

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

FMA 722 of 2024
With
CAN 1 of 2024

Himangshu Saha
-vs-
Birendra Kumar Bhowmik (Deceased)
represented by Smt. Pabitra Bhowmik and Ors.

For the appellant : Mr. Partha Pratim Roy,
Mr. Manik Lal Poddar.

For the respondent
No. 1 (a) : Mr. Debasish Roy, Sr. Adv.
Mr. Somnath Maiti,
Mr. Soumyanil Maiti.

Heard on : March 5, 2025.

Judgment on : March 5, 2025.

Sabyasachi Bhattacharyya, J.:

1. Heard learned Counsel for the parties.

2. The present appeal has been preferred against an order whereby an application for condonation of delay in filing an application for restoration of a suit under Order IX Rule 13 of the Code of Civil Procedure, filed by the present appellant, was dismissed, consequentially dismissing the application under Order IX Rule 13 as well.
3. Learned Counsel for the appellant contends that the appellant had been duly taking steps in the suit. It is submitted that by an Order dated August 8, 2012, at the juncture when the ex parte decree was sought to be executed, the learned Trial Judge passed an order fixing a future date for hearing of an application filed by the defendant No. 5/present appellant on September 13, 2011, while the suit was pending. It is submitted that during pendency of the suit, such application dated September 13, 2011 was filed by the present appellant for taking the suit off the ex parte board and for being given a chance to participate in the suit. However, without disposing of such application, an ex parte decree was passed in the suit

and, as such, the very disposal of the suit by such ex-parte decree is vitiated in law.

4. Learned Counsel further submits that in view of the Order dated August 8, 2012, the appellant was under the obvious impression that the learned Trial Judge would revisit the application dated September 13, 2011 whereby the appellant has sought taking the suit off the ex parte Board, in the process setting aside the ex parte decree and/or recalling the said ex parte decree as well. Such impression was dispelled only on July 16, 2015, when a revisional application filed by the respondent against the Order dated August 8, 2012 was allowed.
5. Immediately thereafter, steps were taken and on September 4, 2015, the application under Order IX Rule 13 along with the connected application for condonation of delay under Section 5 of the Limitation Act were filed.
6. Hence, it is submitted that there was no fault on the part of the appellant in the delay occasioned in preferring the application for setting aside the ex parte decree, as the cause of action for

filing the application under Order IX Rule 13 of the Code riprened, insofar as the defendant No. 5/appellant is concerned, on July 16, 2015, only upon the revisional court setting aside the Order dated August 8, 2012.

7. Learned Counsel appearing for the appellant further insinuates that the suit, against the ex parte decree of which the Order IX Rule 13 application was filed, itself was not maintainable in view of the bar under Order II Rule 2 of the Code of Civil Procedure, since a suit for specific performance of the self-same contract as sought in the second suit was already pending at the juncture when the second and last suit was filed. Thus, since the suit itself was barred by law, the defendant No. 5/appellant had a fair chance of having the said suit dismissed on merit, which also ought to be considered as one of the ingredients of consideration under Section 5 of the Limitation Act.
8. Learned Counsel for the decree holder/respondent No. 1 vehemently opposes the contentions of the appellant. It is submitted that even on September 13, 2011, when the

application was filed by the defendant No. 5/appellant for taking the suit off the ex parte Board, December 1, 2011 was fixed as the next date of hearing by the court, in the presence of the learned Advocate for the appellant. Despite the same, on December 1, 2011, when the matter was taken up for ex parte hearing, none appeared on behalf of the defendant No. 5/appellant and as such, arguments were concluded and subsequently, the ex parte decree was passed on December 5, 2011. It is submitted that although a purported adjournment application has been annexed to the stay application filed in connection with the instant appeal, no such application was moved in the trial court, which will be reflected from the Order dated December 1, 2011 passed in the suit, which was a date fixed in the presence of the appellant.

9. Next, relying on the averments made by the appellant in the appellant's application under Section 5 of the Limitation Act, it is pointed out that the appellant sought to take shelter under the pendency of a revisional application pending before this court and has cast aspersions entirely on the learned advocate

conducting the same on behalf of the appellant by stating that no information about the disposal of the revisional application was given to the appellant. However, no explanation for the long delay of about 12 years up to August 8, 2012, when allegedly the appellant was served with a notice of show cause in connection with the execution case, has been made out in the application under Section 5 and/or the connected application under Order IX Rule 13 of the Code.

10. Learned Counsel for the decree holder/respondent No. 1 places reliance on a judgment of the Supreme Court in the matter of *Pathapati Subba Reddy (Died) by L.Rs. & Ors. Vs. The Special Deputy Collector (LA)* reported at 2024 INSC 286 where the Supreme Court laid down the parameters of adjudication of applications under Section 5 of the Limitation Act. Although the Supreme Court held therein that Section 5 applications have to be construed liberally and the delay should be condoned if sufficient cause had been explained, in the same breath it was held that such discretionary power 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.

11. Upon hearing learned Counsel for the parties, we find from the records that the plinth of the appellant's case for condonation of delay is the Order dated August 8, 2012 passed by the learned Trial Judge. In the said order, the learned Trial Judge recorded that the ex parte decree-in-question was passed without disposing of a pending application of the defendant No. 5/appellant dated September 13, 2011 whereby the suit was prayed for to be taken off the ex parte board. The learned Trial Judge fixed a subsequent date, that is, September 20, 2012 for hearing of the said application filed on September 13, 2011 which, according to the appellant, gave an impression that the ex parte decree erroneously passed by the trial court would be recalled and the application dated September 13, 2011 which was filed in the suit would be revisited. By the same order, the learned Trial Judge also stayed for the time being the previous order dated July 10, 2012 whereby a deed of conveyance had

been directed to be executed pursuant to the ex parte decree of specific performance of contract.

12. However, we are unable to agree with learned Counsel for the appellant on such count. Even if we accede to the proposition to the limited extent that the Order dated August 8, 2012 might have given an impression in the mind of the appellant that the trial court was minded to reopen its ex parte decree and revisit a prior application dated September 13, 2011 on the principle of *Actus Curiae Neminem Gravabit*, such impression does not per se absolve the gross negligence committed by the appellant for the prolonged period between September 13, 2011 and August 8, 2012. We find from the order sheet of the suit that on September 13, 2011, a petition had been filed on behalf of the defendant No. 5/appellant praying for taking the suit off the ex parte Board. However, by the same order, the next date was fixed on December 1, 2011 for ex parte arguments of the suit. Even on December 1, 2011, despite having full knowledge of the date by virtue of the Order dated September 13, 2011, the defendant No. 5/appellant chose to

abstain from appearing before the trial court on that date. Accordingly, the suit was heard ex parte on the said date and judgment was subsequently passed on December 5, 2011.

13. In the application under Section 5, however, an entirely different case has been sought to be made out by the appellant. In the said application, the appellant completely suppresses the fact that the appellant had appeared in the suit and filed an application on September 13, 2011. On a bare perusal of paragraph nos. 5 to 10 of the application under Section 5, it is evident that the appellant claimed that a revisional application had been filed by the decree holder/respondent No. 1 before this court. Upon query from learned Counsel for the parties before us, we learn that such revisional application was filed in the month of August, 2000.
14. Thus, in August, 2000, according to the appellant, the appellant had last knowledge of the proceedings in the suit. Thereafter, according to the averments in the application under Section 5 of the Limitation Act, the appellant entrusted his advocate with the matter, who assured the appellant not to

worry about the same and that he would intimate the appellant at the time of hearing of the revisional application, which he did not do.

15. In Paragraph no. 10 of the Section 5 application, the appellant states that he was surprised since only on or about August 8, 2012, the appellant was served with a notice of show cause in connection with the execution case and rushed to the court and appeared before the trial court.
16. As such, we do not find any plausible explanation in the condonation application filed in the court below for the prolonged delay from August, 2000 till August, 2012, that is, for a period of long 12 years, as to what was done by the appellant to take information about his case. It is absurd that a litigant whose suit is pending, merely because a revision has been filed against an order passed in the same and stay has been granted therein, would completely lose track of the suit and the revisional application. A burden is definitely cast on the litigant himself to take information from time to time from his advocates, both before the revisional court as well as the

trial court, to apprise himself as to what were the stages respectively of the said revisional application and the suit. Having not even pleaded (let alone prove) in the condonation application any such attempt on his part to take such information about his litigation for the long period of 12 years, the defendant No. 5/appellant cannot now take advantage of his own wrong by casting the blame entirely on his learned advocates. It was for the appellant himself, whose litigation was pending, to take information throughout the said period from his learned advocates.

17. Having not done so for 12 years, nor having furnished any explanation for the same, the Order dated August 8, 2012 could not, all on a sudden, grant a new lease of life to the huge delay already occasioned by the appellant. Thus, even if by the Order dated August 8, 2012, some impression was created in the mind of the appellant, the prolonged delay of 12 years prior to the same has not been explained at all.
18. Going by the cited judgment of the Supreme Court, we find that the Supreme Court has crystallized the parameters of

adjudication of condonation applications in paragraph 26 of the report. In Clause (v) of the said paragraph, it is observed that courts are empowered to exercise discretion to condone the delay if sufficient cause has 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.

19. In the present case, all the three exceptions carved out to the exercise of liberal discretion in favour of the applicant in a condonation application are satisfied and as such, since the appellant was all along negligent and was totally wanting in due diligence as well as due to the inordinate delay occasioned, we are of the opinion that the discretionary benefit under Section 5 of the Limitation Act cannot and ought not to be bestowed on such a litigant.
20. Insofar as the argument of the appellant that the merits of the case ought to be considered, we are precluded from doing so due to the observation of the Supreme Court in Clause (vii) of

paragraph no. 26 of the cited judgment, which categorically observes that merits of the case are not required to be considered in condoning the delay, which unsettles the previous settled position of law that merit could be considered as one of the components in adjudicating condonation applications. Since we are bound by the said dictum of the Hon'ble Apex Court, we chose not to go beyond the same.

21. Accordingly, on the basis of the above observations, we do not find any reason or occasion to interfere with the impugned order whereby the application under Section 5 of the Limitation Act filed by the appellant in support of his application under Order IX Rule 13 of the Code of Civil Procedure, and consequentially the Order IX Rule 13 application, has been dismissed.
22. Accordingly, FMA 722 of 2024 is dismissed on contest, thereby affirming the impugned order bearing Order No. 175 dated March 1, 2024.
23. Accordingly, CAN 1 of 2024 also stands dismissed.
24. There will be no order as to costs.

25. Urgent photostat certified copy of the order, if applied for, be supplied to the parties at an early date.

I agree.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)