

(1950) 09 CAL CK 0019

In the Calcutta High Court

Case No : Civil Suit No's. 2943 and 2944 of 1949

Bengal Agency and Stores Syndicate and Others

APPELLANT

Vs

Stores and Engineering Supply Co.

RESPONDENT

Date of Decision : 06-09-1950

Acts Referred:

Calcutta High Court Rules, 1914 — Rule 15

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 41 Rule 19, Order 9 Rule 13

Citation : AIR 1952 Cal 411 : (1952) 1 ILR (Cal) 53

Hon'ble Judges : Sarkar, J

Bench : Single Bench

Advocate : U.C. Law and Marumda, for the Appellant; A.K. Sen, S. Roy Choudhury and H.N. Ghosh, for the Respondent

Judgement

Sarkar, J.—The judgment which I am going to deliver covers two applications. The facts out of which the applications arise are somewhat complicated & may be summarised as follows:

2. In August 1949 this suit was filed for the recovery of Rs. 66961-11-0 for balance of principal & interest due for advance payments on account of price of goods & for price of goods supplied to the debt. The defence is that on the adjustment of the accounts between the parties Rs. 63677-4-3 would be due to the debt. & in fact nothing would be payable by it to the plff. The claim itself would indicate that there was an account between the parties. The defence was filed sometime in November 1949. As this suit is a commercial suit, under the rules of this Court the debt, should have filed its affidavit of documents within a fortnight of the filing of its written statement without any further order of this Court. This fortnight expired before 14-12-1949 but the affidavit was not filed. On 8-6-1950 the plff. took out a summons returnable before the Master, for an order that the debt, be directed to file its affidavit of documents within two days & that in default thereof the defence be struck out. The summons was served on the debt's attorney but the attorney it is alleged could not contest the application

as he was unable to get in touch with his client. In these circumstances, an ex parte order as prayed was made on 12-12-1950, by the learned Master. The order not being complied with the defence stood struck out on 15-6-1950. The deft, says that it did not comply with the order as it was not aware of it till 8-7-1950. The suit appeared for hearing as an undefended suit on 11-7-1950 & on that day the deft, moved the Court for an order that the suit be removed from the list of undefended suits & leave be given to the deft. to defend the suit & to file its affidavit of documents within such time as the Court thought fit. The suit was then adjourned. The application was heard on 24-7-1950 when it was allowed to be withdrawn for reasons to be hereinafter mentioned, & the deft, intimated that it would prefer an appeal from the order of the Master of June 12. The deft, was directed to pay the costs of the application as a condition precedent to preferring the appeal & the costs were duly paid. The suit was again adjourned. On July 28 the deft, took out another summons returnable before, the Master for the following order: (a) The order of June 12, be revised, recalled or set aside, (b) Two days time be given to the deft, to file its affidavit documents, (c) The suit be removed from the list of undefended suits & an opportunity to defend be given, (d) Alternatively the summons may be endorsed for the purpose of appeal to the Judge & time for the purpose be enlarged;

3. On August 5, the learned Master refused this application & delivered a considered judgment. Thereafter on August 7th and 9th the deft's solicitor issued notices of two applications & these are the applications now for hearing. The suit still stands adjourned.

4. The application pursuant, to the notice of August 7, is by way of an appeal from the order of the learned Master of August 5 & it asks for the following reliefs: (a) The order made by the learned Master on June 12, be revised, recalled or set aside, (b) Two days time be given to the deft, to file its affidavit of documents, (c) The suit be removed from the undefended list & leave to defend be given. (d) The delay in making the application be condoned, (e) In case the above prayers be not allowed, the summons may be endorsed for appeal to the Judge.

5. As the application is to the Judge, Cl.(e) of the notice is wholly inappropriate, the notice being itself of an appeal to the Judge under Ch. VI, r. 15 of the Rules. Mr. Sen contended that the application was out of time. For reasons hereinafter stated I do not agree. I have however come to the conclusion that the learned Master's order of August 5 refusing the application was substantially right for the reasons given by him. Whether I have power or not to interfere with order of the learned Master of June 12, in an appropriate proceeding I shall consider later, but it seems to me that I have no such power of hearing an appeal from. the Master's order of August 5. In any event there is a direct appeal from the order of June 12 by the notice of August 9. I have, however, some doubt as to whether the learned Master was right in his view as to the limit of time within which he has power to endorse a summons for appeal to the Judge & as the point has not

been argued before me I express no opinion about it: Another difficulty that struck me was why the Master could not set aside the ex parte order of June 12. It was urged, that apart from there being no merits to justify such an order, the application for the purpose had to be made within the period provided by Article 164, Limitation Act, & the application to the Master was not within the time limited by that article. But that article applies to applications for setting aside a decree passed ex parte & the present is an application to set aside an ex parte order. The matter does not seem to have been argued from this point of view before the Learned Master. I do not myself propose to decide this question & would maintain the order of the Learned Master for I feel that I have power to give the applicant relief on the other application. The application pursuant to the notice of 7-8-1950 is, therefore, dismissed.

6. The other application was by way of an appeal under Ch. VI, Rule 15 of our Rules from the order of the Learned Master, of June 12 & is made by the notice of August 9. It asks practically for the same reliefs as in the application on the notice of August 7. The substantial relief asked is that the default incurred be set aside & the applicant's time to file his affidavit of documents be extended.

7. Mr. Sen argued that this appeal is out of time. He contended that the Judge certainly had power under Ch. VI, Rule 15 to extend the time for appealing to him from the order of a Master but such extension had to be obtained by a separate application & this had not been done in this case. A precisely similar argument had been made under the corresponding rule in the Rules of the Supreme Court in England & rejected, in "Gibbons v. The London Financial Association (1879) 4 C P D 263. Denman J. said:

"Mr. Gibbons says that we ought not to apply the amending rule, first because it is not before us on the summons, & he referred to the rule that every appeal shall be by summons. But that rule is only applicable to proceedings in chambers & not in court, & I think it would be a most undesirable limitation of the power of the court to enlarge the time, if the court were to say, "We never will enlarge it without a special summons taken out at chambers, subject to appeal to the Judge, then to the Divisional Court, the Court of Appeal & eventually the House of Lords". I do not think such was the intention of the rule, but that the intention was that, when the Court has before it an application which is out of time & sees good cause in Justice for enlarging it, they may enlarge it. That has always been the practice & I see no reason for limiting the power. So I think we have power."

In the notice of this appeal there is a specific prayer for extending the time to appeal which it appears was not in the summons in the case just cited. This I think disposes of the preliminary objection to the appeal.

8. Then comes the question whether I should enlarge the time. I think I should. The defendant contends that in May 1950 it had changed its office & the attorney was not aware of the new address. The plff. has forcefully criticised the truth of this statement. On the other hand the affidavits make out a strong case that the

deft's officer-in-charge was away most of the time since the last week of May till July 8 & in his absence the deft, could do nothing. From July 11 the deft, has been assiduously taking steps though it may have blundered in these. There is no reason to think it had negligently whiled away time. It has paid in the shape of costs for its mistake. The claim is large & on the face of it one as to which disputes are possible. The applicant will not suffer any irreparable injury. I have found no reason to doubt the earnestness or bona fides of the deft. In these circumstances I feel the time should be extended. "Bramwell", L. J. said in "Atwood v. Chichester (1878) 3 Q.B.D. 722 ,

"But it has been argued that the deft, is now too late. When sitting at chambers I had often heard it argued that when irreparable mischief would be done by acceding to a tardy application it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, & any injury caused by the delay may be compensated by payment of costs. This I think is a correct view."

I, therefore, treat the appeal as made within time.

9. After this the matter becomes simple. There is clear authority for the proposition that once an appeal is preferred from, an order dismissing a suit for default of taking a certain step or striking out a defence on a like default, the Court hearing the appeal has power even after the default has been incurred to relieve the party from the effects of his default. In "Carter v. Stubbs (1881) 6 Q. B. D. 116, an order was made by a Master on 17-6-1880 directing that if the answers to certain interrogatories were not filed within seven days by the plff. his action would stand dismissed with costs for want of prosecution. The affidavit was affirmed on the 24th of June but was not filed till the 25th of June when the seven days fixed by the order of June 17 had expired. The action therefore was at an end & no extension of the time limited by the order of June 17 could any longer be given by the Master. Actually, however, such an extension was given by another Master on July 9. The order for extension was taken up in appeal to Hawkins, J. who adjourned the appeal till November 4 & in the meantime on July 20 passed two orders. By the first of these orders he extended the time to appeal from the order of June 17 till August 17 & by the second of these orders he directed that the order of June 17, should be varied by substituting fourteen days for the seven days as the time limited for the plff's filing his affidavit in answer to the interrogatories. The deft, appealed but the Common Pleas Division affirmed the orders of Hawkins, J. & set aside the order of July 9. The matter then came up before the Court of Appeal consisting of Earl Selborne L. C. Baggallay & Brett, L. JJ. who also upheld the order of Hawkins J., enlarging the time for answering the interrogatories, Brett L. J. said (p. 120)

"The next order was to enlarge the time for interrogatories & there was, I think, jurisdiction to make that after the time for appealing had been extended."

On the same basis after enlarging the time for appealing from the order of the Master, I have in the present case jurisdiction to extend the time to file the affidavit of documents. In "Carter v. Stubbs", it will be noticed Hawkins J. had extended the time fixed by the order of June 17, not because it was a wrong order, for the plff. had no such grievance against it & had in fact actually almost carried it out but was only late by a day which again was due to an accident. This case shows that the Court has power" to extend the time fixed by the Master's order only for the purpose of giving relief against its operation though it was in all respects a correct order.

10. Now the question arises whether the power to extend the time should be exercised. I think it should. I have stated the facts already. They are not in my opinion so strong against the deft. as to justify maintaining an order striking but the defence. The earnestness with which it has been trying to avoid the consequences of the non-compliance with the order of June 12, is certainly guarantee of its bona fides. I refer again to "Atwood v. Chichester" & propose to compensate the plff. by the award of costs. The same view as in "Atwood v. Chichester" was expressed by Jessel M. R. in "Eaton v. Storer (1883) 22 Ch. D. 91. He said,

"The plff. was out of time, & in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the plff. time to take the next step upon his paying costs, which is a sufficient punishment, & will prevent the rules from being a dead letter. This course will not be departed from unless there; is some special circumstance such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till the 25th of July. The application ought to have been granted on the terms of the plff. paying the costs of it."

In the case before me there has been some delay in preferring the appeal but the most that can be said is that the deft's legal advisers had made some mistakes in taking the appropriate steps. I do not think in this case I ought to visit the consequences of those mistakes on the deft. I feel that on this appeal I have power to extend the time fixed by the order of June 12 & I ought to exercise that power.

11. The matter was put on behalf of the applicant in another way. I was asked to treat the notice dated August 9, as a notice of an application direct to the Judge for extension of the time fixed by the order of the Master of June 12 instead of as an appeal from that order. An application to the Judge at chambers has to be on a summons issued by the Master but the present notice is issued by the attorney for the deft. An application to the Court has to be by a notice issued by an attorney but the present notice is of an application to the Judge at chambers for it expressly says so. The notice of an application to the Judge at chambers issued by an attorney is contemplated only in Ch. VI, Rule 15 that is to say where the application is by way of an appeal from the order of the Master. I do not think I

have power to treat a notice over the signature of the attorney of application to the Judge at chambers either as a notice of motion or as a chamber summons. I do not, therefore, feel that I ought to treat the present application as one to the Court or Judge direct, for extending the time fixed by the order of the Master of June 12. In this view of the matter it is not necessary for me to notice the arguments leveled against the decision of Sinha J. dated 20-2-1950, in "Shyamsundar Bhartia v. Tulsiram Bhagwandas" (suit No. 4145 of 1948, unreported) where the learned Judge seems to have held in a case precisely similar to the present, that the defence having stood struck out by the operation of the order of the Master & no appeal having been preferred from that order the Judge had no power on an application direct to him to extend the time fixed by the Master's order. I would, however, say that those arguments are weighty & worthy of consideration.

12. One thing however I ought to mention. Mr. Sen had stated that if I took a view contrary to that taken by Sinha J. & treated the present application as one direct to the Judge for extension of the time fixed by the order of the Master, the application would still have to be refused. His ground was that this was one of the prayers in the first application made to me pursuant to the summons dated 11-7-1950 & that application was withdrawn on 24-7-1950 without any leave to make a fresh application for a similar relief. He relied on Order 23, Rule 1, Civil P. C. No authority has been cited to me to show that that rule applies to orders on interlocutory applications in a suit. I am also not sure that the summons in that application contained in terms a prayer that the time fixed by the Master should be extended. As far as I remember my impression when I heard that application was that it did not formally ask for that prayer & I having pointed out the defect, learned advocate for the deft. asked for leave to withdraw the application which was thereupon granted. It was certainly my intention that the applicant should rectify the defect & proceed again. I may have been mistaken in my view of the reliefs asked in that application & if the order that I made on that application on 24-7-1950 has not yet been perfected I direct that it be rectified by inserting in it an order that the withdrawal of that application is not to affect the deft's right to make any other application in the suit of a similar nature. I have mentioned this matter because I felt that it may be urged by the plff. that, if its contention is right, I have no power to extend the time in the appeal to me from the Master's order either. I have no doubt that this argument must in any event be rejected. The order of July 7, Contemplated the present appeal & no objection can therefore be taken to it by reason of that order. Further the order if it operates in the way the plff. contends it does it would only bar future applications & cannot bar appeals in any way.

13. In the result, I vary the learned Master's order of 12-6-1950 by extending the time given thereby to the deft, to file its affidavit of documents till 21-11-1950 provided the deft, pays the costs of the two applications in this suit which I assess together at Rs. 400/- before that date but the Master's order will be maintained in other respects. In default of such payment the application

pursuant to the notice of 9-8-1950 will stand dismissed with costs, the costs being assessed at Rs. 200/-. The application pursuant to the notice of 7-8-1950 stands dismissed with costs assessed at Rs. 200/-.