

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

GA (COM) No. 3 of 2024

With

GA (COM) No. 4 of 2024

In

CS No. 105 of 2018

Sushil Kumar More

Versus

Shaikh Asadur Rahman & Ors.

Mr. Jayanta Kr. Mitra, Sr. Adv.

Mr. Krishnaraj Thaker, Sr. Adv.

Ms. Nilanjana Adhya

Mr. Asit Kr. De

... For the plaintiff/respondent.

Mr. Soumabha Ghosh

Ms. Dipika Banu

Mr. S. Chakraborty

Ms. Bolivia Roy

... For the defendant no. 2/petitioner.

Hearing Concluded On : 25.02.2025

Judgment on : 21.03.2025

Krishna Rao, J.:

1. The defendant no.2 has filed an application being G.A. (Com) No.3 of 2024 for condoning the delay of 605 days in preferring an application under Order IX, Rule 13 of the Code of Civil Procedure, 1908. The defendant no. 2 filed another application being G.A. (Com) No. 4 of 2024 praying for recalling/ setting aside Ex-Parte decree dated 22nd November, 2022 passed in C.S. No. 105 of 2018.
2. Mr. Soumabha Ghosh, Learned Counsel representing the defendant no. 2 submits that the defendant no. 2 was at no material point of time aware of the passing of ex parte decree passed by this Court dated 22nd November, 2022. He submits that upon being served with an affidavit-in-opposition to an application under Section 5 of the Limitation Act, 1963 filed in the appeal by the defendant no. 2, it came to know that a writ of summons along with the copy of the plaint was purportedly served upon the defendants on 8th July, 2019.
3. Mr. Ghosh submits that the service report specifically states that neither postal acknowledgement receipt nor undelivered packets for the defendant nos. 1 and 2 was received. He submits that the report relied upon the tracking report which shows that writ of summons along with the copy of the plaint was allegedly served upon the defendant no. 2 on 8th July, 2019. He submits that there is no conclusive proof that the defendant no. 2 received the plaint or writ of summons. He submits

that the defendant no. 2 came to know about the dispute only on 20th June, 2023 i.e. when the defendant no. 2 has engaged an Advocate and sought a copy of the plaint and the petition from the Advocates of the plaintiff.

4. Mr. Ghosh submits that the defendant no. 2 resides in a foreign country, having no other option, he has requested a copy of the plaint from the Learned Advocate appearing for the plaintiff. He submits that the defendant no. 2 has never any information about the suit filed before this Court. He submits that the communication which was issued after service of the decree and the execution case which was enclosed in the affidavit-in-opposition filed by the decree holder and upon receipt of such communication, the defendant no. 2 carried out searches at the office in order to find out whether any such copy of the plaint along with the copy of writ of summons was served upon the defendant no. 2 but even after the search no document was found in the office of the defendant no. 2.
5. Mr. Ghosh submits that the defendant no. 2 has approached its Advocate in Calcutta for taking necessary steps. He submits that the defendant no.2 on receipt of execution application came to know about the particulars of the suit and the decree passed by this Court. He submits that on receipt of Vakalatnama on 21st September, 2023, the Learned Counsel for the defendant no.2 applied for certified copy of the decree and on 3rd October, 2023, the defendant no. 2 got certified copy of decree. On receipt of the same, the defendant no.2 has preferred an

appeal on 11th January, 2024 along with an application for stay as well as for condoning the delay in preferring an appeal.

6. Mr. Ghosh submits that when the appeal was taken up for hearing, the Hon'ble Appellate Court was of the view that instead of an appeal, the appropriate remedy would be to prefer an application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 before this Court for recalling and setting aside of the ex-parte decree against the defendant no.2. He submits that accordingly, the defendant no.2 has filed an application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 along with an application for condonation of delay.
7. Mr. Ghosh submits that the writ of summons along with a copy of the plaint has been shown to have been served upon the defendant no.2 at 4, Old Jessore Road, Khulna- 9200, Bangladesh but the registered office of the defendant no.2 however is not at the address which the writ of summons was served. He submits that the registered address of the defendant no.2 is at Akangkha Centre, Holding No. 4B, KDA Commercial Plot, Jessore Road, Ward No. 21, Khulna City Corporation, P.S. Khulna- 9100.
8. Mr. Jayanta Kr. Mitra, Learned Senior Advocate representing the plaintiff submits that the defendant no.2 before filing of the present applications has filed an appeal along with interlocutory applications in which, the defendant no.2 has annexed the amended copy of plaint of

the instant suit which proves that the defendant no.2 has received the writ of summons along with the amended plaint.

- 9.** Mr. Mitra submits that in paragraph 3 of the G.A. (Com) No. 2 of 2024, the defendant no.2 has also stated that paper publications were also made but the defendant no.2 has taken the stand that everyone is not taken all the newspapers. In paragraph 9 of the said application, the defendant no.2 has stated that the newspapers in which the notice was published, the defendant has not taken the said newspaper. He submits that the statements made by the defendant no. 2 are incorrect as no such order is passed for publication.
- 10.** Mr. Mitra submits that the plaintiff has filed an execution application being Execution Case No. 217 of 2023 and in terms of the order dated 13th June, 2023, notice was served upon the Judgement debtors including the defendant no.2 and the same was confirmed by the defendant no.2 by an email dated 20th June, 2023. He submits in the said e-mail, the defendant no.2 stated that the notice of execution case was received on 19th June, 2023, thus the statement made by the defendant no.2 that the defendant no.2 came to know about the Judgement and Decree on 20th June, 2023 is not correct.
- 11.** Mr. Mitra submits that as per the direction of the Executing Court, the plaintiff/ decree holder has sent notices informing about the date of hearing of the execution case but inspite of receipt of email dated 7th August, 2023 and speed post letter dated 2nd August, 2023, the

defendant no.2 failed to appear before the Executing Court and finally on 31st August, 2023, the Hon'ble Court passed an order directing the ICICI Bank and AB Bank to pay the amount of USD 11,595,98 and USD 78,916 respectively to the account of the plaintiff electronically and the execution case was disposed of.

12. Mr. Mitra submits that the statements made by the defendant no.2 in the application under Order IX, Rule 13 of the CPC and in an application under Section 5 of the Limitation Act, 1963 are not correct. From the record, it is crystal clear that the writ of summons along with plaint was duly served upon the defendant no.2 but the defendant no.2 failed to appear in the suit. In the Execution Case also even receipt of notice, the defendant no. 2 has not appeared and the Court has disposed of the execution case directing the ICICI Bank and AB Bank to pay an amount of USD 1,159,598 and USD 78,916 to the account of the plaintiff.
13. Mr. Mitra in support of his submissions has relied upon the judgment in the case of ***Balwant Singh vs. Jagdish Singh & Others*** reported in ***(2010) 8 SCC 685*** and submitted that once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both the parties equally.

14. Mr. Mitra further relied upon the judgment in the case of ***Binod Bihari Singh vs. Union of India*** reported in ***(1993) 1 SCC 572*** and submitted that a bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time, as contained in the Limitation Act, has been made on a well-accepted principle of jurisprudence and public policy.
15. The defendant no.2 has taken the stand that the writ of summons along with plaint was not served upon and only on 20th June, 2023, the defendant no.2 has come to know about the judgment passed by this Court dated 22nd November, 2022. The defendant no.2 before filing of the instant applications before this Court has preferred an appeal against the said judgment passed by this Court. Subsequently, the defendant no.2 has withdrawn the said appeal with the liberty to file the present application before this Court. Along with appeal, the defendant no.2 has filed interlocutory applications in which, the defendant no. 2 has annexed the copy of the corrected plaint which was served upon the defendants. In the present case, the plaintiff has filed affidavit-in-opposition in which the plaintiff has annexed the said corrected copy of plaint which the defendant no.2 has annexed with interlocutory application but the defendant no.2 has not come forward with any explanation how the defendant no.2 possess the corrected

copy of plaint if the writ of summons were not served upon the defendant no. 2.

16. The defendant no. 2 also taken the stand that there is no conclusive proof that the writ of summons were served upon the defendant no.2. as per the case of the defendant no.2 that the PIN Code of the defendant no.2 mentioned in the cause title and in the speed post letter is not correct as the correct PIN Code of the defendant no. 2 is 9100 but it was sent to PIN Code No. 9200. Before passing an order as undefended suit against the defendant no. 2, the plaintiff has obtained report from the Deputy Sheriff of Calcutta of this Court and in the report dated 14th July, 2022, it is categorically mentioned that as per tracking report of the Postal Authority item was delivered to defendant nos. 1 and 2 on 8th July, 2019. The defendant no.2 has also enclosed the report of Deputy Sheriff as well as track report in the application being G.A (Com) No. 3 of 2024 at pages 19 to 22. The defendant no.2 has alleged that the track report is not conclusive but has also not proved any evidence contrary to the said report and on the other hand, the defendant no.2 has disclosed the track report in its application.

17. The plaintiff has disclosed certain documents in his affidavit-in-opposition in connection with the Execution case. As per the order passed by the Executing Court, notices were served upon the defendant no.2 on the same address by speed post and the said speed post letter were delivered to the defendant no.2. The Advocate for the defendant no. 2 by an e-mail dated 20th June, 2023 admitted the receipt of

notices. Thus the stand taken by the defendant no. 2 that the address and PIN Code of the defendant no. 2 are not correct is not sustainable.

- 18.** As per the case made out of the defendant no. 2 that the defendant no.2 came to know about the judgment dated 22nd November, 2022 only on 20th June, 2023 but in the email dated 20th June, 2023, it is stated that *“Yesterday, we received a lawyer certificate along with a copy of the Judgment and Order of the Court in connection with E.C. No. 217 of 2023 in C.S. No. 105 of 2018”*. The case made out by the defendant no. 2 that the defendant no.2 came to know about the judgment on 20th June, 2023 is also not correct.
- 19.** After the Judgment dated 22nd November, 2022, the plaintiff has initiated Execution Case No. 217 of 2023 in which notices were issued to the judgment debtors including the defendant no.2 but none of the defendants entered appearance in the execution proceeding and by an order dated 31st August, 2023, the Executing Court has disposed of the execution proceeding by passing the following order:

“Considering the decree passed by the learned Single Judge of this Court and the subsequent order of another co-ordinate Bench whereby the orders have already been passed in terms of prayers (c) and (d) of the Tabular Statement and considering the fact that there have been no subsequent events including the judgment-debtors challenging the decree, this Court is of the view that there is no impediment in passing an order in terms of prayer (b) of the Tabular Statement.

Further, upon considering the statements made in paragraph 13 of the supplementary affidavit filed on 7th August, 2023 on behalf of the

decree-holder that judgment-debtor no.2/its Bank ICICI Bank has sufficient amounts which have been kept aside in terms of the order dated 13th June, 2023, ICICI Bank may be directed to transfer USD 1,159,598 lying in its Dollar Account bearing the number mentioned in paragraph 13 of the affidavit and AB Bank be directed to transfer a sum of USD 78,916 towards the interest component of the decree from 16th March, 2023 – 31st July, 2023 which was made clear by the subsequent order dated 25th November, 2022 modifying the decree to the extent as stated in the said order.

The other Banks, which have been made part of the prayer (d) of the Tabular Statement, shall be at liberty of discharging the lien on their accounts.

The ICICI Bank and AB Bank shall pay the amount of USD 1,159,598 and USD 78,916 respectively to the account of the plaintiff which is specified below:-

*ICICI Bank, S.F Road, Siliguri, India being
A/c. No.192905001431 SWIFT CODE:
ICICINBBCTS.*

EC/217/2023 is accordingly disposed of in terms of the above.”

- 20.** This Court also finds that the defendant no.2 is the banker. As per negotiation between the plaintiff and the defendant no. 1, the defendant no. 1 caused the defendant no. 2 to issue irrevocable Letter of Credit in favour of the plaintiff for supply of Indian origin Non-Basmati Rice. On 2nd July, 2015, the defendant no. 2 established the irrevocable Letter of Credit. The defendant no.1 has not challenged the judgment and decree passed by this Court. The defendant no.1 has also not contested the execution proceeding initiated by the plaintiff and the said execution proceeding is disposed of by directing to transfer USD 1, 159,598 and USD 78,916 respectively to the account of the plaintiff.

- 21.** Considering the above, this Court finds that the cause shown by the defendant no.2 for condonation of delay of 605 days in preferring an application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 are not satisfactory and contrary to records.
- 22.** In view of the above, this Court is not inclined to condone the delay of 605 days in preferring the application under Order IX, Rule 13 of the Code of Civil Procedure, 1908. **G.A. (COM) No. 3 of 2024** is **dismissed**. Consequently, **G.A. (COM) No. 4 of 2024** is also **dismissed**.

(Krishna Rao, J.)