

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Uday Kumar

FMAT No. 93 of 2022

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CAN 3 of 2025

Ms. Sankari Sett and others

-VS-

On the death of Sudhir Kumar Bose, represented by his legal heirs
Deb Narayan Bose and another

For the appellants : Mr. Krishna Das Poddar,
Mr. Surajit Maity,
Ms. Mandira Barman.

For the respondents : Mr. Partha Pratim Roy,
Mr. Dyutiman Banerjee,
Mr. Vishal Mallick,
Mr. Sandipan Das.

Heard on : July 3, 2025.

Judgment on : July 3, 2025.

Sabyasachi Bhattacharyya, J.:

1. The present appeal has been preferred against the dismissal of an application for condonation of delay in preferring an application under Order IX Rule 13 of the Code of Civil Procedure (in short “the Code”) filed by the appellants and the consequential dismissal of the application under Order IX Rule 13 of the Code itself.
2. The premise of the application under Order IX Rule 13 of the Code and the connected condonation of delay application was that the present petitioners, who are the heirs and legal representatives of one Panchu Saday Seth (since deceased), while appearing in a revisional case in connection with an application under Section 47 of the Code filed by the judgment-debtor in an execution case arising out of a suit for eviction, where a decree was obtained by the said Panchu Saday Seth, for the first time came to know about Title Suit No. 442 of 1989, which was instituted by the present respondents’ predecessor-in-interest, who was the brother of the judgment-debtor in the eviction suit of late Panchu Saday Seth.

3. The learned trial Judge, upon hearing the parties, disbelieved the case of the appellants upon adverting to the evidence of PW1, the sole witness for the appellants.
4. Learned counsel appearing for the appellants submits that the suit itself, that is, Title Suit No. 442 of 1989, in which the *ex parte* decree was passed, was not maintainable in view of the same being in contravention of the provisions of Order XXI Rule 101 of the Code.
5. It is submitted that the said suit was filed during pendency of an execution case filed in respect of the eviction decree obtained by the predecessor-in-interest of the present appellants, late Panchu Saday Seth, in respect of the self-same property.
6. Learned counsel appearing on behalf of the appellants further submits that the appellants were entirely unaware of the said Title Suit No. 442 of 1989. One Mr. Tapan Datta, an Advocate, who was representing the said Panchu Saday Seth in several litigations and was like a friend, philosopher and guide of the appellants' family, had obtained certain signatures of the appellants on papers, without indicating as to the

purpose for which those signatures were obtained, after the demise of Panchu Saday Seth.

7. As such, it is submitted that there is nothing on record to attribute knowledge of the suit, which was decreed *ex parte*, to the present appellants.
8. Learned counsel appearing for the respondents submits, by handing over photocopies of certified copies of the order sheet of the concerned suit, bearing Title Suit No. 442 of 1989, that on several dates, adjournments were sought on behalf of the present appellants in the said suit, after they were substituted therein in place of late Panchu Saday on the latter's demise.
9. It is further submitted that PW1 (present appellant no. 2), in his cross-examination, pleaded ignorance in respect of the relevant factors. However, conspicuously, he admitted that Mr. Tapan Datta was the learned Advocate who had entered appearance on behalf of the appellants and conducted both the ejectment suit and the ejectment execution proceedings on behalf of the appellants as well as entered appearance in Title Suit No. 442 of 1989 on their behalf.
10. Thus, it is argued that the very premise of the application under Order IX Rule 13 of the Code was demolished by the

appellants' witness as well as the order sheet of Title Suit No. 442 of 1989, which clearly goes on to show that the appellants had entered appearance and prayed for adjournments on several occasions in the suit, after being substituted in place of Panchu Saday Seth, the original defendant therein.

11. Upon a careful perusal of the materials before us, we find that throughout his cross-examination, PW1, who was the sole witness for the appellants in support of the applications under Section 5 of the Limitation Act and Order IX Rule 13 of the Code, feigned ignorance about the said suit, bearing Title Suit No. 442 of 1989. The said witness went so far as to state in his cross-examination that he could not recollect whether any power was issued in favour of Advocate Mr. Tapan Datta, who defended the said suit on the death of their father, and/or whether the appellants were substituted as defendant nos. 1(a) to 1(c) in the said suit or otherwise. He further stated in his cross-examination that he could not say whether the appellants had entered appearance in the said suit or whether any prayer for time to file written statement was made by them through their learned counsel in the said suit on March 26, 1992. Further, he could not say, as per his evidence, as to

whether similar prayers for adjournments were made on May 15, 1992, July 16, 1992 and September 05, 1992.

12. Thus, the PW1 very conveniently and selectively invoked loss of memory in respect of all the salient aspects of the appellants' case. It is to be noted that there is no specific denial in the cross-examination to the suggestions put in that regard by the present respondents, as discussed above. Nowhere in his cross-examination did the PW1 specifically deny that the appellants had entered appearance in Title Suit No. 442 of 1989 after being substituted in place and stead of their deceased father, who was the original defendant, and/or that they had sought for time to file written statement on several occasions in the said suit.

13. Rather, PW1 admitted in his cross-examination that Mr. Tapan Datta, Advocate, obtained signatures of the appellants on some printed papers and that the appellants "might have also executed Vakalatnama in his favour".

14. What clinches the issue against the appellants further is the admission of PW1 in his cross-examination that it is a fact that the learned Advocate Mr. Tapan Datta, who was conducting the ejectment suit and the ejectment execution proceedings on

behalf of the appellants, and the said learned Advocate Mr. Tapan Datta, who entered appearance on behalf of the appellants in Title Suit No. 442 of 1989, was the same and identical person. Although learned counsel appearing for the appellants seeks to argue that the said answer might have been given to a cleverly framed suggestive question put on behalf of the plaintiffs/present respondents during the cross-examination of PW1, we are unable to agree with the same. Even if a suggestive question connecting the appearance of the self-same Mr. Tapan Datta in both the proceedings was put to the witness, it was always open to PW1 to simply deny such suggestion by stating that he did not know whether Mr. Tapan Datta who appeared in Title Suit No. 442 of 1989 and the one who appeared in the ejectment suit of the appellants was the self-same person. On the contrary, PW1 admitted that the advocate appearing in both the matters was the self-same person, thereby also admitting that the appellants were represented by the said Mr. Tapan Datta, Advocate in Title Suit No. 442 of 1989.

15. We must also take note of the fact that, within the four corners of the application under Order IX Rule 13 of the Code

or the evidence of the appellants, nothing was alleged against Mr. Tapan Datta advocate, who admittedly took signatures of the appellants on printed papers, which might have included Vakalatnama for representing them in the suit-in-question.

16. Rather, Mr. Tapan Datta has been described as a friend, philosopher and guide of the appellants. Thus, there could not have been any premise in the pleadings or the case of the appellants to the effect that the appellants were defrauded by Mr. Tapan Datta, Advocate, who had entered appearance in Title Suit No. 442 of 1989 on behalf of the appellants. In the absence of any such allegation, it cannot be denied that it is the appellants who consciously executed Vakalatnama in favour of Mr. Tapan Datta, who had entered appearance on behalf of the appellants in the said suit, bearing Title Suit No. 442 of 1989, on several occasions as borne out by the order sheet of the suit itself. The appellants never alleged that MR. Tapan Datta appeared in the suit on behalf of the appellants without having instruction to do so. Not a single allegation of impersonation has also been levelled by the appellants. The order sheet of the suit cannot lie, but the appellants may.

17. In the circumstances of the case and the evidence of the PW1, read in conjunction with the relevant facets of the case as discussed above, we are of the opinion that the overwhelming majority of the evidence on record indicates unerringly towards the appellants having been utterly negligent in pursuing their remedy by filing an application under Order IX Rule 13 of the Code about six years after the passing of the *ex parte* decree in Title Suit No. 442 of 1989.
18. On a much more serious note, the very premise of the case sought to be made out in the appellants' application under Order IX Rule 13 of the Code was utterly demolished by the cross-examination of PW1. Whereas the very basis of the appellants' case was that they were unaware even of the pendency of the suit and had no notice of the same or the *ex parte* decree passed therein till much later, it is clearly borne out by the evidence that the said plea is a blatant misrepresentation before the court, since the appellants, after being substituted in place of their predecessor-in-interest, entered appearance in the suit and sought adjournments on several occasions and thus were fully aware of the pendency of the suit.

19. Hence, the appellants were not only negligent in conducting the suit but also tried to cover up such negligence by misleading the court, making untrue assertions about their alleged ignorance of the suit.
20. Thus, the appellants were not entitled to equities as well, which might have been a relevant consideration in deciding the application for condonation of the inordinate delay in filing the restoration application.
21. As such, the learned trial Judge was perfectly justified in dismissing the condonation application and, consequentially, the application under Order IX Rule 13 of the Code made by the appellants.
22. In such view of the matter, there is no scope of interference with the impugned judgment and order.
23. Accordingly, FMAT No. 93 of 2022 is dismissed on contest, thereby affirming the impugned judgment and order dated December 22, 2021 passed by the learned Judge, Eighth Bench, City Civil Court at Calcutta in Miscellaneous Case No. 329 of 2010, arising out of the Title Suit No. 442 of 1989.
24. CAN 3 of 2025 is disposed of in the light of the above judgment.

25. Interim order, if any, stands vacated.

26. There will be no order as to costs.

I agree.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)