

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 772 of 2025

Dev Sahitya Kutir Private Limited

VS.

Sri Sankar Mondal & Ors.

For the Petitioner : Mr. Tanmoy Mukherjee
Mr. Partha Pratim De
Mr. Pinaki Brata Ghosh
Mr. Abhinaba Roy

..... advocates

For the Opposite Party No. 1 : Mr. Shiboproshad Mukherjee, Ld. Sr. Adv.
Ms. Paromita Moitra

.... advocates

For the Opposite
Party No. 2(a) : Mr. Saumyajit Ghosal advocate

For the Opposite
Party No. 2(b) and 2(c) : Mr. Shuvajit Bose advocate

Reserved on : 10.03.2025

Judgment on : 06.05.2025

Hiranmay Bhattacharyya, J.:-

1. This application under Article 227 of the Constitution of India is at the instance of the first defendant and is directed against an order being no. 71 dated February 6, 2025 passed by the learned judge, Commercial Court at Alipore District 24 Parganas (South) in Title Suit No. 14 of 2021 which was subsequently renumbered as Title Suit (Commercial) No. 25 of 2021.
2. By the order impugned, the cause shown by the defendant nos. 2(b) and 2(c) was accepted and the order of ex parte hearing of the suit against the said defendants was recalled subject to payment of costs by the said defendants.

3. The Opposite Party no. 1 herein filed a suit praying for a decree of permanent injunction restraining the defendant no. 1/ petitioner herein and/or its men, agents, servants, assigns, representatives and/or distributors from selling, printing, distributing, publishing and/or exploiting and circulating any books or periodicals or magazines containing the literary or artistic works or stories or characters as mentioned in Annexure H to the plaint and for an order directing an enquiry for the loss and damages suffered by the plaintiff for such wrongful and illegal acts and conducts of the defendants and a decree for damages as well as for delivering up and cancelation of all materials of books or periodicals or magazines containing the literary and artistic works as mentioned in Annexure H or otherwise lying with the defendant no. 1.
4. After entering appearance in the said suit, the petitioner herein contested the same by filing a written statement and in the said written statement has also set up a counter claim. The predecessor-in-interest of the opposite party nos. 2 series appeared in the said suit and filed the written statement on October 7, 2021 along with an application for condonation of delay being IA No. 14 of 2021.
5. In the meantime, the original defendant no. 2 died and the opposite party no. 2(a), 2(b) and 2(c) were substituted in place and stead of the original defendant no. 2 by an order dated December 21, 2022.
6. The Opposite Party nos. 2(b) and 2(c) entered appearance in the said suit by filing a vakalatnama on May 19, 2023. The Opposite Party Nos. 2(b) and 2(c) filed an application for adopting the written statement filed by the original defendant no. 2 (since deceased) which was registered as IA No. 20 of 2023. Thereafter, the Opposite Party nos. 2(b) and 2(c) filed an additional written statement on August 3, 2023.
7. The Opposite Party nos. 2(b) and 2(c) were directed to show cause as to why the suit should not be proceeded ex parte against them by an order dated April 24, 2024. The learned Judge of the Commercial Court, by an order dated June 21 of 2024, directed the suit to be proceeded ex parte against the opposite party nos. 2(b) and 2(c).

8. The opposite party nos. 2(b) and 2(c) appeared in the suit on August 13, 2024 and filed a show cause petition which was registered as IA No. 23 of 2024 and an application praying for recalling the order dated June 21, 2024 which was registered as IA No. 24 of 2024. The learned Judge of the Commercial Court, by an order dated February 6, 2025, accepted the cause shown by the opposite party nos. 2(b) and 2(c) and recalled the order of ex parte hearing of the suit subject to payment of cost.
9. Mr. Tanmay Mukherjee, learned advocate appearing for the petitioner submitted that the Commercial Courts Act, 2015 provides for a procedure for expeditious adjudication of commercial disputes of specified value. He submitted that the petitioner herein who has been impleaded as the first defendant in the suit has also set up a counter claim and, therefore, is interested in expeditious adjudication of the commercial disputes involved in the suit and the counter claim. He further submitted that the opposite party nos. 2(b) and 2(c) initially filed an application praying for adoption of the belated written statement that was filed by the original defendant no. 2, since deceased but subsequently filed an additional written statement and also did not press the application praying for adoption of the original written statement filed by the original defendant no. 2 since deceased. By referring to the provisions laid down under Order 8 Rule 1 of the Code of Civil Procedure, Mr. Mukherjee contended that if the defendant fails to file the written statement within 30 days from the date of service of summons upon him, the Court can allow such defendant to file the written statement only upon recording reasons in writing within such extended time which should not be later than 120 days from the date of service of summons and upon expiry of 120 days from the date of service of summons the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. He further contended that since the defendant nos. 2(b) and 2(c) have been substituted in place and stead of the deceased defendant no. 2, they have to adopt the written statement filed by their predecessor-in-interest and cannot straight away file an additional written statement as there is no written statement of the said opposite parties on regard. Mr. Mukherjee took this Court through the list of dates

and events in support of his contention that the opposite party nos. 2(b) and 2(c) are trying to delay the further proceedings of the suit and the counter claim.

10. Mr. Tanmay Mukherjee further submitted that since the written statement filed by the original defendant no. 2 was filed belatedly and the same was not accepted by the Court and the application praying for adopting the said written statement by the opposite party nos. 2(b) and 2(c) was also not pressed, the said opposite parties have forfeited their right to file the written statement. By placing reliance upon the decision of the Hon'ble Supreme Court in the case of **M/s. SCG Contracts India Pvt. Ltd. vs. K.S. Chamankar Infrastructure Pvt. Ltd.** reported at **AIR 2019 SC (Civil) 2002**, Mr. Mukherjee contended that the said opposite parties have forfeited their right to file the written statement and the suit being a commercial suit, the Court should not extend the time to file written statement. He further contended that the resultant effect of non-filing of the written statement is that the participation of the said opposite parties in the said suit shall only be limited to cross-examination of the plaintiff's witness and to address arguments on the basis of the plaintiff's case and such cross-examination cannot be permitted to travel beyond the very limited object of pointing out the falsity or weaknesses of the plaintiff's case. In support of such contention he placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Modula India vs. Kamakshya Singh Deo** reported at **AIR 1989(SC) 162**.
11. Mr. S. P. Mukherjee learned Senior Advocate appearing for the plaintiff/opposite party no. 1 herein seriously disputed the submissions made by Mr. Tanmay Mukherjee. He contended that the petitioner herein being the defendant cannot be said to be a person aggrieved against the order impugned. He further contended that unless the opposite party nos. 2(b) and 2(c) are allowed to participate and contest the suit, certain complications may arise at a later stage of the suit or at the subsequent stage and for which the opposite party no. 1 herein may have to ultimately suffer the consequences thereof.

12. The learned advocate appearing for the opposite party nos. 2(b) and 2(c) submitted that the said opposite parties were very much diligent in contesting the suit but for some contingencies in fund they could not take steps for some time for which the suit was directed to be proceeded ex parte against them. He contended that the learned Trial Judge upon being satisfied with the grounds shown in the show cause petition as well as the application for recalling the order of ex parte hearing was pleased to set aside the order of ex parte hearing and this Court should not interfere with such order in exercise of powers under Article 227 of the Constitution of India.
13. The learned advocate appearing for the opposite party no. 2(a) adopted the argument of Mr. Tanmay Mukherjee learned advocate appearing for the petitioner.
14. Heard the learned advocates for the parties and perused the materials placed. Record reveals that the original defendant no. 2 filed the written statement on 7th October, 2021 along with the petition under Section 5 of the Limitation Act for condonation of delay in filing the written statement. In the meantime the original defendant no. 2 namely Narayan Debnath passed away on January 18, 2022 and upon his death his sons and daughters were substituted in place and stead of the deceased defendant no. 2 by an order dated December 21, 2022.
15. The substituted defendant nos. 2(b) and 2(c)/ opposite party nos. 2(b) and 2(c) herein entered appearance in the said suit on May 19, 2023. On June 27, 2023 the opposite party nos. 2(b) and 2(c) filed an application for adopting the written statement filed by the original defendant no. 2. Thereafter, on 03.08.2023 the opposite party nos. 2(b) and 2(c) filed an additional written statement which was kept with the record and on the said date the learned counsel of the opposite party nos. 2(b) and 2(c) put an endorsement “not pressed” on the application filed by the said opposite parties for adopting the written statement filed by the original defendant no. 2 since deceased. In view thereof the application being IA No. 20 of 2023 was disposed of as being rejected.

16. However, on April 24, 2024 the opposite party nos. 2(b) and 2(c) did not take any steps in the said suit and for such reason the learned trial judge by an order dated April 24, 2024 directed the opposite party nos. 2(b) and 2(c) to show cause as to why the instant suit shall not be proceeded ex parte against them. The learned Trial Judge by an order dated June 21, 2024 directed that the said suit to be proceeded ex parte against the opposite party nos. 2(b) and 2(c) since in spite of specific direction of the Court, show cause was not filed by the opposite party nos. 2(b) and 2(c). The next date for hearing of the said suit was fixed on August 13, 2024.
17. On August 13, 2024 the opposite party nos. 2(b) and 2(c) appeared and filed a show cause petition which was registered as IA No. 23 of 2024 and a petition praying for recalling the order dated June 21, 2024 was registered as IA No. 24 of 2024. By the order impugned, the show cause petition filed by the opposite party nos. 2(b) and 2(c) was accepted and the order of ex parte hearing of the suit against the said opposite party was recalled subject to payment of cost of Rs. 5000/- to be paid by the said opposite parties to the District Legal Service Authority, 24 Parganas (South) Alipore.
18. The issue that falls for consideration is whether the order recalling the order of ex parte hearing calls for interference.
19. It appears from the records that the learned Trial Judge directed the suit to be heard ex parte against the opposite party nos. 2(b) and 2(c) and adjourn the hearing of the said suit to August 13, 2024.
20. Order 9 Rule 7 of the Code of Civil Procedure states that where the Court has adjourned the hearing to 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.
21. In the case on hand the defendant nos. 2(b) and 2(c) appeared on August 13, 2024 i.e., on the date of hearing of the suit which was directed to be proceeded ex parte against the said opposite parties.
22. There has been no amendment of Order 9 Rule 7 of the Code of Civil Procedure by the Commercial Courts Act, 2015. Thus, the provisions of

Order 9 Rule 7 of the Code shall apply to a suit pending before the Commercial Court for adjudication of commercial disputes of specified value and matters connected therewith or incidental thereto.

23. It is well settled that on the adjourned date of hearing of the suit, in spite of the Court having proceeded, ex parte earlier, the defendant is entitled to appear and participate in the subsequent proceedings as of right. It is only if the defendant wishes the proceedings to be relegated back and reopened, the proceedings from the date wherefrom they become ex parte so as to confer the ex parte hearings into bi- parte, an application under Rule 7 of Order 9 of Code is required to be filed. The Hon'ble Supreme Court in **Vijay Kumar Madan vs. R.N. Gupta** reported at **(2002) 5 SCC 30** held thus-

“7. Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression “upon such terms as the court directs as to costs or otherwise”. It is settled with the decision of this Court in Arjun Singh v. Mohindra Kumar [AIR 1964 SC 993] that on an adjourned hearing, in spite of the court having proceeded ex parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be relegated back and reopen the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in the case of Arjun Singh [AIR 1964 SC 993] the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation.”

24. Thus, by applying the proposition of law laid down in **Vijay Kr. Madan** (supra), this Court holds that even in a commercial suit, if the defendant appears on the adjourned date of hearing he is entitled to participate in the subsequent proceedings as of right.

25. Thus, the opposite party nos. 2(b) and 2(c), having appeared on the adjourned date of hearing i.e., on 13th August 2024 was entitled to participate in the subsequent proceedings as of right. However, whether the prayer of the opposite party nos. 2(b) and 2(c) to be relegated back to the position as on the date when the suit was fixed for ex parte hearing should be allowed or not shall depend on the fact as to whether the defendant could assign good cause for his previous non-appearance.
26. The reason for previous non-appearance as stated by the opposite party nos. 2(b) and 2(c) in the show cause petition as well as in the application praying for recalling the order of ex parte hearing is that due to some contingencies in fund the said opposite party could not appear in the suit on previous occasions. Whether the reasons assigned by the opposite party nos. 2(b) and 2(c) falls within expression “good cause” used in the Order 9 Rule 7 of the Code of Civil Procedure is dependant on the facts and situations of each case and there cannot be any straight jacket formula for determination as to what can be said to be the good cause.
27. The learned Trial Judge accepted the reasons assigned by the opposite party nos. 2(b) and 2(c) for their previous non-appearance and recalled the order of ex parte hearing subject to payment of cost. Order 9 Rule 7 of the Code enables the Court to impose cost or otherwise to allow the defendant to be heard in answer to the suit as if he had appeared on the date fixed for his appearance. Thus, it is evident that the cause shown by the petitioner for previous non-appearance was accepted by the learned Trial Judge to be the good cause. This Court finds that the learned Trial Judge recalled the order of ex parte hearing of the suit against the opposite party nos. 2(b) and 2(c) subject to payment of cost.
28. To the mind of this Court, the order impugned does not suffer from any infirmity warranting interference under Article 227 of the Constitution of India.
29. Record reveals that the additional written statement filed by the opposite party nos. 2(b) and 2(c) has been kept on record. The fate of such additional written statement was not decided by the order impugned. For such reason this Court refrains from making any comment on the effect of the filing of

the additional written statement by the defendant nos. 2(b) and 2(c) and also as to whether the said opposite parties can be allowed to file their written statement. The stage for deciding as to whether the proposition of law laid down in **Modula India (supra)** and **M/s. SCG Contracts India (supra)** can be applied against the opposite party nos. 2(b) and 2(c) herein is yet to be reached in the case on hand.

30. For all the reasons as aforesaid this Court holds that the order impugned does not suffer from infirmity. Accordingly, CO No. 772 of 2025 stands dismissed.
31. There shall be, however, no order as to costs.
32. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)