

(1925) 04 BOM CK 0011

In the Bombay High Court

Case No : O.C.J. Appeal No. 36 of 1925 : Suit No. 351 of 1923

Devkaran Bholaram

APPELLANT

Vs

Sangidas Jesiram

RESPONDENT

Date of Decision : 06-04-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21

Citation : AIR 1925 Bom 386 : (1925) 27 BOMLR 694

Hon'ble Judges : Norman Macleod, J;Coyajee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Norman Macleod, Kt., C.J.—This is an appeal against the order of Mr. Justice Taraporewala striking out the defence of defendants Nos. 2 and 2A in an interpleader suit filed by P. Crystal & Co, in January 1923. The original dispute with regard to the money paid into Court by the plaintiffs was between the second defendant Devkaran Bholaram and the third defendants Messrs. Tullockchand and Shapurji a firm. The fourth defendant was afterwards added by the order of February 14, 192 . No order was made discharging plaintiff's and giving directions with regard to the procedure to be adopted for determining the questions in issue between the defendants. There seems to have been considerable delay in filing the written statements, and thereafter an order for affidavit of documents was obtained by the attorneys for the first, third and fourth defendants against the original second defendant on March 7, 1921. The original second defendant died on June 15, 1924, without having filed his affidavit of documents, and the present defendants Nos. 2 and 2 A were brought on the record in his place on September 4, 1924, The proper course for the third and fourth defendants' attorneys then to pursue was to get an order against the newly substituted defendants for an affidavit of documents, and their failure to do that has vitiated the sub-sequent proceedings. Instead of getting that order they wrote calling upon these defendants to file their affidavit of documents. The

attorneys of these defendants on December 16, 1924, promised to furnish a copy of their clients' affidavit in the course of a week. But as the affidavit was not forthcoming, thereafter Messrs. Bhaishankar Kanga and Girdharlal naturally became impatient, so they took out a chamber summons applying for an order that defendants Nos. 2 and 2A should file their affidavit of documents and that in default of their doing so their defence should be struck out and the suit set down for an ex parte decree. In his affidavit in support of the summons (paragraph 9) the fourth defendant says:-

The fourth defendant's attorneys repeatedly called upon the defendants Nos. 2 and 2A to file their affidavit of documents and to furnish a copy thereof but they have failed to file the same up to now. Under the aforesaid circumstances, I pray that the appearance filed on behalf of defendants 2 and 2A and their defence may be struck off and they be placed in the same position as if they had not appeared and defended this suit.

2. If defendants Nos. 2 and 2A had already disobeyed an order of the Court, then that was the right procedure to follow. But as defendants Nos. 2 and 2A had merely failed to fulfil the promise made in correspondence, and there was no order of the Court which they had disobeyed, that procedure was wrong. When the summons came before the Judge he made an order that defendants Nos. 2 and 2A should file their affidavit of documents within three weeks from the date of the order, and that in default of their doing so their appearance and the defence if any should be struck off from the suit. Presumably that order was made under Order XI, Rule 21, Civil Procedure Code. That rule says ."-

Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

3. On March 9, the attorneys of defendants Nos. 2 and 2A had sent an reaffirmed copy of their affidavit to the other side explaining that their Mehta was still absent up-country. On March 10, the case being on the board for an ex parte decree was adjourned until the 17th, defendants Nos. 2 and 2A being told to put in an affidavit explaining the delay. As the Mehta did not arrive the affidavit of documents was thereafter affirmed by these defendants. A defendant is liable to have his defence struck out only when an order of the Court has not been obeyed, and even then the Court should direct that the defendant be called upon to show cause why his defence should not be struck out. That penalty will only be imposed, as has been pointed out in numerous cases, if it can be shown that the non-compliance with the order of the Court is due to wilful default. So that the summons and the order made thereon being inherently defective, it must necessarily follow that the case should never have been set down for an ex parte decree, and the order made on March 18, 1924, cannot be supported. Even on

the merits it is difficult to see how the order was justified. It is quite true that defendants Nos. 2 and 2A have been guilty of delay, but the excuse they gave was that their father having died they were not acquainted with the subject-matter of the suit and that their Mehta was up-country. So that it seems to me that there was certainly some excuse for the delay. Although the affidavit eventually filed could have been filed very much earlier, even assuming that they had disobeyed an order of the Court, we cannot agree with the learned Judge that this was one of the grossest cases of disobedience of the order of the Court, so that these defendants should suffer the extreme penalty of having their defence struck out, We think then that the appeal must be allowed and the order striking out the defence must be set aside. The decree must also be set aside and the hearing of the suit proceeded with.

4. Defendants Nos. 2 and 2A to pay the costs of the day on March 18 of defendants Nos. 3 and 4.

5. Defendants Nos. 2 and 2A to get their costs of the appeal.

Coyajee, J.

6. I am of the same opinion.