
(2012) 01 BOM CK 0158

In the Bombay High Court

Case No : Notice of Motion No. 3056 of 2009 in Suit No. 1595 of 1990

ICICI Bank Ltd.

APPELLANT

Vs

Vikram Seth

RESPONDENT

Date of Decision : 31-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 3

Citation : (2012) 2 ALLMR 562 : (2012) 6 BomCR 449 : (2012) 3 MhLj 394

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : T. Garodia and Ms. N. parmar, for the Respondent

Final Decision : Dismissed

Judgement

Mrs. Roshan Dalvi, J

1. The Plaintiff has taken out this Notice of Motion for setting aside the order of dismissal dated 30th August, 2008. The order of dismissal is passed for want of the Plaintiff's affidavit of evidence despite 4 adjournments granted for that purpose. The Suit is, therefore, dismissed under Order 17 Rule 3 read with Rule 2 of the Code of Civil Procedure. Order 17 Rules 3 & 2 run thus :

3. Court may proceed notwithstanding either party fails to produce evidence etc. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed,

[the Court may, notwithstanding such default,-

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule

2.]

2. Procedure if parties fail to appear on day fixed. Where ,on any day to which

the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such order as it thinks fit.

2. The Suit under the aforesaid provision is dismissed upon seeing that the Plaintiff did not prosecute the Suit. Restoration of such Suit would mean that this Court sits in Appeal against the order of dismissal. It would mean that what the Plaintiff could not obtain from the Court on the date of dismissal, the Plaintiff can obtain from the same Court much later in another application. The entire purpose of Order 17 Rule 3 would be defeated if such an application is granted.

3. A Notice of Motion for restoration is maintainable only for a Suit dismissed for default. Such a Suit would have to be dismissed under Order 9 Rule 3 of the Code of Civil Procedure. Order 9 Rule 3 runs thus :

3. Where neither party appears, suit to be dismissed. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

4. If a party fails to appear and shows cause for such non appearance, the decree or order passed under Order 9 Rule 3 would be set aside under Order 9 Rule 13. The relevant part of which runs thus :

Setting aside decrees ex parte

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:

5. Order 9 can never apply to Suits which have come up for hearing in which the Plaintiff appears and fails to carry out the directions of the Court or otherwise prosecute the Suit.

6. This Notice of Motion is misconceived and hence dismissed.