
(1978) 07 CAL CK 0023
In the Calcutta High Court
Case No : A.F.O.O. No. 74 of 1977

Electrical Industries Corporation

APPELLANT

Vs

Punjab National Bank and Others

RESPONDENT

Date of Decision : 13-07-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 5(1)
Limitation Act, 1963 — Section 5
Original Side Rules, 1914 — Rule 6, 8

Citation : AIR 1979 Cal 8

Hon'ble Judges : Sankar Prasad Mitra, C.J.; Salil Kumar Datta, J

Bench : Division Bench

Advocate : P.K. Mukherji and Gautam Kr. Biswas, for the Appellant; Sujit Sinha, P.K. De, (for Nos. 3, 5 and 6) and G.P. Lath, (for No. 4), for the Respondent

Final Decision : Dismissed

Judgement

Sankar Prasad Mitra, C.J.—This is an appeal from a judgment delivered by Mr. Justice Salil K. Roy Chowdhury on the 25th Aug., 1976.

2. The present suit was instituted on July 11, 1973 against the defendants for leave under Clause 12 of the Letters Patent, for a decree for Rs. 4,45,835/-; for a declaration that the plaintiff's account with the Punjab National Bank was wrongly debited and other reliefs.

3. On July 23, 1973, the writ of summons was taken out and lodged with the Sheriff. The time to serve the writ of summons on the defendants Nos. 3, 5 and 6 expired on Nov. 14, 1973. The Master directed the Sheriff to serve the Writ of Summons on the defendants Nos. 3, 5 and 6 by registered post on the 6th Dec., 1973 and the returnable date was extended by ten weeks.

4. In Dec., 1973, M/s. Fox and Mondal received instructions from the plaintiff to obtain a change of attorney from Anand, Das Gupta & Sagar.

5. On Jan. 7, 1974, the Writ of Summons, directed to be served on the

respondents Nos. 3, 5 and 6 was returned unserved to the Sheriff's office through the General Post Office.

6. On Jan. 30, 1974, M/s. Fox and Mondal filed a warrant for attorney with the consent of Anand, Das Gupta and Sagar.

7. On an application by the first defendant, an order was passed on May 6, 1975 directing the filing of affidavit of documents by the parties who had entered appearance.

8. On June 27, 1975, Mr. Justice Salil K. Roy Chowdhury dismissed the suit. The plaintiff took a change from M/s. Fox and Mondal to Anand, Das Gupta and Sagar on Jan. 14, 1976. Anand, Das Gupta and Sagar obtained the mode of service from the Sheriff's office on Jan. 21, 1976 and came to know that the service of the Writ of Summons was not effected on the defendants Nos. 3, 5 and 6.

9. Thereupon Anand, Das Gupta and Sagar inspected the cause bundle of the suit on Feb. 23, 1976 and discovered that the suit was dismissed on June 27, 1975 by Mr. Justice .Salil K. Roy Chowdhury.

10. On May 14, 1976, an application was made to Mr. Justice Salil K. Roy Chowdhury for restoration of the suit. The learned Judge allowed the application and set aside the order of dismissal. It is obvious that upon restoration the suit went back to its original position on June 27, 1975 when Mr. Justice Salil K. Roy Chowdhury had dismissed the suit.

11. On May 28, 1976 the plaintiff made an application for condonation of delay in filing the application for issue of a fresh Writ of Summons and for extension of time for returnable date of the Writ of Summons and for a direction to the Sheriff of Calcutta to serve the Writ of Summons on the defendants Nos. 3, 5 and 6.

12. This application for issue of a fresh Writ of Summons and extension of time for returnable date came up for hearing before Mr. Justice Salil K. Roy Chowdhury on Aug. 25, 1976. The learned trial Judge by his judgment delivered on that date dismissed the application. The present appeal is directed against the order of the 25th Aug., 1976.

13. It is relevant to consider the provisions of Order 9 Rule 5 (1) of the Civil P. C which are as follows :--

"Order 9, Rule 5-- (1). Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that-

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time in which case the Court may extend the time for making such application for such period as it thinks fit".

14. Order 9, Rule 5 (1) therefore provides that when a summons is returned unserved, the plaintiff has to make an application within three months from the date of the return for issue of a fresh summons, Alternatively, the plaintiff within the said period of three months may apply to the Court for extension of time for making an application for issue of a fresh summons on the grounds specified in the above order. If the plaintiff does not choose to adopt any one of these courses, the Court shall make an order that the suit be dismissed.

15. In the instant case, there is no dispute that the plaintiff failed to take any of the steps envisaged by Order 9 Rule 5 (1) of the Code within the specified period. It was argued before us that we should invoke the provisions of Sec. 5 of the Limitation Act to condone the delay in making the application for issue of a fresh summons. u/s 5 of the Limitation Act, 1963, the applicant must satisfy the Court that he had sufficient cause for not making his application within the period prescribed. In the present case, the plaintiff has failed to satisfy the learned trial Judge and this Court that it had sufficient cause for not making the application within time. The only explanation that we find for the delay is in para. 8 of the petition. The explanation is :--

"The plaintiff states that due to the aforesaid change of Attorney from M/s. Anand, Das Gupta and Sagar to Messrs. Fox and Mondal confusion arose regarding steps to be taken in the suit include ing service of summons, and as such the plaintiff and/or the plaintiff's the then Solicitors, Messrs. Fox and Mondal, did not and/or could not take steps for service of Writs of Summons upon the defendants Nos. 3, 5 and 6 including making an application for extension of time of the returnable date of the Writs of Summons, The said confusion was further confirmed when this Honourable Court was pleased to make an order on the 6th May, 1975, upon an application by the defendant No. 1, directing filing of affidavit of documents by the respective parties within the time mentioned in the said order and further direction was given for appearance of the suit in the prospective list."

16. The above explanation does not appear to us to be satisfactory. From the facts which we have stated earlier in this judgment, it would appear that the Writ of Summons was returned un-served on Jan. 7, 1974. There was a change in favour of M/s. Fox and Mondal on Jan. 30, 1974. The suit was dismissed on June 27, 1975. It is apparent that between Jan. 30, 1974 and June 27 1975 M/s. Fox and Mondal were all along the Solicitors for the plaintiff. We are not told what steps were taken for nearly a year and a half either by M/s. Fox and Mondal or by the plaintiff for issue of a fresh Writ of Summons to the defendants Nos. 3, 5 and 6. In the absence of any explanation as to what happened during this vital

period, we are not inclined to exercise our powers u/s 5 of the Limitation Act, 1963.

17. Learned Counsel for the appellant has advanced an alternative argument before us. He says that Order 9, Rule 5 (1) of the Civil P. C. would not apply to the instant case in view of the provisions of Rr. 6 and 8 of Chap. VIII of the Original Side Rules. We are of opinion that there is no substance in this alternative contention. Rr. 6 and 8 of Chap. VIII of the Original Side Rules do not in any way affect, alter or modify the provisions of Order 9, Rule 5 (1) of the Code. Order 9, Rule 5 (1) therefore, in the absence of specific provisions in the Original Side Rules, applies to the Original Side as well.

18. In the result, this appeal is dismissed but in view of the special facts of this case, we make no order as to costs.

S.K. Datta, J.

19. I agree.