
(1985) 07 CAL CK 0026
In the Calcutta High Court
Case No : Appeal No. 9 of 1982

Ranipet Chemicals and Engineering Co. Pvt. Ltd. APPELLANT
Vs
Swastik Stainless Steel Stores RESPONDENT

Date of Decision : 03-07-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21, Order 9 Rule 13

Citation : AIR 1986 Cal 76

Hon'ble Judges : R.N. Pyne, J;Prabir Kumar Majumdar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.N. Pyne, J.—This appeal is directed against an order of Mrs. Pratibha Bonnerjea, J. dt. 30th Nov., 1981 dismissing the appellant's application for recalling and/or setting aside of an ex parte decree dt. the 27th April, 1981 (wrongly mentioned in the petition as 6th April, 1981).

2. On or about 12th Feb., 1976 the respondent filed a suit against the appellant being Suit No. 61 of 1976 (Swastik Stainless Steel Stores v. Ranipet Chemicals and Engineering Co. Pvt. Ltd.) for Rs. 1,78,347.76 p. on account of damages; interest and for other reliefs.

2A. On 19th April, 1976 the respondent made an application for judgment upon admission for Rs. 78,037.71/- out of which, according to the respondent, Rs. 68,038.71 represented the amount of three dishonoured cheques and Rs. 10,000/- on account of security deposit as admitted by the appellant.

3. On the application of the appellant, by consent of the parties, an order was made on 21st April, 1976 extending the time for filing of the written statement until 2nd June, 1976. The appellant made a second application on the 2nd June, 1976 for extension of time to file its written statement and by consent of the parties an order was made on 21st June, 1976 extending the time to file the written statement. The appellant thereafter filed its written statement.

4. On 14th June, 1976 in the application for judgment upon admission made by the respondents stated above a decree for Rs. 78,038.71 was passed in its favour. The appellant preferred an appeal against the said decree and also made an application for stay thereof. On. 19th Jan., 1977 the appellant's said application for stay was dismissed.

5. In 1977 the said decree dated 14th June, 1976 was transmitted to Velore for execution. The execution proceeding was marked as E. P. No. 5 of 1977. The said execution application was dismissed on 6th Jan., 1981.

6. By an order dt. 16th Aug., 1978 the appellant was directed to file its affidavit of documents within three weeks from the said date. As the appellant could not file its affidavit of documents within the said time by an order dt. 7th Sep., 1978 the time to file the affidavit of documents by the appellant was extended until 21st Sept., 1978 upon payment of cost of the application assessed at 10 G. Ms. as condition precedent to the respondent. On 21st Sept., 1978 the appellant filed its affidavit of documents.

7. On an application of the respondent on 15th May, 1978 an order was made directing the appellant to give inspection of the documents disclosed in its affidavit of documents within one week after summer vacation 1979 and in default thereof the defence of the appellant, if any, was directed to be struck off and the suit was directed to be transferred to the appropriate list of undefended suits and was to be heard and determined ex parte. In spite of the aforesaid order as the appellant did not give inspection of its documents the respondent's Advocate-on-Record M/s. R. N. Dutt & Co. by its letter dt. 12th June, 1979 informed the Registrar, Original Side, High Court about the appellant's default and requested him to put the suit in the appropriate list of undefended suits for being heard and determined ex parte. It appears that a copy of this letter was forwarded by the respondent's Advocate-on-Record to the then Advocate-on-Record of the appellant Mr. B. R. Lodge.

8. It appears that the suit appeared in the list of undefended suits on various dates namely, 26th Nov., 3rd Dec., and 18th Dec., 1979; 18th Feb., 1980, 6th April, 9th April, and 10th April and 15th April, 1981 and 27th April, 1981. On 27th April, 1981 an ex parte decree was passed in the said suit.

9. It is alleged by the appellant in the petition of its application made before the trial Court for setting aside and/or recalling of the ex parte decree that on or about 26th Aug., 1981 it came to learn unofficially from its lawyer in the Court of District Judge, North Arcot, Tamil Nadu that the respondent had obtained a decree in the said suit against the appellant on or about 6th April, 1981 and that the said decree had been transmitted to the Court of District Judge, North Arcot, Tamil Nadu for execution. According to the appellant, immediately on coming to learn of the aforesaid fact its representative rushed down to Calcutta and enquired of Mr. B. R. Lodge, its former Advocate-on-Record in the said suit whether any decree had been passed in the said suit apart from the decree dt.

14th June, 1976. It is alleged by the appellant that as it received no co-operation from Mr. B. R. Lodge its representative informed Mr. B. R. Lodge that the appellant wanted a change to its present Advocate-on-Record Mr. H. S. Basu.

10. By his letter dt. 31st Aug., 1981 Mr. H. S. Basu requested Mr. B. R. Lodge to return the enclosed Vakalatnama duly consented to by him and send all case papers of the suit in his possession to Mr. Basu. By his letter dt. 7th Sept, 1981 Mr. Basu requested Mr. B. R. Lodge to comply with the request contained in his letter dt. 31st Aug., 1981. Along with his letter dt. 14th Sept., 1981 Mr. B. R. Lodge returned the Vakalatnama duly consented to by him as also the case papers of the suit to Mr. H. S. Basu. Mr. H. S. Basu by his letter dt. 15th Sept., 1981 requested Mr. B. R. Lodge to send the original documents and correspondence disclosed in the affidavit of documents of Narayan Seshedri affirmed on 20th Sept., 1971 and filed on behalf of the appellant in the said suit along with the case papers of the appeal.

11. In its petition made in the Court of the first instance the appellant further stated that on or about 7th Sept., 1981 its present Advocate-on-Record Mr. H. S. Basu searched the records of the suit and after such searches informed the appellant that on or about 7th May, 1979 the respondent filed an application for inspection of the documents disclosed by the appellant in the affidavit of documents filed on its behalf on 21st Sept., 1978. On or about 15th May, 1979 an order was passed in the said application directing the appellant to allow the respondent inspection of the documents disclosed by the appellant within one week after the summer vacation and in default thereof the appellant's defence was directed to be struck out and the suit would be transferred to the undefended list. The suit appeared in the peremptory list of the Hon'ble Justice Mrs. Pratibha Bonnerjea on 9th April, 1981 as an undefended suit and was decreed ex parte. The name of the appellant's the then Advocate-on-Record Mr. B. R. Lodge did not appear in the peremptory list of the said day. No application was filed by the respondent alleging that as the order of 15th May, 1971 was not complied with by the appellant its defence would be struck out.

12. As already mentioned that the appellant in its petition filed in the Court of the First instance stated that on or about 26th Aug., 1981 it came to learn unofficially from its lawyer of the Court of the District Judge, North Arcot, Tamil Nadu that the respondent had obtained a decree in the said suit against the appellant on or about 6th April, 1981 (the correct date of the decree is 27th April, 1981) and the correct position was ascertained only after searches were conducted by its present Advocate-on-Record on or about 7th Sept., 1981. Thereafter on or about 14th Sept., 1981 the appellant instructed the counsel for preparing a petition for recalling and/or setting aside of the ex parte decree,. Thereafter, on or about 21st Sept., 1981 the appellant made an application in the Court of the first instance for recalling and/or setting aside of the ex parte decree dt. 6th April, 1981 although the correct date of the ex parte decree is 27th April, 1981.

13. The ground stated by the appellant in its petition of the application made in the Court of the first instance for recalling and/or setting aside of the ex parte decree was that it had no notice or knowledge that the aforesaid suit appeared in the list of the Mrs. Pratibha Bonnerjea, J. on April 6, 1981. The name of the appellant's the then Advocate-or-Record Mr. B. R. Lodge did not appear as against the aforesaid suit in the cause list of 6th April, 1981. According to the appellant, as no order was made striking out the appellant's defence the said suit could neither be placed in the undefended list nor the same could be decreed as an undefendant suit.

14. It was further stated by the appellant that it had no office in Calcutta and it was only for the purpose of defending the aforesaid litigation and the various interlocutory proceedings therein that the representatives of the appellant used to visit Calcutta. Apart from those visits the only means of contact by and between the appellant and its former Advocate-or-Record was through correspondence. "

15. An affidavit of one Narendra Raja, a partner of the respondent, affirmed on 9th Nov., 1981 was filed in opposition to the petition of the appellant's said application made in the Court of the first instance. In the said affidavit it is stated that the appellant's application was barred by limitation. It is further stated that the date of the knowledge of the appellant about the passing of the ex parte decree had been set up only for the purpose of saving limitation. Further, on several dates when the suit appeared in the undefended list nobody appeared on behalf of the appellant.

16. As stated earlier the appellant's application for setting aside and/or recalling of the ex parte decree was heard by Mrs. Pratibha Bonnerjea, J. and Her Lordship by order dt. 30th Nov., 1981 dismissed the said application. The instant appeal has been preferred against the said order.

17. The appellant's registered office is at North Arcot, in the State of Tamil Nadu. It has no place of business at Calcutta. For the purpose of defending the suit it engaged Mr. B. R. Lodge, Advocate. Written statement and affidavit of documents were filed by the appellant through its said Advocate. The appellant made over the original documents disclosed in its affidavit of documents to its said Advocate and the same were lying with him from the second week of Sept., 1978. The order dt. 15th May, 1979 directed the appellant to give inspection of the documents disclosed in its affidavit of documents within one week after summer vacation of 1979 and in default thereof the suit was directed to be transferred to the undefended list and heard ex parte. The documents disclosed by the appellant were in the possession of its former Advocate-on-Record. After the said order he failed to give inspection of the documents. As the appellant had nothing to do in the matter it cannot be made liable for the laches and/or default of its former Advocate-on-Record, for not giving inspection of the documents. Although the suit appeared in the list of undefended suit on several days the appellant's former Advocate-on-Record neither took any step in the

matter nor informed the appellant about the same.

18. As already mentioned the appellant's registered office is at North Arcot in the State of Tamil Nadu and it carries on business there and has no office or place of business at Calcutta. Whenever it became necessary its representative came down to Calcutta in connection with the suit. The appellant's former Advocate-on-Record did not inform the appellant about the order dt. 15th May, 1979 directing the appellant to give inspection of documents disclosed by it. In any event as the original documents were lying with the appellant's former Advocate-on-Record he could have given inspection thereof and for that purpose the presence of any representative of the appellant at Calcutta was not necessary. Further, the appellant's former Advocate-on-Record was not careful enough to keep a watch on the daily list. The suit appeared in the list of undefended suits on several days but the appellant's former Advocate-on-Record neither noticed the same nor took any step in the matter. He did not inform the appellant about the above facts.

19. In the above facts and circumstances we are of the view that the appellant did what was expected of it to do in the matter of conducting the litigation. The appellant engaged the lawyer for the purpose of defending the suit. It gave its lawyer necessary instructions and also made over the original documents disclosed by it in the affidavit of documents. Appellant's former Advocate-on-Record Mr. B. R. Lodge was not careful enough to take necessary steps required for defending the suit. There was laches, negligence and inaction on his part for which the appellant, a lay client, should not suffer. It is now well settled that for the laches and/or negligence and/or default on the part of the lawyer a lay client should not suffer. In this connection reference may be made to the cases of Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi, Rafiq and Another Vs. Munshilal and Another, ; Smt. Lachi Tewari and Others Vs. Director of Land Records and Others, and Tusnial Trading Company v. Himangshu Kumar Roy (1985) 1 Cal HN 375.

20. The appellant has further stated that on the day on which the ex parte decree was passed the name of its Advocate-on-Record did not appear in the peremptory list and in view thereof no step could be taken by its former Advocate-on-Record on that day.

21. In the case of Benoy Krishna Rohatgi and Others Vs. Surajbali Misra and Another, it has been observed that where the name of the defendant's solicitor did not appear either in the lists prepared by the private agency or in the lists prepared by the department, but instead the name of solicitor who, at no stage, had to do anything with the suit had appeared, with the result that the defendant's solicitor had no knowledge that the suit was in the peremptory list and as such took no steps on behalf of the defendants and that the suit was decreed ex parte, the Court on an application for review will set aside the ex parte decree. In this connection reference may also be made to the judgment of the Division Bench in the case of Kanai Lall Shaw Vs. Bhattu Shaw, . In the

instant case the name of the appellant's former Advocate-on-Record Mr. B. R. Lodge did not appear in the daily list on the day the decree was passed ex parte and, therefore, he could not attend the matter on that day.

22. According to O. 11, R. 21 of the Civil P.C. as amended, if the defendant fails to comply with any order for inspection of documents his defence would be struck out and he would be placed in the same position as if he had not defended and the party seeking inspection may apply to Court for an order to that effect and an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard. In the instant case no application was made for striking out the defence for non-compliance with the order for giving inspection of the documents by the appellant in compliance with the above rule.

23. For all the reasons stated above the appeal succeeds. The appeal is allowed. The ex parte decree dt. 27th Aprl. 1981 passed in Suit No. 61 of 1976 (Swastik Stainless Steel Stores v. Ranipet Chemicals & Engineering Company (Private Limited)) is set aside. The appellant (the defendant in the above suit) will give inspection of the documents disclosed by it within three weeks from today. The suit will appear in the appropriate Prospective List after five weeks from today. In the facts and circumstances of this case the appellant will pay to the respondent the cost of the appeal and the cost thrown away for setting aside of the ex parte decree dt. 27th Aprl. 1981 as of undefended suit.

29. Parties to act on a signed copy of the ordering portion of this judgment upon usual undertaking.

Prabir Kumar Majumdar, J.

30. I agree.