

(1976) 10 DEL CK 0005

In the Delhi High Court

Case No : Regular First Appeal No. 157D of 1964

Esso Standard Eastern Inc. Company

APPELLANT

Vs

Wearwell Cycle Company

RESPONDENT

Date of Decision : 29-10-1976

Acts Referred:

Citation : (1977) 13 DLT 131 : (1977) RLR 497

Hon'ble Judges : V.S. Deshpande, J;B.C. Misra, J

Bench : Division Bench

Advocate : B. Kirpal and D.D. Sharma, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) The suit of the plaintiff-appellant has been dismissed under Order XVII rule 3 Civil Procedure Code. Hence this appeal by the plaintiff. The main question to be considered is whether the plaintiff-appellant committed a "default" within the meaning of the said rule so as to justify the dismissal of the suit by the trial court.

(2) The suit was originally brought by M/s. Esso Stand

(3) Secondly, it was argued by the respondent that the original plaintiff company, Esso Eastern Inc. ceased to exist and with that the suit filed by it abated. But it is precisely to prevent such abatement that Act No. 4 of 1974 provides that such a suit would not abate and that it shall be continued either by the Central Government in which the Indian undertaking of the company vests or by the successor in which the said undertaking would later vest. We, Therefore, allow the application for amendment.

(4) Merits Of The APPEAL- The suit of the plaintiff was dismissed on 6th June, 1964 by the following order :-

"PRESENT:-Counsel for the parties. plaintiffs were burdened with Rs. 50 costs on the previous date and Rs. 30 on the date previous to that. plaintiffs were in all to pay Rs. 80 as costs which were conditional but plaintiffs have failed to pay the

same and the counsel for the plaintiffs slates that costs were not conditional so he will now pay. But my previous orders are quite clear. Costs were conditional and as the plaintiffs are not ready to pay the costs, evidence of the plaintiffs cannot be recorded. The plaintiffs' evidence is, Therefore, deemed to be closed."

(5) As the plaintiffs' evidence has been closed and as the burden of all the issues was on the plaintiffs so case is to be deemed to have not been issued Therefore there is no necessity of deciding the issues separately. The suit is Therefore dismissed with costs.

(6) The background of the above order was as follows :-On 22nd February 1964. the case had been fixed for the evidence of the plaintiff. The process fee and diet money were. however, paid late by the plaintiff. The result was that though the summonses duly reached all the witnesses, only one of them could be served. The purpose of paying process fee and diet money early is that repeated service of summons could be attempted. If the process fee and diet money are paid late and only one attempted service can be made, then there is a risk that in one attempt all the witnesses may not be served. The plaintiff was, Therefore, to be blamed for the late payment of process fee and diet money and the trial court was justified in granting adjournment subject to payment of Rs. 30 as costs. The trial court also ordered that plaintiff shall be responsible to get the witnesses served. The next date for the evidence of the plaintiff was 7th April 1964. Again the plaintiff paid process fee late, but fortunately for it all the witnesses except one were served. The record does not show whether any of the served witnesses attended the court. However, the trial court further levied adjournment costs of Rs. 50 and allowed the previous costs also to be paid on the following date and adjourned the case for the evidence of the plaintiff for 6th June. 1964. Again the court ordered that the plaintiff was to come with A the witnesses on its own responsibility. On 6th June, 1964 the counsel for the appellant submitted that the costs imposed were not conditional and were not justified. The court, however, treated the previous order for payment of costs as being conditional to further progress of the suit. The previous order dated 7th April 1964 is in the handwriting of the Reader of the court. It is, Therefore, reasonable to suppose that there may have been some misapprehension in the mind of the counsel as to whether or not the imposition of costs was conditional. The court after perusing the record came to the conclusion that the costs were conditional. If that were so, the court ought to have allowed the appellant reasonable time to pay the costs.

(7) The learned counsel for the appellant, Shri Prakash Narain, Advocate (now a Judge of this Court), who filed the grounds of appeal has denied that the plaintiff had refused to pay the adjournment costs though the plaintiff could not pay them at the very moment when the case was called out and it wanted the court to hold over the case for a short time so that it may arrange for payment of the adjournment costs. Under the circumstances we are satisfied that the court below has erred in exercise of its power under order XVII. rule 3 CPC to decide

the suit forthwith. Further, the court dismissed the suit merely because the payment of adjournment costs had been made conditional. Clearly the court thought that it was bound by its own order and had no discretion to give more time to the plaintiff to pay costs. In this view, the trial court was in error. The trial court always had the discretion to give time to the plaintiff for the payment of adjournment costs. If any authority were needed, it is provided by Mahanth Ram Das Vs. Ganga Das, .

(8) As a rule this Court would not interfere with the discretion of the trial court in deciding the suit forthwith under Order XVII rule 3 Civil Procedure Code. But in this particular case, the trial court seems to have been under a mis-apprehension that once it made the payment of adjournment costs conditional, it had no discretion to allow more time to the plaintiff for payment of costs, It, Therefore, failed to exercise the discretion which it had in giving the plaintiff some time to pay the adjournment costs under a mistaken view of law.

(9) We, Therefore, set aside the order dated 6th June. 1964 dismissing the suit and hold that in the circumstances of the case an opportunity should have been given to the plaintiff to pay the adjournment costs. We order that the parties do appear in the trial court on the 15th November 1976 and on that date the plaintiff shall pay the Vs. M/S. Wearwell CYCIE COMPA.NY (D. B.) A adjournment costs to the defendant. Thereupon the trial court shall fix the case for evidence of the plaintiff giving the plaintiff due opportunity for payment of process fee and diet money to summon its witnesses through court without making the plaintiff responsible for enforcing the attendance of the witnesses. If the witnesses remain absent after service, it is open to the trial court to refuse to adjourn the case -unless the plaintiff prays for the issue of warrants of arrest against such witnesses. In the circumstances, we order the parties to bear their own costs in this appeal.