

(1969) 10 CAL CK 0011
In the Calcutta High Court
Case No : Suit No. 683 of 1951

The Administrator General of West Bengal	APPELLANT
Vs	
Kumar Purnendu Nath Tagore	RESPONDENT

Date of Decision : 07-10-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 4, Order 9 Rule 35, Order 9 Rule 35A
Limitation Act, 1963 — Article 124

Citation : AIR 1970 Cal 231 : (1970) 1 ILR (Cal) 604

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : Advocate General, for the Appellant;

Judgement

Sabyasachi Mukharji, J.—On 20th of December, 1968 this suit appeared in my list of suits in the Special List under Chapter X of the Rules of the Original Side of this Court. This suit was filed on 2nd of February, 1951. Counsel appeared on that date and made oral submissions before me that I should adjourn the suit till the next date for taking up suits in the Special List as his client was not in a position to place the facts relating to the non-prosecution of the suit. As there was no affidavit I was not inclined to accept the oral submissions made on behalf of the plaintiff in this suit and as no cause was shown why the suit had not been prosecuted so long. I directed that the suit be dismissed. On the 20th of January, 1969 this application was noted as made and a notice of motion was taken out for recalling and setting aside the said order made on the 20th of December, 1968 and further praying for review of the said order dated 20th December 1968 and for directions for the hearing of the above suit.

2. It appears that the suit was filed on the 2nd of February 1951 by the petitioner as administrator to the estate of Raja Profulla Nath Tagore, since deceased, against one Kumar Purnendu Nath Tagore, for an account of all realisations made by the defendant in respect of "Tagore Villa" from the Military

Authorities as well as other tenants between the death of Raja Profulla Nath Tagore and the institution of this suit, for further accounts and for certain other incidental reliefs. It appears that Messrs. Mukharji and Lahiri, a firm of Solicitors, having office at 10. Old Post Office Street, Calcutta was the Attorney on record of the plaintiff. Mr. A. B. Lahiri, since deceased, was the sole proprietor of the said firm. It has been stated in the petition that except Mr. Lahiri there was no other Solicitor in the said firm. It has been further stated that the said Mr. Lahiri looked after all the legal matters of the estate of Raja Profulla Nath Tagore and was entrusted with the suits and proceedings in connection thereof. The petitioner states in the petition that Mr. Lahiri died on or about 4th of February, 1966.

3. This petition which was noted as being made on the 20th of January, 1969 is verified by one Balaknath Paramanik, who has described himself as Head assistant in the employment of the Administrator General of West Bengal. In paragraph 4 of the petition it has been stated that the petitioner caused enquiries to be made to find out if any other Solicitor was looking after the business of Messrs. Mukherjee and Lahiri in paragraphs 4 to 10 the petitioner has stated about certain enquiries being made and how the petitioner tried to contact the family of late A. B. Lahiri Unfortunately there is no particulars as to the dates when these enquiries were made. Certain correspondence are annexed to the petition. The first letter which I find is a letter dated 30th of April, 1968, written to Mrs. A. B. Lahiri by the Administrator General of West Bengal It has been stated that certain cause papers in respect of the estate of Raja P. N. Tagore were lying with late Mr. Lahiri and Mrs. Lahiri was requested to hand over those papers. The next letter is dated 19th of December, 1968 written to the son of late Mr. Lahiri.

It appears that on or about 18th December, 1968 the petitioner received the notice from this Court that the above suit had been set down in my list of 20th December, 1968. The petitioner states that the said letter was addressed to Messrs. Mukherjee & Lahiri and most presumably have been served on the petitioner because the office of Messrs. Mukherjee & Lahiri was found to be closed. The matter appeared in my list, as mentioned hereinbefore on the 20th of December, 1968 and the petitioner was not in a position to instruct the present Solicitor about the steps taken in respect of the suit. In the petition the petitioner has stated about how certain enquiries and searches of the records were made. The petitioner has however stated that before 20th December, 1968 the petitioner was not able to get the cause papers of the suit in the question. There was a supplementary affidavit affirmed on the 18th June, 1969 by one Balaknath Paramanik. He has stated in this supplementary affidavit in paragraph 15 that on the 30th of May, 1969 he persuaded Mr. Subodh Kumar Chatterjee, who is supposed to have been formerly the Managing Clerk of Messrs. Mukherjee & Lahiri to go to the office room occupied by late Mr. Lahiri. He has further stated in paragraph 16 that he made certain searches and found out the several dates on which the suit had appeared in the peremptory list.

From the list given by him, it appears the said suit appeared in the list on the 3rd of August, 1961. He further stated in paragraph 17 that he had come to know on enquiries made by him that this suit along with several other suits between the parties were directed by the P. C. Mallick, J., to be placed in the list of his Lordship. It further appears that on 3rd August, 1968 P. C. Mallick, J., had directed that this suit along with several other suits save and except those mentioned in the subsequent paragraph were directed to go out of the peremptory list. He has further stated that as searches were made by him he could not place the information earlier before this Court. Learned Advocate General, who appeared on behalf of the Administrator General of West Bengal, placed before me a copy of the minutes of the 3rd August, 1968. It is in the following terms:--

"O.S. No. 41 of 1953 (Cal.), A. G. v. Purnendu Nath Tagore.

Mr. I. P. Mukherjee, for the applicant also appear Mr. Sudhamay Basu, Mr. Ajit Ganguli, Mr. B. C. Dutta, Mr. R. K. Ghosh and Mr. T. K. Ghosh.

Court -- The order dated 8-6-1969 will not be drawn up until the disposal of this application. Nor the Report of Mr. G. K. Dutt the Special Referee appointed herein, be given effect to.

The A. G. is directed to write to the Land Acquisition Collector at Varanashi enquiring when the money will become payable because without that the administration is being held up and the Court is prevented from disposing of the suits. Similar letter be written to the Certificate Officer. The application is adjourned to Monday next.

A. G. to take steps for substitution of the heirs of Anjali Tagore since deceased in the consolidated suit Mr. Ganguli will supply the names of the heirs to the A. G. by this week. Other Tagore suits to go out of the list."

4. There is an affidavit in opposition affirmed by one Charu Chandra Basu Roy on 9th July, 1969. In paragraph 11-A of the said Affidavit he stated that the solicitor for the Administrator General died in 1966 and it appears that until January, 1969 the Administrator General had taken no steps for filing a fresh Warrant of Attorney. In paragraph 15 he has also stated that the office of the Administrator General got the Cause List at his Office. In subsequent paragraphs of the affidavit he had stated that Mallick, J., did not fix any period as to how long the suit was not to appear in the peremptory list. According to Mr. Charu Chandra Basu Roy, many of these suits, excepting this suit, specifically mentioned by Mallick J., appeared in the Daily List of suits. He had given certain names of those suits in paragraphs 23-25 of the said affidavit.

5. Learned Advocate General, appearing for the Administrator General of West Bengal, drew my attention to the Bench decision of this Court in the case of Nanalal M. Varma and Co. (Gunnies) P. Ltd. Vs. Gordhandas Jerambhai and Others, . The first point that requires consideration in this case is whether the

suit can be restored by me under the provisions of Order 9 of the Code of Civil Procedure. On a proper reading of the relevant rules of Order 9 of the CPC it appears to me that in the facts and circumstances of the case Order 9 can have no application. Rule 3 states that where neither party appears when the suit is called on for hearing, the Court may make an order for dismissal of the suit Rule 4 empowers the plaintiff to bring a fresh suit on the same cause of action subject to the law of limitation. It also empowers the plaintiff to make an application for restoration of the suit provided he is able to satisfy the Court that there are sufficient causes either for not paying the Court-Fee and the postal charges or for non-appearance. Rule 8 empowers the Court to dismiss the suit, unless the defendant admits the claim or any part thereof, in case the defendant appears and the plaintiff does not appear when the suit is called on for hearing. Rule 9 of Order 9 similarly empowers the plaintiff to make any application for restoration provided he is able to satisfy the Court about the cause of his non-appearance when the suit was called on for hearing.

It is evident therefore that Order 9 deals with the dismissal of the suit in case the parties do not appear when the suits are "called on for hearing" and in case of the applications for restoration, the scope of enquiry is limited to finding out whether there is "sufficient cause for non-appearance" when the suit is called on for hearing. Therefore in order to attract the provisions of Order 9 suits must be called on for hearing and in order to grant restoration of the suits dismissed under Order 9, the Court must be satisfied that there are sufficient causes for non-appearance at the time when the suits were called on for hearing. Under Rules 35 and 35-A of Chapter X of the Rules of the Original Side of this High Court the scope of enquiry is entirely different. When a Court exercises its power under Rule 35 or Rule 35-A the Court is concerned with the reasons for non-prosecution of the suit. Suits are not called on for hearing when they appear in the list of the Judge under Rule 35 or Rule 35-A. In considering whether a suit should be dismissed either under Rule 35 or 35-A the Court is concerned with the question whether there has been non-prosecution after the length of time mentioned in those rules and whether there are sufficient reasons for such non-prosecution. Therefore, on the construction of the rules, I am of the opinion, that Order 9 cannot be attracted to this case, even though the application was made within 30 days from the date of dismissal of the suit in the special list. It should be mentioned here that the suit was dismissed on the 20th of December, 1968 and the present application was noted as being made on 20th January, 1969, 19th January, 1969 being a Sunday. In the decision in the case of Nanalal M. Varma and Co. (Gunnies) P. Ltd. Vs. Gordhandas Jerambhai and Others, their Lordships of the Division Bench so observed but the Court further observed that even if Order 9 applied, against an order refusing to restore a suit under Rule 4 of Order 9, no appeal lies.

6. The next point that has to be borne in mind in this case is that the order has been drawn by, signed and perfected. A point incidentally was taken that in respect of the settlement of this order no notice had been given to the plaintiff.

But as was observed in the aforesaid Bench decision that amounts to a mere irregularity and does not affect the validity of the order drawn up. Until an order has been drawn up and/or perfected the Court exercising the jurisdiction in the original side of this Court retains power to alter or amend or vary that order if the Court considers it necessary for any sufficient cause or in the interests of justice. But after the order has been drawn up and perfected, the Court has no such authority to vary the decision and/ or recall the order as such. These propositions are well settled. I need not discuss the several authorities cited from the Bar on this aspect of the matter.

7. Learned Advocate General appearing for the plaintiff submitted before me that this is a case where I should exercise my power under Order 47 of the CPC and review my order of dismissal According to him there is sufficient reason for his client's not being able to place before the Court facts relating to non-prosecution of the suit. According to him if these facts were placed before the Court then the Court would not have dismissed the suit. The question, therefore, is: can I exercise powers under Order 47 of the CPC and if so whether there is sufficient reason to review or recall my order of dismissal made on the 20th of December, 1968? Order 47 of the CPC empowers the Court to review its judgment or order on certain conditions. Rule 1 of Order 47 empowers the Court to review its order if it can be shown that new and important matters or evidence have not been produced at the time of the passing of the order in spite of due diligence on the part of the party seeking to adduce such material or if it can be shown that there was mistake or error apparent on the face of the record, or for any other sufficient reason. Therefore, only in three cases review can be permitted, that is to say, where important and new materials were overlooked, by misfortune not due to laches of the party or where there are mistakes or errors apparent on the face of the record, or for any other sufficient reason. Proviso (b) of Rule 4 of Order 47 enjoins that no application shall be granted on the ground of discovery of a new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation. Here the material on which review is being sought is the minutes of the order dated 3rd of August 1961 passed by Mallick J., as I indicated before. The plaintiff urged that the plaintiff due to the death of its Solicitor and due to the difficulty resulting from the death of Mr. A. B. Lahiri, could not bring this fact to the knowledge of the Court at the time of the passing of the order on the 20th of December, 1968. Having regard to the averments in the petition and in the affidavit it cannot be said, in my opinion, that the plaintiff has been able to prove strictly that the plaintiff after due diligence could not have brought to the notice of the Court that fact. In law the knowledge of the Solicitor is deemed to be the knowledge of the client in matters like this. Therefore if strict proof is required of the fact that in spite of exercise of the due diligence the purport of the order of Mallick J. could not have been adduced by the plaintiff before the Court, it cannot be said that the plaintiff has been able to prove strictly that the plaintiff could not have

brought this fact to the notice of the Court on the 20th of December, 1968. I am, therefore, of the opinion that the first ground on which a review can be sought under Rule 1 of Order 47 of the Code of Civil Procedure, has not been made out. Therefore the fact that there has been discovery of new and important matters which, after the exercise of the due diligence, was not within the knowledge of the plaintiff has not been established. It is not a case also where there is any mistake or error apparent on the face of the record.

The question, therefore, is, is there any other sufficient reason in the facts and circumstances of this case? In the case of (1922) ILR 3 LAH 127 (Privy Council) the Judicial Committee held that Rule 1 of Order 47 of the CPC must be read as in itself definitive of the limits within which review of a decree or order is now permitted, and the words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified in the rule. A Court hearing an application for a review has, therefore, no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at. The Judicial Committee reiterated the same view in the case of AIR 1934 213 (Privy Council) . The Supreme Court also in the case of M. M. B. Catholicos v. M. P. Arthanasius AIR 1954 SC 526 reiterated the same view. In the case of Bindubashini Roy Chowhury Vs. Secretary of State, , there was an enquiry u/s 19-H of the Court-fees Act where the Government Pleader was not ready to go on with the case on the date fixed and the Court dismissed it, but afterwards granted a review "for other sufficient reason" and restored the case. It was held that the order was bad in form and in substance. Rankin J. delivering the Judgment ILR Cal 75 : AIR 775 of the report observed:

"The question of law is whether the facts as found constitute within the meaning of the rule "other sufficient reason" remembering that the Privy Council in the case of (1922) ILR 3 LAH 127 (Privy Council) have laid it down that those words are to be construed in the light of the previous words and on the principle of ejusdem generis. The case is perhaps near the border line. The effect of (1922) ILR 3 LAH 127 (Privy Council) in my judgment, is that, under the words "other sufficient reason", the reason must be one having sufficiency of a kind analogous to the two specified cases, that is to say, analogous to excusable failure to bring to the notice of the Court new and important matter or analogous to error on the face of the record." his Lordship further observed:

"In this case, there is not merely an element of negligence, that is to say, it is not merely that by greater diligence the person could have had better knowledge of his case or a better chance of producing evidence which he knew not, but the present case seems to me on the findings to be a case where for no adequate reason the party had not been ready on the date solemnly fixed for the purpose and had no real excuse for not being ready."

In that view of the matter the learned Judge was of the opinion that there was no ground for review.

In the case of Benoy Krishna Rohatgi and Others Vs. Surajbali Misra and Another, , S. P. Mitra, J., had to construe provisions of Order 47. The Court observed that the phrase "ejusdem generis" is more restricted than the word "analogous". Mr. Das, appearing for the defendant also drew my attention to the case of Hriday Kanta Koyal Vs. Jogesh Chandra Mandal and Another, But the facts in that case were entirely different. The expression "analogous" means bearing same correspondence or resemblance, similar in certain circumstances. An analogous reason therefore does not mean the same reason but similar reason. A reason therefore which is similar in nature but does not strictly come within the first two reasons mentioned in Rule 1, Order 47 is also covered by the expression "sufficient reason."

In the Minutes of Order dated 3rd of August 1961 passed by Mallick J., it was provided that other Tagore suits would go out of list. Mr. Das contended before me that on a proper construction of the Minutes it appears that Rule 35-A of Chapter X of the Rules would be attracted to the facts of this case because if no period has been mentioned by the Judge then if the suit remains out of the peremptory list for more than 3 months and the plaintiff does not take any step to bring the suit to a hearing, the suit is liable to be dismissed, if no sufficient cause is shown to the contrary. Mr. Das has urged that in this case no period had been fixed by the learned Judge, and no steps had been taken to bring the suit to a hearing after 3 months and no sufficient cause has been shown, so the suit is still liable to be dismissed. It is true that the last sentence of the order of Mallick J. dated 3rd August, 1961, read by itself, would indicate that no period had been fixed. But in my opinion this last sentence cannot be read independently of the context. It appears to me that the intention of the learned Judge was the Tagore matters should be heard after certain proceedings as indicated in the said order have been taken. It has been contended that some of the other Tagore suits which had appeared on that date, namely 3rd of August 1961, have since been disposed of. But I do not find any material to indicate under what circumstances these were disposed of; whether they were disposed of because they automatically came in the list of any learned Judge or whether they were disposed due to any special direction or orders by any learned Judge. It thus appears to me that the order of Mallick J., dated 3rd of August, 1961 is not very clear and specific. Speaking for myself, I have no hesitation in saying that had I known of this order of Mallick J., I would not have dismissed the suit on the 20th of December, 1968.

The next question that requires consideration is, could the plaintiff have brought this fact to the knowledge of the Court on the 20th of December, 1968? On this aspect the facts are that Mr. A. B. Lahiri has died. He died sometime in 1966. He was the sole proprietor of his firm, nobody seems to be looking after his affairs. Members of his family are not obviously in the legal profession. There is some evidence that even before the suit had appeared in the Special List the plaintiff was trying to get the Cause Papers of the suit as alleged in paragraphs 4 to 9 of the petition and letter was written to Mrs. Lahiri in April, 1968. Therefore, though

it is true that the plaintiff has not been able to prove strictly so as to come within the first limb of Rule 1 of Order 47, there is evidence to justify to come to the conclusion that there is sufficient reason for exercising my power under Order 47, Rule 1 of the Code of Civil Procedure, in the interest of justice,

8. Under Article 124 of the Limitation Act of 1963 period of limitation is 30 days from the date of the order for an application for review. Therefore, there is no bar of limitation in this case. Mr. Das contended that the application for review is not in the prescribed form. In my opinion, that is not fatal to the maintainability of this application. In paragraph 19 of the petition it has been stated that there is sufficient cause for this Hon"ble Court to consider and review the said order. In the premises and in the facts and circumstances of this case I am of the opinion that the said order dated 20th of December, 1968 passed by me should be reviewed. I hereby recall the said order dated 20th of December, 1968 and direct the suit to appear at the top of the prospective list and I give parties liberty to mention for hearing. In this case respondent has incurred certain expenses due to no fault of his own; therefore I direct that the applicant will pay the costs of this application which I assess at 50 Gold Mohurs, which should be paid within 3 weeks after the long vacation.