

(1999) 04 CAL CK 0050

In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction G.A. No. 847 of 1999 Suit No. 7 of 1995

A B S Marine Products Pvt. Ltd.

APPELLANT

Vs

Indian Bank and Others

RESPONDENT

Date of Decision : 01-04-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 4

Citation : AIR 1999 Cal 267 : (1999) 2 CALLT 247

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Mr. Samarjit Ghosh, for the Appellant;

Judgement

The Court

1. The suit, as per cause list, was appearing in the list of this court under the heading of "For hearing" quite sometime.
2. The suit was dismissed for default on 26th February 1999 when neither of the parties appeared before this court even in the third call.
3. At the time of rising of the court at 4-15 P.M. of the day, in an unusual time, learned Advocate for the plaintiff mentioned the matter to recall the order of dismissal of the suit only taking the name and absence of the appearing of a senior counsel of this court since it was not the proper time for mentioning nor court should run its administration only on the name and absence of the senior counsel, the court was pleased to direct to mention on the following day as and when court takes mentioning of the matters.
4. On the following day learned Advocate again mentioned taking the name of self-same senior counsel and his absence and prayed for recalling of the order as if the name of the counsel will serve the purpose of recalling when the court refused the same on the ground that court should not proceed on the basis of the stand or face value of any senior counsel of the bar but on the basis of the

face value of the case with a direction to take out a formal application for the purpose of consideration in accordance with law.

5. Subsequently the petitioner took out an application which according to them Is an application under order 9 Rule 4 of the Code of Civil Procedure.

6. Order 9 Rule 4 of the Code of CMI Procedure prescribes as follows :

"Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set aside the dismissal aside, and if he satisfied the court that there was sufficient cause for (such failure as Is referred to in rule 2) or for his non-appearance, as the ease may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."

7. As and when the application was called on, the court sought for explanation as to the "sufficient cause" for recalling and setting aside the order of dismissal of the suit.

8. At the threshold learned Advocate appearing in support of the petitioner contended that their case is squarely hit by the principles laid down by a case reported in Rafiq and Another Vs. Munshilal and Another, and wanted to cite the decision as if principle of such case is an absolute proposition of law Irrespective of the factual position.

9. To understand the situation, I want to explain that the principle laid down therein is that a lay client should not be made to suffer for laches, inaction and/or negligence on the part of their respective Advocates.

10. I refused to accept such submission of the petitioner since the ratio of the Rafiq and Another Vs. Munshilal and Another, can not be regarded as a good law now in view of the later decision of the Supreme Court reported in Salil Dutta Vs. T.M. and M.C. Private Ltd., by which Supreme Court distinguished the feature of absolute proposition of the earlier decision I.e. Rafiq and Another Vs. Munshilal and Another, . Learned Advocate was not aware of the later decision and accordingly, this court was pleased to adjourned the matter for giving scope to the learned Advocate to address this court on that score.

11. On the next date of hearing, the petitioner made two submissions :

(a) They have their sufficient cause for not attending the court on the relevant date and time;

(b) Their case Is factually distinguishable with the decision reported in Salil Dutta Vs. T.M. and M.C. Private Ltd.,

12. Although this court repeatedly wanted to know the facts and circumstances of the case first but again the learned Advocate wanted to indicate the distinguishing features of their case from Salil Dutta Vs. T.M. and M.C. Private Ltd., to establish their case in a negative way.

13. As I have understood from his argument that the litigant was not present on numerous occasions in that case, when ex-parte hearing was concluded and posted for delivery of the judgment, the litigant subsequently took the plea of recalling by saying that he acted on the basis of the advice given by the Advocate-on-record of the defendant who advised him need not be present. According to him the above fact is the basic distinguishing feature from the present case where Advocates were not present but the representative of the plaintiff company was present.

14. As because he had no right of audience without an Advocate, he was nor able to put his presence before the court. Even he can state the facts from the witness box. As and when the learned advocate started repeatedly helping this point the court become curious to know the statement of the petitioner to that extent in the application. But, with an utter surprise, this court found that no such explanation nor a bare explanation is made.

15. Again the learned advocate harped the point and stated that statement of sufficient cause is made in paragraph 5 of the petition. But paragraph 5 of the petition does not speak that the representative of the petitioner was present in the court on the relevant date and time. in this context I considered the affidavit in support of the application affirmed by such representative being Director of the petitioner company which it appears that information derived from the Advocate-on- Record but not true to his knowledge. Therefore it is crystal clear that the deponent was not present on that very day and time in the court but received information from the Advocate-on-record.

16. Hence this court has come to a conclusion that the litigant has not come with clean hands to earn sympathy from the court.

17. The next phase is to consider the scope and ambit of the judgment reported in Salil Dutta Vs. T.M. and M.C. Private Ltd., in this circumstances. Factual aspect of the dismissal of the suit and passing and ex parte decree may not be the same but the court is on the principle. The cardinal principle of the Judgment is that a lay client should not be made to suffer for laches, in a section and/or negligence of the Advocate cannot be an absolute proposition. There is a gulf difference in between a rustic villager and a company having an office in the city and managed by educated businessmen who know where their interest lies. in the instant case the plaintiff company also have their registered office at 7, K.S. Roy Road, Calcutta-700 001 not only within the jurisdiction of the court, but in fact, within a stone throwing distance of the court premises even then no explanation has been given here in respect of their conduct in the petition supported by an affidavit of the Director of the company save that he has got the information from his Advocate-on-Record.

18. According to me this case is worse than the case reported in Salil Dutta Vs. T.M. and M.C. Private Ltd., factually as such principle of such Supreme Court Judgment should be applied rigorously in this respect.

19. Now let us confine to the factual analysis I.e. portion of the paragraph 5 of the petition which is quoted hereunder :

"On or about 26th February, 1999 the matter was appearing in the combined list of His Lordship the Hon"ble Mr. Justice Amitava Lala for hearing and the plaintiff was resting assured that the plaintiff having entrusted the matter to the learned Advocates like Mr. J. Mlra, Mr. D. Roychowdhury and S. Ghosh the matter would be taken care of by the learned Advocates. Unfortunately on that day Mr. Roychowdhury was out of station and Mr. Mllra could not reach the Hon"ble Court due to bandh call by CPI-ML and Mr. S. Ghosh reached the Hon"ble Court after recess and as a result the matter was called thrice and since nobody appeared on behalf of the plaintiff the matter was dismissed for default of appearance."

20. Therefore even from the plain reading in it appears that no explanation is given therein about the conduct of the litigant, but bare explanations are given about the Advocates.

21. Therefore altogether three explanations are there, senior counsel was absent due to so called bandh. Another counsel was absent because he was out of station. Advocate-on-record was absent because he came after recess of the day.

Therefore to called "Bandh" is not criteria alone for dismissal of the suit on 26th February 1999 in the 3rd call admittedly. Even then the court should be much more explanatory about so called "Bandh" to draw a correct line of balance of convenience for the purpose of discretionary value.

22. Although "bandh" is declared as illegal by the court of law but in the garb of "Bandh" sometimes some political party call general strikes. Therefore, court has to observe the gravity of the situation. A general strike called by a political party cannot be the equal with other because it is depending upon the various aspects which can be seen in open eyes. Court can also take Judicial notice on that score. This time so called bandh was so insignificant that neither there was insufficiency of Advocates nor the court staffs in proceeding with the matters. Now a days call of "bandh" or general strike become additional holiday for some people irrespective of situation. Leisure is a personal act for which court proceedings cannot be vitiated specially when bare explanations as to the other counsel and Advocate are not of "Bandh" or general strike but such counsel was out of station and Advocate-on-Record came late to the court. Can it be said sufficient cause in the eye of law? Total insufficient explanation has come forward taking It granted the affairs of the court of law lightly.

23. in these circumstances, court should not Ignore the value of law and apply It's discretion to recall the order even after observing the situation. As a result whereof the dismissal of this application is obvious. Therefore, this application is dismissed but no order is passed as to costs.

24. However, the petitioner is at liberty to institute a fresh suit subject to the law of limitation, if any.

Prayer for stay is made, considered and refused.

All parties are to act on a signed copy minute of the operative part of the order.

25. Application dismissed