

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

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 2257 of 2025

Sri Satish Sharma

Vs.

Sri Tapan Kumar Pal & Anr.

For the Petitioner

: Mr. Md. Farhaduddin
Ms. Shamama Nasrin
Mr. Shabbir Yazdani

For the opposite party

: Mr. Kamesh Jha
Ms. Srabani Biswas

Heard on

: 01/07/2025

Judgment on

: 01/07/2025

Hiranmay Bhattacharyya , J. :

1. This application under Article 227 of the Constitution of India is at the instance of the applicant under Order 9 Rule 13 of the Code of Civil Procedure and is directed against an order dated May 16, 2025 passed by

the learned Judge, 5th Bench, City Civil Court at Calcutta in Miscellaneous Appeal No.7 of 2024.

2. The opposite party herein filed a suit for eviction against one Shivalik Mistri and Arvind Mistri. The said suit was decreed *ex parte* by a judgment and decree dated September 22, 2022.

3. The petitioner herein filed an application under Order 9 Rule 13 of the Code of Civil Procedure praying for setting aside the *ex parte* decree on the ground that after the death of his father, namely, Shivalik Mistri, the petitioner was neither substituted in the suit nor any intimation about the pendency of the suit was given to him. The said application was registered as Miscellaneous Case No.21 of 2023.

4. The learned trial judge by an order dated January 29, 2024 dismissed the miscellaneous case only on the ground that the petitioner failed to produce any necessary document showing that at the time of death of Shivalik Mistri, the petitioner herein was residing with him and enjoyed the suit premises with him and that he inherited the tenancy right of his father.

5. Challenging the said order the petitioner preferred a Miscellaneous Appeal No.7 of 2024 and the learned Judge, 5th Bench, City Civil Court at Calcutta by an order dated May 16, 2025 dismissed the said miscellaneous appeal. The learned judge of the Appellate Court upon holding that after the death of Maro Mistri, the original tenant, Shivalik Mistri and Arvind Mistri were accepted as joint tenant and upon the death of Shivalik Mistri the tenancy devolved upon the surviving tenant and the right to sue only

survives against the defendant No.2 i.e against Arvind Mistri. On such finding the learned judge of the Appellate Court dismissed the said miscellaneous appeal.

6. The learned advocate appearing for the petitioner submits that the petitioner was residing with Shivalik Mistri and the petitioner was not aware of the pendency of such proceeding. He further submits that after the death of Shivalik Mistri the petitioner was not substituted in the suit.

7. Mr. Jha, learned advocate appearing for the opposite party seriously disputes the submission of learned advocate for the petitioner. He submits that the petitioner could not produce any documents in support of his claim that he was the heir of the deceased defendant No.1.

8. Heard the learned advocates for the parties and perused the materials placed.

9. After going through the order of the learned judge of the Appellate Court, this Court finds that the learned judge of the Appellate Court proceeded on the basis that after the death of Shivalik Mistri, the learned advocate representing him did not notify the names of his heirs and successors and for which his name was expunged.

10. Order 22 Rule 10A of the Code of Civil Procedure deals with the duty of the pleader to communicate to Court the death of the party. It states that whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, for this

purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

11. On a bare reading of the aforesaid provision it appears that the duty of the pleader appearing for a party after coming to know of the death of such party is only to inform the Court about the factum of death. The statute does not cast any obligation upon such pleader to disclose the names of the heirs of the deceased party.

12. Be that as it may, since the carriage of proceeding lay with the opposite party it was for the opposite party who was the plaintiff in Ejectment Suit No.98 of 2014 to take appropriate steps in accordance with law.

13. On a query of the Court, Mr. Jha, learned advocate appearing for the opposite party, in his usual fairness, submits that no steps in accordance with Order 22 Rule 4(4) of the Code of Civil Procedure for exemption from substituting the legal representatives of the deceased defendant No.1 was taken. That apart, this Court finds that the learned trial judge as well as the learned Appellate Court proceeded on extraneous matters without considering the scope of an application under Order 9 Rule 13 of the Code of Civil Procedure.

14. Order 9 Rule 13 of the Code of Civil Procedure states that 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.

15. Section 146 of the Code of Civil Procedure, 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. Section 146 read with Order 9 Rule 13 of the Code would imply that after the death of original defendant, his/her heirs, heiresses and legal representative can apply for setting aside the *ex parte* decree.

17. The petitioner herein is claiming right and interest as an heir of the deceased defendant. This Court holds that an heir of the deceased defendant can maintain an application under Order 9 Rule 13 of the Code.

18. In a proceeding under Order 9 Rule 13, the Court has to consider whether the applicant has satisfied the Court that the summons was not served upon him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

19. The learned trial judge as well as the Appellate Court did not consider the application in the light of the aforesaid provisions.

20. For the reasons as aforesaid, this Court is inclined to set aside the impugned orders. Accordingly, the order dated January 29, 2025 passed by the learned trial judge in Miscellaneous Case No.21 of 2023 and the

order passed by the learned Judge, 5th Bench, City Civil Court at Calcutta on May 16, 2025 in Miscellaneous Appeal No.7 of 2024 are set aside. The application under Order 9 Rule 13 of the Code of Civil Procedure being Miscellaneous Case No.21 of 2023 is restored to the file of the learned Judge, 2nd Bench, Presidency Small Causes Court at Calcutta. The learned Judge, 2nd Bench, Presidency Small Causes Court at Calcutta is requested to decide the Miscellaneous Case No.21 of 2023 afresh in the light of the observations made hereinbefore as expeditiously as possible without granting unnecessary adjournments to either of the parties.

21. With the above observations and directions CO 2257 of 2025 stands disposed of.

22. In view of the order passed in the civil revision application, there shall be an order of stay of all further proceedings in Ejectment Execution Case No.125 of 2023 pending before the learned Judge, 2nd Bench, Presidency Small Causes Court at Calcutta till the end of the month of September, 2025 or until further orders, whichever is earlier.

23. It will be open to the petitioner to pray for extension of the order of stay of the execution case or for fresh interim order before the learned Judge, 2nd Bench, Presidency Small Causes Court at Calcutta.

13. There will be no order as to costs.

14. Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Hiranmay Bhattacharyya, J.)