

New Bangasree Bastralaya and another Vs Ramanlal Phurma Karta

Court: Calcutta High Court

Date of Decision: May 6, 1976

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 115, 148, 149, 151

Citation: AIR 1976 Cal 63

Hon'ble Judges: N.C. Mukherji, J; B.C. Ray, J

Bench: Division Bench

Advocate: Jamini Kumar Banerjee and Tapas Kumar Mukherjee, for the Appellant; G.C. Tandon, Biswajit Ghosh and Mrs. Gita Lalwani, for the Respondent

Judgement

N.C. Mukherji, J.

This is an application for extension of time to furnish security of Rs. 5,500 in the trial Court in modification of the order passed by this Court on 13th of August 1975. The facts of the case may briefly be stated as follows:

The opposite party filed a suit in the City Civil Court at Calcutta for recovery of a sum of Rs. 11,800.00 under Order XXXVII of the Code of

Civil Procedure. The petitioners after entering appearance filed an application praying for unconditional leave to defend the suit. The petitioners

were allowed to contest the suit only on furnishing security to the extent of Rs. 8,000. It was further ordered that in default of furnishing security the

application would stand rejected. Being aggrieved by the aforesaid order, the petitioners moved an application u/s 115 of the Code. On the said

application a Rule was issued being Civil Rule No. 2159 of 1974. When the Rule was issued the petitioners were directed to furnish security to the

extent of Rs. 2,500. That order was complied with. The Rule came up for final disposal on August 13, 1975. On that date the petitioners agreed to

furnish security for the balance sum of Rs. 5,500 within two weeks after the Puja Vacation. It was ordered that on furnishing the said security and

the same being accepted leave would be granted to the petitioners to contest the suit. In default the application for leave would stand rejected. The

said order could not be complied with for the reasons stated in the present application. It has been stated in paragraph 13 of the application that in

spite of their best efforts the petitioners could not furnish security and that they have now been able to make necessary arrangements for furnishing

security to the extent of Rs. 5,500.

2. Mr. Biswajit Ghosh, learned Advocate appearing on behalf of the opposite party strongly contends that this application is not maintainable

because by order dated August 13, 1975 the Rule was disposed of and that being so, this Court has now become functus officio and cannot pass

any order in modification of the order passed on August 13, 1975. In support of his contention Mr. Ghosh refers to a decision reported in (1949)

53 Cal WN 192 (Pulin Krishna Roy v. Sushil Kumar Dey). In this case it was held by Chatterjee, J. that

Where in an application for leave to defend under Order 37 of the CPC leave was granted upon furnishing security within a specified time and it

was provided that in default the application should stand dismissed with costs (sic), "" it was also held that ""in default the action was dead and no

further extension of time was possible.

In rejecting the application for extension of time for furnishing security the learned Judge observed

The difficulty I feel is that in a suit under Order 37 an application for leave to defend must be made within 10 days of the service of the writ of

summons and the Court has no power to extend this period.

But it may be mentioned that in this very case leave was granted to the defendants to defend the suit on condition that security to be furnished

within a fortnight to the satisfaction of the Registrar. The application for leave to defend was filed within 10 days of the service of the writ of

summons.

3. Mr. S. P. Ray Chowdhury, learned Advocate appearing on behalf of the petitioners, first refers to a decision reported in (1967) 71 Cal WN 12

(Brojomohan Sabui v. Binapani Sur), It has been held in this case that

Where direction for payment made in a procedural order the Court is not functus officio to extend the time if payment is made after the expiry of

the time originally fixed.

It was however held that

Where time is fixed by the decree the Court has no jurisdiction to extend the time after expiry of the period fixed by the decree.

In coming to the decision the learned Judge relied on the decision reported in Mahanth Ram Das Vs. Ganga Das,

4. Mr. Ray Chowdhury next refers to a decision reported in Sm. Lakshmi Bala Chanak Vs. Brojendra Nath Pain and Others, . In this case it has

been held that

A Court has power to extend time u/s 148 even after the time fixed by decree or order has expired.

In view of the decision reported in Mahanth Ram Das Vs. Ganga Das, the learned Judge held that Tarapada Sarkar Vs. Nepal Gazi and Others,

was not good law.

5. We thus find that in both the cases the learned Judge relied on the Supreme Court decision referred to above. In the Supreme Court case an

appeal was decided in favour of the appellant but a peremptory order was passed fixing the period for payment of deficit court-fee and the

appellant made an application for extension of time before the time fixed had run out, but the application came on for hearing before a Division

Bench after the period had run out. It was held by the Supreme Court that

the High Court was not powerless to enlarge the time even though it had peremptorily fixed the period for payment. Section 148, in terms, allowed

extension of time, even if the original period fixed had expired, and Section 149 was equally liberal. A fortiori, those sections could be invoked by

the applicant, when the time had not actually expired. An order extending time for payment, though, passed after the expiry of the time fixed, could

operate from the date on which the time fixed expired. The procedural orders though peremptory (conditional decree apart) are in essence in

terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note

of events and circumstances which happen with the time fixed. Sections 148, 149 and 151 clothed the High Court with ample power to do justice

to a litigant if sufficient cause was made for extension.

6. The facts of the present case are somewhat different, namely, in the present case the application for extension of time has been made after the

period fixed by previous order for furnishing security had expired and the application for leave to defend stood dismissed.

7. Mr. Ray Chowdhury in support of his contention also refers to an unreported decision being F. A. 151 of 1964 (Biswanath Kundu v. Manindra

Nath Sadhukhan). Their Lordships in this case while disposing of a similar application considered several decisions including the decisions of the

Judicial Committee. Their Lordships also relied on the Supreme Court decision reported in Mahanth Ram Das Vs. Ganga Das, It was pointed out

before their Lordships that in the case before the Supreme Court an application was made before the time granted had run out. Their Lordships

observed

We may mention also in passing that the Supreme Court decision in Mahanth Ram's case is also an authority for the proposition that in appropriate

cases the court is not powerless to allow extension of time either under Sections 148, 149 or u/s 151 of the Code as the case may be, even if the

application is made after the original period fixed has expired and this would be clear from the illustration given in the judgment. We are bound by

the decision of the Supreme Court.

Their Lordships of the Supreme Court gave the illustration in the following way.

For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and

robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like

the law of the Medes and the Persians. Cases are known in which Courts have molded their practice to meet a situation such as this and to have

restored a suit or proceeding even though a final order had been passed.

8. Considering the facts that the petitioners complied with the order passed by the Court at the time of issuance of the Rule and that the present

application has been filed few days after the expiry of the time granted by this Court and that the petitioners are ready and willing to comply with

the order of this Court passed on August 13, 1975 and relying on the principles laid down in the decision reported in Mahanth Ram Das Vs.

Ganga Das, we allow this application. The petitioners are directed to furnish security to the extent of Rs. 5,500 to the satisfaction of the Court

below within three weeks from this date. On furnishing the said security and the same being accepted, leave would be granted to the petitioners to

contest the suit. In default the application for leave will stand rejected. The order dated August 13, 1975 is modified to the extent indicated above.

9. Let the order be communicated to the court below immediately.

10. Let the records also go down within a week.

11. There will be no order for costs in this application.

B.C. Ray, J.

I agree.