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Govind Das Bhattar Vs Pran Kumar Das

Court: Calcutta High Court

Date of Decision: Feb. 19, 1959

Citation: 63 CWN 877

Hon'ble Judges: Das Gupta, C.J; Bose, J

Bench: Division Bench

Advocate: Subrata Roy Choudhury, for the Appellant;A.N. Sen, for the Respondent

Final Decision: Dismissed

Judgement

Bose, J.
This is an appeal against an order refusing restoration of a suit dismissed for default of appearance. The decree of dismissal of the

suit was passed on the 27th May, 1957. On 10th June, 1957 the plaintiff took out a Chamber Summons for restoration of the suit and it was made

returnable on the next day, i.e. 11th June. 1957, by Special leave granted by the learned Master at the time he signed the Summons on 10th June,

1957. On the returnable date the Chamber application was by consent of parties adjourned till 24th June, 1957 and it was agreed that the affidavit

in opposition would be made by the 18th June, 1957 and the affidavit in reply by the 22nd June, 1957. This fact of adjournment and the dates of

the affidavits were endorsed on the back of the Summons and the endorsement was signed by the attorneys for the parties and was counter-signed

by the Assistant Registrar who was at the time the Court Officer in the Court of Mr. Justice G.K. Mitter before whom the summons had been

made returnable. On the 24th June, 1957 the application was again adjourned by consent till 1st July, 1957 and it was agreed that the affidavit in

reply which was not made ready by that time would be made ready in the meantime. This fact of adjournment is also endorsed on the back of the

summons and the endorsement bears the signature of the attorneys and the counter-signature of the Assistant Registrar of the Court. On 1st July,

1957 the matter was further adjourned by consent of parties till 3rd July. 1957 and similar endorsement was made on the back of the summons

with signatures and countersignature as before.

2. On 3rd July, 1957 the matter was mentioned to the learned Judge sitting in Chambers and it was adjourned till 8th July, 1957. On the last

mentioned date the Court again adjourned the matter till Wednesday next and directed the matter to be listed. The fact of the two adjournments

granted by the Court is also endorsed on the back of the Summons and signed and countersigned by the attorneys and the Assistant Registrar

respectively. It appears that the application was finally disposed of on 22nd July. 1957 by G. K. Mitter, J. who refused to set aside the decree of

dismissal. The learned Judge was of the view that the procedure adopted in making the application for restoration was not the proper procedure

and the plaintiff should have taken out a Notice of Motion instead of a Chamber Summons. The learned Judge however adjourned the matter to

Court and indicated the view that he would be prepared to grant an indulgence to the applicant, if permissible, by treating the application as one by

way of Notice of Motion instead of a Chamber Summons and allowed the matter to be argued before him at length. The learned Judge upon

hearing the matter came to the conclusion that the application was barred by limitation and the merits also did not justify any order for restoration

of the suit.

3. Before us the learned counsel for the appellant has challenged these findings of the learned Judge. I propose to take up first the question of

limitation.

4. Mr. Subrata Roy Chowdhury has argued that the application for restoration must be regarded as having been made to court on the day when

the Chamber Summons was taken out inasmuch as the learned Master by affixing his signature to the Summons and by granting special leave fixing

a returnable date of the Summons shorter than the normal period had taken cognisance of the application. In my view when the Master discharges

his functions under Rule 3 or Rule 5 of Chap. VI of the rules of this Court he cannot be said to be doing any judicial Act. Rule 3 prescribes that the

learned Master or the Registrar will merely put his signature on the Summons. It is a purely ministerial act. Rule 5 only empowers the Registrar or

Master to abridge the period of the returnable date of the Summons. It is only this limited power which is conferred on the Registrar or Master by

this Rule.

5. In the case reported in ILR 20 Cal. 899 which has been followed in subsequent cases of this Court it has been held by a Bench of three learned

Judges of this Court that merely taking out a Chamber Summons to which Master has affixed his signature does not amount to making an

application to the Court. I see no reason to take a different view. The additional fact present in this case, namely, the giving of the Special leave by

the learned Master for a shorter returnable date of the Summons does not make any difference. Moreover, the learned Master had no jurisdiction

to sign or grant special leave in respect of a Summons which was for setting aside a decree of dismissal and which Summons, as has been pointed

out hereafter, did not lie at all.

6. It has been further contended by Mr. Roy Chowdhury that even if it be held that mere taking out a Chamber Summons signed by the Master

and the granting of Special leave would not amount to making an application to Court, yet fact is that the Assistant Registrar of the Court had

signed the endorsements of adjournment made on the back of the Summons by the Attorneys for the parties and the time for making the affidavits

was also mentioned in two of the endorsements which indicate that the Court had taken congnisance of the application and so it must be held that

the application had been made to Court on the 11th June, 1957 which was within 30 days from the date of dismissal of the suit. Reliance is placed

on the Resolution of the Full Court passed in February, 1944 under which the practice of noting the adjournments and countersignature of the

Assistant Registrar on the back of the Chamber Summons was extended to the cases in which Counsel appeared for the parties.

7. The Resolution is as follows:-

Resolved that in order to avoid delay if any application on Summons in which counsel are appearing for parties, is to be adjourned, such

adjournment is to be noted on the Summons by the Court officer as in the case of applications by attorney. If the application is not brought up on

the adjourned date or a further adjournment obtained, the Summons will be deemed to have lapsed and no action will be taken on the same. The

Court officers are to bring to the notice of the Judges cases of undue delay.

8. The learned Judge interpreted this resolution to mean that the court officer only plays the role of an observer for the purpose of checking that

there was no undue delay in disposal of the Chamber Summons in which counsel had been briefed. The observations that the learned Judge made

were as follows:-

But this resolution does not mean that the court officer was empowered to grant any adjournment or that any adjournment of the summons in the

manner indicated amounted to the court having dealt with the matter or the parties having moved the court for the purpose. The capacity of the

court officer in cases like these is merely that of an observer. He does not take any initiative himself. He does not suggest that adjournments should

be had. Whatever is done is done by the attorneys for the parties and the court officer merely puts his signature on the summons at the foot of the

endorsement made by attorneys by way of check of the adjournments had. Really the parties agree among themselves as to the day to be

''appointed'' by them for the consideration of the matter within the meaning of the expression used in rule 9 of Chap. VI.

9. Now it is clear that the object of this Resolution was to stop cases of undue delay in chamber applications being brought up before the court and

with that end in view the resolution required that the adjournments should be noted on the summons by the Court Officer. In other words whenever

adjournment of a Chamber Summons is sought, such fact has to be brought to the notice of the Court Officer and the latter must note such

adjournment on the back of the summons. There is hardly any room for doubt that this practice was introduced to avoid wastage of the court''s

time by such matters being mentioned before the presiding judge. The provision in the Resolution that if the application is not brought up on the

adjourned date and if further adjournment is not ""obtained"" the summons would lapse indicates that by the notings made by the Court Officer the

summons is kept alive and the application remains pending. The word ""obtained"" used in the expression ""further adjournment obtained"" means the

adjournment obtained from the Court by the act of noting of the Court Officer.

10. By virtue of this Full Court resolution the power of allowing adjournment of Chamber Summons has been delegated to the Court Officer. If

there is in any case undue delay in moving a Chamber application the Court Officer can certainly bring it to the notice of the Court and refuse to

make further notings on the summons. The word ""appointed"" in rule 9 of Chapter VI, means the day appointed by the noting made by the Court

Officer or by the Court when the matter is mentioned before the Court. In my view when according to the practice laid down by the resolution of

the Full Court notings about adjournments are made by the Court Officer on the back of the summons the application is to be deemed to have

been made before the Court on the date when the first noting is made. The first noting in the present case having been made on 11th June, 1957

the application cannot be said to have been barred by limitation.

11. The next point argued by Mr. Roy Chowdhury is that the learned Judge was wrong in holding that the merits of the case did not justify an

order for restoration. This contention does not appear to be without any force. The plaintiff''s case was that his counsel was engaged in the Appeal

Court. This fact is not specifically denied in the opposition of the defendant. I cannot see why this ground does not constitute a sufficient cause for

non-appearance. It appears that the learned Judge did not accept all the statements of facts alleged in the affidavit of Tarapada Sen affirmed on the

6th June, 1957 and he preferred to accept some of the statements in the affidavit of Pran Kumar Das but the learned Judge does not appear to

have rejected the case of the plaintiff as made in the affidavit of Tarapada Sen that the plaintiff''s advocate was engaged in some other court and

was absent from his court at the crucial moment and this led to the dismissal of the suit for default of appearance. So I do not think that the

application can be thrown out on the ground that it is lacking in merits.

12. Mr. Subrata Roy Chowdhury has also contended that the application for restoration of a suit dismissed for default can be made by taking out a

Chamber Summons and it is not obligatory to take out a Notice of Motion for the said purpose. The learned Counsel has placed reliance on items

12, 13 and 18 of Rule 11 of Chapter VI of the Rules of the Original Side of this Court, in support of his argument that this application can be by

way of Chamber Summons. I am unable to accede to this contention.

Item 12 is as follows:

Application for time to plead, for leave to amend, for discovery and production of documents and generally all applications relating to the conduct

of any suit or matter.

13. It is argued that an application for restoration is one relating to the conduct of the suit. In my view this is not a correct reading of the words

and generally all applications relating to the conduct of any suit or matter"" as appearing in item 12 of Rule 11. The expression ""conduct of any suit

has been explained in Item 12 itself by reference to certain specified matters which relate to the conduct of the suit e.g. applications asking for time

to plead, for leave to amend, for discovery and inspection. So only matters of like nature which relate to the conduct of a pending suit that are

covered by the expression ""conduct of any suit."" An application for restoration of a suit which has come to an end by reason of a decree of

dismissal is not one relating to the conduct of the suit. It is an application for reviving a suit which is dead or has ceased to exist and is no longer on

the file. There cannot be any conducting of a dead suit.

14. Similarly Item 13 of Rule 11 of Chapter VI of the Rules has no application.

Item 13 reads thus:-

All proceedings in execution or otherwise under a decree or order.

15. An application for restoration of a suit or for setting aside the decree of dismissal cannot by any stretch, of imagination be regarded as a

proceeding taken under a decree or order. The very object of such an application is to challenge the decree or order or to get rid of the decree or

order of dismissal.

16. The next item relied on is Item No. 18 of Rule 11 of Chapter VI which is as follows:

Such other matters as are not expressly required to be disposed of in court and which the Judge thinks fit to be heard in Chambers and such other

applications as are directed to be made in Chambers.

17. There is nothing to show that any Judge had directed or thought fit that this matter would or should be heard in Chambers before the Chamber

Summons was taken out in, the present case.

18. It appears to me that in view of the opening words of Rule 11 of Chapter VI and Rule 3 of Chapter XX of the Rules of the Original Side of

this Court it should be held that the present application ought to have been made by taking out a Notice of Motion. In Rule 3 of Chapter XX it is

provided that except where otherwise provided by statute or prescribed by these rules all applications which in accordance with these rules cannot

be made in Chambers, shall be made on motion. This residuary provision applies to this case and in my opinion the proper procedure of making an

application for restoration of a suit dismissed for default of appearance is by way of Notice of Motion.

19. It has been argued by Mr. Roy Chowdhury that even if it is held that the proper procedure is an application by notice of motion, the learned

Judge by adjourning the matter to court and by treating the application as one made by Notice of Motion had condoned the defect and regularised

the application and so the application cannot be thrown out for the initial defect in procedure that was there when the Chamber Summons was

taken out.

20. Now the Rules which empower the Judge sitting in chambers to adjourn any application to court are Rules 2 and 10 of Chapter VI of the rules

of the Original Side of this Court. But these rules, in my view, have reference to initially proper or regular applications which can be validly made in

chambers and not to applications which cannot according to the rules be made in chambers at all. The present application being one which could

not be properly made in chambers, the further question that arises is whether the learned Judge could treat it as an application by way of notice of

motion. It is to be noted that the learned Judge himself was in doubt whether he could so treat it.

21. The words ""if permissible"" used by him in his judgment indicate this doubt. It appears to me that the Court should not lightly brush aside the

rules framed by this Court or allow the parties to contravene the rules with impunity. But adherence to the rules and practice of the court should be

insisted upon. It is true that the Court on certain occasions has allowed restoration of suits dismissed for default of appearance upon the oral

application of parties and sometimes on a mere affidavit of the party in default but such cases are to be treated as special or exceptional cases

where the Court has shown special indulgence. But where the parties have to make or are directed to make applications for restoration in the

ordinary way they must follow the normal procedure.

22. Now although the normal procedure for an application for restoration of a suit dismissed for default is by taking out a notice of motion and not

a Chamber Summons, I am inclined to think that dismissal of the application on this technical ground alone will result in hardship and injustice to the

plaintiff.

23. I would, therefore, allow this appeal and set aside the order of the learned trial Judge but on the term and condition that the appellant-plaintiff

will pay to the Respondent the costs of this appeal and the costs of the application before G.K. Mitter, J. and also all costs of the day when the suit

was dismissed for default as a condition precedent within three weeks from date. Such costs are assessed at Rs. 1,750/- subject to taxation and

subject to the usual mutual undertaking to refund or pay the excess. Upon such payment the suit will be restored and liberty to mention for placing

the suit in the list for trial. In default of payment, the appeal will stand dismissed with costs.