

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 1397 of 2024

Sri Kallol Das

VERSUS

Smt. Sipra Bose

For the petitioner:

Mr. Tanmoy Mukherjee, Adv.
Mr. Anant Kumar Shaw, Adv.
Mr. Souvik Das, Adv.
Mr. Soumava Sartia, Adv.

For the Opposite Party

Ms. Sarmistha Ghosh Sarma, Adv.
Mr. Rajiblochan Chakraborty, Adv.
Ms. Vaswati Chakraborty, Adv.
Mr. Priyanjit Kundu, Adv.

Last Heard on: March 17, 2025

Judgment on: April 25, 2025

Biswaroop Chowdhury,J:

The petitioner before this Court is a decree holder in an Execution Case being Title Execution Case No-07 of 2023 arising out of judgment and decree dated 4th January 2023 passed in Title Suit No. 57 of 2017 pending before Learned Civil Judge Junior Division Bidhannagar. The petitioner being

aggrieved by an order dated 15-03-2024 in an application under Order IX. Rule 13 CPC being Misc Case no-11 of 2024 granting stay of Title Execution Case 7 of 2023 along with Misc Case 44 of 2023 (in connection with Title Suit No. 57 of 2017) has come up with the instant application.

The case of the opposite party/judgment debtor in application under Order 9 Rule 13 of the Code of Civil Procedure may be summed up thus:

1. The judgment debtor is occupying and enjoying all that piece and parcel of shop room measuring about 180 sq Ft lying and situated at holding 11/1 Nirmal Sengupta Sarani, under Ward No. 5 within the limits of the Dum-Dum Municipality under Police Station Dum-Dum District-North 24 Parganas Kolkata – 700079.
2. The Judgment Debtor is carrying on business in the decretal property since 1998 with the permission of her mother Padma Rani Das and during her lifetime it was her desire that the Petitioner shall enjoy and occupy shop as absolute owner after her death. The judgment debtor being an aged widow and her sons having no other income is dependent upon the said shop.
3. The decree-holder have fraudulently obtained a deed of gift in his favour from the said Padma Rani Dasi taking advantage of her age.
4. The judgment debtor challenged the authenticity of the said deed and thereafter the decree-holder along with two local developers being supported by the antisocial threatened her to vacate the shop room.

5. The decree holder filed a Title Suit before the Learned Civil Judge Junior Division 3rd Court Sealdah. The judgment debtor received the summons and appeared before the Learned Court and also filed her written statement along with Counter claim against the Title Suit No. 57/2017. Thereafter the said matter was transferred to the Learned Civil Judge Junior Division Bidhan Nagar for disposal but the judgment debtor did not receive any information from the Learned conducting Advocate namely Anup Kundu and as such could not contest the matter. No notice was also served from the Learned Court and the judgment debtor was prevented by sufficient cause from appearing on 09-03-2022 when the suit was fixed ex-parte against the petitioner.
6. The judgment debtor being an aged lady lost the track of the matter and was waiting for the information from the end of the conducting Advocate, but never received the same.
7. The Learned Advocate of the judgment debtor stopped contacting her and due to her age it was not possible for her to visit the Court in regular manner to get the whereabouts of the matter.
8. One person came to the shop of the judgment debtor and directed her to vacate the shop the decree holder along with his men and agents also accompanied him. The said person without showing any order stated that he has been sent from Court for vacating the shop. The judgment debtor being an aged lady could not understand the same.

9. That soon thereafter the judgment debtor rushed to the Sealdah Court and enquired about the matter but returned empty handed. Moreover the judgment debtor could not contact the Learned Advocate conducting the matter.
10. The judgment debtor thereafter received a summon from the Court of the Learned Civil Judge Junior Division, Bidhannagar in the month of December 2023 for appearing in the Misc case being 44/2023 on 15-01-2024.
11. The judgment debtor on the said date contacted Mr. Ravy Lachan Chakraborty along with the paper and he advised to file an application under Order 9 Rule 13 of the Code of Civil Procedure.
12. The judgment debtor/opposite party thereafter through her Learned Advocate Mrs. Snigdha Saha appeared before the Learned Court with Fresh Vokalatnama, and also applied for the certified copy of the Decree and Judgment dated 04-01-2023 along with all order before the copy department on 15-01-2024 in regard to Title Suit No. 57/2017, but till date no record could be traced out from the said department.

The Learned Trial Court by Order dated 15-03-2024 was pleased to register the Misc Petition under Order 9 Rule 13 being Misc 11/24. The Learned Trial Court was further pleased to grant stay of Title Execution 07 of 2023 along with Misc Case 44 of 2023. (In connection with Title Suit No. 57 of 2017) by observing and directing as follows:

The application for stay on behalf of the petitioner is placed before me and taken up for consideration.

By moving the application of stay application, petitioner avers that due to her physical incapacities she could not follow the case. Further petitioner states the Opposite Party has misrepresented the Court and procured the deed of suit property. By filing this stay application petitioner prays before this Court to stay the Title Execution case 07 of 2023 along with Misc Case 44 of 2023 (in connection with Title Suit No. 57 of 2017).

Petitioner has filed following documents, a counter party of copying petition, Xerox copy of misc. case 44/2023 petition, Xerox copy of CIS, Xerox copy of the order TS 57/2017 and Xerox copy Aadhar card.

Perused the application and order relevant documents produced.

It appears that due to petitioner's physical and education incapacities, she could not proceed with the Title Suit. It is the cardinal principle of law that the procedural law should be construed liberally to further the ends of justice. This Court is of the opinion that the petitioner should be given a chance to contest the title suit to prove her contentions.

It is also pertinent to note that opposite party has obtained the decree on ex-parte basis. Moreover, petitioner is in possession of the suit property and this stay shall not be allowed without any condition. Thus, the Title Execution 07 of 2023 along with Misc. Case 44 of 2023 (in connection with

Title Suit No. 57 of 2017) be stay till the disposal of this instant Misc Case of 11 of 2024 on condition that the petitioner herein shall pay Rs. 2,000/- per month within the 15th day of every month before this Court as civil deposit in connection with Misc Case 11 of 2024. The first deposit shall be made within 10 days from the date of the passing of this Order. The subsequent deposits shall be made within 15th day of every month.

Hence, it is,

ORDERED

That the application for stay of the Title Execution 07 of 2023 along with Misc. Case 44 of 2023 (in connection with Title Suit No. 57 of 2017) is allowed.'

The petitioner/decreed holder being aggrieved by Order dated 15-03-2024 passed by Learned Trial Judge in granting stay of the Title Execution 07 of 2023 along with Misc Case 44 of 2023. (in connection with Title Suit No 57 of 2017) has come up with this application under Article 227 of the Constitution of India.

It is the contention of the petitioner, that the Learned Judge of the Executing Court below in exercise of its jurisdiction acted illegally and with material irregularity by allowing the application for stay on the initial day by the order impugned thereby granting the stay till the disposal of the application filed under Order IX Rule 13 of the Code of Civil Procedure

without granting the decree-holder/petitioner an opportunity to contest the said application.

It is further contended that the Learned Judge Executing Court below in exercise of its jurisdiction acted illegally and with material irregularity by not appreciating the fact that the case made out by the Judgment Debtor/opposite party herein in the application under Order IX Rule 13 of the Code of Civil Procedure is not a case of non-servive of summons of the suit but in fact she has tried to convince the Court by making pleadings that she has been prevented by alleged sufficient cause for not contesting the suit before the Learned Trial Judge. It is also contended that the Learned Judge of the Executing Court below in exercise of its jurisdiction acted illegally and with material irregularity by not appreciating the fact that the application filed under Order IX Rule 13 of the Code of Civil Procedure ex-facie barred by limitation.

Heard Learned Advocate for the Petitioner/Decree holder and Learned Advocate for the opposite party perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that the Learned Trial Court erred in entertaining the application under Order IX Rule 13 of the Code of Civil Procedure without there being any application for condonation of delay when the said application is barred by law of limitation. Learned Advocate further submits that Learned Judge ought not to have granted Order of stay

when the application under Order IX Rule 13 of Code of Civil Procedure is barred by Limitation. Learned Advocate for the petitioner also submits that the averments made in the petition under Order IX Rule 13 of the Code of Civil Procedure are vague and the opposite party/Judgment Debtor is not entitled to any relief.

Learned Advocate for the Petitioner/decreed-holder relies upon the following judicial decisions:

Abul Hosan and others VS Additional Commissioner (II) Allahabad Division.

Reported in 2020 SCC Online All. 2943.

Gagandeep Pratisthan Pvt Ltd and Ors. VS Mechano and anr.

Reported in (2002) 1 SCC. P-475

Ramesh Chand Sharma. VS Udham Singh Kamal and others.

Reported in (1999) 8 SCC-P-304.

Learned Advocate for the opposite Party/Judgment Debtor submits that his client is a poor person and she was prevented by sufficient cause to attend the Court proceedings and thus the Learned Trial Court rightly passed the order dated 15/03/2024.

Learned Advocate for the opposite party relies upon the following judicial decisions.

Sri Biswajit Das and ors. VS Smt Ruma Barh and ors.

Reported in 2012 (4) ICC-P-341

Shaukat Hussain VS Smt Bhuneshwari Devi.

Reported in (1972) 2 SCC-731.

Before proceeding to decide the issue it is necessary to consider the provisions contained in Order IX Rule 13 of the Code of Civil Procedure and Section 5 of the Limitation Act.

Order IX Rule 13 of the Code of Civil Procedure provides as follows:

Order IX R-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 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 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 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.

Section 5 of the Limitation Act provides as follows:

Section 5 – Extension of prescribed period in certain cases – Any appeal or any application other than an application under any of the provisions under Order XXI of the Code of Civil Procedure 1908 (5 of 1908) may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.- The fact that the appellant or the applicant was misled by any order practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

Upon perusing the provision contained in Order IX Rule 13 of the Code of Civil Procedure it will appear that Courts have power to set aside decree

passed, ex-parte against defendant if the defendant can satisfy 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 case of the opposite party in the application under Order IX Rule 13 of the Code of Civil Procedure is based on the ground that she was prevented by sufficient cause from appearing in Court. The opposite party Judgment Debtor although has pleaded cause in the Petition but whether the said cause is sufficient or not will be decided upon hearing both the parties to the suit and by a reasoned decision.

Now with regard to the contention of the petitioner/decreed-holder that the application under Order IX Rule 13 CPC is barred by Limitation and there is no application filed under Section 5 of the Limitation Act. It is necessary to consider Section 5 of the Limitation Act.

Section 5 of the Limitation Act 1963 empowers the Court to extend the prescribed period Provided under the statute to prefer application or appeal if the appellant or the applicant satisfies the Court for not preferring, the appeal or making the application within such period.

Thus in an appeal or application the Court concerned if the said appeal as application is instituted after the prescribed period of limitation has power to extend the time if it is satisfied that the appellant or applicant has sufficient cause for not preferring the appeal or making the application within the prescribed period limitation. The explanation for delay can be

given in the application itself or a separate application can be filed for condonation of delay. The difference between condonation of delay in an appeal and an application is that in the case of appeal when a memorandum of appeal is filed setting out the grounds there is no scope to give explanation of delay thus an application for condonation of delay is required to be filed separately. Hence when an appeal is filed beyond the period of limitation, it is necessary that it should be accompanied by an application for condonation of delay. In the event a memorandum of appeal is not accompanied by an application for condonation of delay the same is marked defective and dismissed if defect is not removed. In the case of application position is different. The applicant may explain delay in the application itself or may file a separate application for condonation of delay.

Section 5 of the limitation Act nowhere provides that separate application for condonation of delay is required to be filed as it empowers the Court to condone the delay if it is satisfied from the application itself that the applicant has sufficient cause for not making the application within prescribed period. However in case of appeal filing of application for condonation of delay is necessary unless from other applications filed along with appeal explanation for delay is given with a prayer for condoning the same.

In the case of Abdul Hasan and others (supra) the Hon'ble Supreme Court observed as follows:

‘29. The S.D.M, Fatehpur while allowing the application under Order IX, Rule 13 of C.P.C has failed to appreciate that the application of the petitioners under Order IX, Rule 13 of CPC was not maintainable in absence of delay condonation application. Further, even in application under Order IX, Rule 13 of C.P.C, the petitioners have not averred any fact explaining the delay in filing the application under Order IX, Rule 13 of C.P.C nor they had disclosed the date of knowledge of the *ex-parte* judgment.’

In the case of Ramesh Chand Sharma (supra) the Hon’ble Supreme Court observed as follows:

‘7. On a perusal of the materials on record and after hearing counsel for the parties, we are of the opinion that the explanation sought to be given before us cannot be entertained as no foundation thereof was laid before the Tribunal. It was open to the first respondent to make proper application under Section 21(3) of the Act for condonation of delay and having not done so, he cannot be permitted to take up such contention at this late stage. In our opinion, the OA filed before the Tribunal after the expiry of three years could not have been admitted and disposed of on merits in view of the statutory provision contained in Section 21(1) of the Administrative Tribunals Act, 1985. The law in this behalf is now settled.’

Upon perusal of the decision of Abdul Hasan (supra) it appears that in the event separate application for condonation of delay is not filed explanation must be given in the application itself regarding cause of delay

Rules of Some Courts provide for separate application for condonation of delay and some Rules do not provide for filing separate application. For example Original Side Rules of this Hon'ble Court do not provide separate application for condonation of delay but there must be explanation and prayer for condonation of delay which is made in the application filed along with appeal praying for interim relief's.

As Rules are handmade of justice made to advance Justice rigid view may not be taken.

With regard to delay although Judgment Debtor/opposite party pleads lack of knowledge of the decree but whether it is sufficient or not has to be decided by Learned Trial Court upon hearing both parties.

In the Order dated 15-03-2024 passed by Learned Trial Court it appears that the Learned Judge upon being satisfied of the grounds filed in the application opined that the opposite party/Judgment Debtor should be given a chance to contest the title suit to prove her contentions, and thus granted stay of Title Execution 07 of 2023 along with Misc Case 44 of 2023.

Now the point for consideration is whether the Learned Trial Court was justified in passing interim Order of stay of execution till disposal of Misc Case – 11/2024 without hearing the petitioner/Judgment Debtor and without recording satisfaction of condonation of delay when the application for setting aside ex-parte decree was filed after the period prescribed for filing application for setting aside ex-parte decree.

Normally delay is condoned after hearing the opposite party and after condoning delay stay may be granted with regard to the execution of decree. However in exceptional circumstances where execution case has already been filed and order of police help is already passed Courts in the interest of Justice and to prevent abuse of the process of Court may pass limited interim Order for stay of execution case pending hearing of application for condonation of delay, granting opportunity to the opposite party to contest the application.

In the instant case Learned Trial Court upon considering the grounds of the application of the judgment debtor and upon imposing condition of payment of occupational charge of Rs. 2,000/- per month by judgment debtor granted stay of Execution Case till disposal of Application for setting aside ex-parte decree being Misc Case No-11/2024. The grant of stay of Execution case ought to have been for a limited period granting opportunity to the Decree-holder/petitioner to file objection to the petition, and argue on the point of limitation. Upon hearing the Petitioner/Decree holder the Learned Court is to decide whether to condone the delay.

Hence the Order dated 15-03-2024 passed by the Learned Trial Judge should be modified.

Hence this Revisional Application is disposed. Order dated 15/03/2024 passed by Learned Civil Judge (Junior Division) Bidhan Nagar in Misc Case No-11/2024 arising out of Title Execution Case No-7 of 2023 in connection

with Title Suit No-57 of 2017 is modified to the extent that the stay of Execution Case 7-of 2023 shall be for a period of 8 weeks from date. During the said period the Petitioner/Decree holder and Judgment Debtors shall file objection and rejoinder respectively to the petition under Order IX Rule 13 CPC. Upon considering the objection and rejoinder in the event the Learned Court decides on the issue of condonation and condones the delay the interim order may be extended till further consideration of the application. In the event the issue of condonation cannot be decided separately without the application being decided on evidence the interim Order of stay may be extended. However payment of occupational charge as directed by Trial Court shall continue. Learned Trial Court is requested to dispose the application expeditiously.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury,J)