ORIGINAL CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Beasley and Mr. Justice Reilly.*

1928
October 4.

A. V. NARAYANASWAMI NAICKER (PLAINTIFF),

v.

SAKHARAM RAO AND OTHERS (DEFENDANTS).*

Original Side Rules (High Court, Madras), O. VI, r. 4 — Suit dismissed for default under—Application to restore after period prescribed by proviso to rule 4—If Court has discretion to revive.

Where a suit on the Original Side of the High Court appeared, under Order VI, rule 4 of the Original Side Rules, in the list of default cases for three weeks and stood dismissed at the end of that period, and the plaintiff applied by a Master's summons to have the suit restored after the expiry of the thirty days prescribed under the proviso to rule 4,

Held, that the Original Side Rules gave a discretion to the Court to revive a suit even after the expiration of the time delimited for the taking of a particular step in it and that that discretion should be exercised on a consideration of the merits of the application unfettered by any supposed rule of law. *Bradshaw* v. *Warlow*, (1886) 32 Ch.D., 403; *Schafer* v. *Blyth*, [1920] 3 K.B., 140, followed.

APPEAL against the order of the Acting Master, dismissing the plaintiff's application to set aside the order of dismissal of the suit for default against defendants 1 and 7 and to restore the suit as against them. This matter came on for hearing before his Lordship Mr. Justice KUMARASWAMI SASTRIYAR, who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This is an appeal against the order of the Acting Master dismissing the plaintiff's application to set aside the order of dismissal of the suit for default against defendants 1 and 7 and to restore the suit as against them.

* O.S. No. 38 of 1928.

The suit against defendants 1 and 7 was dismissed by the Second Assistant Registrar on the 23rd of April 1928. The order runs as follows:—"This suit coming on this day before this Court in the list of default causes for orders under Order VI, rule 4 of the Original Side Rules, 1927, upon reading the plaint filed herein on the 18th day of January 1928, it is ordered that this suit as against defendants 1 and 7 do, for default of prosecution, stand dismissed out of this Court."

Under the Rules of 1927 every suit entered in the list of default causes is allowed to stand there for three weeks and if nothing is done in the meantime, it is automatically dismissed and the order is drawn up. There is no notice given to the parties.

Rule 4 of Order VI (which corresponds to Rule 54 of the old rules) under which this suit was dismissed runs as follows:—"Unless otherwise ordered, after a case has stood in the list of default causes for three weeks, the suit shall stand dismissed for default of prosecution as against the defendant in respect of whom default has been made.

Provided that the plaintiff may, within 30 days from the date of dismissal, apply by Master's summons that the suit may be restored, and thereupon the Master may make such order as he thinks fit. Notice of the application shall be given to all parties who have filed a written statement."

The plaintiff applied on the 24th of July 1928 before the Master in Chambers that the order of dismissal of the suit for default against defendants 1 and 7 may be set aside and the suit restored. To this, Counsel for defendants 2 to 4 endorsed his consent. The matter came on before the Master on the 27th of July and it was dismissed, the Master holding that the application was barred by time. The order runs as follows:—

"For the reasons given in the Master's order, dated 21st February 1928, in C.S. No. 586 of 1926 with which I agree and which was upheld by the Judge (WALLER, J.) in appeal, I must dismiss the application. I do not think that the consent of the other side could extend the period of 30 days fixed by Order VI, rule 4, within which the application for restoration should be made."

It is argued for the plaintiff who is appealing against this order that the learned Master was wrong in holding that he had no discretion in the matter and that he was bound to dismiss an application for restoration if not made within 30 days.

The main grounds urged are that this case does not fall under Article 163 of the Limitation Act and that Order I,

NARAYANA-SWAMI NAICKER v. SAKHARAM RAO.

rule 7, gives ample power to extend the time even though the period within which the application is to be made has expired. Order I, rule 7, runs as follows :—

"The Court or the Master shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act, or taking any proceedings, upon such terms, if any, as the justice of the case may require; and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that, when the time for filing or delivering any pleading or document, or filing any affidavit, answer or document, or doing any act, is or has been fixed or limited by any of these rules or by any direction on or under a summons for directions or by any order of the Court or Master, the costs of any application to extend such time and of any order made thereon, shall be borne by the party making such application unless the Court or Master shall otherwise order."

It is argued that the rule is clear and that in cases governed by the Original Side Rules an extension of time can be granted even though the period within which the application is to be made has elapsed.

Order I, rule 7, corresponds to Order LXIV, rule 7 of the Supreme Court Rules which runs as follows :—

"The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules; or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that, when the time for delivering any pleading or document or filing any affidavit answer or document, or doing any act is or has been fixed or limited by any of these rules or by any direction on or under the summons for directions or by any order of the Court or a Judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the Court or a Judge shall otherwise order.

Under this rule it was held by NORTH, J., in *The Script Phonography Co.* v. *Gregg*(1), that, when an order has been

(1) [1890] 59 L.J., Ch. 406.

made dismissing an action, an application to extend the time cannot be made after the expiry of the period fixed by the rules within which the application is to be made. NORTH, J., following *Whistler* v. *Hancock*(1) and *King* v. *Devenport*(2), observed as follows:—"The Court cannot, after the action is gone, entertain an application the result of which would be to set it on foot again. The time for delivering the statement of claim expired on the 17th of December 1889. The summons to extend the time was not returnable till the 18th of December, and under these circumstances the application was too late, and I have no jurisdiction to extend the time."

The same learned Judge in *Walker* v. *James*(3), was of opinion that when an action was dismissed for the non-appearance of the plaintiff, an application made on behalf of the plaintiff to restore the action after the expiry of the time fixed by Order XXXVI, rule 33, cannot be granted by virtue of the provisions of Order XXVII, rule 15. The learned Judge observed: "I do not think the power conferred by that order can be regarded as independent of the limit of time for making the application imposed by Order XXXVI, rule 33. I must act strictly on that rule, and therefore refuse the motion with costs."

This view in the earlier cases, however, has not been followed in the later decisions. In *Schafer* v. *Blyth*(4), it was held that the Court had discretion to enlarge the time fixed by Order XXXVI, rule 33, which provides that any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge . . . upon an application made within six days after the trial. The learned Judge (LUSH, J.) followed *Bradshaw* v. *Warlow*(5), and dissented from *Walker* v. *James*(3) and observed: "Counsel for the plaintiff has taken the preliminary objection that the application is not made within six days after the trial as required by Order XXXVI, rule 33 (1), and that I have no power to enlarge the time for making it. In support of the objection he relies on *Walker* v. *James*(3). In that case, where the circumstances were similar to those of the present case, NORTH, J., did no doubt hold that it was imperative that the application should be made within the time appointed by the rule, and that the Court had no power to enlarge the time, and if that decision is

(1) (1878) 3 Q.B.D., 83. (2) (1879) 4 Q.B.D., 402.
(3) (1886) 53 L.T. (N.S.), 597. (4) [1920] 3 K.B., 140.
(5) (1886) 32 Ch.D., 403.

NARAYANA-SWAMI NAICKER v. SAKHARAM RAO.

binding upon me, I should have to dismiss the application. Unless it is binding upon me, I should, however, be slow to follow it, because personally I do not take the same view as was taken by NORTH, J. It cannot, I think, have been intended that the period of six days appointed by the rule should in every case be treated as a fixed period incapable of extension, inasmuch as a litigant might be absolutely prevented by illness or an accident, or other circumstances, from making an application within the six days, and in that case a grave injustice might be worked if he was debarred from making the application at a later date. On consideration, I think that the decision of NORTH, J., is not binding upon me. The same point in substance came before the Court of Appeal in *Bradshaw* v. *Warlow*(1). It is true that it was Order XXXIII, rule 21 of the Rules of the Palatine Court of Lancaster which was there under consideration, but the language of that rule is substantially identical with that of the rule now in question. In that case *Walker* v. *James*(2), was cited, but the Court of Appeal took the view that the Court had power to enlarge the time so as to admit of the application being made to the Court on the first practicable day after the expiration of the six days. That decision of the Court of Appeal seems to me to be in conflict with *Walker* v. *James*(2), and therefore impliedly to disapprove it."

The order of the Master in C.S. No. 586 of 1926 referred to by the Acting Master related to a case which was dismissed for default of payment of the first day's hearing fee which under Order XLIII, rule 4 is payable within 14 days from the date on which issues were settled. The suit was entered in the list of default causes under Order VI, rule 3 (*d*) and was dismissed under Order VI, rule 4. An application was made to restore the suit after 30 days had expired. An application was also made to excuse the delay in filing the application and to extend the time under Order I, rule 7. Mr. White, the Master, held that the application was not one under Article 163 of the Limitation Act and that the Court had no power to extend the time and relied on *The Script Phonography Co.* v. *Gregg*(3), *Whistler* v. *Hancock*(4), *King* v. *Devenport*(5).

An appeal was preferred against this order and it came on before WALLER, J., and the learned Judge passed the following order: "I think that the Master's order is right and that he

(1) (1886) 32 Ch.-D., 403. (2) (1886) 53 L.T. (N.S.), 597.
(3) [1890] 59 L.J. Ch., 406. (4) (1878) 3 Q.B.D., 83.
(5) (1879) 4 Q.B.D., 402.

had no power to extend the time under Order I, rule 7 of the Original Side Rules. The appeal is dismissed with costs."

It is unfortunate that the subsequent decisions where the cases referred to by Mr. White have been overruled were not brought to the notice of the Master or the learned Judge. It seems to me that Order I, rule 7, gives ample discretion to the Court to extend the time even in cases where the time has expired.

Section 5 of the Limitation Act gives similar powers in the case of appeals and applications made under the Act. Section 148 of the Civil Procedure Code also gives the Court power to extend time even after expiry of the time fixed.

I think that the view taken by the Master in C.S. No. 586 of 1926 and by WALLER, J., on appeal therefrom, which, as I said before, was based on the earlier decisions which have not been followed, is erroneous.

As this question has arisen in several cases and the matter is of considerable importance to the practitioners and suitors, I think an authoritative ruling by a Bench is desirable and I direct that this matter be placed before the Hon'ble the CHIEF JUSTICE for orders.

ON THE HEARING BEFORE THE FULL BENCH—

K. S. Krishnaswami Ayyangar (*P. V. Subramanyam* with him).—Under Order I, rule 7, of the Original Side Rules the Master and the Court have a discretion to extend the time. Our rule corresponds to Order XLIV, rule 7, of the Supreme Court Rules. In the earlier cases, *Whistler* v. *Hancock*(1), *King* v. *Devenport*(2). *The Script Phonography Co.* v. *Gregg*(3), *Walker* v. *James*(4), the Courts dealt with cases where applications for extension of time were in respect of suits which had already been decided and not suits which had to be revived. This distinction was kept in mind in the later cases. In *Schafer* v. *Blyth*(5), it was decided that the Court had a discretion to enlarge the time following the decision of the Court of Appeal in *Bradshaw* v. *Warlow*(6). See also *Carter* v. *Stubles*(7).

No one appeared for the defendants.

---

(1) (1878) 3 Q.B.D., 83.
(2) (1879) 4 Q.B.D., 402.
(3) [1890] 59 L.J., Ch., 406.
(4) (1886) 53 L.T. (N.S.), 597.
(5) [1920] 3 K.B., 140.
(6) (1886) 32 Ch.D., 403.
(7) (1880) 6 Q.B.D., 116.

NARAYANA-SWAMI NAICKER v. SAKHARAM RAO. — COUTTS TROTTER, C.J.

The JUDGMENT of the court was delivered by

COUTTS TROTTER, C.J.—Under the provisions of Order VI, rule 4, of the Original Side Rules of this Court, this case, having been in the list of default cases for three weeks, stood dismissed. The proviso to that rule allows the plaintiff within 30 days of the date of dismissal to apply by Master's summons to have the suit restored and thereupon the Master has a discretion to restore it or not as he thinks fit. That proviso was not availed of by the plaintiff in this case and he took no steps within 30 days. The Master held that in those circumstances he had no discretion to allow the case to be restored after those 30 days. It is pointed out that by Order I, rule 7, which is in effect a reproduction of that which appears as Order LXIV, rule 7, of the Rules of the Supreme Court in England and which repeats similar rules which had been in force for many years, there is a general discretion given to revive a suit, because it says in terms that an enlargement may be ordered although the application for the same was not made until after the expiration of the time appointed or allowed. We have been referred to a series of English cases, the earliest of which is *Whistler* v. *Hancock*(1), a decision of Chief Justice COCKBURN and Mr. Justice MANISTY. There an order was made dismissing an action for want of prosecution unless a statement of claim should be delivered within a week. The week expired and nothing was done and it was held that the action was at an end. A similar conclusion was arrived at in *King* v. *Davenport*(2), a decision of Chief Justice COCKBURN and Mr. Justice MELLOR, but it has been held that this case only applied to a state of things where an extension was sought to do something in the action after the action was dead.

(1) (1878) 3 Q.B.D., 83. (2) (1879) 4 Q.B.D., 402.

Thus it was decided in *Schafer* v. *Blyth*(1), that the general words of the rule covered a case where it was sought not to extend the time for taking a particular step in a case that had automatically come to an end but to revive the whole case itself and that the words of the rule gave a discretion to that effect. And in so deciding Mr. Justice LUSH was following a decision of the Court of Appeal—*Bradshaw* v. *Warlow*(2). It is quite obvious that the draftsman of the Madras rules went for guidance to the English rule and no doubt was familiar with these decisions. We think that it must be taken that the intention of the framers of the rules which are made under the statute—and it is not suggested that they are *ultra vires* of the statute—was to give a discretion to the Court to revive a suit even after the expiration of the time delimited for the taking of a particular step in it. The learned Master here held that he had no discretion and that he was bound by the terms of Order VI, rule 4, to decline to entertain any application or exercise any discretion with regard to its revival. We think that this cannot be upheld and we propose to remit the case to the learned Judge with this intimation of our opinion. He will probably send it back to the Master with a direction that he should consider the application on its merits and that his discretion on the merits is unfettered by any supposed rule of law.

B.C.S.

(1) [1920] 3 K.B., 140. (2) (1886) 32 Ch. D., 403.