(1969) 09 BOM CK 0019

Bombay High Court

Case No: Appeal from Order No"s. 271 and 272 of 1968

G. Rite and Co.		APPELLANT
	Vs	
Chandrakant Harilal Shah		RESPONDENT

Date of Decision: Sept. 25, 1969

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 148, 149, 151

Citation: (1971) 73 BOMLR 423

Hon'ble Judges: Gatne, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Gatne, J.
These two appeals challenge two different orders passed by the learned Judge of the City Civil Court at Bombay in the proceeding of Suit No. 2936 of 1960.

2. The plaintiff had filed the aforesaid suit against the defendants with a view to recover possession of the suit premises on the footing that the defendants, who were originally his licensees, were no longer entitled to occupy the premises after revocation of their licence. That suit was resisted by the defendants, hut the same eventually ended in an ex-parte decree for possession against them on March 22, 1968 and for the purpose of setting aside that ex-parte decree, they took out a Notice of Motion on March 25, 1968. That Notice of Motion was heard by the learned Judge of the City Civil Court on April 1, 1968 and he held that the defendants had shown sufficient cause for not remaining present on the day of hearing, but instead of straightway setting aside the ex-parte decrees passed against them, what he did was to direct these defendants to deposit Rs. 4,275 by way of rent and Rs. 45 by way of costs of the motion on or before April 22, 1968. His order provided that:

On the defendants depositing Rs. 4,275/- in Court and paying the costs of the Notice of Motion fixed at Rs. 45/- on or before the 22nd April 1968, the Notice of Motion to be made absolute in terms of prayer (a). On the defendants failing to deposit the amount and paying the costs as stated above, the Notice of Motion to be dismissed with costs. Suit to come on board for hearing on 23rd April 1968 peremptorily before the learned Judge taking short causes.

In pursuance of this order, the defendants did deposit Rs. 4,275 in Court on April 17, 1968, but somehow or other the small amount of costs was not deposited and the omission in that behalf was not noticed either by the defendants or by the plaintiff or even by the Court. The result was that the suit was placed for hearing before the learned Judge on July 19, 1968 and some evidence on the side of the plaintiff was recorded thereafter. While the evidence on the side of the plaintiff was being recorded on July 23, 1968, it was noticed that the amount of Rs. 45 by way of costs was not deposited by the defendants and as soon as that omission was brought to the notice of the learned Judge, the learned Judge held that the order of dismissal of the Notice of Motion became operative and he having become functus officio, it was not open to him to do anything in the matter. He, therefore, refused to record any further evidence in the suit. On July 25, 1968 the defendants took out another Notice of Motion with a view to obtain an extension of time from the Court for depositing the amount of Rs. 45, but that Notice of Motion was dismissed by the learned Judge on July 29, 1968, holding that he had no power to enlarge the time. Feeling aggrieved by that order, the defendants have filed A.O. No. 271 of 1968. They have also filed a separate appeal (A.O. No. 272 of 1968) with a view to challenge the earlier order of the learned Judge dated April 4, 1968 by which the payment of Rs. 4,275 and Rs. 45 by way of costs was made a condition precedent for restoration of the suit. Since these two appeals practically arise out of the same litigation and parties to both the appeals are the same, it has been found convenient to consolidate the same for being heard together. Both these matters shall accordingly be disposed of by this common judgment.

3. The first submission of Mr. Mody, appearing on behalf of the defendants-appellants, was that the learned Judge of the City Civil Court was in error in holding that he had no power to extend the time for payment of the amount of costs, in view of the earlier order passed on April 1, 1968. It was urged that the order passed on April 1, 1968 was in the nature of a procedural order and in cases of such orders the Court does not become functus officio merely because the payment directed by the earlier order is not made within the time fixed. According to Mr. Mody, the Court was competent to enlarge the time not only u/s 148 of the CPC but also u/s 151 of the Code and in support of these submissions, he relied on the Supreme decision in Mahanth Ram Das Vs. Ganga Das, . Reliance was also placed on the decisions in B. Sabui v. Binapani Sur 71 C.W.N. 12, Buta Singh Shankar Singh Vs. State of Madhya Pradesh, , Jyotish Chandra Sen Vs. Rukmini Ballav Sen and Others, , Surajmal Marwari v. Bhubneshwar Prasad [1940] AIR Pat. 50 and the unreported decisions of this Court in Mulchand Agarwal v. D.N. Chowbay

(1956) Civil Revision Application No. 88 of 1956, decided by Shah J., on August 13, 1956(Unrep.) and in Kalimuddin Mohiuddin Shaikh v. Auto Credit Corporation 1968) Special Civil Application No. 2709 of 1968, decided by Chitale J., on December 18, 1968 (Unrep.). The submission on the side of the plaintiff, on the other hand, Was that the order in this case was a self operating order and the order of dismissal of the Notice of Motion accordingly became operative on April 22, 1968 on account of the defendants'' failure to deposit or pay the amount of Rs. 45 and once that dismissal became operative, the learned Judge had become functus officio and had no power to grant further time to the defendants to pay that amount. In support of this contention, reliance was sought to be placed on the decisions in L. P. Jain v. Nandkumar (1960) 63 Bom. L.R. 48, P. Nasar Saheb v. P. Nabi Saheb [1957] AIR A.P. 780, Madan Gopal Daga Vs. Rallis, India Ltd., , and Ramaben Bhagubhai Patel Vs. The Hindustan Electric Co. Ltd., .

4. While considering the rival contentions, it is necessary to notice the provisions of Sections 148 and 151 of the Code of Civil Procedure. Section 148 provides:

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Section 151 says:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make (such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The argument of Mr. Mody, founded on Section .148, was that the power to enlarge the time could be exercised by the Court below even after the period originally fixed for payment had expired. In ease this submission was riot accepted, reliance was placed on Section 151 and it was argued that under that section, at any rate, the inherent powers of the Court could properly he invoked in favour of the defendants, who had admittedly deposited before the due date a large sum of Es. 4,275 and in view of that deposit, it could hardly be suggested that they would deliberately avoid to deposit or pay a small amount of Rs. 45.

5. On the side of the plaintiff, it was pointed out that the application of Section 148 to a case depends on the question whether the matter has been finally disposed of by the Court or the Court is seized of the matter and has control over it. If the order is not final and the Court retains its control over and is seized of the matter, it was conceded that it has full power to make any just or necessary order therein, including, in appropriate cases, the extension of the time under this section. The argument, however, was that the order in the present case was such that as soon as the defendants failed to pay the amount of costs on or before April 22, 1968, the order about the dismissal of the Notice of Motion became absolute and the moment that order came into operation, the Court

became functus officio and lost all control over the proceeding-. It is, therefore, necessary to examine if the order in question really is an order which could be said to be a self-operating order. The order in question was passed in these terms:

On the defendants depositing Rs. 4,27s/- in Court and paying the costs of the Notice of Motion fixed at Rs. 45/- on or before the 22nd April 1908, the Notice of Motion to be made absolute in terms of prayer (a). On the defendants failing to deposit the amount and paying the costs us stated above, the Notice of Motion to be dismissed with costs. Suit to come on board for hearing on 23rd April 1968 peremptorily before the learned Judge taking short causes.

It would be noticed that the order did not say that, "on the defendants failing to deposit the amount and costs as stated above, the Notice of Motion would stand dismissed with costs," The words used were "the Notice of Motion to be dismissed with costs" and these words do lend themselves to the interpretation that a further order of dismissal was contemplated in this case, in the event of the defendants" failure, to deposit the amount, including the amount of costs. This interpretation suggested on the side of the defendants was not accepted by the Court below, but it seems to me that the view canvassed by Mr. Mody does find support in the decision of the Patna High Court in Nurajmal Marwari v. Bhubaneshwar Prasad. The suit in that case was decreed by the Munsif on December 21, 193(5 in the following terms:

Considering the evidence on record, I decide that the plaintiffs, are entitled to a declaration of their title as sudhbharnadars over the land and they are entitled to recover possession as such over the same. The suit accordingly is decreed on contest against, the contesting defendants with costs including pleader"s fee at five per cent.... The plaintiffs must file the deficit court-fee within a fortnight from today otherwise they will not be entitled to have the aforesaid decree and the suit will be dismissed.

The words "the suit will be dismissed" were, therefore, considered by the High Court, and it was held that a final order had not been passed in the suit and so the Court, having still retained control over the proceeding, had jurisdiction to accept the deficit court-fee after the period fixed. Fazl Ali J. who delivered judgment in that ease observed (p. 51) :

...Now, when we examine the order passed by the Munsif in the present case on 21st "December 1930, we find that, it did not state that in the case of failure on the part of the plaintiff to pay the deficit court-fee within a fortnight, the suit was to be dismissed automatically. It merely stated that "the plaintiff will not be entitled to a decree and the suit will be dismissed: "

The same reasoning can, I think, be applied to the order in question containing the words "on the defendants failing to deposit the amount and paying the costs as stated above, the notice of Motion to be dismissed with costs.

6. If this construction of the order is accepted, it would he clear that the Court had not become functus officio merely because the defendants failed to deposit the amount of Rs. 45 on or before April 22, 1968 and if the Court had not become functus officio, it could clearly extend the time for payment on the Notice of Motion taken out by the defendants on July 25, 1968.

7. Even assuming" that the order in question was a self-operating order and the expression "the Notice of Motion to be dismissed with costs" is treated as being equivalent to "the Notice of Motion to stand dismissed with costs", it seems to me that the Court still had got the power to extend the time both u/s 148 and, in any case, u/s 151 of the Code of Civil Procedure. In this connection, it is necessary to notice the important decision of the Supreme Court in Mafianth Earn, Das v. (Janga Das. The plaintiff in that case had filed a suit in the Court of the Subordinate Judge II, Gaya. That suit was dismissed by the trial Judge on May 31, 1947. He then appealed to the High Court at Patna, and on November 26, 1951, the appeal WHS. decided in his favour on condition that he paid Court-fee 011 the amended relief of possession of properties involved in the suit, for which purpose the case was sent to the Court of First Instance for determining the value of the properties and for fixing the amount of Court-fee to be paid. After the report from the Subordinate Judge was received, the case was placed for final orders before the High Court and the Division Bench held that the valuation for the purpose of this suit was Rs. 1.2,1.78-4-0 and that ad valorem Court-fee was payable on it. The following order was, therefore, passed by the Division Bench:

The High Court office will calculate the amount of court-fee payable on the valuation we have given and communicate to the counsel for plaintiff-appellant what is the amount of court-fee he has got to pay both on the plaint and on the memorandum of appeal. We grant the plaintiff three months" time to pay the "court-fee for the Trial Court and also for the High Court. The time will he computer from the date counsel for appellant, is informed of the calculation "by the Deputy Registrar of the High Court. If the amount is not paid within the time given, the appeal will stand dismissed. If the court-fee is paid within the time given, the appeal will be allowed with costs and the suit brought, by the plaintiff will stand decreed, with costs and the plaintiff will be granted, a decree, etc.

The office of the High Court gave intimation on April 8, 1954 that the deficit Court-fee payable was Rs. 1,987-8-0. The time was to expire on July 8, 1954, but the appellant was not able to find -the money. His advocate in the High Court asked the case to he mentioned before the Vacation Judge on July 8, 1954, so that a request for extension of time could be made. No Division Bench, however, was sitting on that date, and the appellant filed an application on July 8, 1954, requesting that he be allowed to pay "Rs. 1,400 immediately, and the balance, within a month thereafter. That application was placed before a Division Bench and the following order was passed:

This application for extension of time must be dismissed. By virtue of the order of the Bench dated the 30th March, 1954, the appeal has already stood dismissed as the

amount was not paid within the time given.

The appellant then moved an application u/s 151, which, again was rejected by the Division Bench on September 2, 1954. That Division Bench expressed :the view that the proper remedy of the plaintiff was review. The plaintiff then filed another petition under ,s. 151 read with Order XLVII, Rule 1 of the Code of Civil Procedure, setting out the reasons why he was unable to find the money and offered to pay the deficit Court-fee within such time as the, High Court might fix. That application also was dismissed and the plaintiff-appellant had eventually to go to the Supreme Court and the Supreme Court allowed the appeal and set aside the order of dismissal passed by the High Court observing that it was competent to the High Court to grant extension of time both u/s 148 and Section 151 of the Code of Civil Procedure. It was pointed out that Section 148 of the Code iii terms allows extension of time even if the original period fixed has expired and Section 149 is equally liberal. A fortiori, those sections could be invoked by the applicant, when the time had not actually expired. Although the application for extension of time was in that case made before the expiry of the period, the aforesaid observations of the Supreme Court show that, according to the Supreme Court, time could be extended even after the original period had expired and that could be done u/s 148 of the Code of Civil Procedure, notwithstanding the fact that the order provided that if the amount is not paid within the time given, the appeal shall stand dismissed. It was pointed out that such procedural orders, though peremptory, 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 within the time fixed. The important observations made in para. 5 of the judgment are (p. 884) :

...But we are of opinion that in this case the Court could have exercised its powers first on July 13, 1954, when the petition filed within time was before it, and again under the exercise of its inherent powers, when the two petitions u/s 151 of the CPC were filed. If the High Court had felt disposed to take action on any of these occasions, Sections 148 and 149 would have clothed them with ample power to do justice to a litigant for whom it entertained considerable sympathy, but to whose aid it erroneously felt unable to come.

Then in para, 6 of the same judgment it has been observed (p. 884) :

In our opinion, the High Court was in error on both the occasions. Time should have been extended on July 13, 1954, if sufficient cause was made out and again, when the petitions were made for the exercise of the inherent powers. We, therefore, set aside the order of July 18, 1954, and the orders made subsequently.

These observations clearly show that the learned Judge of the Court below was not deprived of his jurisdiction to extend the time at the request of the defendants merely because the order on the first Notice of Motion provided that "on the defendants failing to deposit the amount and paying the costs as stated above, the Notice of Motion to be dismissed with costs." On the side of the, plaintiff, emphasis was only placed on the fact

that in the case before the Supreme Court the application for extension of time was made before the period had actually expired. But the fact does remain that there are unmistakable observations of the Supreme Court which show that time could be extended even after the expiry of the original period. These observations, even though they are deemed to be in the nature of obiter, are clearly binding on this Court.

8. This Supreme Court decision was followed by the Calcutta High Court in the recent decision in B. Sabui v, Rinapani Sur. There also the original suit was decreed ex-parte on May 29, 1962 in the absence of the defendants. Thereafter there was an application under Order IX, Rule 13 of the CPC for setting aside the ex-parte decree. This application was allowed by the learned Munsif by an order dated February 27, 1963 on condition of making a payment of Rs. 40 us costs by March 5, 1963. That order further directed that in case of default of payment of this sum, the application would stand dismissed. The deposit was not made by the date fixed and final order dismissing the application was passed. The defendants thereafter made a deposit of the sum on March 6, 1963, but it was not accepted. An application u/s 151 of the CPC filed by the defendants was also rejected on April 27, 1963 on the ground that a final order was passed and the Court was functus officio. The defendants appealed against that order to the District Court, but without any success and the matter eventually went to the High Court, and the High Court, following'' the aforesaid decision of the Supreme Court, held that where direction for payment is made in a procedural order, the Court is not function officio to extend the time if payment is made after the expiry of the time originally fixed. After referring to the decision of the Supreme Court, A. K. Das J, observed (p. 13) :

...It comes to this, therefore, that where the direction for payment is made in a procedural order to warn dilatory litigants against making default or delay, the Court has power to extend the time. This decision applies to the present case before us where the application under Or. 9, Rule 18 was allowed subject to payment of certain costs within a certain date. Apparently the whole idea was to warn the party coming with a prayer for setting aside the decree to be diligent and to make the deposit within the time and in that view of the matter, the order was of a procedural nature and the Court, therefore, was within its rights to extend time in suitable cases.

9. In Buta, Singh v. State of M.P., the plaintiff had filed a suit for restraining the defendants from recovering an amount of Rs. 2,000 regarding a forest contract. That suit came to be dismissed for default. He applied for restoration of the suit to file, but the trial Court refused to restore it. Thereafter the petitioner filed an appeal. The appellate Court, by its order dated April 27, 1961, restored the suit to file upon certain conditions. The appellate Court imposed a condition precedent to the restoration of the suit by directing that the plaintiff should pay Rs. 30 as costs to the Government Pleader or should deposit the same within a week in the trial Court for payment to the Government Pleader. If that was done, the suit will be deemed to have been restored; and if the amount was not paid within the time, the suit will be deemed not to have been restored. The said amount was not, however, deposited within one week from April 27, 1961 and the same was offered

on July 7, 1961 and the Government Pleader refused to accept the same on the ground that a valuable right had accrued in favour of the defendants to treat the suit as dismissed, as the operation of the appellate order dated April 27, 1961 was automatic. On these facts Tare J. ruled as follows (p. 210) :

...where orders fixing time are passed either in pursuance of the provisions of the CPC or fixed by the decree, the Court has always the power u/s 148, CPC to extend time, even when the time fixed has expired. But, so far as automatic orders are concerned, the Court has no jurisdiction to extend time after the order has started to be operative. At any time before the order has started to be operative, the Court has the power to extend time even in respect of such automatic orders. After the expiry of the time, the Court passing the automatic order alone has the jurisdiction to lessen the rigour by reviewing its own order, provided the matter is covered by Order 47 Rule 1, Civil Procedure Code. The Court may also have inherent powers u/s 151, Civil Procedure Code,...

This authority was cited at the Bar in support of the proposition that in any case the learned Judge of the Court below had ample power u/s 151 of the CPC to extend the time for payment.

10. In Jyotish Chandra v. Rukmini Ballav, it has been held that Order VIII, Rule 9 of the CPC provides that an additional written statement may be accepted by the leave of the Court on such terms as the Court may think fit. Where one of the terms is that certain amount would be paid within a fixed time, that is an act allowed by the Code and when a period is fixed by the Court for doing that act, Section 148 of the Code in terms applies. It is then open to the Court to enlarge this period even though the period originally fixed or granted might have expired. The fact that there was a default clause that if the payment be not made within a specified time, the application will stand dismissed, does not take away from the Court''s power to enlarge the time u/s 148 of the Code of Civil Procedure.

11. In Kalimuddin Mohiuddin Shaikh v. M/s. Auto Credit Corporation, the facts were that an ex-parte decree was passed in a summary suit on June 27, 1968 and the defendants took out a Notice of Motion for setting aside the said decree. That Notice of Motion came up for hearing on August 13, 1968 and a conditional order of restoration was passed in favour of the defendants, one of the conditions being that they deposited in Court a sum of Rs. 3,000 on or before September 26, 1968. That amount was not deposited in time and on September 16, 1908 the defendants took out a Chamber Summons, stating that they were willing to deposit Rs. 1,500 immediately and prayed for time to pay the balance of Rs. .1,500. That Chamber Summons came up for hearing on October 17, 1968 and the learned Judge, who heard that Chamber Summons, took the view that the Court had no jurisdiction to extend the time fixed by the order dated August 13, .1968. He, therefore, dismissed the Chamber Summons with costs, but that decision was sot aside by Chitale 3,, on the strength of the Supreme Court decision in Mahanth Earn Das v. Ganga Das. In Mulchand Agarwal v. D. N. Chow bay, the facts were that an ex-part e decree for Rs. 2,900 was passed against the defendant in the Court of Small Causes at Bombay on

September 12, 1955, and on September 24, 1955 the defendant applied for restoration of the suit after setting aside the ex-part e decree. Thai application was placed for hearing on November 11, 1955 and the Court passed an order stating: "By consent, on defendant depositing in Court the sum of Rs. 1,500/- within 10 days, notice absolute, suit to be on board on 10-1-1956, in default notice discharged", but the defendant was unable to deposit the amount of Rs. 1,500 in Court within 10 days. The amount was actually deposited on the 11th day and hence the defendant applied for condoning one day''s delay in depositing the money in Court, setting out the circumstances which were responsible for that delay. The learned Judge rejected the application, holding that he was functus officio and against that order, the defendant went upto the High Court in revision and J. C. Shall J. held that the Court had the power to condone delay u/s 151 of the Civil Procedure. Code. It was observed that Section 151 of the CPC enables all civil Courts to exercise the inherent powers to act ex debito justice to do real and substantial justice for the doing of which alone the Court exists or to prevent abuse of the process of Court.

12. From the aforesaid survey of the relevant provisions of the Code and the authorities cited on the side of the appellants, it is clear that the Patna decision in Surajmal Marvmri v. Bhubaneshwar Prasad, supports Mr. Mody''s submission that it is possible to interpret the learned Judge''s order in the first Notice of Motion as meaning that it was not a final and self-operating order and the Court still retained its control over the proceeding before the final order dismissing the Notice of Motion was actually passed. Even if the order in question is interpreted as equivalent to an order that the Notice of Motion would stand dismissed in the event of the defendants'' failure to pay the costs within the stipulated time, the decision of the Supreme Court and the various other decisions, in which that decision is followed, support Mr. Mody''s second submission that even after such an order is passed, the Court has the necessary power u/s 148 of the CPC to extend the time and apart from the provisions of Section 148, the Court is also empowered to use its inherent powers u/s 151. in a case of this kind where the Court is satisfied that the failure to deposit the amount of costs was not deliberate but more or less accidental. It remains to be seen whether these propositions can be successfully assailed on the strength of the authorities cited on the side of the plaintiff. The first-case, on which reliance was sought to be placed on the side of the plaintiff, is the decision in P. Nasar Saheb v. P. Nabi Saheb. The facts of that case were that the plaintiff obtained a decree ex-parte for possession against the defendant. On an application filed by the defendant to set aside the export c decree, the Court made the following order (p. 780) :

By consent, the ex-parte decree will be set aside on condition of the petitioner depositing into the Court the costs awarded by the decree as condition precedent by 2 p.m. on 14th July 1951. In default the petition will stand dismissed.

The amount was not deposited before 2 p.m. on July 1.4, 1951. The defendant thereafter filed two applications for extending the time for depositing the amount and for reviewing the order. The learned subordinate Judge dismissed those applications and the matter,

therefore, name up before the High Court and the High Court held that where; on an application for setting" aside an ex-parte decree the Court passes an. order that "the decree will be set aside, on condition that the petitioner should deposit in Court the costs awarded by the decree within a certain time and in default the petition is to stand dismissed and the petitioner commits default in. payment of the costs within the. prescribed time, the Court has no power thereafter to extend the time u/s 148. The period prescribed under the section can be extended only during the currency of the previous order. Once an, order has become defunct, no question of extending the time made under that order can arise. It must be observed that in that decision it was recognised that the act of making a deposit in pursuance of the order was an act prescribed or allowed by the Code, and, therefore, an application for extension of time u/s .148 could be made. If the application was rejected, it was only on the ground that after the expiry of the time, the Court became functus officio, but the validity of that proposition is now considerably weakened by the recent decision of the Supreme Court to which a reference has already been made.

13. The second decision, on which reliance was sought to be placed on, the side of the plaintiff, is the decision of this Court in L. P. Jain v. Nandkumar. The defendant in that case took out a Notice of Motion for setting aside an. ex-part e decree passed against him, and in disposing of it the City Civil Court passed an order that on the defendant depositing a certain amount in Court and on his paying the plaintiff a certain amount for costs within a specified period, the ex-parte decree should be set aside and if the said amounts" were not so deposited and paid, the Notice of Motion to stand dismissed. The-defendant failed to carry out, the terms and conditions of the order within the specified time and he took out a Chamber Summons for extension of time for payment of deposit and costs. The .Chamber" Summons was heard by the same Judge, who had heard the Notice of Motion,, and he dismissed it on the ground that he had no jurisdiction to entertain the application for extension of time. On the question whether the Judge had jurisdiction to extend the time u/s 148 of the Civil Procedure Code, it was held that Section 148 of the Code did not apply to the case as the deposit and the payment required to be made by the order we"re not acts which were either prescribed or allowed "by the Code and that once the Judge had disposed of the Notice of Motion, and passed a final order on it, he was completely functus affection and he had no seisin over the matter, and he could not, therefore, entertain "the defendant"s application for extension of the time for making the deposit and the payment of costs. In the course of his judgment, S.M. Shah J. made the following observations "(p. 52):

Accordingly, the application for extension of lime made by the defendant in this ease could not be entertained by the learned Judge u/s 148 of the Code. There are, as stated above, two strong reasons for it. Firstly, the deposit and the payment of the respective amounts of money required to be made by the order of the learner! Judge it not an act which is allowed or prescribed by the Code and secondly, the learned Judge ceased to have seisin of the matter immediately he passed the order disposing of that notice of

motion.

With respect, it is difficult to agree with the first ground mentioned by the learned Judge. A plain reading of the provisions of Order IX, Rule 33 of the CPC is enough to show that under that rule if the .Court is satisfied that the Summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, it shall make an order-setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit. Therefore, the order, directing the defendant to pay costs and, deposit the .amount, if any, is clearly an order permitted or allowed by the Code and in complying with that order, the defendant must evidently be deemed to be performing an act prescribed or allowed by the Code. This in fact was clearly recognised in the Division Bench decision of the Andhra Pradesh High Court, to which a reference has just been made. This has further been recognized by the High Court at Calcutta in Jyotish Chandra v. Rukmini Ballav, and again in Madan Gopal v. Rallis, India. Ltd., on which reliance has been sought to be placed on the side of the plaintiff himself. In that case the facts were that the plaintiff had instituted a suit for the recovery of money from the defendant as damages for failure to supply gunny bags to the plaintiff under a contract. The suit appeared on the peremptory list for disposal on December 19, 1956. An application was then made orally for an adjournment. On December 19, 1956 the Judge directed the plaintiff to pay Rs. 500 to the defendant by the end of December 1956 and ordered that in default the suit was to stand dismissed. On December 29, 1956 a cheque for Es. 500 was drawn by the plaintiff''s attorney in favour of the defendant''s attorney and was sent to the defendant''s attorney. December 29, 1956 being a Saturday and the cheque and the letter enclosing it having been sent after 1 p.m., the payment was refused by the defendant''s solicitor. The following three days were holidays. December 30, 1956 was a Sunday, December 31, 1956 and January 1, 1957 were public holidays and hence immediately on the following open day, namely, January 2, 1957, the cheque and the letter were sent to the defendant''s solicitor. The defendant''s solicitor admitted the receipt of the cheque, but returned the cheque on the ground that it should have reached by the end of December 1956. A question, therefore, arose whether the payment of costs was made by the plaintiff in time and whether the Court had the power to enlarge time. On the facts of the particular case, the High Court held that the payment was made in time, but it also considered the provisions of Section 148 of the CPC and in para. 12 of his judgment Mukharji J. observed as follows: (p. 600) :

A reference to Section 148 of the CPC will also be relevant in this connection showing Court''s power of enlarging time.

The section was thereafter quoted and it was observed (p, 600) :

...This surely was an act, namely, payment of a sum which was allowed by the Court because the Judge adjourned the matter on such terms and conditions as he thought fit by reason of Order 17(1)(2) of the CPC and the condition imposed in this case was as

quoted in the Order of the 19th December 1956... The Court also fixed a period within which the act of payment of costs assessed at Rs. 500/- was to be made. Therefore, u/s 148 of the CPC the Court has discretion from time to time to enlarge the period even though the period originally fixed had expired.

From these observations it is clear that it was clearly recognised that the act of making the payment of costs was regarded as an act prescribed or allowed under the Code. It is, under the circumstances, difficult to accept the first ground on which the decision of S. M. Shah J. in L. P. Jain v. Nandkumar rests. The second ground was also the ground on which the decision of the Andhra Pradesh High Court (P. Nasar Saheb v. P. Nabi Saheb rested and as I have already pointed out, the authority of that decision is considerably shaken by the recent decision of the Supreme Court in Mahanth Ram Das v. Ganga Das. The same is true about the decision in L. P. Jain v. Nandkumar as well. It is not, therefore, possible to successfully assail the propositions urged by Mr. Mody on the strength of these two decisions.

14. That leaves the decision in Ramaben v. Hindustan Electric Co. That decision has clearly no bearing on the question involved in these appeals. The question about the applicability of Section 148 did not arise in that case. What was held in that case was that a decree passed under Order XXXVII, Rule 2(2) of the Code on the ground that the defendant had not complied with the terms of the conditional order of leave cannot be set aside u/s 151 of the Code. The following observations of Chandrachud J. clearly show why the exercise of the powers u/s 151 of the CPC was held to be unjustified in that case (p. 797) :

...Order XXXVII of the CPC is, in a sense, a self-contained Code and with the consciousness of hard decisions, -when the Legislature wanted to make provision with regard to the circumstances in which a decree passed under any of the provisions of that Order should be set aside, the Legislature expressly provided by Rule 4 that the decree could be set aside in the circumstances mentioned. in that rule. If it was intended that a decree which is passed by reason of the default of the defendant to comply with the terms of the conditional order could also be set aside by the Court which passed the decree, the Legislature would have made a suitable provision similar to the one which is found in Order XXXVII, Rule 4. It is clear from the absence of any such provision that what was intended was that a Court which passes a decree in a summary suit should have jurisdiction to set aside the decree in cases covered by Order XXXVII, Rule 4 only and in no other case. In exercising his inherent jurisdiction u/s 151 the learned Judge has in effect exercised it so as to contravene an implied prohibition and it is settled law that the powers preserved by Section 151 should not be exercised so as to overcome a prohibition enjoined by the Code. The sole function of Section 151 being to preserve the powers to act in the interest of justice, it must follow that Section 151 cannot be invoked so as to enlarge or widen the scope of one''s jurisdiction.

15. Nothing of this kind can be said about the use of inherent powers u/s 151 in the present case. In fact the recent decision of the Supreme Court, to which a reference has just been made, as also the decision of the Madhya Pradesh High Court in Buta Singh v. State of M. P., clearly show that in a case like the present it was open to the Court even to resort to its inherent powers u/s 151 in case any difficulty was experienced in applying the provisions of Section 148 to the facts of a particular case. That power to enlarge the time was a necessary power to be exercised by the Court was clearly recognized in Section 148 and since there was no other provision which prohibited the Court from exercising the inherent powers, there was nothing to preclude the Court from invoking those powers in a case of this kind, provided it was found necessary to exercise the same in the interest of justice.

16. There is, therefore, nothing in the authorities, on which reliance was sought to be placed on the side of the plaintiff, to challenge the two propositions urged on the side of the defendants and the authorities cited in support of those propositions. I am, therefore, inclined to take the view that the order in the first Notice of Motion was not a self-operating order and it did contemplate the passing of a further order of dismissal in the event of default on the part of the defendants. Quite apart from this interpretation of the Order, the Court clearly had jurisdiction to grant relief to the defendants both u/s 148 as also u/s 151 of the Civil Procedure Code. On facts it is clear that the learned Judge was himself perfectly satisfied that if he had jurisdiction to extend the time, he must exercise it in favour of the defendants. He was only handicapped by the decision of this Court in L. P. Jain v. Nandkumar. That handicap now being removed, there is clearly nothing to prevent the Court from extending the time -to enable the defendants to pay the small amount of Rs. 45 which evidently remained unpaid on account of sheer inadvertence. It is impossible to suggest that a person, who paid or deposited Rs. 4,275 in time, was reluctant to deposit or pay the small amount of Rs. 45. The order passed by the learned Judge on the defendants" subsequent Notice of Motion on July 29, 1968 is, therefore, set aside and the defendants are permitted to pay to the plaintiff or to deposit in Court the amount of Rs. 45 by tomorrow evening and A.O. No. 271 of 1968 is allowed. It is, however, fair that the plaintiff-respondent should get his costs of this appeal from the defendants-appellants. The defendants-appellants are accordingly ordered to pay the costs of this appeal to the respondent.

17. That leaves A.O. No. 272 of 1968. That appeal is really without any merit. It is evident from the provisions of Order IX, Rule 13 of the CPC that the Court was competent to set aside the ex-parte decree on such terms and conditions as it thought fit. The Court was, therefore, in the exercise of its discretion justified in directing the defendants to deposit in Court the arrears of rent as also the costs of the Notice of Motion. The exercise of that discretion cannot, under the circumstances, be said to be either capricious or arbitrary. The order passed on the earlier Notice of Motion on April 1, 1968 is accordingly confirmed and A.O. No. 272 of 1968 is dismissed with costs.

18. Mr. Kadam, appearing on behalf of the plaintiff, has pointed out that the result of the decision in A.O. No. 271 of 1968 was going to be the revival of the suit which was commenced as far back as 1960 and it was, therefore, necessary that an old litigation of this kind should be brought to an early end. It is, therefore, directed that Suit No. 2936 of 1960 shall peremptorily be placed on the board for hearing before the end of December 1969.