she was informed of the dismissal of the first appeal, she promptly filed the second appeal. The Hon’ble Supreme Court in **Kumari Sahu** (supra) took note of the decision of the Hon’ble Supreme Court in the case of **Rafiq & Anr. Vs. Munshilal & Anr.** reported at **(1981) 2 SCC 788**. In **Rafiq** (supra), wherein the Hon’ble Supreme Court noted that at the time of hearing of the appeal, the personal appearance of the party is not only not required but hardly useful and such a party is not required to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as the watchdog of the Advocate to see that the latter appears in the matter when it is listed.
32. In an appeal a litigant after engaging an Advocate may not be required to go to the Court to inquire as to what is happening in the Court with regard to the appeal but such logic cannot be applied to a suit pending before the learned Trial Judge. In a suit for eviction, the defendant has to take steps in the suit regularly and also has to give evidence to prove the defence case. The decision in the case of **Kumari Sahu** (supra) which reiterates the proposition of the Hon’ble Supreme Court in the case of **Rafiq** (supra) cannot, therefore, come to the aid of the petitioner in the case on hand as the said decisions were passed in a different context.
33. The learned Judge of the Appellate Court sitting in appeal against an order rejecting an application under Section 5 of the Limitation Act does not decide the application under Section 5 of the Limitation Act. The Appellate Court is required to consider in the Miscellaneous appeal as to whether the learned Trial Judge exercised its discretion or failed to exercise its discretion in a proper manner.

34. To the mind of this Court, refusal to exercise discretion in favour of the petitioner by the learned trial judge cannot be said to be improper in the facts and circumstances of the case on hand and the learned Judge of the First Appellate Court was right in refusing to interfere with the order dated 18.07.2022 passed by the learned Trial Judge in the Misc. case 298 of 2015.
35. For all the reasons as aforesaid, the instant civil revision application fails and the same stands dismissed. There shall be, however, no order as to costs.
36. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)

(P.A.- Rinki,Sanchita)