

**IN THE COURT OF THE CHIEF JUDGE,
CITY CIVIL COURT, CALCUTTA.**

Present : Sri Abhijit Som, Chief Judge (WB01127)

Misc. Appeal No.09 of 2025
(CNR No.WBCC01-002960-2025)
(Arising out of Misc. Case No.58 of 2022)
(Arising out of Ejectment Suit No.47 of 2020)

1. ABDUS SALAM MULLICK
2. ABDUR RAHAMAN MULLICK

..... Appellants/Defendants

-Vs-

MD. JAMIL AHMED

..... Respondent/Plaintiff

Date of delivery of Judgment : 5th day of August, 2026

This appeal having come on for final hearing on 30.07.2026 in
the presence of -

Aishwarya Pratihar Ganguly

.....Ld. Advocate for the Appellants;

Shri Malay Saha

.....Ld. Advocate for the Respondent;

and having stood for consideration on this day, the court
delivers the following Judgment:-

J U D G E M E N T

Aggrieved with the order no.42 dated 31.01.2025 passed by the Ld.
Judge, Bench -III, Presidency Small Causes Court, Calcutta in Misc. Case

Misc. Appeal No.09 of 2025

No.58 of 2022, the instant Misc. Appeal is filed.

Background :

Originally, the present respondent being the plaintiff filed an Ejectment Suit being no.47 of 2020 against the appellants. The suit was decreed exparte. Subsequently, the appellants filed the Misc. Case under Order IX Rule 13 of Code of Civil Procedure for setting aside the decree passed exparte. The Misc. Case was heard on contest and was finally dismissed. Having impugned the said order the instant appeal is filed.

Case of the Appellants :

The appellants were the petitioners of the Misc. Case filed under Order IX Rule 13 of the Code of the Civil Procedure. It was their case that summons of the Ejectment Suit was not served upon them. It is specifically stated that they did not reside at their address during pandemic situation and at the relevant time stayed at their native village at Howrah. One of the brothers of the appellants, namely, Mehamudur Rahaman who would look after the court proceeding was seriously ill and admitted at Vellore for treatment and that is why, the appellants could not take proper steps in the suit. On 25.03.2022 during an altercation with the landlord the appellants were threatened of eviction from the case property and being alerted by the said threat the appellants rushed to the court on the next day to get the information that an exparte decree was passed on 23.03.2022. In order to set aside the said decree passed exparte the application under Order IX Rule 13 of the Code of Civil Procedure was filed.

Written Objection on behalf of the Respondent (Opposite Party) :

The respondent being the Opposite party having filed written objection disputed the claims and allegations made by the appellants in the application for setting aside the exparte decree. It was stated that the application was barred by limitation. It was also stated that summons of the Ejectment Suit was served upon the appellants (petitioners therein) on 24.02.2020 through the court bailiff. One of the appellants being the defendant received the summons for self and on behalf of the another appellant. It was also stated that 26.03.2022 was holiday due to 4th Saturday of the month, so it was not possible for the appellants to get information from the Court on 26.03.2022. So,

Misc. Appeal No.09 of 2025

the appellants in their application before the Trial Court made the statement which was not true. It was further stated that the illness of the brother of the appellants had no connection or relevance with the case and taking proper steps in the proceeding pending in the court. Naturally, the respondent prayed for dismissal of the Misc. Case filed under Order IX Rule 13 of the Code of Civil Procedure.

Evidence :

Abdus Salam Mullick as P.W.1 adduced evidence in the Misc. Case. Abdur Rahman Mullick as P.W.2 also deposed in the said Misc. Case. During the evidence of P.W.2 several documents were produced and marked exhibits 1 to 4. Both witnesses were cross-examined by the present respondent (Opposite party therein).

Observation of the Trial Court :

Ld. Trial Court observed that summons was served upon the defendants (present appellants) and they had due knowledge about the suit. However, they intentionally chose not to appear and contest the claim of the plaintiff (respondent herein). It was further observed that no separate application for condonation of delay was filed although the application for setting aside the exparte decree was filed after the period of limitation. Accordingly, the Misc. Case under Order IX Rule 13 of the Code of Civil Procedure was dismissed.

Points for determination

Now, this Court is to scrutinize whether the order passed by the Ld. Trial Court suffers from any infirmity mainly on two grounds :

- (a) fixing of date for hearing exparte during Covid pandemic situation within the period excluded for the purpose of limitation by the Hon'ble Supreme Court; and
- (b) absence of the application for condonation of delay along with the application for setting aside the exparte decree.

Decision with reasons

The appellants made twofold claims in their application for setting aside the exparte decree. The service of summons was specifically denied on the ground that they lived at their native village at Howrah during the Covid pandemic situation. On the other hand, it

Misc. Appeal No.09 of 2025

was claimed that due to illness of the brother of the appellants proper steps could not be taken in the Court. The Ld. Trial Court in the impugned order observed that the present appellants (petitioners herein) created confusion as to which limb of the provision of Order IX Rule 13 of the Code, the appellants resorted to.

The provision of Order IX Rule 13 of the Code of Civil Procedure reads as follows :

“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 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”

So, on an application the Court could set aside the exparte decree provided the defendant satisfied the court that the summons was not duly served or that he was prevented by any sufficient cause for appearing when the suit was called on for hearing. It was already observed by this court that the application for setting aside the exparte decree was based on both limbs of the relevant provision. The service of summons was denied and the ground of non-appearance due to sufficient cause was taken as well.

On the other hand, the respondent (Opposite party) made a specific claim that notice of the original Ejectment Suit was served upon the defendants (present appellants). Having drawn the attention of this Court to the cross-examination of P.W.1, the Ld. Advocate for the respondent stated that in cross-examination the appellant no.1 admitted the receipt of notice upon his signature. Having gone through the record, it was also found by this Court that summons of the suit was received by the defendants of the Ejectment Suit on 24.02.2020. It was rightly observed by the Trial Court that the petitioners (appellants herein) took contradictory plea in their application for setting aside the exparte decree. The service of the summons was denied and also it was stated that on their behalf steps could not be taken in the suit due

Misc. Appeal No.09 of 2025

to temporary migration of their brother, who would look after the case, for treatment at Vellore.

Ld. Advocate on behalf of the appellants (petitioners) placed the decision of the Hon'ble Supreme Court in ***Suo Moto Writ Petition (C) No.3 of 2020 in Re : Cognizance for Extension of Limitation*** and having referred the Para 5(III) of the decision stated that the period between 15.03.2020 to 28.02.2022 shall be excluded for the purpose of limitation in every litigation pending during Covid pandemic situation. However, this Court found that the Hon'ble Supreme Court passed the order in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022. It was the order of the Hon'ble Supreme Court that in such cases where the limitation would have expired during the period as mentioned above, notwithstanding the actual balance period of limitation remaining, all persons should have a limitation period of 90 days from 01.03.2022. The present case was slightly different. In the present case the exparte decree was passed on 23.03.2022. So, the above decision of the Hon'ble Supreme Court relaxing the period of limitation for Covid pandemic situation would not be squarely applicable in the present case. It was not the case that the limitation for filing Misc. Case under Order IX Rule 13 of the Code of Civil Procedure fell within the period as mentioned above, rather the limitation should run on and from 23.03.2022 when the Ejectment Suit was decreed exparte, if in case the summons was duly served.

Having perused the entire record of the original Ejectment Suit it was found that vide order dated 22.11.2021 the Ld. Chief Judge, Presidency Small Causes Court, Calcutta passed an order of hearing of the suit exparte and the case was transferred to the Ld. Judge, Bench III, P.S.C Court, Calcutta. When the case was transferred to the transferee court, the defendants (present appellants) were not present in the Court and no notice was served upon the defendants from the transferee court. Vide Order dated 22.11.2021 the suit was transferred to the transferee Court for hearing ex parte. On receipt of the case record the transferee Court vide order dated 04.01.2022 posted the matter for hearing exparte on 23.03.2022. On the said day i.e. on 23.03.2022 the hearing was taken exparte and decree was passed. It could not be denied that the date was posted for hearing exparte

Misc. Appeal No.09 of 2025

during Covid pandemic situation. No doubt the decree was passed immediately after the period mentioned in the decision of the Hon'ble Supreme Court while enlarging the period of limitation. However, during the period when the decree was passed ex parte the situation in the city of Kolkata and in the State of West Bengal was not normal and totally free from all Covid protocol imposed by the Government of West Bengal and the High Court of Calcutta. It was already found in the pleading that at the relevant time during Covid pandemic the appellants (petitioners) went to their native place leaving Kolkata. So there was no scope of disbelieving that during neo-normal situation the appellants or their advocate could not make their appearance before the Court to contest the suit. Moreover, it was the specific case of the appellants that their brother who would look after the case went to Vellore for his treatment and came back to Calcutta in February, 2022. Everybody was aware that during Covid pandemic situation several restrictions were imposed upon the people at large causing serious inconvenience in transportation and movement. So it could be presumed that the appellants were having sufficient cause for their absence in the court on 22.11.2021 and 04.01.2022 when the case was posted for hearing ex parte and subsequently, on 23.03.2022 when the suit was heard exparte in absence of the defendant.

When the summons of the Court was served upon the defendant an application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the exparte decree was required to be filed within 30 days from the date of passing of the decree. In the instant case the application under Order IX Rule 13 of the Code of Civil Procedure was filed on 28.04.2022 for setting aside the exparte decree dated 23.03.2022. It was observed by the Ld. Trial Court that no application for condonation of delay was filed along with the Misc. Case under Order IX Rule 13 of the Code of Civil Procedure. So naturally, a question could arise whether delay in filing application would be condoned in absence of an application for condonation of delay.

In ***Sesh Nath Singh vs Baidyabati Sheoraphuli Co Operative*** ***AIR 2021 SUPREME COURT 2637*** the Hon'ble Supreme Court held as follows :

“63. Section 5 of the Limitation Act, 1963 does not speak of any

Misc. Appeal No.09 of 2025

application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.

64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the Court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making an application.”

Therefore, in view of the above decision of the Hon'ble Supreme Court it could not be stated that discretion of condoning delay would not be exercised by the Court in absence of a formal application of Section 5 of the Limitation Act. Although it was observed in the impugned order that if the delay was properly explained in the application under Order IX Rule 13, no separate application was required. However, the conclusion of the Ld. Trial Court could not be accepted that the appellants being the petitioners did not furnish any explanation in the main application under Order IX Rule 13. Moreover, it was discussed earlier that after transfer of the case to another court

Misc. Appeal No.09 of 2025

no notice was given to the defendants (appellants herein) and the suit was heard exparte.

In view of the above discussion, it would safely be concluded that the delay, if any, in filing the application under Order IX Rule 13 of the Code of Civil Procedure could be condoned as the appellants had sufficient cause for not filing the said application prior to the date of actual filing of the Misc. Case. Moreover, it was also discussed that in a neo-normal situation due to Covid pandemic the absence of the defendant party in a Court proceeding could be taken into consideration for the purpose of setting aside an ex parte decree. So the application for setting aside of the decree ought to have been allowed by the Ld. Trial Court. The order passed by the Ld. Trial Court suffered from infirmity.

Accordingly, the instant appeal succeeds.

Hence, it is

ORDERED

that the Miscellaneous Appeal be and the same is hereby allowed on contest.

The order passed by the Ld. Trial Court is set aside.

The Misc. Case being No.58 of 2022 is allowed.

The Judgement and Decree passed exparte in Ejectment Suit No.47 of 2020 is set aside.

The Ejectment Suit is restored to its original file.

No order as to costs.

Let a copy of this Judgement along with the T.C.R be sent to the Ld. Trial Court for information and necessary action.

Dictated and corrected by me,

Chief Judge,

Chief Judge,
City Civil Court, Calcutta.
05.08.2026