

In the Court of Civil Judge (Jr. Div.), Kalimpong

Misc. 04 of 2025 (CIS 04 of 2025)
CNR No. WBDJ08-000315-2025
(Arising out of O.C. Suit No. 19 of 2011)

Present- Smt. Diti Bhattacharjee
JO Code: WB01365

Order no.17
29.08.2026

Today is fixed for passing Order.

The respondent has filed hazira through counsel. But the petitioner is without steps.

Heard the Ld. Advocates for both sides at length on earlier occasions.

Now, the record is taken up for passing Order.

1. The petitioner has filed this Misc. Case under **Order IX, Rule-13 of the C.P.C read with Section 151 of C.P.C** for setting aside the ex-parte Decree dated 30.05.2015 as passed by this Court in connection with O.C. Suit No. 19 of 2011. Now, as the petitioner has filed the Misc. case after expiry of the statutory period for filing the case, thus, along with the main petition under Order IX, Rule-13 of C.P.C, the petitioner has also filed a **petition under Section 5 of the Limitation Act for condonation of delay.**

Case of the petitioner: -

2. The case of the petitioner is that since 2011, the petitioner of this case i.e. the defendant no.2 of the main O.C. Suit no. 19 of 2011, has been residing in the District- Champaran in the state of Bihar. On 27.06.2025, the principal O.P. along with some police personnels came to the house of the petitioner and stated that proforma O.P. No. 1 of this case i.e. the Defendant no. 1 of the main O.C. Suit no. 19 of 2011, that he had got a Decree in the suit to the effect of demolition of the illegal portion of the building of the petitioner and proforma O.P. No. 1 i.e. the defendants of the O.C Suit no. 19 of 2011 and to restore the passage and drain between the two buildings of both parties of the O.C. suit. He also directed the proforma O.P No.1 to demolish the illegal portion of the building and to construct the drain in between the two buildings in compliance with the Decree of the Court, otherwise, the O.P. would come again with mason to demolish the illegal portion of the building. After that incident, the pro O.P. No. 1 informed the same to the petitioner over phone and the petitioner on hearing the same, immediately took leave from his workplace and started for Pedong, Kalimpong and after reaching Kalimpong, he engaged his lawyer for getting information and to get the certified copies

of the impugned Judgment and Decree. After obtaining the certified copies of the same, the petitioner get to know through his appointed Advocate about the O.C. Suit No. 19 of 2011 for the first time, in which the

Contd..P/2

Page-2

Court passed ex-parte Decree in favour of the plaintiffs and against the defendants i.e. against the present petitioner and the Proforma O.P. No. 1. He also came to know for the first time that in Order No. 9 dated 02.12.2011 it had been noted that the summons upon the defendants were duly served, though the defendant no. 2 of the suit i.e. the petitioner of this case never received any summons in the O.C suit. He has further stated that the address which is mentioned in the cause title of the plaint of the O.C. suit No. 19 of 2011, does not match with his address. So, he never received any summon in his address at Bihar. There were no laches or negligence on the part of the petitioner.

3. In the main petition as well as in the petition under Section 5 of the Limitation Act, the petitioner also stated that though in Order No. 7 dated 07.12.2011, it is reflected that S/R of Defendant no. 1 and 2 are received back with a note 'Refused', but returned summons of the petitioner/defendant no. 2 is showing that the defendant no. 2 was out of station and thus, the summons of the defendant no. 2 was tendered to the proforma O.P. No. 1 i.e the defendant no. 1 of the O.C. suit no. 19 of 2011, but he refused to receive the summon of the petitioner/ defendant no. 2. But, actually the defendant no. 2 of the main suit i.e. the present petitioner never received any summons in the O.C. suit No. 19 of 2011 or never even got any information relating to the suit and its Decree and Judgment which was not the fault of the petitioner. So, the petitioner is praying before the Court that at least one opportunity is to be given to the petitioner to contest the main O.C. Suit no. 19 of 2011 so that a just order and judgment may be passed in that suit after hearing the defendant no. 2 of that suit.
4. The petitioner has also stated that the petitioner was prevented by 'sufficient cause' from appearing in the main O.C. Suit No. 19 of 2011 to contest the suit and also prevented by 'sufficient cause' in filing this Misc. Case within the statutory time. Thus, the petitioner is praying before the Court to allow the Misc. Case by giving an opportunity to the petitioner of being heard and to contest the suit after condoning the delay in filing the present Misc. Case.

Case of the Principal Opposite Party:

5. The Principal O.P., on the other hand, by filing the written objections in respect of the main petition as well as the petition u/sec 5 of the Limitation Act has denied and disputed the case of the petitioner in both petitions contending inter alia that the present applications have been filed by the petitioners after 10 years of passing the Decree and Judgment in the O.C. Suit no. 19 of 2011, but almost without any valid explanation. The JDRs of the Execution case are brothers by blood.

Contd..P/3

Page-3

The petitioner was well aware of the case and the refusal to receive the summons itself reflects his clear knowledge about the institution of the suit against him. Even the petitioner also appeared in the Execution case filed by the O.P. and also filed vokalatnama. The petitioner was in contact with his previous lawyer also. But suddenly the counsel stopped appearing in the execution case stating that the JDR did not contact him. Even at that time also the Respondent No.2/JDR/petitioner of this petition did not come before the Court to file this Misc. case. The O.P. also stated that the present address of the petitioner is whether Bihar or Pedong, has no relevance with service of summons and it is reflected from the summons itself that it was duly served to the petitioner/ defendant no. 2, but he chose not to appear in the main suit. The claim of the petitioner that he came to know about the decree in the year 2025, is absolutely false, as he appeared in the Execution case. Engagement of lawyer after many years cannot constitute 'sufficient cause', rather there is gross negligence and deliberate inaction on the part of the petitioner. The petitioner had even filed a petition under Order XXI, Rule 26 of C.P.C in the Execution case which was rejected by the Court vide order no. 68 dated 11.09.2024 as the court could not find the required 'sufficient reason'. The petitioner has actually suppressed material facts and thus has not come before the Court with clean hands but has the intention only to delay and frustrate the execution of the lawful Decree. Filing the present petition is clearly an afterthought as motivated by the fact that the Court has granted police assistance for execution which led the petitioner to suddenly file the case and thus, the O.P.s are praying before the Court to dismiss the present application of the petitioner.

6. In this case, the parties did not adduce any witness to support their respective cases. So, there is no exhibited documents also in this case.

DECISION WITH REASONS: -

7. Now, on perusal of the petition, it appears before the Court that the petitioner filed the Misc. case under Order IX, Rule 13 of C.P.C. on 22.07.2025 along with the petition under Section 5 of the limitation Act and in the Original O.C Suit no. 19 of 2011, the ex-parte Judgment was passed on 30.05.2015 vide Order no. 56. That means the applicant/petitioner filed the present Misc. Case along with limitation application after expiry of more than 10 year from the statutory period for setting aside the ex-parte Decree.
8. The only reason that is stated in the petition is that the petitioner had no knowledge about the institution of the O.C. Suit 19 of 2011 and he came to know about the same only when the DHR went to the decretal property with police and directed the DHR/

Contd..P/4

Page-4

9. per O.P. No. 1 to demolish the illegal portion of his building and to construct the drain between two buildings in compliance of the Judgment and Decree, then only his brother i.e. the Pro-O.P. no. 1/ Defendant no. 1 called him over phone and he came to know about the main O.C. Suit, the ex-parte Judgment and decree passed there and also regarding the Execution case filed by the DHRs.
10. The petitioner's contention is that since 2011 he has been staying in Bihar and the address mentioned in the cause title of the plaint of O.C. Suit no. 19 of 2011 is not correct. His brother after refusing to receive the summons in that case, never informed him about the suit and subsequently its fate thereof. Thus, he actually did not receive the summons and did not get the chance to contest the main suit.
11. But on careful perusal of the S/R of the main O.C. Suit No. 19 of 11, it clearly appears that when the process server went to serve the summons upon the Defendants, the defendant No 1 refused to receive the same and the defendant no. 2 i.e. the petitioner of this case was not in home and when the process server tendered the summons of the

petitioner to his brother i.e. the defendant no. 1, he refused to receive the same and he never even disclosed the Lalit Saha 's alternate address where the summons could have been served.

12. Now, as the summons upon both the defendants were attempted to be served but refused by defendant no.1, so , **as per Order V, Rule 9(5) of the C.P.C.**, the summons is deemed to have been duly server as the same was tendered to his elder brother being his family member (**As per Order V, Rule 15 CPC**), but he refused to receive the same on behalf of his younger brother i.e. the defendant no.2. and for that reason only, this court declared the summons were being 'Duly Served' and proceeded ex-parte hearing of the suit vide Order No. 09 dated 20.12.2011.
13. The petitioner's contention is that his brother never informed him about the institution of the suit. But surprisingly, from the service return of the Misc. Case No. 07 of 2011 (which was filed for violation of interim injunction order passed by the Court in the O.C. Suit), the petitioner being the O.P. no. 2 of the case did not receive the summons rather refused to receive the summons on 27.02.2012.
14. Thus, at this stage, it cannot be said that the petitioner had no knowledge of institution of O.C. suit No 19 of 2011 as he himself refused to receive the Summons of the Violation Misc. Case no. 07 of 2011 arising out of O.C Suit No. 19 of 2011, in the year 2012.

Contd..P/5

Page-5

15. Again, after receiving the summons in the Execution case (arising out of O.C. suit No. 19 of 2011), the present petitioner has appeared in that execution case as JDR and filed vokalatname also. Again, during the pendency of the execution case, he filed one petition under Order XXI, Rule 26 of the CPC which the Court rejected as no sufficient cause being given by the petitioner of that petition.
16. Thus, from the above analysis, the Court comes into the conclusion that from the very beginning of the institution of the O.C. Suit no. 19 of 2011, the present petitioner had full knowledge about the institution of the suit, the violation Misc. Case, its order and the ex-parte Judgment and Decree passed in favour of the plaintiffs of the suit.

17. No satisfactory explanation has been given by the petitioner to explain the delay in filing the Misc. Case and also no satisfactory reason has been given by the petitioner for filing the present Misc. case under order IX, Rule 13, after expiry of more than 10 years of passing Judgment and Decree in the main suit. so, there is no justifiable reason in the hands of the Court to condone the delay.
18. Even the petitioner could have examined himself or adduce the proforma O.P. no.1 or other independent persons as witnesses in this case, otherwise on cross examination, there was a fair chance to reveal the actual truth. But neither the petitioner nor the pro-O.P. No.1 adduced themselves as witness and faced the cross examination. The proforma O.P. is not coming forward which raises serious question in the mind of the Court that whether his appearance or his deposition may reveal the actual truth which would go against the interest of the petitioner.
19. Even in the cause title of the main petition as well as in the petition u/s 5 of the limitation Act, the address of the petitioner is given as “Banker Road, near Pantaloons, HDFC Bank, P.O. and P.S. Motihari, Dist: East Champaran, Bihar 845401.” Which is the present address of the petitioner, but he did not put his permanent address in the Cause title of the both petitions. Had the petitioner come to the Court with clean hands, he would have definitely produce any of his identity card like Voter card, Aadhaar Card, Passport etc. where the permanent address of the petitioner is to be written, but no such document has been filed by the petitioner to support his case. On the contrary, the petitioner is repeatedly stressing on the point that he did not receive the summons in the O.C. suit No. 19 of 2011, whereas he refused to receive the summons in both cases.
20. Even the commissioner was appointed in this case for conducting commission. Ld. Commissioner before conducting commission served notice to both parties and their lawyers. So, at this stage it has become unbelievable for the Court that the petitioner never received any summons in this case.

Contd..P/6

Page-6

21. The Hon’ble Apex Court in **Civil Appeal No. 2909-2913 of 2005 decided on 24.02.2011** where the Hon’ble Apex Court took the view that **“the concepts such as**

“liberal approach” “justice-oriented approach”, “substantial justice” cannot be employed to jettison the substantial law of limitation. Especially in cases where the Court concludes that there is no justification for the delay”. Hon’ble Court again held in the decision that “while considering applications for condonation of delay under Section 5 of the Limitation Act, the Court do not enjoy unlimited and unbridled discretionary power.”

22. Thus, considering the above decisions of the Hon’ble Apex Court, this Court is of the considered view that the petitioner has failed to explain the every day delay properly in filing the present Misc. Case after such extraordinary delay of more than ten years after passing the Judgment and decree in the O.C. Suit No. 19 of 2011 and thereby failed to establish ‘sufficient cause’ for which he had been prevented from filing the Misc. Case within statutory period. No cogent evidence has come before the Court from which it can be ascertained that the petitioner was actually prevented by sufficient reasons for not attending the Court on the day on which the ex-parte order was passed or filing this Misc. Case beyond statutory period. The Court finds no justification for causing the delay in filing the present case beyond the statutory period. So, there is no scope to adopt any liberal approach to consider the case of the petitioner and to allow the present case by condoning the delay. Rather, if the present petition is allowed at this stage, then it might cause great hardship upon the Opposite Party no.1 and the Court has to travel back more than ten years and all the efforts and money invested by the Opposite party No.1 in contesting the case will have no value and it might cause irreparable loss to the O.P. No.1 which might not be compensated in terms of money.
23. In such circumstances, the Court is of the opinion that there is no other option left in the hands of the Court but to reject the present petition under Section 5 of the Limitation Act for condonation of delay.
24. Court fees paid is correct.

Hence, it is

O R D E R E D

25. That the present petition under Section 5 of the Limitation Act be and the same is rejected on contest without any cost.
26. Accordingly, the present Misc. Case being No. 04 of 2025 is also dismissed on contest without any cost.
27. The Misc. case is thus disposed of on contest.
28. D/A to note the same in the concerned Register and upload the Order in CIS portal at once.
29. Henceforth, the Title execution case being No. 02 of 2018 will be proceeded accordingly as the present Misc. case is dismissed and thus, disposed of on contest.

D/C by me,

Sd/-

Civil Judge (Jr. Div.), Kalimpong
JO CODE: WB01365

SD/-

Civil Judge (Jr. Div.), Kalimpong
JO CODE: WB01365