

(1966) 07 CAL CK 0011

In the Calcutta High Court

Case No : Appeal from Original Order No. 9 of 1956

Pannalal Ramnarain

APPELLANT

Vs

The Bengal Nagpur Cotton Mills Ltd.

RESPONDENT

Date of Decision : 25-07-1966

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 20
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, Order 22 Rule 3(1), Order 22 Rule 9, Order 22 Rule 9(2), Order 22 Rule 9(3)
Industries (Development and Regulation) Act, 1951 — Section 18A
Limitation Act, 1908 — Section 5
Limitation Act, 1963 — Article 137, 10, 11, 12, 13

Citation : (1968) 1 ILR (Cal) 95

Hon'ble Judges : Mitter, J; Masud, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Mitter, J.—The point of law arising in this appeal and in the next two Nos. 10 and 11 of 1966 is the same and the appeals can conveniently be disposed of together. The question is whether the application of Pannalal Ramnarain in appeal No. 9 of 1966 for dismissal of suit No. 1614 of 1963 and for setting aside the ex parte order of May 27, 1965, directing the issue of fresh writ of summons in the suit should have been allowed by the learned trial Judge.

2. The facts are as follows: The Bengal Nagpur Cotton Mills Limited filed a suit No. 1614 of 1963 on September 6, 1963, against Pannalal Ramnarain, Ramnarain Rathi, Minda Ram Mohta and Textile Agents for recovery of a sum of Rs. 87341-50 as price of goods sold and delivered in September 1960. The writ of summons in the suit was issued on September 23, 1963, and the returnable date thereof was October 25, 1963. On November 27, 1963, an application was made by the Plaintiff for leave to lodge the writ with the Sheriff within a fortnight from the date of issue and for extension of the returnable date of the writ by eight weeks from the date of the order and for other directions. On December 2,

1963 the Master made an order in terms of the prayers of the said application. The order of extension was actually endorsed on the application on December 9, 1963. On December 10, 1963, the writ was received by the Sheriff's office. On January 10, 1964, the Sheriff issued a certificate that no one on behalf of the Plaintiff had attended at his office to have the writ of summons served on the Defendants. On January 28, 1964, the writ of summons was actually returned by the office of the Registrar. The Plaintiff does not appear to have taken any steps in the matter till May 27, 1965, when an application was presented to this Court on the basis of a petition affirmed by one Baijnath Garg praying for condonation of the delay in making the application, for extension of time to make the application for the issue of fresh writ of summons until May 27, 1965, and for the issue of a writ of summons for effecting service thereof upon the Defendants. In the petition it was stated that the Plaintiff could take no steps after lodging of the writ with the Sheriff on December 16, 1963, because of certain difficulties which cropped up in the management of the affairs of the Plaintiff company. By an order dated December 17, 1963, published in the Gazette of India, the Central Government made an order purporting to exercise power under the provisions of Section 18A of the Industrial (Development and Regulation) Act of 1951 authorising Rajaram & Bros. to take up the management of the undertaking of the Plaintiff at Rajnandgaon in M.P. under the terms and conditions specified in the said order. There was considerable doubt as to the validity scope and effect of the said order and on January 21, 1964, one Ramkumar Agarwalla and others being shareholders and directors of the Plaintiff moved an application to this Court in its writ jurisdiction praying for the issue of a writ in the nature of certiorari calling upon the Respondents Union of India, State of Madhya Pradesh and Messrs. Rajaram & Brothers for quashing and setting aside the said order dated December 17, 1963. Although a Rule had been issued on the said application it was still pending on May 27, 1965. In view of the pendency of the writ petition considerable doubt arose as to whether the Plaintiff by its Board of Directors or the said Rajaram & Brothers could prosecute and continue the suit filed in this Court. In view of this controversy, it was not possible for anybody to instruct Messrs. Mukherji & Biswas (Solicitors for the Plaintiff) to take steps for issue and service of a fresh writ of summons. These facts and grounds which were stated in the petition are sufficient cause for extension of time to make the application for the issue of a fresh writ of summons. On this application an order was made by Law, J. to the effect that the time for the Plaintiff company to make an application be extended till the date of the order with further order that fresh writ of summons do issue for service on the Defendants and the same be returnable within seven weeks from the date of the signing of the order. On September 28, 1965, the writ of summons was served on the Defendants Nos. 1, 2 and 3. This Court remained closed for the long vacation from September 30, 1965 to November 14, 1965. The Appellant before us gave instructions to its Solicitors to search the records of the suit. On November 15, 1965, the Defendants entered appearance in the suit and on November 18, 1965, the present application out of which the appeal has arisen, was taken out.

3. The prayers in the application have already been stated. After setting forth the main facts the Appellant stated in para. 6 of the petition that it was suppressed from the said petition of the Plaintiff and from this Court when the order of May 27, 1965 was made that the writ of summons issued in this suit had been returned unserved and that the time provided by Order 9, Rule 5 of the CPC to make the application had then expired.

it was submitted in para. 7 of the petition that the said ex parte order dated May 27, 1965, was procured by the Plaintiff by suppression of material facts and by misleading this Court. The substantial complaint of the Appellant was that inasmuch as no application had been made within a period of three months from the date of the return of the writ of summons unserved no order could be made extending the time for making the application for issue of a fresh writ of summons and the suit was liable to be dismissed as against the Appellant. A further contention was raised that the learned Judge making the order dated May 27, 1965, had no jurisdiction to do so.

4. An affidavit-in-opposition was affirmed on behalf of the Plaintiff by one Harish Chandra Rishi. There it was contended, inter alia, that the Appellant having unconditionally appeared in the suit in pursuance of the writ of summons issued under the order of Court dated May 27, 1965, was not entitled to make the application for the reliefs claimed. It was said that the order of May 27, 1965, was rightly made on the facts and circumstances of the case and it was not beyond the competence of the learned Judge making it. An affidavit-in-reply was used on December 6, 1965. On December 22, 1965, an order was made by Ray, J. that the Court did not think fit to make any order on the application excepting that the Appellants were to be at liberty to file their written statement in suit within a fortnight from the date of the reopening of the Court after the ensuing X-mas vacation and it is this order which is now in appeal before us.

5. The points which we have to consider are as follows:

(i) Did the learned Judge Law, J. have jurisdiction to make the order directing the issue of a fresh writ of summons by order dated May 27, 1965, under the provisions of Order 9, Rule 5 of the Code of Civil Procedure?

(ii) Is Section 5 of the Limitation Act applicable to a case where no application had been made for the issue of a fresh writ of summons or for extension of time to make an application for the purpose within three months from the expiry of the returnable date of the writ of summons?

(iii) Was it competent for the Appellant to make the application dated November 18, 1965, after having entered appearance in the suit without any protest and specially in view of the fact that the application also included a prayer for extension of time to file the written statement?

(iv) Is the order dated December 22, 1965, appealable? And,

(v) Should we allow the appeal and make an order that the suit should be

dismissed on the facts and circumstances of the case?

6. Order 9, Rule 5 provides as follows:

(1) Where, after a summons has been issued to the Defendant or to one of several Defendants and returned unserved, the 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.

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

7. It was argued on behalf of the Appellant that the above provision of law stands by itself, that it is of a mandatory nature and must be given effect to strictly. The interpretation put upon Sub-section (1) by Mr. Bhabhra was that once a writ of summons which has issued out of the Court is returned unserved to the Court the Plaintiff may apply within three months from the date of the return for the issue of a fresh writ. He is entitled as a matter of right to make such an application no matter why the writ of summons was returned unserved. It was further argued that this right of the Plaintiff is subject to the qualification that if he does not apply for the issue of a fresh summons within three months it is his bounden duty to make an application to the Court and satisfy it within the said period that the time for making such an application ought to be suitably extended in view of any of the grounds set forth in Sub-clauses (a), (b) and (c) of the Rule. As at the stage when the Plaintiff makes an application for extension of time the Defendant is not in the picture at all, that the Plaintiff need do is to make out a prima facie case to the satisfaction of the Court that the situation calls for an extension of time to make the application for the issue of a fresh summons. In other words even if the Plaintiff has failed in his duty to make the service effective on the Defendant he has only to come to Court within the period of three months and make an application for the issue of a fresh summons. If, however, there has been no want of diligence on his part but he has failed after using his best endeavours to discover the residence of the Defendant or where he finds the Defendant avoiding service of process or where there is any other sufficient cause preventing him from making the service effective, he can within the period of three months make an application to the Court on the grounds

mentioned for extension of time to enable him to make a suitable application so that the Court would not be called upon to make an order that the suit be dismissed.

8. In my opinion, the object of Order 9, Rule 5 is that the Plaintiff must try his best to serve the Defendant personally with the writ of summons. So far as Clause (b) is concerned Order 5, Rule 20 makes an express provision for what is known as substituted service which is as effectual as if the Defendant had been served personally. Clause (c), in my opinion, gives the Court the power to enlarge the time for making an application on grounds other than those stated in Clauses (a) and (b). I can visualise a situation in which Clause (c) may be applicable. Take for instance the case where the Plaintiff who is the only person who can identify the Defendant is taken ill and cannot help the process server in identifying him, the Court should not penalise him by dismissing his suit. If the Plaintiff is so seriously ill for the space of three months after the return of the writ of summons to the Court as not to be able to make an application for extension of time, it would be manifestly unjust that his suit should be dismissed and his valuable claim against the Defendant should be lost for ever if at the date when he is well enough to make an application for extension the period of limitation for the cause of action in the suit has already expired. Again consider the case where the Plaintiff who filed the suit dies before the service of writ of summons. His heirs and legal representatives may not know anything about the institution of the suit for months thereafter. The suit will abate under the provision of Sub-rule (1) of Order 22, Rule 3 of the Code of Civil Procedure. But it will be open to the person claiming to be the legal representative of the deceased Plaintiff to apply for setting aside the abatement of the suit or its dismissal under the provision of Sub-rule (2) of Rule 9 of Order 22. It is further to be noted that under Sub-rule (3) of the same Rule the provisions of Section 5 of the Indian Limitation Act have been expressly made applicable. Under Order 22, Rule 3 the abatement is automatic, but under Order 9, Rule 5 the Court has to make an order that the suit be dismissed. Before making an order for dismissal the Court has to apply its mind to the facts of the case. As a suit in which the writ of summons has not been served will not appear in the cause list in the ordinary way the question of dismissal of the suit will ordinarily not arise unless under the special provisions of the rules of the Original Side of the Court the suit is placed on the special list for disposal. If and when that is done the Court must consider the facts of the case and make the order which justice requires. The Court has thus jurisdiction to consider the merits of the case and make the appropriate order. I do not see any reason to hold that the use of the word "shall" in place of the word "may" before the amendment of Sub-rule (1) by Act XXIV of 1920 makes it obligatory on the Court to pass an order for dismissal even if it is satisfied that there was sufficient cause for the Plaintiff's inability to make an application within the period mentioned in Sub-rule (1) of Order 9, Rule 5. If it was the intention of the Legislature that any suit in which no application is made within three months of the return of the writ of summons in

terms of Sub-rule (1) should stand dismissed irrespective of the question as to whether there was sufficient cause for the making of an application beyond the period of three months from the date of the return of the writ the language of the Rule should have been "the suit shall stand dismissed as against such Defendant" in place of the words "the Court shall make an order that the suit be dismissed as against such Defendant." After all the intention of the Legislature in enacting Sub-rule (1) of Order 9, Rule 5 was that the Plaintiff should not be tardy in prosecuting his suit and he was put in peril of having his suit dismissed unless he was in a position to satisfy the Court that his failure to take steps in terms of Sub-rule (1) was beyond his control and there was sufficient cause justifying extension of time for the issue of a fresh writ of summons. The Legislature has fixed varying periods of limitation for institution of suits and Section 5 of the Limitation Act is not applicable to suits, but once a suit is filed within the period of limitation, I see no reason why the Court should view a period fixed for an application for the issue of a writ in the same light as a period of limitation for a suit.

9. The cases on Order 9, Rule 5 regarding limitation which were cited at the bar may now be considered. In *Shaw & Co. v. B. Shamaldas & Co.* ILR (1955) 1 Cal. 187 (decided in December, 1953) a learned Judge of this Court expressed the opinion that a Plaintiff who allowed the period of three months from the date of the unsuccessful service to expire without making first an application and also secondly without satisfying the Court within that period of time on the grounds stated in Clauses (a), (b) and (c) of Order IX, Rule 5(1) incurred the penalty of dismissal of his suit thereunder. Although this judgment was not noted in *Mrinalini Dassi v. Kumar Surjendu Narayan Deb* ILR (1956) 1 Cal. 197 (decided in January, 1954), a Division Bench of this Court consisting of Chakravartti, C.J. and S.R. Das Gupta, J. were of the view that Order 9, Rule 5 obviously intended to impose a penalty on the Plaintiff. In *Mrinalini Dassi's* case ILR (1956) 1 Cal. 197 the suit was filed under the provisions of Order XXXVII of the CPC and the writ of summons was issued on May 31, 1946, which was returned unserved by the Sheriff on August 2 of that year. No one took any notice of the suit until February, 1950, when the Court issued a notice to the Plaintiff that the suit would be set down on the special list which meant that it would appear for dismissal on account of default, unless good cause to the contrary was shown. Thereupon the Appellant showed some cause by a petition stating that the Solicitor in charge of the case had died in September, 1946, after which no steps had been taken. The matter was adjourned by the learned Judge who was taking special list on February 8, 1950. Presumably he did so in order to give the Appellant an opportunity to serve the Respondents, if that course was still open to her. On February 17, 1950, the Appellant made an application before the Master praying for the issue of fresh summons and by an order passed on the same date the Master directed fresh summons to issue the only ground in the application to the Master being the death of the Solicitor in charge of the case. The Defendants filed a warrant of appearance and made an application before the learned Judge

taking interlocutory matters praying that the order of the Master directing the issue of fresh summonses be set aside and the suit be dismissed under Order IX, Rule 5. Both these contentions were given effect to by the learned Judge and the matter was taken up in appeal. The Court of Appeal held that the order of the Master for the issue of a writ of summons might be erroneous, but it was not without jurisdiction nor a nullity. Chakravartti, C.J. said that

it may be that the application before him was not made within the time limited by law and did not also satisfy the statutory conditions which applications of that kind are required to satisfy. These deficiencies might have the effect of affecting the legality of the order passed by the learned Master, but in view of the fact that he had jurisdiction over the subject-matter, the order would operate as a valid order till it was set aside in appeal. As had so often been pointed out, and what indeed has become now a common place of legal knowledge there is a fundamental distinction between existence of jurisdiction and error in its exercise. Jurisdiction depends upon the power of the authority concerned to take cognizance of a matter and if that power exists the errors he may commit in the process of taking cognizance, either by disregarding certain procedural rules or failing to comply with certain statutory requirements, may make the order passed by him illegal, but will not make it null and void.

After dealing with other contentions the learned Chief Justice observed that

the position is that the present case was one where there was, in fact, a service of summons which could not be disregarded and that being so, the case was not one which came within the ambit of Order IX, Rule 5.... The suit, at the time it came before the learned Judge, was not a suit in which the summonses had been returned unserved and that being so, Order IX, Rule 5 had no application.

The main contention before the Court of Appeal was that the suit being one under the provisions of Order 37 of the CPC the Defendant, who had not taken leave of the Court to enter appearance therein, was not competent to move an application for the reliefs claimed before the learned Judge.

10. In another case *Laxmi Trading v. Shri Ram Gobind Narain* 61 C.W.N. 212 the same learned Chief Justice sitting with Lahiri, J. had to consider the ambit of Order IX, Rule 5. In this case judgment was delivered on May 2, 1955. The suit was instituted on June 25, 1953. The writ of summons was issued on July 3, 1953, and it was lodged with the Sheriff on July 7. The writ of summons was returned by the Sheriff on February 13, 1954. The application for issue of fresh summons was taken out on May 17, 1954. The learned Master who was moved in this connection came to the conclusion that he could make no order in view of the provisions of Order IX, Rule 5. This was taken up in appeal to the learned Judge taking interlocutory matters without any success. A further appeal was then taken to the Court of Appeal without notice to the Defendants. Chakravartti, C.J. observed that a valuable right had accrued in favour of the Defendants and it was not proper that such appeal should be heard without giving an opportunity

to the party to be affected thereby. Interpreting Order 9, Rule 5 the learned Chief Justice was of the view that

where the Plaintiff has not made an application for the issue of a fresh summons within three months, 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 the issue of a fresh summons and that in the situation which arises, the Court will be bound to make an order that the suit be dismissed.

11. It will be noted at once that there is some difference between the facts of Laxmi Trading's case Supra from those in Mrinalini Dassi's case Supra. In Laxmi Trading's case the Master and the Court both refused to make an order for extension of time under Order 9, Rule 5, while in Mrinalini Dassi's case the order for issue of a summons had been made and the Court held that once the order for issue of a fresh summons was passed, Order 9, Rule 5 could no longer be operative. In my view, notwithstanding the change of the language of the Rule by substitution of the word "shall" in place of the word "may" by the Act of 1920 (XXIV of 1920) the Legislature did not intend that the Court would be powerless to extend the time for making an application preferred beyond the period of three months from the date of the return of the writ of summons by the serving officer. This was the view taken by Ray, J. in Shri Ramanuj Corporation Private Limited v. Benarashi Lal Agarwalla Suit No. 2074 of 1962, unreported, and I concur with the opinion therein expressed so far as this point is concerned. I respectfully differ from the view to the contrary in Shaw & Co.'s case Supra.

12. The next question to consider is whether Section 5 of the Limitation Act of 1963 is applicable where the Plaintiff makes an application beyond the period in Order 9, Rule 5.

13. u/s 5,

any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the Appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

It will be noticed at once that the section is of very wide import and in terms applies to all applications under the CPC excepting those covered by Order XXI. We must also take into consideration Sections 3 and 29 of the Act. u/s 3(1),

subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set as a defence.

Under Section 29(2),

where any special or local law prescribes for any suit, appeal or application a

period of limitation different from the period prescribed by the schedule, the provision of Section 3 shall apply as if such period were the period prescribed by the schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in Sections 4 and 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

Under Section 2(j) of the Limitation Act "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the schedule and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act. The schedule does not prescribe any period for the purpose of application under Order 9, Rule 5. Obviously it was not the intention of the Legislature that Article 137 of the new Limitation Act which prescribes the period of three years in the case of any application for which no period of limitation is provided elsewhere should be available to the Plaintiff from the date when the right to apply accrued. In my opinion, Order 9, Rule 5(1) is a special law within the meaning of Section 29(2) of the Limitation Act which brings in its chain the operation of Section 3 unless the Court makes an order u/s 5 of the Limitation Act.

14. In this connection it is necessary to note the departure made in the new Limitation Act from the wording of the old Act so far as Section 5 is concerned. Under the old Act, Section 5 did not contain the words "other than applications under any of the provisions of Order 21 of the Code of Civil Procedure". The Legislature has now thought fit to exclude the operation of Section 5 from all applications under Order 21 evidently with the object that execution of decrees should be proceeded with as quickly as possible. Apart from this, however, as already pointed out, Order 22, Rule 9 of the CPC expressly provides for the application of Section 5 of the Limitation Act. This, however, does not in my opinion mean that where there is no provision like Clause (3) of Rule 9 of Order 22 the provisions of Section 5 of the Indian Limitation Act being of general application will only be excluded when its exclusion is expressly provided for. In my opinion, there is no express exclusion of Section 5 of the Limitation Act to applications under Order 9, Rule 5(1).

15. The next question is whether the order is appealable. There is no provision for an appeal under Order 43 of the Code of Civil Procedure. The appealability of the order will, therefore, depend on whether it amounts to a judgment within the meaning of Clause 15 of the Letters Patent. If we were to apply the test laid down by Couch, C.J. in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Co. Limited* 8 Ben.L.R. 433 we would have to ascertain whether the order is a decision which affected the merits of the question between the parties by determining some right or liability. Clearly there is no such determination. The learned Chief Justice referred to the case of an order for admission of a plaint and an order for its rejection and said:

the former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally so far as the Court which makes the order is concerned, that the suit, as brought will not lie. The decision, therefore, is a judgment in the proper sense of the term.

In my opinion, the order in this case is somewhat akin to an order for the admission of a plaint in that the Court determines that a fresh writ of summons should issue for service on the Defendant.

16. We may also test the matter in the light of the decision of White, C.J. in *Tuljaram Row v. Alagappa Chettiar* ILR 35 Mad. 1. There the learned Chief Justice said that the test seemed to him to be not what was the form of the adjudication but what was its effect in the suit or proceeding in which it was made. According to the learned Chief Justice,

if its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause.

17. In my view, applying this test to the facts of the case it cannot be held that the order amounted to a judgment.

18. Reference may also be made to the judgment of Chakravartti, C.J. in *Mrinalini Dassi's* case *Supra*. The order in this case is not one made under Order 9, Rule 5 but one challenging an order made under that rule read with Section 5 of the Limitation Act.

19. In *Braja Gopal Ray Burman v. Amar Chandra Bhattacharjee* ILR 56 Cal. 135 the question arose whether an appeal lay under Clause 15 of the Letters Patent in a case where a second appeal had been presented out of time and the Appellant obtained a rule calling upon the opposite party to show cause why the appeal should not be registered, and the two Judges composing the Bench differing in opinion the Rule was made absolute with the opinion of the senior Judge. Rankin, C.J., who delivered the judgment of the Bench consisting of three Judges, observed that the cases which bore upon the competence of an appeal under Clause 15 of the Letters Patent from a decision u/s 5 of the Limitation Act admitting an appeal after the period of limitation prescribed required to be separated from cases which proceeded upon the footing that the decision appealed from had put an end to the litigation. According to the learned Chief Justice it was not correct to say that

an order admitting an appeal u/s 5 deprives the Respondent of a vested right granted to him by Section 3. The opening words of Section 3 are subject to the provisions contained in Sections 4 to 25 inclusive. Section 5 applies, broadly speaking, to cases in which the limitation period is short. It does not apply so as to give a power of extending the period of limitation prescribed for suits. It

appears to me to be the intention of the Limitation Act that where an Appellant has proceeded with due diligence, no right shall accrue to the Respondent by reason merely of the lapse of the statutory period.

Rankin, C.J. went on to add

that on the whole, and not without some doubt, I think that the mere circumstance that an order puts in peril the finality of a decision given in the Respondent's favour, does not of itself make that order a judgment within the meaning of Clause 15 of the Letters Patent.

In the view of the learned Chief Justice the same might be said of an order restoring a suit under Order 9, Rule 9 or any order giving leave to appeal or granting a certificate that a case was a fit one to be taken on appeal. His Lordship doubted whether any distinction could logically or practically be maintained between an order setting aside an abatement and an order restoring a suit after dismissal for default, but the order appealed from being one declaring that the appeal may be entertained did not set anything aside.

20. It is to be noted that this Court has held in *Sarat Chandra Sarkar v. Maihar Stone and Lime Co. Ltd.* ILR 49 Cal. 62 that an order setting aside the abatement of a suit was judgment under Clause 15 of the Letters Patent. In my humble opinion there is some difference between an order setting aside an abatement and an order directing the issue of a fresh writ of summons under Order 9, Rule 5 after condoning the delay in making the application on the strength of Section 5 of the Limitation Act. Order 9, Rule 5 does not by itself put an end to the suit. If its terms are not complied with it directs the Court to make an order dismissing the suit. Whether the circumstances of the case are such as to exercise the discretion u/s 5 of the Limitation Act is for the Court to consider when called upon to do so and the exercise of such discretion does not, in my opinion, take away any valuable right of the Defendant but merely removes a clog from the course of the suit. In setting aside an abatement, however, the order of the Court revitalises a suit which for all practical purposes was dead. Such an order decides that the heirs and legal representatives of a deceased Plaintiff have a right to sue the Defendant or that the Plaintiff has a right to sue the heirs and legal representatives of a deceased Defendant. The decision is one which determines the right of one person to proceed with the suit against another. This is very different from a case where a suit is on the file, but the Plaintiff has not been able to make an application within the period mentioned in Order 9, Rule 5 for the issue of a fresh writ of summons. The Plaintiff's cause of action or his right to sue is not in dispute. The only question is whether he has been so lacking in diligence that the Court ought not to help him by extending the time for the issue of a fresh writ. There is no decision in such a case on the merits of the case or the rights of the parties in controversy. The adjudication may put the Defendant in peril of a decree being passed against him eventually, but it does nothing more and in my opinion the order appealed from is not a judgment within the meaning of the expression used in Clause 15 of the Letters

Patent.

21. In my opinion, the Appellant was not precluded from making an application in this case after having entered appearance in the suit without any protest. Nor in my view was he precluded from challenging the order extending the time for the issue of a fresh writ of summons because he had also included a prayer for extension of time to file his written statement.

22. Our CPC does not envisage any appearance by a Defendant under protest except under Order XXX, Rule 8 which is limited to the case of a person served with the summons as a partner when he denies that he is a partner. To the same effect are the provisions in chap. 8, Rule 20 of the Original Side Rules of this Court. So far as the Rules of the Supreme Court in England are concerned there is a provision for entering a conditional appearance as also appearance under protest. Thus Order 12, Rule 30 of the Rules of the Supreme Court envisage a Defendant entering a conditional appearance. Order 48A, Rule 7 of the Rules of the Supreme Court in England is on the same lines as Order 30, Rule 8 of our Code of Civil Procedure. Appearance under protest is well recognised in England so far as admiralty actions are concerned. According to the annotation in the Annual Practice under Order 12, Rule 30 of the Rules in England the term

appearance under protest is more usually applied to an appearance by a person served as a partner under Order 48A, Rules 3 & 4, but who denies that he is a partner, for entry of which no leave is required.

Further it seems to be well-settled in England that

a conditional appearance or appearance under protest is a complete appearance to the action for all purposes, subject only to the right reserved by the Defendant to apply to set aside the writ or the service thereof, on any ground which he can sustain. A Defendant has the right to appear conditionally where he has a bona fide intention to dispute the jurisdiction of the Court.

23. In England there is a special provision in the Rules of the Supreme Court with regard to the currency of a writ of summons which has no counterpart either in our CPC or in our Original Side Rules. Thus Order 8, Rule 1 of the Rules of the Supreme Court provides that

no original writ of summons shall be in force for more than 12 months from the day of the date thereof, including the day of such date; but if any Defendant therein named shall not have been served therewith the Plaintiff may, before the expiration of the 12 months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such Defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for 6 months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ.... A writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of

the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

24. Our attention was drawn to the judgment of the Court of Appeal in England in *Sheldon v. Brown Bayley's Steel Works Ltd. and Dawanays Ltd.* (1953) 2 Q.B. 393 where it was held that a writ which had not been served within 12 months was not nullity. Referring to the provision for enlarging the time under Order 64, Rule 7, Singleton, L.J. observed that the Court could grant an application which resulted in making a writ just as effective as it was before the 12 months period had elapsed. According to the learned Lord Justice,

the question was whether the Court would exercise the discretion which it had under Order 64, Rule 7 to renew a writ when the renewal would deprive a Defendant of the benefit of a limitation which had accrued, and the judgment was to the effect that discretion ought not be exercised in such circumstances.

In *Sheldon's* case *Supra* the facts were as follows: The writ in the action under the Fatal Accidents Act, 1846, was issued on October 3, 1951, just within the 12 months limit prescribed by Section 3 of the Act. There were two Defendants, neither of whom was served with the writ within 12 months from the day of its date. The first Defendant made a conditional appearance and successfully applied to have service upon them set aside. The second Defendant *Dawanays Ltd.* entered an unconditional appearance. Thereafter, they made an application of the kind made by the first Defendant. The Master granted the application and set aside the service of the writ. On appeal, Barry, J. upheld the order of the Master. This was upset in appeal by the Court of Appeal. Singleton, L.J. referring to Order 64, Rule 7 which provided that

a Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed,

and said:

it has been held over a long period of years that this Rule enables the Court to renew a writ even though application is not made until after the expiration of 12 months laid down under Order 8, Rule 1. The Court will not normally exercise its discretion in favour of the renewal of a writ after the period of service has expired if the effect of doing so will be to deprive a Defendant of the benefit of a limitation which has accrued.

According to the learned Lord Justice,

the unconditional appearance by *Dawanays Ltd.* is a step in the action; it amounts to a waiver with regard to service; it prevents *Dawanays Ltd.* from being able to contend successfully that the service on them is bad.

The reasoning of the learned Lord Justice was that as it was open to a Defendant, under Order 12, Rule 30, before appearing, without obtaining an order to enter or entering a conditional appearance, to take out a summons in the Queen's Bench Division and in any other Division take out a summons or serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorising such service, it was incumbent upon the Defendant to have recourse to that. As against this it was contended before the Court of Appeal that there was still an inherent jurisdiction in the Court to set aside service of the writ. This was repelled by Singleton, L.J. observing

I do not see why we should be asked to act upon any such assumption when there is a precise rule which is clear in its terms, and which appears to recognize the entering of an unconditional appearance as a step in the action.

According to Denning, L.J., the service out of time was only an irregularity which could be waived. It is to be noted that the Court of Appeal did not follow the decision in *Battersby and Ors. v. Anglo-American Oil Co. Ltd. and Ors.* (1945) K.B. 23, where Goddard, L.J. who delivered the judgment of the Court of Appeal had said that:

When the Court was apprised of the fact that the period of limitation had run when the application for renewal was made, it would be disregarding the statute, which no Court had a right to do merely because its operation worked hardship in a particular case.

There being no provision in our CPC corresponding to Order 12, Rule 30 of the Rules of the Supreme Court in England it is not possible to hold that the Defendant should have entered a conditional appearance and ought to have the service of the writ set aside and his failure to do so ought not to prejudice him when he applies to have the ex parte order of the Judge extending the period under Order 9, Rule 5 of the Code of Civil Procedure, set aside. A fortiori he cannot be prejudiced because in his application to have the ex parte order set aside he has made a prayer for extension of time to file his written statement. If he had not included such a prayer in his application the result would have been that on the refusal of his application for dismissal of the suit he would have had to come to Court again with another application for extension of time to file his written statement and the question would again arise whether he was justified in waiting for the disposal of the other application. In circumstances like these the Court should try to see that there was no duplication of proceedings and that where one application sufficed two ought not to be made.

25. In the very recent case of *Heaven v. Road and Rail Wagons Ltd.* (1965) 2 Q.B. 35 the facts were as follows: The Plaintiff Heaven employed by the Defendant Road and Rail Wagons Ltd. suffered personal injuries on March 31, 1961. In June, 1963, the existence of a claim was notified to the Defendant and on December 20, 1963, a writ was issued but the service was delayed,

negotiations taking place between the Plaintiff's Solicitors and the Defendants' insurers until September 15, 1964, by which time the negotiations broke down and the Defendant's Solicitors knew of the issue of the writ. Further on January 26, 1965, on the Plaintiff's application for an ex parte order, the validity of the writ was extended for 3 months. On January 29, 1965, the writ was served on the Defendant's Solicitors who applied to strike out or set aside the writ and for a declaration that the writ and its service were invalid. The application was heard by a Master of the Court and was dismissed with costs. The Defendants appealed and the appeal was heard by Megaw, J. It appears that the learned Judge took the view that there was no sufficient reason for the Plaintiff to wait till January 29, 1965, for applying for extension of the validity of the writ when on September 15, 1964, he had definitely come to know that negotiations were at an end. According to his Lordship, to justify the exercise of the discretion given by Order 64, Rule 7, there must be exceptional circumstances and there were none in this case. The learned Judge summarised the grounds put forward in support of the appeal thus (at p. 364)--

that the failure to serve the writ within the 12 months was a mere technical slip; that the claim had been intimated to the Defendants' insurers long before the expiration of the limitation period; that the Defendants were aware, by September 1964, that a writ had been issued and it was intended to serve it; and that the delay (about 1 month) between the expiry of the validity of the writ and the date of the application to extend the validity was, to use counsel's adjective "minimal". None of these matters is in any way exceptional.

His Lordship went on to discuss what would be exceptional cases.

26. In my view it would be difficult to define the exact limits of the exceptional cases and a Court of law must scrutinise the facts of the case before it to ascertain whether the circumstances justify the exercise of power under Order 64, Rule 7 or u/s 5 of the Indian Limitation Act.

27. In view of our conclusion that the order of December 22, 1965, is not appealable it is not necessary for us to go into the merits of the case. We may, however, indicate our views thereon. The case made out for the condonation of the delay in making the application for issue of a fresh writ of summons by a petition of May 27, 1965, have already been set out. We are not prepared to hold that there was suppression of any material fact in the petition filed for the purpose as alleged by the Appellant.

28. The learned Judge before whom the application was moved thought that a sufficient cause had been made out for extension of time to make the application for the issue of a fresh writ of summons. The question being one of the exercise of discretion it would not be right on our part to take a different view even if we felt disposed to hold that sufficient cause had not been made out. In a case like this the observations of Viscount Simonds in *Zacharia v. Republic of Cyprus* (1963) A.C. 634 (661, 662) are apposite and ought to be borne in mind. There

the question of exercise of discretionary jurisdiction, u/s 10 of the Fugitive Offenders Act, was before the Court. The Divisional Court had exercised such jurisdiction and before the House of Lords it was canvassed that this had been wrongly done. Viscount Simonds observed:

My Lords, the Divisional Court has exercised a discretionary jurisdiction u/s 10 of the Act. Interference with such an exercise can only be justified if that Court has clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration. That is a principle upon which this House, sitting as a final Court of Appeal, has always acted and will, I hope, continue to act, not least in matters of criminal jurisdiction which have traditionally been the province of the Court of King's Bench. I should, therefore, be content to say that I see no possible ground in this case for substituting my own view, if I had a different one, for that of the Divisional Court.

In this case another learned Judge might have taken the view that the controversy and doubt which had arisen because of the order made under the Industries (Development and Regulations) Act of 1951 did not sufficiently explain the delay in making the application but if one learned Judge exercised the discretion in favour of the applicant in a case like this it would not be proper for the Court of Appeal to set aside the order merely because in its opinion reasonable diligence had not been exercised.

29. The Appeal, therefore, fails and must be dismissed with costs.

Masud, J.

30. I agree.