

(2006) 05 CAL CK 0048

In the Calcutta High Court

Case No : A.P.O. No. 458 of 2005, G.A. No. 2629 of 2005, A.P.O.T. No. 538 of 2005 and C.S. No. 232 of 1999

Shrikant Mantri and Others

APPELLANT

Vs

Radheshyam Chotia and Others

RESPONDENT

Date of Decision : 03-05-2006

Acts Referred:

Limitation Act, 1963 — Section 5
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 9 Rule 5, Order 9 Rule 5(1), 92

Citation : (2006) 3 CALLT 230

Hon'ble Judges : Tapan Kumar Dutt, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Judgement

Tapan Kumar Dutt, J.—Heard the learned advocates for the respective parties. The defendant Nos. 1 to 4 in a suit being C.S. No. 232 of 1999 have preferred this appeal challenging an order dated June 20, 2005 passed by the Hon'ble First Court in G.A. No. 61 of 2005. The respondent Nos. 1 and 2 are the plaintiffs in the suit and the respondent Nos. 3 and 4 are the defendant Nos. 5 and 6 in the suit.

2. The plaintiffs/respondents filed the suit claiming leave u/s 92 of the CPC and also under Order 1 Rule 8 of the Code of Civil Procedure. The plaintiffs/respondents prayed inter alia for a decree for removal of the defendants/appellants as trustees of a certain Smt. Kamla Devi Mantri Charity Trust and for appointment of fit and proper persons as trustees, framing of a scheme for the purpose of proper management and administration of the trust and for enquiry into the funds and accounts standing in the name of the trustees and a decree for a certain sum of money with interest etc. It appears that sometime in May 1999, the plaintiffs moved an interlocutory application for injunction for restraining the defendants/appellants from dealing with the shares which were subject of the Trust Fund and the plaintiffs/respondents also filed an application for adding certain parties as party defendants in the suit. Both the said

applications are pending hearing. The defendants/appellants, on coming to know of such proceedings, sometime in July 1999, moved an application for taking the plaint off the file alleging that the leave granted u/s 92 and Order I Rule 8 of the CPC was granted on an incorrect basis and such leave is liable to be revoked and that on such application an order was passed sometime in July 1999 directing inter alia that the suit not be transferred to the undefended list. The said application is also pending hearing. The appellants/petitioners have alleged in their application being G.A. No. 61 of 2005 that on enquiry it transpired that the suit was filed by the plaintiffs/respondents on 12th April, 1999 and till the filing of the said application no Writ of Summons was lodged with the Sheriff. According to the defendants/appellants, the plaintiffs/ respondents have no real intention to prosecute the suit and the suit has been filed with an ulterior purpose and as such the suit be dismissed. The defendants/appellants made the aforesaid application being G.A. No. 61 of 2005 praying inter alia that the plaint in the said suit be rejected and taken off the file. According to the defendants/appellants the writ of summons remained un-served for 6 years and no explanation was given why the notice in terms of leave granted under Order 1 Rule 8 of the CPC could not be published in newspapers within the stipulated time or at any time thereafter.

3. The plaintiffs/respondents made an application being G.A. No. 1286 of 2005 for extension of the returnable date of the writ of summons and condonation of delay in making the application. The said G.A. No. 61 of 2005 and G.A. No. 1286 of 2005 were taken up for hearing by the Hon''ble First Court and by the Order dated June 20, 2005 the Hon''ble First Court was pleased to dismiss the defendants/appellants application being G.A. No. 61 of 2005 and was pleased to allow the plaintiffs/respondents application being G.A. No. 1286 of 2005. This appeal has been filed for dismissal of the defendants/appellants application being G.A. No. 61 of 2005. Another appeal being No. 459 of 2005 has been filed by the defendants/appellants challenging the order by which the Hon''ble First Court allowed the G.A. No. 1286 of 2005.

4. Both the appeals have been taken up for hearing together since both the appeals arise out of a common Judgment.

5. It appears that by the Judgment which is under consideration in this appeal the Hon''ble First Court found that in the instant case it is an admitted position that the defendants/appellants herein had knowledge of the filing of the suit as they have been contesting the proceedings but did not enter appearance in the suit. The Hon''ble First Court was also pleased to observe that it is apparent that the parties have been contesting the matters before the interlocutory Court and since a demurer application has been taken out it is required to be adjudicated first before the suit was proceeded with. ""The Hon''ble First Court was of the view that steps for causing the service of the writ of summons are really departmental steps and are normally taken by the Solicitor and/or their Clerks concerned and it is expected that a client after having entrusted the matter to an

advocate need not pursue day to day in the matter of lodging of writ of summons and causing summons to be served by the department. The Hon''ble First Court was also of the view that the whole object and purpose of service of writ of summons is to notify the defendant about the filing of the suit so that it is not decreed without any knowledge of the defendants. Taking such view, the Hon''ble First Court was pleased to reject the defendants/appellants application and allow the plaintiffs/respondents application. It appears that the plaintiffs/respondents have served the writ of summons on the appellants/petitioners on July 8, 2005 as has been stated in the application for Stay filed by the appellants/petitioners.

6. In course of argument certain decisions were cited at the Bar:

(1) 61 CWN 212 (Laxmi Trading v. Shriram Gobindnarain). In this reported case the writ of summons was returned, unserved and there was a failure on the part of the plaintiff to make an application for issue of fresh summons within the period then prescribed under Order 9 Rule 5 of the Code of Civil Procedure. The plaintiff filed the application for issuance of fresh summons after the period of 3 months, which was then prescribed under Order 9 Rule 5 CPC, had already expired. The learned Master disposed of the application by saying that it has been presented after the expiry of time limit of 3 months and as such he could not make any order on such application. The plaintiff then presented the petition to an Hon''ble single Judge of this Court but failed to obtain any relief and thereafter an appeal was preferred. The Hon''ble Appeal Court was pleased to observe that failure of the plaintiff to make any application for issue of fresh summons within the prescribed period resulted in a valuable right being accrued in favour of the defendant. The Hon''ble Appeal Court concluded by holding that-

It is clear from the terms of the Rule to which I have just referred, 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. The learned Master, therefore, was entirely right in the present case in refusing to make any order on the appellant's application and the learned Judge's order appealed from is also right.

For the reasons given above, this appeal is dismissed, but as there is no respondent, there will be no order for costs.

(2) Electrical Industries Corporation Vs. Punjab National Bank and Others, In this reported case there was no dispute that the plaintiff failed to take any of the steps envisaged by Order 9 Rule 5(1) of the CPC within the specified period. In the said case it was argued before the Hon''ble Division Bench that the Court should invoke the provision of Section 5 of the Limitation Act to condone the delay in making the application for issue of a fresh summons. The Hon''ble Division Bench was pleased not to exercise the powers u/s 5 of the Limitation Act

in absence of any explanation as to what happened during a vital period as indicated in the said reported case. It appears that an alternative argument was advanced before the Hon''ble Division Bench by submitting that Order 9 Rule 5(1) of the CPC could not apply to the said case in view of the provisions of Rules 6 and 8 of Chapter (VIII) of the Original Side Rules. The Hon''ble Division Bench was pleased to observe that there is no substance in such alternative argument and that Rules 6 and 8 of Chapter (VIII) of the Original Side Rules do not in any way affect or alter the provisions of Order 9 Rule 5(1) of the CPC and that said provision [Order 9 Rule 5(1) CPC] in absence of specific provisions in the Original Side Rules, applies to the Original Side as well.

(3) Fort Gloster Industries Ltd. and Another Vs. Tatanagar Transport Corpn. and Others, . In the said case the application which came up for consideration before the Hon''ble single Judge was an application for leave to lodge fresh writ of summons for service upon the defendant and also for extension of returnable date of the writ. The Hon''ble single Judge was pleased to hold ultimately that having regard to the facts of the said case and the explanation given in the said case, the Hon''ble Court did not find any reason to extend the time for lodging a fresh writ of summons with the Sheriff. Accordingly the said application in the said case was dismissed.

(4) 1992(2) CHN 161 (State Bank of India v. Tarit Appliances(P) Ltd. and Ors.). In the said reported case the Hon''ble single Judge was pleased to find that it did not appear from the records of that case that the defendants concerned in the suit had waived their right to be served with the writ of summons in the suit in due course. The relevant provisions of Order 9 CPC and the relevant Rules of Chapter VIII of the Original Side Rules came up for consideration before the Hon''ble single Judge and his Lordship after considering the facts and circumstances of the said case and the relevant provisions of law was pleased to dismiss the application filed by the plaintiff in the said suit for extending the time for issuance of writ of summons and also for taking out and delivering the same to the Sheriff''s Office for service upon the defendants. The Hon''ble Court was pleased to allow the application of the concerned defendants by holding that the suit against the two defendants concerned shall stand dismissed.

(5) An unreported case disposed of by an Hon''ble Division Bench of this Court on 16th June, 2004 in A.P.O.T. No. 780 of 2002 (Deepak Prakash and Ors. v. Jayanta Kumar Bose and Ors.}. In the said unreported case the Hon''ble Division Bench was pleased to observe that the said Division Bench saw no reason why the plaintiff should get an unlimited time for issuance of writ of summons when in accordance with Rules of the Original Side it has to be done within fourteen days from the date of institution of the suit. The Division Bench was further pleased to observe that there are enough indications in the CPC and also in the Original Side Rules of this Court that the writ of summons have to be served upon the defendant within a prescribed period and their right to apply for extension of time to serve the writ of summons cannot extend beyond the period of limitation.

(6) An unreported case (order dated 13.09.2003 passed by an Hon"ble single Judge in G.A. No. 728 of 2003, G.A. No. 3820 of 2002 and C.S. No. 577 of 1987 in Hindustan Motors Limited v. National Insurance Company Ltd. and Ors). In the said unreported case the Hon"ble single Judge was pleased to hold that the learned Master cannot extend the time for service of the fresh summons without giving an opportunity to the petitioner of being heard, since such action of the Master destroys the valuable right of the petitioner. It appears that in the said unreported case the Hon"ble single Judge was also pleased to consider the relevant provisions of the CPC and the Original Side Rules in this regard.

7. It appears that the instant suit was filed by the plaintiff/ respondent sometime in May 1999. The plaintiff's case in the application being G.A. No. 1286 of 2005 was that by virtue of the Order dated 12th July, 1999 passed by the Hon"ble single Judge, the plaintiffs were estopped from taking any further steps in the suit at least till such time the demurer application of the defendants was disposed of. It further appears from the said application that the plaintiffs subsequently made an application for amendment of the plaint and the said application was moved on 8th February, 2000 but the hearing of the said application has been adjourned till after the disposal of the defendants demurer application. The plaintiffs have stated in their application that the plaintiffs intended to have the plaint in the suit amended and summons taken out for the amended plaint and thereafter have it served upon the defendants and that service of the writ of summons prior to the disposal of defendants" demurer application and prior to the hearing of the amendment application filed by the plaintiffs will serve no useful purpose. The plaintiffs/respondents have also alleged that the plaintiffs bonafide believed and also expected that their learned advocate will do all things needful in the suit and that issuance and the service of writ of summons is entirely procedural and routine matter for which no instructions were necessary from the plaintiff/respondent and the same was the responsibility of the learned advocate-on-Record and that the plaintiffs/respondents were also not under any obligation to find out if their learned advocate-on-Record has taken proper steps in the matter, particularly those which are procedural and are of routine nature.

8. The defendants/appellants have taken the stand in their application being G.A. No. 61 of 2005 to the effect that the said order dated 12th July, 1999 do not in anyway restrain the plaintiffs/ respondents from serving the writ of summons and that the plaintiffs/ respondents" intention to have the plaint amended has not got nothing to do with the non-service of writ of summons on the defendants since the plaintiffs would always have had the liberty to serve fresh writ of summons on the defendants after the amendment of the plaint unless such service was waived. The defendants/appellants further stated that a valuable right has accrued to the defendants, which cannot be defeated.

9. 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 u/s 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 CPC 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.

10. Considering the facts of the instant case we cannot accept the case made out by the plaintiffs/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 12.07.1999 passed by the Hon''ble single Judge that the plaintiffs/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 plaintiffs was done after the said order dated 12th July, 1999 was passed, cannot be a ground for preventing the plaintiffs from taking steps for issuance and service of the writ of summons in accordance with relevant Rules. The plaintiffs/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 plaintiffs/respondents' case of being under bonafide 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 plaintiffs/ respondents will serve no useful purpose. After having tried to make out such case it cannot be appreciated how the plaintiffs/respondents can shift the blame upon his learned advocate-on-Record for not taking proper steps in due time, since the plaintiffs 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 plaintiffs/respondents then it becomes difficult to appreciate as to how the plaintiffs/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 plaintiffs/respondents failed to take proper steps within the time prescribed by law and the plaintiffs 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.

There will, however, be no order as to costs.

Pinaki Chandra Ghose, J.

11. I agree.