

(2014) 04 CAL CK 0035

In the Calcutta High Court

Case No : APD Nos. 230, 231 of 2010, CS 97, 94 of 2003, APO Nos. 8, 9 of 2011, CS Nos. 61 and 339 of 2004

NPR Finance Ltd. and Others

APPELLANT

Vs

Deepak Jhunjunwala and Others

RESPONDENT

Date of Decision : 30-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 11 Rule 21, Order 14 Rule 2(2), Order 5 Rule 19A, Order 7 Rule 11 — Limitation Act, 1963 - Section 5

Citation : (2014) 5 CHN 158

Hon'ble Judges : A.K. Banerjee, J;Arijit Banerjee, J.

Bench : Division Bench

Advocate : Abhrajit Mitra, Rajashree Ajaria and Soumabho Ghose, for the Appellant; Surajit Nath Mitra, Asish Chakraborty and Arindam Mukharjee, for the Respondent

Final Decision : Disposed off

Judgement

Arijit Banerjee, J.?These four appeals would raise a common question of law and have accordingly been heard analogously and are being disposed of by the foregoing judgment and order. The common question of law that would arise is that whether in view of the relevant provisions of the Code of Civil Procedure, 1908 and the Original Side Rules of this Court, an inordinate delay on the part of the plaintiff in taking steps for issuance of a writ of summons would necessarily warrant dismissal of the suit. We propose to review the law on the subject and then apply the same to the facts of each appeal and dispose of the appeals accordingly.

2. Section 27 of the Code of Civil Procedure provides as follows:-

"Summons to defendants.--Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed."

3. In course of his argument, Learned Counsel for the respondent has also referred to Order 9 Rule 5 of the Code of Civil Procedure which provides as follows:-

"Dismissal of suit where plaintiff, after summons returned un-served, fails for three months to apply for fresh summons.--[(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned un-served, the plaintiff fails, for a period of [one month] 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 using his best endeavors 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.]

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit."

4. The relevant provisions of the Original Side Rules of this Court are Rules 6 and 7 of Chapter VIII, which are set out hereunder:-

"Summons to be delivered to the Sheriff within 14 days,--Except as hereinafter provided every writ of summons shall be taken out and delivered to the Sheriff, for service within the local limits of the jurisdiction of this Court, or for transmission for service elsewhere. A writ of summons shall have annexed thereto a copy of the plaint and of every document, sued on, a copy of which is filed therewith. Unless an extension of time is obtained, it shall be taken out and delivered to the Sheriff within 14 days from the filing of the plaint or the date of the order of amendment. [Unless otherwise ordered, the writ of summons required to be served by registered post under the provision of Rule 19A of Order 5 of C.P.C. shall be served in all cases by the Sheriff of Calcutta.]

Sheriff not to receive summons after time.--Unless otherwise ordered, no summons shall be received by the Sheriff for service or transmission, after the expiration of the days mentioned in Rules 6 and 8,"

5. The aforesaid provisions have been considered by our Court as also by the Hon"ble Apex Court in several cases which have been cited by Learned Counsel for the parties. Let us consider those cases one by one.

6. Mr. Abhrajit Mitra, learned Counsel for the appellants in APD No. 230 and 231 of 2010 first cited the decision in the case of Hindustan Motors Ltd. Vs. National Insurance Co. Ltd.--> . In that case the Learned Single Judge had dismissed the

suit because of 15 years delay in serving the writ of summons on the defendant. The suit had been filed in 1987 and the writ of summons was served in 2002. However, a writ petition had been filed by the plaintiff in the suit in 1992 against the defendant-Insurance Company for cancellation of certain notice and in that writ petition it was disclosed that the suit was pending. Thus, the defendant-Insurance Company was aware of the pendency of the suit at least since 1992. In that background, while allowing the appeal and setting aside the judgment of the Learned Single Judge, a Division Bench of this Court observed as follows:-

"Hence, we are of the view that it was not a case of laches. It was a strategy and/or a decision taken by the appellant that they would not take any step in the suit as according to them the suit had become infructuous. The respondent also did not take any step for dismissal of the suit earlier. They were all along aware of the pendency of the suit, at least from 1992 when the writ petition was filed. When the learned Single Judge observed in His Lordship's judgment that the claim would be considered in the civil suit the respondent did not make any grievance against that part of the order. On a plain reading of the judgment and order of the Writ Court it appears that the learned Judge rather gave implied liberty to the plaintiff/appellant to proceed with their claim made in their writ petition in the pending suit. Hence, in our view, the laches, if any, prior to 2001 stood waived; firstly because of the implied liberty granted by His Lordship; secondly because of the respondents not taking any contemporaneous step either for dismissal of the suit or for cancellation of the liberty so granted by His Lordship. The learned Single Judge, however, did not approach the problem from this angle." The judgment and order of the learned Single Judge is based upon two premises i.e. (i) in the writ petition the plaintiff categorically stated that the suit had become infructuous and they intentionally did not take any steps for service of the writ of summons; (ii) because of non-service right had accrued in favour of the defendant which could not be jeopardized by curing the defect. His Lordship observed that no cogent ground was assigned by the plaintiff for extension of the returnable date of the writ petitioners in the application which resulted the order of extension passed by the Master. His Lordship relied on Order 9 Rule 5 of the Code of Civil Procedure to dismiss the suit.

Order 9 Rule 5 is a provision where a suit is liable to be dismissed in case the plaintiff does not take any step to serve the writ of summons on the defendant when it comes back un-served meaning thereby it is second stage of attempt to serve the writ of summons. Our High Court Rules do not specifically contemplate a situation where the Court is to dismiss the suit when no step at all is taken for service of the writ of summons. We are in agreement with Mr. Mitra that Order 9 Rule 5 may not be strictly applicable in the instant case. However, this is a situation worse than the situation contemplated in Order 9 Rule 5. Hence, it would be a proposition that the suit could be dismissed in a situation contemplated under Order 9 Rule 5 and could not be dismissed if the situation is worse than what was contemplated in the said provision. Such proposition would be ridiculous. Hence, following the inherent power we are of the view that the

Court can dismiss a suit if no step is taken by the plaintiff having the carriage of proceeding. To that extent we fully agree with His Lordship that the Court has inherent power to dismiss a suit in case steps are not taken in the suit by the plaintiff."

7. The next decision referred to by Mr. Mitra was in the case of Smt. Shalini Poddar & Ors. vs. M/s. VCK Share and Stock Broking Services Ltd., which is an unreported decision of a Division Bench of our Court. In that case, the Learned Master had extended the time to lodge the writ of summons on an application of the plaintiff's whereupon the writ of summons was served on the defendants. The defendants applied before the Learned Single Judge for setting aside the order of the Learned Master. The Learned Single Judge set aside the order of the Learned Master but at the same time extended time to lodge the writ of summons. Being aggrieved the defendants preferred an appeal. While dismissing the appeal the Division Bench of this Court observed as follows:-

"Coming back to the factual matrix, we would rather fall back upon the Division Bench decision on the issue in the case of Hindustan Motors Ltd. D.B. (supra). In the said decision we considered the earlier decisions and ultimately came to the conclusion that the Court would have discretion to consider as to whether the plaintiff's were prevented by sufficient cause from taking any step in the suit by serving writ of summons. If the causes are sufficient, they would be entitled to revive the suit or continue with the suit. In short, the Court would have discretion to examine the conduct of the plaintiff as well as the defendant before allowing the suit to be dismissed in limine. When a litigant approaches the Court for a substantive relief, the Court must dispose of it by adjudicating the controversy on merit that could never be done without affording opportunity to the defendant to appear and defend the said action. If the defendant is not put on notice, the action is liable to be dismissed in limine without any adjudication on merit. Still there would be a discretion vested upon the Court to examine as to what prevented the plaintiff to serve the notice upon the defendant. There could not be any automatic fiction that would make the suit infructuous in absence of writ of summons not being served within the returnable date. Our discretion would still be available, otherwise it would be travesty of justice to play in the hands of technicalities. To rely on a fiction, such proposition would be ridiculous. In the case of Hindustan Motors Ltd. D.B. (supra) we considered Order 9 Rule 5 of the Code of Civil Procedure and made a clean distinction with our Rules in the Original Side.....Hence, in our view, although the respondents were at fault in having the writ of summons served within the stipulated period still there would be discretion that we would have to exercise judiciously to find out whether the plaintiff would still deserve sympathy of this Court coupled with an order of revival of the suit particularly when the writ of summons was ultimately served.

Coming back to the factual matrix involved in the present appeal we would find, simultaneously on filing of the suit, the suit got decreed in favour of the plaintiff

to a substantial extent. After protracted litigation the suit got ultimately revived when decree was set aside that happened in 2007. Contemporaneous action was taken by the plaintiff's for service of summons. It is true, the defendants cautioned the plaintiff's by taking earlier action. However, the period upto the dismissal of the Apex Court proceeding could not be taken into consideration as both the parties were litigating.

The matter may be viewed from another angle. Even if we assume, Order 9 Rule 5 or the principle underlying thereto would still be applicable, we would find, the said provision being enacted principally to Stop frivolous suit or suits initiated by callous plaintiff's who unnecessarily burden the Court record with infructuous proceedings. In the present case, simultaneously on filing of the suit the defendants were put on notice by service of the application for judgment upon admission coupled with service of the copy of the plaint. Had the decree passed on the said application not been set aside in 2007, the defendants would have to adhere to the decree. In any event they got opportunity to defend the proceeding at every stage and ultimately became successful in getting the judgment upon admission application dismissed coupled with recall of the decree and thereby getting opportunity to defend the suit. We do not find any scope of interference when the learned Single Judge directed contested hearing of the suit. The learned Single Judge heard the parties at length, considered the cases cited by the parties and ultimately extended the returnable date upon being satisfied with the explanation offered by the plaintiff's. Such exercise of discretion by the learned Single Judge cannot be said to be perverse and thus would not deserve any interference by this Court."

8. The next decision referred by Mr. Mitra is one of the Hon"ble Apex Court in the case of Alka Gupta Vs. Narender Kumar Gupta, . Mr. Mitra drew our attention to paragraphs 16 and 17 of the said judgment which are set out hereunder:-

"Code of Civil Procedure is nothing but an exhaustive compilation-cum-enumeration of the principles of natural justice with reference to a proceeding in a Court of law. The entire object of the Code is to ensure that an adjudication is conducted by a Court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the Court. There are no short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.

The Code enumerates the circumstances in which a civil suit can be dismissed without trial. We may refer to them (not exhaustive):

(a) Dismissal as a consequence of rejection of plaint under Order 7 Rule 11 of the Code on the following grounds: (i) where it does not disclose a cause of action; (ii) where the relief in the plaint is undervalued and plaintiff fails to

correct the valuation within the time fixed; (iii) where the Court fee paid is insufficient and plaintiff fails to make good deficit within the time fixed by Court; (iv) where the suit appears from the statement in the plaint to be barred by law; (v) where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Order 7 Rule 9 of the Code.

(b) Dismissal under Order 9 Rule 2 or Rule 3 or Rule 5 or Rule 8 for non-service of summons or non-appearance or failure to apply for fresh summons.

(c) Dismissal under order 11 Rule 21 for non-compliance with an order to answer interrogatories, or for discovery or inspection of documents.

(d) Dismissal under Order 14 Rule 2(2) where issues both of law and fact arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only and it tries such issue relating to jurisdiction of the Court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the decision on such preliminary issue warrants the same.

(e) Dismissal under Order 15 Rule 1 of the Code when at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact.

(f) Dismissal under Order 15 Rule 4 of the Code for failure to produce evidence.

(g) Dismissal under Order 23 Rules 1 and 3 of the Code when a suit is withdrawn or settled out of Court."

9. The next decision relied on by Mr. Mitra is also of the Hon"ble Apex Court rendered in the case of Salem Advocate Bar Association Vs. Union of India (UOI), . Mr. Mitra relied on paragraph 16 of the said judgment which is set out:

"Our attention has been drawn to Order 7, Rule 11 to which clauses (e) and (f) have been added which enable the Court to reject the plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule 9 of Order 7. It appears to us that the said clauses being procedural would not require the automatic rejection of the plaint at the first instance. If there is any defect as contemplated by Rule 11(e) or non-compliance as referred to in Rule 11(f), the Court should ordinarily give an opportunity for rectifying the defects, and in the event of the same not being done the Court will have the liberty or the right to reject the plaint."

10. Mr. Mitra then relied on an observation of the Hon"ble Apex Court in paragraph 26 of the judgment delivered in the case of S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others, to the effect that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights to citizen under personal, property and other laws. Procedure has always been viewed as the handmade of justice and not meant to hamper

the cause of justice or sanctify miscarriage of justice.

11. Mr. Mitra then cited the decision of Hon"ble Apex Court rendered in the case of Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another, . Mr. Mitra relied on a portion of paragraph 15 of the said judgment and also on paragraph 17 thereof which are quoted below:-

"It is, thus, now well-settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal or the omission to file the vakalatnama executed by the appellant, along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the Appeal memorandum or the presentation thereof before the appellate Court was with the knowledge and authority of the appellant. Such omission or defect being one relating to procedure, it can subsequently be corrected. It is the duty of the Office to verify whether the memorandum of appeal was signed by the appellant or his authorized agent or pleader holding appropriate vakalatnama. If the Office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorized by a Vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without an opportunity to the appellant to rectify the defect.

Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by an oppressive or punitive use. The well recognized exceptions to this principle are:-

- (i) Where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.
- (ii) Where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;
- (iii) Where the non-compliance or violation is proved to be deliberate or mischievous;
- (iv) Where the rectification of defect would affect the case on merits or will affect the jurisdiction of the Court.
- (v) In case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

12. Mr. Surajit Nath Mitra, learned Senior Counsel appearing for respondent firstly relied on the decision in the case of Hindustan Motors (Supra), which has already been discussed above.

13. Next Mr. Mitra would refer to the Hon''ble Supreme Court's decision in the case of Binod Bihari Singh Vs. Union of India, . The portion of the judgment referred to by Mr. Mitra is set out hereunder:-

"A bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause action in a Court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. That apart, the appellant, in this case, having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the respondent. We may also indicate here that the High Court is justified in its finding that the objection petition has been filed within time by the respondent and the service of the copy of the application made by the appellant on the counsel of the respondent who had appeared in an earlier proceeding did not constitute a notice as contemplated under Article 119(b) of the Limitation Act. In the aforesaid circumstances, the appeal must fail and is dismissed but we make no order as to costs."

14. Then Mr. Mitra relied on the decision of the Hon''ble Apex Court in the case of Salem Advocate Bar Association, Tamil Nadu (supra) and in particular referred to paragraph 7 of the said judgment which is reproduced hereunder:-

"It was submitted by Mr. Vaidyanathan that the words "on such day not beyond thirty days from the date of the institution of the suit" seem to indicate that the summons must be served within thirty days of the date of the institution of the suit. In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears, fix outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1st January 2002, then the correct addresses of the defendants and the process fee must be filed in the Court within thirty days so that summons be issued by the Court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the Court is not in a position or is unable to or does not issue summons within thirty days, there will be, in our opinion, compliance with the provisions of section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the Court to issue the summons."

15. Mr. Mitra then referred a judgment of Division Bench of our Court in the case of Luxmi Trading Vs. Shriram Govindnarain, .

In this case it has been held that Order 9 Rule 5 of the Civil Procedure Code uses the word "Court" both in the provision directing the dismissal of the suit and in the provision providing for making out sufficient reason for the failure to serve the summons within time. Where the Rules speak of the Court making an order dismissing the suit, the "Court" contemplated can only be a Judge and cannot be the Master. The Master cannot dismiss a suit. Where, however, the Rule is speaking of the "Court" which may be satisfied that one or other of the specified reasons made it impossible for the plaintiff to serve the summons within the schedule time, the expression means or at least includes the Master. Where the plaintiff has not made an application under Order 9 Rule 5 of the Civil Procedure Code for the issue of fresh summons within three months, nor has made an application within that period for extension of time, the Master can no longer entertain an application for such extension nor an application for issue of a fresh summons. In such a case, the Court is bound to make an order that the suit be dismissed.

16. Then Mr. Mitra referred to a decision in the case of Smt. Shalini Poddar (supra) which has already been discussed above.

17. Mr. Mitra next referred to a decision in the case of Shrikant Mantri and Others Vs. Radheshyam Chotia and Others, and in particular paragraphs 2, 3, 9 and 10 of the said judgment. In the said case the plaintiff's filed the suit praying for leave under Section 92 of the Code of Civil Procedure and also under Order 1 Rule 8 thereof. In the suit the plaintiff's moved an interlocutory application for diverse reliefs. On coming to know of such proceedings, the defendant moved an application for taking the plaint off the file alleging that the leave granted under section 92 and Order 1 Rule 8 is liable to be revoked. On such application an order was passed directing that the suit be not transferred to the undefended list. All this happened between May and July 1999. In 2005 the defendants made an application for rejection of the plaint on the ground that the writ of summons remained un-served for six years and that there was no newspaper publication in terms of the leave granted under Order 1 Rule 8 of the Code of Civil Procedure. Soon, thereafter, the plaintiff's made an application for extension of the returnable date of the writ of summons and condonation of delay in making the application. The Hon'ble First Court dismissed the application of the defendants and allowed the application of the plaintiff's. The defendants appealed. After discussing the case law on the subject the Division Bench of this Court in paragraphs 9 and 10 of the judgment held as follows:-

"Considering the facts of this case and the decisions (reported and unreported) which have been cited at the Bar, we are of the view that a valuable right has accrued to the defendants in the suit and it does not appear from the records that the defendants have at any point of time waived their rights to be served with the writ of summons in the usual course prescribed by law. In Lakshmi

Trading Case (supra) the Division Bench of this Court was pleased to hold that where the plaintiff has not made an application for the issuance of fresh summons within the time prescribed nor has made an application within that period for an extension of time, the Master can no longer entertain an application for such extension, far less an application for issue of fresh summons and the Court will be bound to make an order that the sum be dismissed. The Division Bench was pleased to observe that the valuable right had accrued in favour of the defendants. In the case of Satyanarayan Todi (supra) the Hon''ble Division Bench of this Court was also not inclined to exercise powers under Section 5 of the Limitation Act in absence of proper explanation as to what happened during the relevant period. It further appears that the Hon''ble Division Bench was also pleased to observe that Rules 6 and 8 of Chapter VIII of the Original Side Rules do not in anyway affect or alter the provisions of Order 9 Rule 5(1) of the Civil Procedure Code and that Order 9 Rule 5(1) CPC, in the absence of specific provisions in the Original Side Rules, applies to the Original Side as well.

Considering the facts of the instant case we cannot accept the case made out by the plaintiff''s/respondents in their application for extension of the returnable date of the writ of summons. It cannot be said from a perusal of the said order dated 12.7.1999 passed by the Hon''ble Single Judge that the plaintiff''s/respondents were estopped from taking further steps in the suit like taking steps for issuance and service of writ of summons upon the defendants. In our view, the filing of the application for amendment of the plaint, which according to the plaintiff''s was done after the said order dated 12th July, 1999 was passed, cannot be a ground for preventing the plaintiff''s from taking steps for issuance and service of the writ of summons in accordance with relevant Rules. The plaintiff''s/respondents'' case that they intended to have the plaint in the suit amended and the summons taken out for the amended plaint and thereafter have it served upon the defendants is not an acceptable argument. Such argument, if accepted, would render the Rules meaningless. We are also not satisfied with the plaintiff''s/respondents'' case of being under bona fide impression and genuine belief that the service of the writ of summons upon the defendants prior to disposal of the defendants'' demurer application and prior to the hearing of the amendment application filed by the plaintiff''s/respondents will serve no useful purpose. After having tried to make out such case it cannot be appreciated how the plaintiff''s/respondents can shift the blame upon his learned advocate-on-Record for not taking proper steps in due time, since the plaintiff''s have themselves stated that no useful purpose would have been served if the writ of summons was served prior to the disposal of the defendants'' demurer application and prior to the hearing of the amendment application. If this be the ground for the belief of the plaintiff''s/respondents then it becomes difficult to appreciate as to how the plaintiff''s/respondents can thereafter fix the responsibility entirely upon their learned advocate-on-Record. Thus, considering the facts and circumstances of this case and the decisions which were cited at the Bar, as discussed above, we are of the view that the Hon''ble First Court was

not right in dismissing the defendants/appellants' application being G.A. No. 61 of 2005. In our view, the suit ought to be dismissed for non-service of writ of even though it has been stated by the defendants/appellants in their application for any stay that the writ of summons was served on the defendants/appellants on July 8, 2005, it is of no consequence, since the plaintiff's/respondents failed to take proper steps within the time prescribed by law and the plaintiff's have failed to give proper and cogent reason for their failure. Thus, the defendants' application for dismissal of the suit being G.A. No. 61 of 2005 stands allowed and consequently, the plaintiffs' application being G.A. No. 1286 of 2005 for extension of the returnable date of the writ of summons is dismissed. Thus the Order dated 20th June, 2005 passed by the Hon'ble First Court which is under challenge in this appeal is set aside and the A.P.O. No. 458 of 2005 is allowed."

18. The next decision relied on by Mr. Mitra is of the Hon'ble Apex Court in the case of Balwant Singh (Dead) Vs. Jagdish Singh and Others, . In this case the Supreme Court was considering as to what would be "sufficient cause" for resurrecting a proceeding which has abated or has been dismissed under Order 22 of the Code of Civil Procedure. In that context, in paragraphs 34, 35, 36 and 38 of the judgment, the Supreme Court observed as follows:-

"Liberal construction of the expression "sufficient cause" is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect "sufficient cause" as understood in law. (Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edn., 1997)

The expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.

We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention. (Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edn., 2005) Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should

be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which have to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger Benches as well as equi-Benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications."

19. Then Mr. Mitra referred to a decision of a Division Bench of our Court in the case of East Bengal Steam Services Ltd. Vs. East Bengal Steam Service and Engg. Works Workers Co-operative Industrial Society Ltd. and Others, . In the said case, it was noted that the plaintiff was in hibernation for 24 years after filing of the suit and no writ of summons was served on the defendants. On an application of the defendants, learned First Court dismissed the suit and the same was upheld by the Division Bench in the facts of the case.

20. In reply, Mr. Abhrajit Mitra relied on the decision of the Hon"ble Apex Court in the case of Manoharan Vs. Sivarajan and Others, . The Hon"ble Apex Court, referring to its earlier judgment in the case of State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, held that the power to condone the delay in approaching the Court has been conferred upon the Courts to enable them to do substantial justice to parties by disposing of matters on merits. On the facts of the case, the Hon"ble Supreme Court held that the delay in payment of Court fee by the appellant had been sufficiently explained and such delay deserve to be condoned. The Hon"ble Supreme Court advocating the liberal approach in such matters.

21. Upon a careful consideration of the decisions noted above, the law that emerges, as appears to us, is when the plaintiff defaults or unduly delays service of writ of summons on the defendant, and the defendant applies for dismissal of the suit on that ground, the Court has discretion as to whether or not to dismiss the suit. Such discretion has to be exercised on sound judicial principles. No straitjacket formula can be laid down for exercise of such discretion. It will depend on the facts of each case. The period of delay, and the conduct of the plaintiff would obviously be two very important factors to be considered for exercise of such discretion.

22. The object of service of writ of summons on the defendant is to make him aware that a suit has been filed against him. If the defendant is otherwise aware

of the institution of the suit e.g. by reason of participation in interlocutory proceeding or any parallel proceeding, the gravity of non-service or unduly delayed service of writ of summons would obviously be mitigated. In some cases it may happen that due to prolonged talks of settlement between the parties, the plaintiff has refrained from taking steps for service of writ of summons on the defendant. In such cases also the conduct of the plaintiff would not be so deplorable as to punish him by dismissing his suit.

23. It is true that procedure is the handmade of justice and procedural technicalities should not be allowed to defeat substantial justice. However, at the same time, an indolent litigant would not deserve sympathy from Court. One cannot be allowed to take the process of law lightly and burden Court records unnecessarily. Just as the provisions of the Limitation Act debar a person from approaching a legal forum if he has slept over his rights, the plaintiff who has filed a suit and has slept over it deserves no sympathy from the Court.

24. In the light of the above discussion let us now take up the four appeals one by one and dispose of them on facts.

APD No. 230 of 2010 arising out of CS No. 97 of 2003 (NPR Finance Ltd. vs. Deepak Jhunjhunwala):-

25. In the above suit the plaint was filed on 28th March, 2003. For six years the plaintiff took no steps in the matter. In February, 2009 the plaintiff made an application before the Learned Master of this Court praying for issuance of writ of summons and for leave to the Sheriff to accept the same. By an order dated 24th February, 2009 the learned Master allowed such application. The writ of summons was issued on 5th March, 2009. Upon service of the writ of summons, the defendant, who was hitherto in the dark about the suit, made enquiries and came to know of the aforesaid facts. The defendant then applied for recalling of the order of the Learned Master and for dismissal of the suit.

26. The learned Judge by his judgment and order impugned herein, set aside the order of the Learned Master and allowed the defendant's application, thus, dismissing the suit.

27. We have gone through the erudite judgment of the Learned Judge carefully. We agree with His Lordship that the conduct of the plaintiff has been deplorable and highly unsatisfactory. Going into hibernation for six years after filing the suit is quite un-supportable. However, we feel that ends of justice would be subserved if rather than non-suiting the plaintiff we put it on terms. We do not feel that such a prejudice has been caused to the defendant that cannot be compensated by awarding heavy costs in his favour. As noted by the Hon'ble Supreme Court in the case of Monoharan (Supra) the Court should always endeavour to adjudicate a lis on merits rather than dispose it of on technical points.

28. Accordingly, we set aside the judgment and order impugned subject to the

appellant paying costs assessed at Rs. 5 lakhs to the respondent. The appellant's claim in the suit is for money decree of Rs. 3,61,04,191.80 along with interest at the rate of 16.5% per annum. If, according to the appellant, its claim is genuine and bona fide, the appellant should not mind paying the aforesaid costs in order to be able to proceed with the suit. If the appellant pays the costs, which is to be paid within a week from date, it will be at liberty to proceed with the suit by taking steps for issuance and lodging of fresh writ of summons. In default of payment of the costs within the time aforesaid, this appeal shall stand dismissed with costs assessed at 1000 gms.

APD No. 231 of 2010 arising out of CS No. 94 of 2003 (Rani Leasing & Finance Ltd. vs. Deepak Jhunjhunwala):-

29. The facts of this appeal are almost identical with those of the earlier appeal being APD No. 230 of 2010. In this case also the plaint was presented in March, 2003. The writ of summons was issued on 1st April, 2003 but no steps were taken thereafter by the plaintiff to deliver the same to the Sheriff for service on the defendant. By an order dated 24th February, 2009, the Master extended the time for issuance of fresh writ of summons and for lodging the same with Sheriff. On 23rd March, 2009 the defendant was served with the writ of summons and the plaint. Thereafter, the defendant made enquiries and came to know of the aforesaid facts. The defendant applied for recalling of the order of the Master dated 24th February, 2009 and for dismissal of the suit. By the judgment and order impugned in this appeal the Hon'ble First Court recalled the order and dismissed the suit.

30. The only factual difference in this appeal is that the claim of the plaintiff's is Rs. 43,57,482/-. Since the facts in this appeal are otherwise identical with the facts of the other appeal being APD No. 230 of 2010, our judgment and order in APD No. 230 of 2010 will also govern the present appeal.

APO No. 8 of 2011 (Stock Holding Corporation of India Ltd. vs. The Calcutta Stock Exchange Association Ltd.)

31. The appellant filed CS No. 61 of 2004 on 11th March, 2004 claiming a money decree for Rs. 2,89,08,275/- and a further decree for Rs. 5,00,00,000/- on account of damages. For the next six years no steps were taken by the appellant for issuance or service of the writ of summons on the respondents. Sometime, in April 2010 the appellant made an application for issuance of writ of summons and lodging the same with the Sheriff. The application was strongly opposed by the respondents and by the judgment and order impugned herein, the Hon'ble First Court dismissed the application.

32. We have carefully considered the pleadings filed before the Hon'ble First Court and also the judgment and order passed by the learned Judge. We are completely in agreement with the Learned Judge that the application is bald and sketchy. No convincing or credible explanation has been advanced by the appellant for its deep slumber over a period of six years. Purported reasons

sought to be given are vague and unacceptable. However, for the reasons stated in our judgment in APD 230 of 2010 we are inclined to grant an opportunity to the appellant to proceed with its suit subject to it compensating the respondents with costs assessed at Rs. 5 lakhs. Accordingly the judgment and order impugned herein is set aside subject to the appellant paying to each of the respondents a sum of Rs. 2.5 lakhs within a week from date. If such payment is made, the appellant will be at liberty to proceed with the suit by taking appropriate steps for issuance of writ of summons and service thereof on the defendants. In default of payment of costs within the said period this appeal shall stand dismissed.

APO No. 9 of 2011 (Stock Holding Corporation of India Ltd. vs. The Calcutta Stock Exchange Association Ltd.)

33. The facts of this appeal are almost identical with the facts of APO No. 8 of 2011 excepting that the quantum of the appellant/plaintiff's claim in the suit is much more in this case. Accordingly our judgment in APO No. 9 of 2011 will govern the present appeal as well.

Conclusion: The four appeals are accordingly disposed of.

A.K. Banerjee, J.

I agree.