

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

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

**C.O. 924 of 2024
Dr. Subir Guha Roy & Anr.
VS.
Sri Sandip Ghosh & Anr.**

For the Petitioner : Mr. Milan Chandra Bhattacharjee, Sr. Advocate
Ms. Sulagna Bhattacharya

..... advocates

For the Opposite Party : Mr. Subhrendu Halder
Mr. Abhirup Halder

.... advocates

Heard on : 01.07.2025

Judgment on : 26.09.2025

Hiranmay Bhattacharyya, J.:-

1. This application under Article 227 of the Constitution of India is at the instance of the plaintiffs and is directed against judgment and order dated 19.11.2024 passed by the learned District Judge, 24 Parganas (South) at Alipore in Misc. Appeal No. 381 of 2023.
2. By the judgment and order impugned, the Misc. Appeal was allowed thereby setting aside the ex parte decree passed in Ejectment Suit no. 15 of 2019.

3. The petitioners herein filed a suit for eviction being Ejectment Suit no. 15 of 2019 before the learned Civil Judge, Junior Division at Alipore, District 24 Parganas (South) against the opposite parties herein. The said suit was decreed ex parte on 17.09.2021. The opposite party no. 1 herein filed an application under Order 9 Rule 13 of the Code of Civil Procedure which was registered as Misc. Case no. 126 of 2022. Since the said Misc. Case was filed beyond the statutory period of limitation, the same was accompanied by an application under Section 5 of the Limitation Act. The learned Trial Judge rejected the prayer for condonation of delay by an order dated August 10, 2023 and consequently dismissed the Misc. Case being barred by limitation. Being aggrieved by the said order, the petitioners filed an application under Article 227 of the Constitution of India being CO 3284 of 2023 and the same was dismissed as withdrawn by an order passed by a co-ordinate bench on October 13, 2023 by giving liberty to the petitioner to approach the appropriate forum in accordance with law. Thereafter, the opposite party no. 1 preferred a Misc. Appeal being no. 381 of 2023 and the learned District Judge, 24 Parganas (South) at Alipore by a judgment and order dated February 19, 2024 allowed the said Misc. Appeal, thereby setting aside the ex parte decree passed in Ejectment Suit no. 15 of 2019.
4. Being aggrieved by the judgment and order dated February 19, 2024 passed in Miscellaneous Appeal No. 381 of 2023, the plaintiffs have approached this Court.
5. Mr. Bhattacharya learned Senior Advocate appearing for the petitioner submitted that the opposite parties herein did not adduce any evidence in support of the case made out in the Miscellaneous Case under Order 9 Rule 13 of the Code of Civil Procedure. He contended that the ex parte decree could not have been set aside unless the defendants proved their case made out in the application under Order 9 Rule 13 of the Code of Civil Procedure by adducing evidence in that regard. Mr. Bhattacharya further contended that the wife of the defendant no. 1 refused to accept the summons after going through the said summons. He thus contended that summons was

duly served upon the defendants. He further contended that by way of abundant caution a paper publication was also made and in spite thereof the defendants did not appear to contest the said suit.

6. Mr. Bhattacharyya further contended that the delay in preferring the Misc. Case could not have been condoned unless sufficient cause was shown. He further contended that it was found by the learned Trial Judge that the delay has not been appropriately explained. The learned Judge of the Appellate Court failed to appreciate that condonation of delay in such a case would amount to giving a premium to a person who fails to explain the delay. In support of such contention he placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Lingeswaran Etc. v. Thirunagalingam** reported at **(2022) Livelaw SC 27**.
7. Mr. Bhattacharya contended that the opposite parties had full knowledge about the proceedings of the ejectment suit and the application for condonation of delay was filed with incorrect facts. He therefore, contended that an application for condonation of delay with incorrect facts was rightly rejected by the learned Trial Judge. In support of such contention he placed reliance upon a decision of the Hon'ble Supreme Court in the case of **Mohd. Sahid v. Raziya Khanam**, reported at **(2019) 11 SCC 384**. He further contended that delay in preferring an appeal or an application can be allowed where no gross negligence or deliberate inaction or lack of bona fides is imputable to the parties seeking condonation of delay. However, in a case where there is gross negligence or deliberate inaction or lack of bona fides imputable to the parties seeking condonation of delay, the prayer for condonation of delay is liable to be rejected. In support of such contention he placed reliance upon a decision of the Hon'ble Supreme Court in the case of **State of Nagaland v. Lipok Ao**, reported at **(2005) 3 SCC 752**.
8. Mr. Bhattacharya also placed reliance upon a decision of the co-ordinate bench in the case of **M/S. Trimurti Cargo Movers Pvt. Ltd vs M/S. Auto Cars & Ors** reported at **(2017) 2 ICC 288 Cal** in support of his contention that an application for condonation of delay and setting aside abatement

can be rejected if it is found that the defendants had knowledge of the proceedings and was possible for them to attend the trial of the suit and they waited till the suit was decreed and the execution applications were served upon them in order to try to reopen the suit. Mr. Bhattacharya placed reliance upon a decision of the co-ordinate bench in the case of **New Globe Transport Corporation v. Magma Shracchi Finance Ltd.**, reported at **AIR 2011 Cal 72** in support of his contention that “Not claimed” amounts to good service. Mr. Bhattacharya also placed reliance upon a decision of the Hon’ble Supreme Court in the case of **Poonam v. Sumit Tanwar**, reported in **AIR (2010) SC 1384** in support of his contention that in a case where the counsel for the party is not able to render any assistance, the Court may decline to entertain the petition.

9. Per contra Mr. Halder appearing for the opposite party contended that the summons was not served upon the defendants. He contended that the addressee was not found present when the postal articles were sought to be served and for which the same were returned to the Court unserved. He further contended that the paper publication cannot be said to be a valid service in the case on hand. He further contended that upon being served with the notice of a Miscellaneous Case No. 101 of 2022 the petitioner became aware of the ex parte decree and immediately thereafter filed the application for condonation of delay.
10. Mr. Halder contended that the expression “sufficient cause” must receive a liberal interpretation so as to advance the substantial justice and in support of such contention he placed reliance upon the decision of the Hon’ble Supreme Court in the case of **State of Nagaland v. Lipok Ao** reported at **(2005) 3 SCC 752**. He further contended that the condition precedent for condonation of delay is the existence of sufficient cause and acceptance of explanation furnished should be the rule and refusal an exception when no negligence or inaction or want of bona fide can be imputed to the defaulting party. In support of such contention he placed reliance upon the decision of

the Hon'ble Supreme Court in the case of **Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.**, reported at **(2021) 7 SCC 313**.

11. Mr. Halder placed reliance upon the decision of the Hon'ble Rajasthan High Court in the case of **Shyam Lal and Ors. v. Ramcharan** reported at **(2001) AIHC 2728** in support of his contention that it is the incumbent duty of the Court to see whether the party is served in accordance with law instead of proceeding ex parte just on receipt of the report of the process server.
12. Mr. Halder contended that in the case on hand the learned Trial Judge without being satisfied that the defendants were served in accordance with law proceeded with the suit ex parte merely on the receipt of the report of the process server. Mr. Halder placed reliance upon a decision of the Hon'ble Supreme Court in the case of **Rabindra Singh v. Financial Commr., Coop.**, reported at **(2008) 7 SCC 663** in support of his contention that publication of a notice in a local newspaper which has no wide circulation in the place where the person is residing cannot be said to be an effective service.
13. Heard the learned advocates for the parties and perused the materials placed.
14. Ejectment Suit no. 15 of 2019 was decreed ex parte by a judgment and decree dated 17.09.2021. The application under Order 9 Rule 13 of the Code of Civil Procedure being Misc. Case no. 126 of 2022 was filed on 23.09.2022.
15. The Hon'ble Supreme Court in Suo Moto (Civil No. 3 of 2020) passed orders from time to time taking into consideration the onset of Covid 19 Pandemic. The Hon'ble Supreme Court took suo moto cognizance of the situation arising from difficulties that might be faced by litigants across the country in filing petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under any special law (both central and state) extended the period of limitation prescribed under general law or special law from time to time. By an order

dated 23.03.2020 the Hon'ble Supreme Court extended the period of limitation prescribed under the general law or special laws were compoundable or not with effect from 15.03.2020 till further orders. The said order dated 23.03.2020 was extended from time to time. The Hon'ble Supreme Court after noting that the lockdown has been lifted and the entire country is returning to normalcy and all the Courts and Tribunals are functioning either physically or by virtual mode opined that the order dated 23.03.2020 has served its purpose and in view of changing scenario relating to the pandemic, the extension of limitation should come to an end. After considering the suggestions of the learned Attorney General of India regarding the future course of action the Hon'ble Supreme Court deemed it appropriate to issue certain directions by an order dated 08.03.2021 which are extracted hereinafter-

“1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.

2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply.

3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Section 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe periods(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

4. *The Government of India shall amend the guidelines for containment zones, to state.*

“Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements.”

16. The Hon'ble Supreme Court by an order dated January 10, 2022 clarified that the period from 15.03.2020 till 28.02.2022 shall stand excluded in computing the period of limitation. The said order is extracted hereinafter-

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Order

1. *In March, 2020, this Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications / suits/appeals / all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the COVID-19 pandemic.*
2. *On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders. On 08.03.2021, the order dated 23.03.2020 was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021.*
3. *Thereafter, due to a second surge in COVID-19 cases, the Supreme Court Advocates on Record Association (SCAORA) intervened in the Suo Motu proceedings by filing Miscellaneous Application No. 665 of 2021 seeking restoration of the order dated 23.03.2020 relaxing limitation. The aforesaid Miscellaneous Application No.665 of 2021 was disposed of by this Court vide Order dated 23.09.2021, wherein this Court extended the period of limitation in all proceedings before the Courts/Tribunals including this Court w.e.f 15.03.2020 till 02.10.2021.*
4. *The present Miscellaneous Application has been filed by the Supreme Court Advocates-on-Record Association in the context of the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID cases across the country.*

Considering the prevailing conditions, the applicants are seeking the following:

- i. allow the present application by restoring the order dated 23.03.2020 passed by this Hon'ble Court in Suo Motu Writ Petition (C) NO.3 of 2020 ; and*
- ii. allow the present application by restoring the order dated 27.04.2021 passed by this Hon'ble Court in M.A. no. 665 of 2021 in Suo Motu Writ Petition (C) NO.3 of 2020; and*
- iii. pass such other order or orders as this Hon'ble Court may deem fit and proper.*

5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:

- I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.*
- II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*
- III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.*
- IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.*

6. As prayed for by learned Senior Counsel, M.A. No. 29 of 2022 is dismissed as withdrawn.

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17. From the aforesaid order it is evident that the Hon'ble Supreme Court held that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the period prescribed under Section 23(4) and 29A of the Arbitration and Conciliation Act, 12A of the Commercial Courts Act 2015 and proviso (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws which prescribed period(s) of limitation for instituting proceedings, outer limits (within which the Court or Tribunal can condone delay) and termination of proceedings. It was also observed by the Hon'ble Apex Court that in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. It was further observed therein that in the event the actual balance period of limitation remaining, with effect from 01.03.2022, is greater than 90 days, the longer period shall apply.
18. In view of the order dated January 10, 2022 passed by the Hon'ble Supreme Court in the Suo Motu writ petition, it follows that in cases where the period of limitation would expire between the period from 15.03.2020 till 28.02.2022, an aggrieved party shall have a limitation period of 90 days with effect from 01.03.2022.
19. Article 123 of the Limitation Act deals with the limitation for setting aside an ex parte decree passed in a suit or to rehear an appeal decreed or heard ex parte. The period of limitation is 30 days. The time from which the period begins to run is the date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.
20. In the case on hand, the suit was decreed ex parte on 17.09.2021. If the date of decree is to be considered as the starting point of limitation for filing a Misc. Case under Order 9 Rule 13 of the Code of Civil Procedure, the applicant would have a limitation period of 90 days with effect from 01.03.2022 in view of the order passed by the **Hon'ble Supreme Court (supra)** and not 30 days from 17.09.2021.

21. The Miscellaneous Case under Order 9 Rule 13 of the Code was filed on 13.09.2022, i.e., three months after the expiry of 90 days with effect from 01.03.2022.
22. The finding of the learned trial Judge that the Misc. Case was filed with a delay of 341 days cannot be supported by this Court.
23. The learned trial Judge, however, proceeded on the basis that the summons of the suit was duly served upon the defendants.
24. Record reveals that the learned trial Judge passed a direction for newspaper publication in the suit. It is not disputed by the plaintiff/petitioner herein that pursuant to the said direction publication was made in the newspaper. Direction for publication in the newspaper is passed in exercise of powers under Order 5 Rule 20 which deals with substituted service.
25. Without venturing to decide whether the preconditions for substituted service was satisfied in the case on hand, this Court shall proceed to consider the effect of substituted service on the period of limitation.
26. Explanation to Article 123 of the Limitation Act states that for the purpose of the said Article, substituted service under Rule 20 of Order V of the Code of Civil Procedure shall not be deemed to be due service.
27. To the mind of this Court, the learned Judge of the appellate Court was right in holding that the substituted service shall not be deemed to be due service.
28. It is the specific case of the opposite parties in the application under Section 5 of the Limitation Act, that summons of the suit was not served upon them and after getting notice of the Misc. Case No. 101 of 2022, they came to know that the petitioner obtained an ex parte decree on 17.09.2021.
29. Petitioner did not file any objection against the application under Section 5 of the Limitation Act. Therefore, the statement made by the opposite parties in the application under Section 5 of the Limitation Act with regard to non-

service of summons and the date of knowledge of the ex parte decree remains uncontroverted.

30. The learned Judge of the Appellate Court took note of the well settled proposition of law that liberal approach should be adopted while considering an application for condonation of delay and also that a litigant does not stand to benefit by lodging an appeal or an application belatedly.
31. The Hon'ble Supreme Court in **Sesh Nath Singh** (supra) held that the condition precedent for condonation of delay in filing an appeal or application is the existence of sufficient cause. Whether the explanation furnished for the delay would constitute "sufficient cause" or not would depend upon facts of each case. There cannot be any straight jacket formula for accepting or rejecting the explanation furnished by the applicant for the delay in taking steps. It was further held that acceptance of explanation furnished should be the rule and refusal an exception, when no negligence or inaction or want of bona fides can be impute to the defaulting party.
32. It is not a case that the delay occasioned on account of culpable negligence or on account of mala fides.
33. The learned Judge of the appellate Court correctly applied the tests laid down by the Hon'ble Supreme Court to the facts of the case on hand and assigned cogent reasons in support of condonation of delay. This Court does not find any reason to interfere with such finding.
34. It is well settled that it is only after the delay is condoned, the Court acquires the jurisdiction to enter into the merits of the Miscellaneous Case under Order 9 Rule 13 of the Code.
35. In the case on hand, the learned trial Judge rejected the prayer for condonation of delay and consequently dismissed the Misc. Case. The learned Judge of the appellate Court, however, condoned the delay by the impugned judgment and order. However, after condoning the delay, the learned Judge of

the Appellate Court ought to have remanded the Misc. Case under Order 9 Rule 13 before the learned trial Judge for deciding the same on merit.

36. It is not in dispute that the opposite parties herein did not adduce any evidence in support of the case made out in the Misc. Case. It is well settled that the facts pleaded in the Misc. Case have to be proved in accordance with law. This Court is, therefore, inclined to interfere with the order impugned in so far as the ex parte decree in Ejectment Suit No. 15 of 2019 was set aside.
37. The decision in the case of **Smt. Poonam** (supra) does not have any manner of application to the case on hand as it has been held therein that in case the counsel of a party is not able to render any assistance, the Court may decline to entertain the petition.
38. There is no quarrel to the proposition of law laid down in **New Globe Transport Corporation** (supra) that “Not claimed” tantamounts to good service. The said decision cannot come to the aid of the opposite parties herein as in the case on hand the Court directed substituted service by way of paper publication.
39. In **M/s. Trimurti Cargo Movers Pvt. Ltd.** (supra), the plea taken by the second and third defendant that they are not connected with the first defendant was found to be untrue. The conduct of the defendants was held to be murky. The names of the partners of defendant no. 1 were not disclosed and the application was filed by a constituted Attorney whose power of attorney was not disclosed. On such facts, the co-ordinate bench refused to condone the delay and set aside the ex parte decree.
40. In **State of Nagaland** (supra), the order refusing to condone the delay in making an application for grant of leave was challenged. It was held in the said reported case that the State as a litigant cannot be put on the same footing as an individual as the decision are taken by officers/agencies and there is considerable delay of procedural red tape in the process of their making decision and, therefore, certain amount of latitude is not

impermissible. The said decision being distinguishable on facts cannot be applied to the case on hand.

41. In **Mohd. Sahid** (supra) though the appellants therein claimed that they were not present before the learned trial Court but the other sheet of the suit reflected presence of both sides on a particular date when the submissions of the parties regarding preliminary issues were considered and subsequent date was fixed for cross examination of first witness of the plaintiffs. The Hon'ble Supreme Court after taking note of the order sheet and other materials placed recorded a factual finding that the application for condonation of delay was filed with incorrect facts. The said decision being distinguishable on facts cannot come to the aid of the petitioner.
42. In **Lingeswaran** (supra), the trial Court even after observing that there are no merits in the application for condonation of delay, however, condoned the delay on the ground that no prejudice will be caused to the plaintiff. On such facts, that Hon'ble Supreme Court held that once it was found that delay has not been properly explained and there are no merits in the application, the condonation of delay application was required to be dismissed. The said decision being distinguishable on facts cannot apply to the case on hand.
43. Since this Court is inclined to remand the Misc. Case before the learned trial Judge for fresh adjudication on merits, this Court refrains from making any comment on the applicability or otherwise of the decision in the case of **G.P. Srivastava** (supra) **Shyam Lal** (supra) and **Rabindra Singh** (supra).
44. For all the reasons as aforesaid, C.O. 924 of 2024 stands allowed in part. The portion of the order dated February 19, 2024 whereby the ex parte decree passed in Ejectment Suit was set aside is accordingly set aside. The Misc. Case No. 126 of 2022 stands restored to its original file and number and the learned Civil Judge (Junior Division) 2nd Court at Alipore is directed to consider the said Misc. Case afresh on merits and dispose of the same in accordance with law. It is, however, made clear that the portion of the order

allowing the application under Section 5 of the Limitation Act is not interfered with by this Court.

45. There shall be, however, no order as to costs.
46. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)