

**Misc. Case No. 109 of 2024**  
**(U/o-9, Rule-13 of CPC)**  
**arising out of Ej. Suit no. 239 of 2019**  
**CNR No. WBPS01-000431-2024**

**Order No. 21**  
**Date: 19.08.2024**

Today is fixed for passing order in respect of the application u/s 5 of the Limitation Act which is being accompanied with the application Under Order-9, Rule-13 of CPC and passing order in respect of the petition u/s 151 of CPC filed by the petitioner/ defendant on 13.08.2024 seeking order of stay of the Ej. Ex. Case No. 71 of 2023 and hearing of the instant Misc. Case.

Both sides have filed their respective haziras.

The opp. party/ plaintiff has already filed written objection against the petition u/s 5 of the Limitation Act and the application U/S 151 of CPC.

No objection against the application under Order-9, Rule-13 of CPC has been filed.

Since the instant Misc. Case under Order-9, Rule-13 of CPC has been filed along with an application u/s 5 of the Limitation Act, it has become imperative on the part of this Court to pass necessary order with regard to the application u/s 5 of the Limitation Act as the same leads to the very maintainability of the instant Misc. Case in which the application for stay has been moved.

The petitioners who are defendants of Ej. Suit No. 239 of 2019 has categorically mentioned that the said decree was passed in exparte against the petitioner/defendant when no summon was served upon them. It is specifically stated that the exparte decree dated 15.12.2022 came to notice of the petitioners for the first time on 08.08.2024 when the decree was to be executed with the help of police. As such, the petitioner could not file the application under Order-9, Rule-13 of CPC within one month from the date of the decree dated 15.12.2022 but they have filed the same within one month from the date of acquiring knowledge about the said decree i.e. on 08.08.2024 and 12.08.2024 respectively. As such, the petitioner have prayed for condonation of delay, if any, within the ambit of Section 5 of the Limitation Act.

The opposite party/plaintiff raised vehement objection and submits that the petitioners had knowledge about the exparte decree all along but intentionally abstained from appearance for which the exparte decree was passed rightly against the petitioners. As such, the application u/s 5 is required to be rejected by this Court.

I heard both sides.

Perused the materials on record.

Considered.

Upon perusal it is found that Ej. Suit no. 239 of 2019 was fixed for exparte hearing on 09.03.2021 owing to the absence of the defendant/petitioner and the Court is not unmindful of the fact that at the relevant point of time, the second wave of the Covid Pandemic was prevalent.

It is necessary to note here in this context that the period of limitation for bringing an application under Order-9, rule-13 of CPC has been specified under Article 123 of the Limitation Act which is reproduced below:

<b>Description of suit</b>	<b>Period of Limitation</b>	<b>Time from which period begins to run</b>
To set aside a decree passed exparte or to rehear an appeal decreed or heard exparte.  Explanation.—For the purpose of this article, substituted service under rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service.	Thirty days.	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

Thus, when an application u/O-9, Rule-13 of CPC has been filed beyond the period 30 days from the date of decree, the party desires to bring such application beyond 30 days must accompany the same with an application u/s 5 of the Limitation Act. Under section 5 of the Limitation Act, any application may be admitted after the

prescribed period if the applicant satisfies the Court that he had sufficient cause for not making the application within such period.

This Court is mindful of the settled position of law that too technical or pedantic approach in case of dealing with an application u/s 5 of the Limitation Act is not warranted. The Court has to adopt a justice oriented system dictated by the upper most consideration that ordinarily a litigant ought not to be denied an opportunity of having a litigation/lis determined on merits unless he has, by gross negligence, deliberate inaction or something alike to misconduct, disentitle himself from seeking the indulgence of the Court.

Therefore, considering the above, I am inclined to allow the application u/s 5 of the Limitation Act as filed by the petitioner on contest but without cost.

**Hence, it is,**

**ORDERED,**

That the application u/s 5 of the Limitation Act as filed by the petitioner is allowed on contest but without cost.

Let the delay in bringing the instant Misc. Case be condoned.

Let the Misc. Case under Order-9, Rule-13 of CPC being registered as Misc. Case No. 109 of 2024 be proceeded in accordance with law.

Now in presence of both sides, the petition U/S 151 of CPC seeking order of stay is taken up for hearing.

The petitioner by filing the above petition submits that the opp. Party being plaintiff filed Ej. Suit no. 239 of 2019 and obtained exparte decree herein by suppressing material fact regarding the service of summons upon the defendant. Subsequently, the opposite party / plaintiff being decree holder filed Ej. Ex. Case no. 71 of 2023 and filed an application Under Rule-208 of CRO for order of Police help for executing the exparte decree dated 15.12.2022 which was allowed in exparte.

It is specifically stated by the petitioner / defendant that the petitioner has brought the instant Misc. Case U/O 9 R 13 for setting aside the exparte decree passed in Ej. Suit no. 239 of 2019, but the opposite parties are making every attempts to execute the said decree most illegally even during the pendency of the instant Misc. Case which has necessitated the instant application U/S 151 of CPC seeking order of stay of the execution proceeding under Ej. Ex. Case no. 71 of 2023 till the disposal of the instant Misc. Case.

The Ld. Advocate for the petitioner raised strong objection that stating that the instant petition has been filed only to intent to delay the execution proceeding and accordingly the petitioner has prayed for rejection of the application seeking stay. Moreover, it was also submitted that the suit premises is situated at a very costly area having 50 sq. ft. of area which generates at least Rs. 10,000/- as rent per month and at present the defendant /petitioner has not been paying even a single penny in respect of their present occupation.

On the other hand, the Ld. Advocate for the petitioners submits that the suit shop-room is having an area of only 20 sq. ft. and the rent of the same is Rs. 554/- per month and he has prayed for rejection of the prayer of the opposite party for grant of occupational charges.

Heard both sides.

Perused the materials on record.

Considered.

It is admitted fact that Ej. Suit No. 239 of 2019 was decreed exparte in respect of which execution proceeding under Ej. Ex. Case no. 71 of 2023 is going on. It is also admitted fact that an application u/o-9, Rule-13 of CPC being registered as Misc. Case No. 109 of 2024 has been filed by the petitioner for setting aside the exparte decree and the said case is pending.

It is settled law that if the exparte decree passed in Ej. Suit No. 239 of 2019 is being executed, the proceeding of Misc. Case No. 109 of 2024 filed u/o-9, Rule-13 of CPC would be frustrated. Accordingly, for effective proceeding / hearing of the execution proceeding being no. 71 of 2023 is required to be stayed till the disposal of the instant Misc. Case No. 109 of 2024 U/O 9 R 13 CPC.

However at the same time it is true that the opp. party has already obtained a decree in his favour and has initiated execution proceeding in accordance with law and if the same is automatically stayed by the Court only on the basis of application of the opposite party, the petitioner will certainly be prejudiced.

It has been held by the Hon'ble Court in the case of **Barun Samanta -vs- Rabin Bhakta and Others reported in 2018 (1) ICC 601 (CAL)** in paragraph 6 that-  
“It is no longer *res integra* that the Executing Court or the Appellate Court should not pass the blanket order of stay for execution proceeding in relation to decree of eviction or recovery of possession without imposing conditions. The condition may vary on a given set of facts and depends upon case to case”.

In the above decision the Hon'ble Court upheld the order of the Trial Court imposing cost of Rs. 50,000/- while granting stay of the execution proceeding on the basis of application of the judgement debtor on the ground that an application u/o-9, Rule-13 of CPC was filed by him challenging the exparte decree for execution of which a proceeding for execution was initiated by the decree holder.

Now so far as regard the date for payment of occupational charge, the proposition of law is quiet clear that the occupational charges ordinarily dates back to the date of the decree, granted by the trial court as has been held by the Hon'ble Calcutta High Court in **C.O. no. 2262 of 2022** in the case of **Sree Sree Shyam Sundar Jew Thakur Bari and Ors. Vs. Sanat Kumar Bera**.

It is matter of record as appearing from the decree, it is nowhere mentioned as to what is the size of decretal shop-room but it is a shop-room situated in the locality of Burabazar and the same is used for the purpose of business. None of the parties have filed any document showing the present rent of the shop-rooms in the locality where the decretal property is situated. However, taking into consideration the location of the suit shop room as well as present market value prevailing, and the nature of the decretal room which is admittedly a commercial tenancy, this Court is of the view that an order of stay can be given to the petitioner but subject to payment of occupational charges to the tune of Rs.3,000/- per month.

Thus, borrowing wisdom from the decision of the Hon'ble Court, this Court finds it appropriate to allow the stay application dated 13.08.2024 as filed by the petitioner on the conditions mentioned below.

Hence, it is,

**O R E R E D ,**

That the application for stay dated 13.08.2024 as filed by the petitioner is allowed on contest but without any cost.

The above application is allowed on condition of making payment of occupational charges by the petitioner amounting to Rs. 3,000/- per month from the date of the decree.

The arrear amount shall be paid in two monthly installments from September, 2024 and the petitioner is further directed to pay occupational charges for the current month within 10<sup>th</sup> day of every English Calendar month.

The proceeding in connection with Ej. Ex. Case No. 71 of 2023 is stayed, subject to payment/deposit occupational charges by the petitioner @ Rs. 3,000/- per month since the date of exparte judgment and decree passed in Ej. Suit No. 239 of 2019.

It is hereby mentioned that in the event of failure to deposit the occupational charges as directed above, the order of stay shall stand vacated automatically.

The opp. Party is given liberty to withdraw the amount of occupational charges, subject to the result of Misc. Case No. 109 of 2024.

Fixing **18.09.2024** for written objection by the opposite parties against the Misc. Case. and filing of relevant document by the petitioner showing payment of occupational charges.

Dictated and corrected by me:

*Judge*

**Smt. Sudipa Banerjee**  
**J.O. Code : 01148**  
**Judge, 3<sup>rd</sup> Bench,**  
**Presidency Small Cause Court,**  
**Calcutta.**