

(2005) 11 CAL CK 0007

**Calcutta High Court****Case No:** G.A. No"s. 1870 and 2210 of 2004, C.S. No. 301 of 2003 and E.C. No. 32 of 2005

Radhe Shyam Saraf (HUF)

APPELLANT

Vs

Central Bank of India

RESPONDENT

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**Date of Decision:** Nov. 17, 2005**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13, Order 9 Rule 6, Order 9 Rule 7

**Citation:** (2006) 1 CALLT 541**Hon'ble Judges:** Kalyan Jyoti Sengupta, J**Bench:** Single Bench

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**Judgement**

Kalyan Jyoti Sengupta, J.

These applications are taken up for hearing. I put it on record that ordinarily I would not have taken up for hearing of the application for setting aside ex parte decree and I would have sent it to the regular suit Court which had passed the decree though I do have the jurisdiction to take up the matter: Learned Judge who had passed the decree has retired. I have taken up this application because of the fact that the execution application has been taken up for enforcement of the decree which is sought to be impugned by this application by the defendant. From the records I find that summons was duly served and thereafter the suit was placed in the list as undefended suit and the suit was heard for several days and decree was passed on March 12, 2004 and thereafter it was modified on April 06, 2004. The instant application for recalling of the decree was taken out on May 14, 2004. If the date of the passing of the decree is to be reckoned then this application is out of time by 64 days roughly and if the date of modification of the decree which is sought to be executed here is taken into consideration then the delay will be lesser by at least one month. Any way having regard to the days I think delay is not an extraordinary. It appears further from the records that the bank/defendant woke up from slumber after the decree was passed and explanation have been given in the petition is that the laches and negligence on the part of the officials of the bank,

2. Apart from the aforesaid fact it is highlighted by Mr. Das, learned senior Advocate, that on that date the decree ought not to have been passed in view of the provision of Order 9 Rule 6 read with Rule 7 and Rule 13 of the Code of Civil Procedure. He further contends that on that date the Court should have taken a decision after having been satisfied that writ having been served and the suit should have been heard ex parte on some other day and not the day itself when the suit was called for hearing. This will appear from the conjoint reading of the aforesaid three rules. In support of his submission Mr. Das in his usual style has brought fairly recent Supreme Court decision reported in AIR 2002 SC 2370. He has relied on paragraph 12 of the aforesaid Judgment. The paragraph 12 of the said Judgment obviously supports his contention.

3. Mr. Tilok Bose has submitted on the other hand on this legal proposition by drawing my attention to the provision of Rule 24 of the Chapter 10 of the Original Side Rules of this Court. I have checked up all these provisions and it is rightly submitted by Mr. Das that there has been no conflict between the aforesaid provisions. Therefore, there cannot be any difficulties for applicability of both the provisions. I appropriately set out provisions of Order IX Rule 6 and also Rule 7 of the CPC which are as follows :

Order IX Rule 6 : Procedure when only plaintiff appears.--(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then--

(a) When summons duly served--If it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte;

(b) When summons not duly served--If it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time--If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiffs default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Rule 7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.- Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the

suit as if he had appeared on the day fixed for his appearance.

4. From the conjoint reading of the aforesaid Rules I think that it is the discretion of the Court as to whether a decree should be passed on the same date itself or it will be adjourned for some other date. The legislature has not mandated that on that date after scrutinising and examining everything hearing of the suit should be adjourned for a future date. It is for the Court to adjourn, or not to adjourn a matter. In the event the Court decides to adjourn this matter then provisions of Rule 7 will be applicable not otherwise. Factually in this case I think the Court did adopt the same procedure, perhaps unknowingly because the matter was heard for several days and decree was passed ultimately on that date mentioned in the notice of motion, at the instance of the plaintiff. The legal pronouncement of the Supreme Court's Judgment is not disputed, but it does not support Mr. Das's client's case to upset the decree on the lapses of procedural applicability,

5. But it is a case of eviction decree. The defendant is a nationalised bank and is to depend upon the vagaries, whims and capricious actions of the officers of the bank who are always lethargic as it does not affect their individual rights as such they would not be so diligent. Therefore, the negligence and laches on the part of the officials cannot be attributed to the bank in order to suffer ex parte decree. At least a chance should be given to the defendant. Therefore, I recall the ex parte decree passed. But such recalling will be subject to the following conditions :

6. Admittedly Mr. Das's client has not paid any single paise for occupation at least from the date of institution of the suit. The defendant is occupying an area of 2033 sq. ft. in a prime locality of Kolkata and the rate of rent was Rs. 8,724/- per month. This rate was revised last in the year and from 1997 since then there has been no increase of the said rate. Therefore, I direct Mr. Das's client to pay all the arrears of occupation charges at an increased rate. The rate will be calculated (c) Rs. 15/- per sq.ft. and to be paid from September, 2003 together interest @ 8.33% p.a. from the respective due dates. The defendant shall also go on paying at the aforesaid rate for current monthly charges. The defendant shall also pay costs of this application assessed at Rs. 10,000/- and this costs shall be realised from the officer or officers of the bank for whose negligence the suit could not be contested and no step could be taken at the appropriate time for which the plaintiff and defendant have suffered. The erring official should be taken to task in appropriate and lawful manner for his negligence. The aforesaid arrear payments shall be made within a period of 8 weeks from the date of communication of this order. The aforesaid costs shall be paid within three weeks from date.

7. If the aforesaid conditions are fulfilled then the defendant will be entitled to file written statement within six weeks from date. This direction is peremptory and mandatory. In the event the written statement is filed there will be cross order for discovery within fortnight thereafter; inspection will be made forthwith. In case the aforesaid arrears and occupation charges are not paid the defendant will be

debarred from filing written statement and decree passed earlier will revive.

This matter is disposed of accordingly.

Thus the execution application is adjourned sine die with liberty to mention. In default as above this execution application shall stand dismissed.

Let urgent xerox certified copy of this Judgment and order be made available to the parties, if applied for.

Receiver and all parties are to act on a signed copy of the operative portion of this Judgment and order on the usual undertaking.