

ORIGINAL CIVIL.

Before Greaves J.

SEWRATAN

v.

KRISTO MOHAN SHAW.*

1921

Jan. 13.

Practice—Peremptory order dismissing action—Order dismissing action in default of conditions precedent—Difference—Order not completed or filed, effect of, on suit.

On the suit coming for hearing on the 10th April, 1919, it was ordered that it be adjourned to the 1st June, 1919, that the plaintiff was to pay to-day's costs and was to pay Rs. 200 as a condition precedent before the 1st June to the defendant's attorney, refundable on taxation of bills, and that in default the suit would be dismissed with costs and no further adjournment would be granted. This order was never drawn up or filed. The suit came up again on the 25th June, 1919, when it was adjourned, though opposed on the ground that the suit could not proceed, on an application of the surviving plaintiff to enable substitution in respect of one of the plaintiffs who had died on the 28th June, 1919. On the 25th August, 1919, the surviving plaintiff obtained an *ex parte* order recording the death of the deceased plaintiff. On the 13th January, 1921, when the suit was on the Special List, plaintiffs applied that it be placed in the Prospective List. It was contended on behalf of the defendants that the suit was dead.

Held, that irrespective of subsequent proceedings or any question of drawing up of the order, and in the absence of any appeal from the order, the dismissal would be from the date of the order had it contained the words "in default the suit will stand dismissed" but in the terms of the order of the 10th April, 1919 containing conditions precedent, a further order of the Court was necessary before the suit was dead.

ON an application for adjournment by the plaintiff which was opposed by the infant defendants, when the suit came on for hearing on the 10th April, 1919, the following order was made—"Adjourned to the 1st June, 1919. The plaintiff is to pay to-day's costs. He

* Original Civil Suit No. 515 of 1914.

“is to pay Rs. 200 as condition precedent before the 1st
 “June, the said defendant’s attorney undertakes to
 “refund the excess, if any, on taxation of his bills. If
 “money is not paid by the 1st June, 1919, the suit will
 “be dismissed with costs. No further adjournment is
 “to be granted.”

This order was not drawn up, completed or filed. The sum of Rs. 200 was not paid by the plaintiff at all. When the case came up again on the 25th June, 1919, for hearing, another adjournment was granted to the plaintiff as one of the plaintiffs had died, though the application was opposed on the ground that the suit could not go on.

On the 25th August, 1919, the surviving plaintiff obtained an *ex parte* order recording the death and substituting the present plaintiffs.

On 13th January, 1921, when the suit was placed on the Special List, counsel for the plaintiff applied that the suit might be placed on the Prospective List for hearing.

Mr. N. N. Ghatak, for the infant defendants, contended that this action was dead owing to default on the part of the plaintiffs in carrying out the order of the 10th of April, 1919. The suit became dead after the 1st June, 1919. Referred to *Script Phonography Company v. Gregg* (1), *Whistler v. Hancock* (2), *King v. Davenport* (3). He further contended that any order made after the suit was dead was wholly without jurisdiction and was a nullity. The case in 59 L.J. Ch. 406, supports the contention that it does not matter whether the order is drawn up or not.

Mr. H. C. Mazumdar (counsel for the plaintiff) submitted that the cases cited had no bearing on the

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(1) (1890) 59 L. J. Ch. 406.

(2) (1878) 47 L. J. Q. B. 152.

(3) (1879) 48 L. J. Q. B. 606.

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facts of this case. Firstly, all the cases cited showed that the peremptory order provided that if default was made to carry out the condition of the order within the particular time, the suit would stand dismissed with costs. In effect the order for dismissal was from date, but the order would not be effective if a condition was fulfilled within a particular time. In this suit another order had to be obtained from Court before the suit could be actually dismissed and therefore the suit was not dead.

Secondly, penalty clauses contained in an order are to be construed strictly. An order of Court directing a party to do a particular act is not effective unless it is drawn up and filed. Referred to *Metcalf v. British Tea Association* (1). The head note in the case of *Script Phonography Company v. Gregg* (2) is incorrect and misleading in so far as it is alleged to overrule *Metcalf v. British Tea Association* (1). The order was drawn up and filed whereas in this case the peremptory order of the 10th April 1919 was never drawn up and completed, nor filed.

Mr. Ghatak, in reply, submitted that from the Minutes it appeared that the Court when passing the order of the 10th April, 1919, distinctly ordered that no further adjournment would be granted, that the distinction sought to be made out between "stand dismissed" and "will be dismissed" is not borne out by any of the authorities cited and that it was merely playing with words.

GREAVES J. This suit appeared on the Special Board sometime in December last. When the suit was called on, the defendants contended that the suit was dead by virtue of an order passed on the 10th April, 1919. That order has never been drawn up.

(1) (1881) 46 L. T. R. 31.

(2) (1890) 59 L. J. Ch. 406.

But it appears from the Minute Book that the order was made in these terms :—“ Adjourned till 1st June ; “ Rs. 200 as condition precedent to be paid before 1st “ June. If the money is not paid by 1st June the suit “ will be dismissed with costs.” The money was not in fact paid in by the 1st June, and has not been paid up to this day. On the 4th June, Mr. Mandal, attorney for some of the parties, wrote a letter to the plaintiff with regard to the drawing up of the order for dismissal. On the 25th June the case came on, and another case in which a similar order had been made, and in which on the 25th an order for dismissal was made. On the 21st June one of the plaintiffs had died and on the 25th the case was ordered to go out of the list for substitution to be made, and in August of the same year an order for substitution was made. I have been referred to the cases of *The Script Phonography Co. v. Gregg* (1), *Metcalf v. British Tea Association* (2) and also to the case of *Whistler v. Hancock* (3).

It seems to me that the real question is the effect of the order of the 10th April, 1919. If that order had contained the words “ In default the suit will stand “ dismissed,” I should have thought that as from that date the suit in the circumstances was dead and that, irrespective of subsequent proceedings and any question as to the drawing up of the order, the Court could not revive the suit in the absence of any appeal from the order of the 10th April 1919. But I think, having regard to the terms of the order of the 10th April, 1919, a further order was necessary by the Court before the suit was dead, and that on an application for such an order, it would be open to the Court, if the circumstances appeared to the Court to justify such an order, to further extend the time for making

(1) (1890) 59 L. J. 406 (N.S.) (2) (1881) 46 L. T. R. 31 (N.S.)

(3) (1879) 48 L. J. Q. B. 606.

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the payment. Under the circumstances, I think, it is now open to the Court, in spite of the order of the 10th April, 1919, to hold that the suit can proceed. Counsel for the plaintiff tells me that the suit is ready for hearing, and is willing to have it put in the Prospective List. In these circumstances, I will allow the suit to go into the Prospective List. But the order of the 10th April must be complied with, and I give the plaintiff one week to comply with the order. In default of compliance, within one week from this day, the suit will stand dismissed. Costs, costs in the cause. Certified for counsel.

Attorneys for plaintiff : *B. N. Basu & Co.*

Attorney for the infant defendants : *N. C. Mandal.*

S. K. R.

APPELLATE CIVIL.

Before Mookerjee and Buckland JJ.

MAHOMED KAMEL AND OTHERS

v.

HAJI HEDAYETULLA.*

Partnership Business—Death of one partner—Liability of surviving partner for profits made in the business subsequent to the death of the deceased partner.

Where on the death of one partner, the surviving partner continued the business :

Held, that he was liable to give to the representatives of the deceased partner a share in the profits of the business which may have accrued subsequent to the death of the deceased partner.

* Appeal from Original Decree No. 170 of 1919, against the decree of S. P. Bakshi, District Judge of Birbhum, dated April 5th 1919.