

ORIGINAL CIVIL.

Before Lord-Williams J.

GULRAJ SHROFF

v.

KANIRAM SUREKA.*

1937

Nov. 22, 23 ;
Dec. 1, 2.

Discovery of documents—Inspection—Dismissal of suit for want of prosecution—Conditional order of dismissal—Practice—"Forthwith", Meaning of—Code of Civil Procedure (Act V of 1908), O. XI, r. 21.

Order XI, r. 21 of the Code of Civil Procedure, 1908, contemplates, ordinarily the making of two orders: first, an order for discovery or inspection, and, secondly, upon default on the part of the plaintiff, an order of dismissal of the suit for want of prosecution.

Jagamath Motilal v. Bala Prosad Arjundas (1) referred to.

Where, however, there has been a previous order for discovery or inspection and it has not been complied with, it is in accordance with the practice of the Court to make a conditional order to the effect that if discovery is not made or inspection is not given within the time freshly prescribed the suit be dismissed, or do stand dismissed. There is no difference in effect between the two expressions.

The effect of such an order is that upon plaintiff's default the suit is automatically dismissed without any further order.

King v. Davenport (2) relied upon.

Sewatan v. Kristo Mohan Shaw (3) distinguished.

Where an act is required to be done forthwith it must be done within a time reasonable in the circumstances and if it be capable of being done without any delay no delay is permissible.

In re *Southam* ; ex parte *Lamb* (4) relied on.

SUMMONS in Chambers.

The facts of the case and arguments of counsel appear sufficiently from the judgment.

S. N. Banerjee (Sr.), *K. P. Khaitan* and *G. P. Kar* for the applicants.

R. S. Bachawat for the respondents.

Cur. adv. vult.

*Application in Original Suit No. 1212 of 1937.

(1) (1923) 50 C. L. J. 397.

(2) (1879) 48 L. J. (Q. B.) 606.

(3) (1921) I. L. R. 48 Cal. 902.

(4) (1881) 51 L. J. (Ch.) 207.

LORT-WILLIAMS J. This is a summons taken out by the defendants asking that it be recorded that this suit stands dismissed and the same be struck out and removed from the list.

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On February 19, 1937, the defendants filed a suit against Gulraj Shroff for self and as *kartá*, being suit No. 279 of 1937, for recovery of Rs. 1,801-2 for money lent.

Gulraj Shroff filed a written statement alleging, *inter alia*, that he had paid a sum of Rs. 1,500 and produced a *purjá* in support, which is challenged by the defendants.

On March 9, 1937, one of the defendants, Banwari Lal Sureka, instituted a suit, No. 388 of 1937, against Gulraj Shroff and Hanuman Bux Shroff, for the recovery of Rs. 7,578-1 for money lent. A written statement was filed by Gulraj Shroff in that suit also.

Both these suits were appearing high in the prospective list in July, 1937, when the plaintiffs instituted the present suit on July 14, 1937. On the 28th July, Panckridge J. ordered the plaintiffs to supply particulars within a fortnight and the defendants to file a written statement within a fortnight thereafter. On the 29th July, Panckridge J. directed that affidavits of documents should be filed within a week after the filing of the written statement and inspection was to be given immediately thereafter, and the suit was to be placed, after the aforesaid suits Nos. 279 and 388 of 1937, on the list, after the vacation. The defendants filed their written statement on the 17th August and the time for filing affidavits of documents expired on the 23rd August.

On the 30th August an order was made, by consent, by Biswas J. directing the adult plaintiff Gulraj Shroff to file an affidavit of documents within ten days, inspection to be completed within a week thereafter, and that in default the suit "will stand dismissed" with costs. The office was directed to

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accept the affidavit during the vacation. The plaintiff Gulraj Shroff failed to file the affidavit of documents within time, and, on application made by the plaintiffs, Biswas J. on the 9th September extended the time for filing the affidavit until the 18th September, and ordered inspection to be given forthwith.

The learned Judge acted thus, presumably, under the provisions of ch. XXXVIII, r. 33 of the Rules and Orders (O. S.) of this Court which gives power to the Court or a Judge to enlarge or abridge time, but I am doubtful whether this rule gives the Court power so to act, with regard to a consent order, without the consent of the parties.

The adult plaintiff filed the affidavit of documents on the 17th September but failed to give inspection forthwith as he had been directed so to do.

On the 21st September, Messrs. Khaitan & Co., the attorneys for the defendants, wrote to Messrs. Fox & Mondal, the attorneys for the plaintiffs, asking them to appoint a time to give inspection. They wrote again on the 22nd September saying that no time had been appointed and that the defendants would attend at the office of Messrs. Fox & Mondal next day between 2 and 3 p.m. to take inspection. On the 23rd, Messrs. Fox & Mondal replied, to the effect, that they had had no time to communicate with their clients and that they could not arrange inspection on that day, and that they would inform Messrs. Khaitan & Co. later on when they had been able to hear from their clients. On the 30th September Messrs. Khaitan & Co. wrote saying that, inasmuch as they had failed to give inspection according to the orders of the Court, the suit stood dismissed. In reply Messrs. Fox & Mondal said that there was no question of failure to give inspection, and that their suggestion that the suit stood dismissed was preposterous, that the time for offering inspection expired on a day on which the Court was closed, and as their office was also closed for all normal work, n-

inspection could be given during that period, and they stated that they had already made an appointment to allow the defendants to have inspection on the first day after the re-opening of the Court after the Long Vacation. They accordingly fixed November 6, 1937, for inspection.

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In the plaintiffs' affidavit in reply they allege that no order for inspection was made, that they duly filed their affidavit of documents in compliance with the order of the Court on the 17th September, and they deny that they failed to give inspection or that there was any demand for inspection. Both these allegations are obviously inaccurate. The minutes show that an order for inspection was made and the letters to which I have referred show that there were repeated demands for inspection. They further allege that they appointed 6th November for inspection, but that the defendants' attorneys did not appear and that they made a further appointment for the 8th November but the defendants were absent. They say also that the defendants treated the suit as subsisting by giving a notice to admit and produce, dated November 6, 1937. This is correct, but the defendants say that this notice was given by inadvertence and, in my opinion, it makes no difference to the question which I have to decide.

In another affidavit dated about the 9th September, a clerk in the employ of Messrs. Fox & Mondal said that the adult plaintiff left on pilgrimage on or about August 27, 1937, and was expected back in Calcutta by the first week of September, but had not yet returned and was moving about in different places of pilgrimage and would come back in about ten days' time. In the circumstances, the order dated the 30th August could not be communicated to him.

In spite of the orders made by Panckridge J. to which I have referred, the adult plaintiff deliberately chose to go on pilgrimage and flout and disregard the orders which the Court had made. There is, therefore, no shadow of excuse for the plaintiffs' failure to obey these orders.

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The question which I have to decide is whether, as a result of these proceedings, this suit is dead as from September 30, 1937. Order XI, r. 21 of the Code of Civil Procedure, 1908, provides that where any party fails to comply with any order for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and the party seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly. This Rule is similar in terms to O. XXXI, r. 21 of the Rules of the Supreme Court in England. The form of the order of Biswas J. in the present case was that the adult plaintiff Gulraj Shroff should file an affidavit within the prescribed time and that inspection be completed within a further prescribed period and that, in default, the suit "will stand dismissed." The question for decision, therefore, is whether the effect of such an order, in the present circumstances, results in the suit being automatically dismissed upon default, without any further order.

The terms, both of the English and the Indian rule, seem to contemplate that ordinarily there will be two orders: first, an order for discovery, and second, on default an order of dismissal of the suit for want of prosecution. On this point, I am in agreement with the opinion expressed by Sanderson C.J. in *Jagannath Motilal v. Bala Prosad Arjundas* (1). But the learned Chief Justice seems to suggest that ordinarily it would not be proper to make a conditional order—for example, an order for discovery within a prescribed time, and on default that the suit be or stand dismissed. If that be the meaning of the judgment, I regret to find myself in disagreement.

Where, as in the present case, there has been a previous order for discovery, it is, in my opinion, proper and according to practice both in England and India, to make a subsequent conditional order, for

(1) (1923) 50 C. L. J. 397.

example, an order for discovery within a prescribed time and upon default that the suit be dismissed or stand dismissed. The English forms under O. XXXI, r. 21 are to be found at pp. 364 and 365 of Chitty's King's Bench Forms, 16th Ed. Form No. 2 at p. 364 provides for such a conditional dismissal of a suit for want of prosecution. The expression used by this author is "be dismissed". For similar forms see Seton's Judgments and Orders, 7th Ed., vol. I, at pp. 133 and 134. Forms Nos. 4 and 5 at p. 134 provide for similar conditional orders. The expression used by this author is "stand dismissed". There is a similar form, No. 15, in appendix K to the Rules of the Supreme Court in the Annual Practice, 1937, at p. 1759 where the expression used is "be dismissed".

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However, in that case, as in the present case, the point could not and cannot be agitated because there was no appeal from the order and all that now remains for decision is what is the effect of the order upon the suit. In that case the material words were "and it is further ordered that in default of the plaintiff firm filing such affidavit within the time aforesaid this suit do stand dismissed." The Court held that this order became, on default, a final order dismissing the suit.

In *Sewratan v. Kristo Mohan Shaw* (1) the order ran :—

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.

Greaves J. considered that if the order had contained the words "In default, the suit will stand dismissed", the suit, in the absence of any appeal from the order, would have been dead [on this point

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see *The Script Phonography Company (Limited) v. Gregg* (1)], but that having regard to the terms of the order a further order was necessary. With this opinion, I respectfully agree. The order was that the application be adjourned until the 1st June and obviously contemplated that the matter would again come before the Court, and that if there were default, the suit would then be dismissed. That case is clearly distinguishable from the present case.

In my opinion, there is no difference in effect between the terms "stand dismissed" and "be dismissed". Both mean that the effect of the order is to dismiss the suit unless something be done within a specified time. Thus, in *King v. Davenport* (2), where an order was made dismissing the action unless a statement of claim should be delivered within fourteen days, it was held that the action was dead when the day fixed by the order expired. Similarly, in the present case, the order contemplated that in case of default the suit would be dead.

Nor have I any doubt that the plaintiffs were guilty of default. The order provided for inspection "forthwith" and obviously contemplated that it would be given during the period of the vacation. In the case of *In re Southam; ex parte Lamb* (3), it was held that "forthwith" was to be construed according to circumstances and meant within a reasonable time, and that where an act, required to be done forthwith, is one which is capable of being done without any delay, no delay can be permitted, and that in other cases the delay must not be unreasonable. The delay in the present case, in my opinion, was unreasonable, and no reasonable excuse for it has been offered by the plaintiffs.

The plaintiffs have relied also upon certain *obiter dicta* in the case of *Metcalfe v. British Tea Association* (4) to the effect that an order does not take effect

(1) (1890) 59 L. J. (Ch.) 406. (3) (1881) 51 L. J. (Ch.) 207.
 (2) (1879) 48 L. J. (Q. B.) 606. (4) (1881) 46 L. T. 31.

until it is drawn up and served, and state that the order in the present case has not even yet been drawn up. But these *dicta* were not approved subsequently in England: *Script Phonography* case (*supra*) and *Farden v. Richter* (1); or in this High Court: *Hiralal Murarka v. Mangtupal Bagaria* (2); and, in my opinion, they do not correctly state the law in India.

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Finally, it has been argued that in any case the second plaintiff is not affected by the order and the suit is alive so far as he is concerned. I fail to appreciate this argument. The same attorneys were and are acting for both the plaintiffs. The summons asking for an order directing the adult plaintiff to file an affidavit of documents was directed to these attorneys as "Solicitors for the plaintiffs" and both plaintiffs were asked to give inspection and to pay costs. The order was by consent and was directed to both of them.

The result is that this application must be allowed with costs. It is recorded that the suit stood dismissed as from September 30, 1937, and the defendants will have the costs of the suit and reserved costs.

Application allowed.

Attorneys for applicants: *Khaitan & Co.*

Attorneys for respondents: *Fox & Mondal.*

P. K. D.

(1) (1889) 23 Q. B. D. 124.

(2) (1932) I. L. R. 59 Cal. 1475, 1481.