(1974) 08 BOM CK 0022

Bombay High Court

Case No: C. Revision Application No. 318 of 1974

B.C. Shah and Co. — APPELLANT

Vs

T.P. Kanani — RESPONDENT

Date of Decision: Aug. 29, 1974

Acts Referred:

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

Citation: (1976) MhLj 40

Hon'ble Judges: M.H. Kania, J

Bench: Single Bench

Advocate: Sujata Manohar, instructed by Shah and Sanghavi, for the Appellant; Ajay H. Desai with Ramesh R. Shah, for the Respondent

Judgement

M.H. Kania, J.

An interesting question arises in this revisional application as to whether the Court has any power to enlarge the time granted for fulfilling a condition imposed on a defendant by an order passed under Order XXXVII, rule 4 of the Civil Procedure Code, 1908, setting aside an ex parte decree in a summary suit filed under the provisions of Order XXXVII, rule 2 of the said Code.

2. The facts, which are necessary for appreciation of the points raised before me lie within a narrow compass. The respondent filed a summary suit against the petitioners under the provisions of Order XXXVII, rule 2, Civil Procedure Code, in the Bombay City Civil Court. This suit was based on a promissory note for Rs. 7,000 executed by the petitioners. A summons for judgment was taken out in this suit. On February 7, 1974 the said summons for judgment reached hearing. The petitioners and their advocate were absent and the summons was made absolute with the result that an ex parte decree was passed against the petitioners. The petitioners then took out a notice of motion for setting aside this ex parte decree. This notice of motion was disposed of by learned Judge Shri Dighe of the Bombay City Civil Court.

The order of the learned Judge provided that the ex parte decree was set aside on condition that the petitioners deposited in the Court a sum of Rs. 4,000 within two weeks of the making of the said order. Although there is some error in the actual words used in the later part of the order, it is clear, and it is common ground before me, that the rest of the order provided that in case of failure of the petitioners to deposit the said amount within that time, the motion was to stand dismissed with the result that the ex parte decree was to stand. This order was passed on March 6, 1974. It is also common ground that this order was made under Order XXXVII, rule 4, Civil Procedure Code. The petitioners preferred an appeal to this Court, which was dismissed summarily by my learned brother Vaidya J. on March 20, 1974, which was also the last date for making the deposit of Rs. 4,000. This amount was not deposited in the trial Court in time. According to the petitioners, they were ready with the amount on the following day, but the respondent''s advocate did not consent to the deposit and hence they were unable to make the deposit. There is some controversy about this, but I am not concerned with the same. The fact remains that it was on March 28, 1974, that the petitioners took out a notice of motion for enlargement of the time to make the said deposit. This motion reached hearing before the learned Judge, Shri Guttal, of the said Court. After setting out the facts, which I have set out above, the learned Judge has taken the view that he had no jurisdiction u/s 148, Civil Procedure Code, to enlarge the time. He has further held that there was no inherent jurisdiction in the Court, either, under the provisions of section 151, CPC to enlarge the time for the making of the deposit. In view of these conclusions reached by the learned Judge, he dismissed the notice of motion taken out by the petitioners. It may be noticed that the judgment of the learned Judge makes it clear that the learned Judge preferred the view taken by a learned Single Judge of this Court in L.P. Jain Vs. Nandakumar R. Taliwalla, to the view taken by another learned Single Judge of this Court in G. Rite and Co. Vs. Chandrakant Harilal Shah, . The principal question before me is whether the learned Judge of the Bombay City Civil Court was in error when he took the view that he had no jurisdiction to enlarge the time either u/s 148 or section 151, Civil Procedure Code.

3. As the controversy centres mainly on the provisions of sections 148 and 151, Civil Procedure Code, it may be useful to take note of these provisions at this stage. Section 148, Civil Procedure Code, lays down that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the 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, Civil Procedure Code, provides that nothing in the 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.

4. In support of the view taken by the learned Judge below Mr. Desai, who appears for the respondent, has placed strong reliance on the decision in L. P. Jain v. Nandkumar. That is a decision of S. M. Shah J. of this Court. In that case, the

defendant took out a notice of motion for setting aside an ex parte decree passed against him and in disposing of it the City Civil Court passed an order that on the defendant''s 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 was 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. This 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. It was held, on appeal, by S. M. Shah J. that section 148 of the Code did not apply to the case as the deposit and payment required to be made by the order were not acts which were 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 officio and he had no seisin over the matter, and he could not, therefore, entertain the defendant''s application for extension of time for making the deposit and the payment of costs. S. M. Shah J. has observed in the judgment (p. 49) that the only point, which was canvassed before him by the learned counsel for the defendant, was that u/s 148, Civil Procedure Code, the learned Judge had ample jurisdiction to extend the time for making the deposit as well as the payment directed by the order setting aside the ex parte decree. This argument was negatived by S. M. Shah J., who took the view that once the order setting aside ex parte decree on certain conditions was passed, the Court, which passed the order, immediately becomes functus officio on the passing of the said order and could possibly have no jurisdiction on the subject-matter of the notice of motion at all after the order was passed and, therefore, any application by the defendant for extension of time for the purpose of complying with the terms of that order would not be entertainable by that Court. Hence, according to the view taken by S. M. Shah J., even if the application for extension of time were to be made within the period fixed for the making of the deposit, yet the Court would be powerless to grant any extension of time. The further observations of S. M Shah J. show that in his view as the final order on the notice of motion had been passed, there was no scope for the exercise of inherent jurisdiction u/s 151, Civil Procedure Code. It is submitted by Mr. Desai that, in view of this decision, the learned trial Judge was clearly right in the view which he has taken.

5. I would have little hesitation in accepting the aforesaid argument of Mr. Desai, if the matter had rested with this decision alone. However, I find that there are a number of other decisions, which are material on this point, and which tend to suggest that the view taken by S. M. Shah J. in the aforesaid case cannot now be regarded as good law. In Mahanth Ram Das Vs. Ganga Das, a Bench of the High Court, while deciding an appeal in favour of the appellant, passed a peremptory order fixing the period for payment of deficit court-fee. The order of the High Court

provided that the office of the High Court was to calculate the amount of court-fee payable on the valuation given by the High Court and the plaintiff (appellant) was given three months'' time to pay the court-fee for the trial Court and also for the High Court. The said order further, inter alia, provided that if the amount was not paid within the time given, the appeal would stand dismissed. If the court-fee was paid within the time given, the appeal would be allowed with costs and the suit brought by the plaintiff would stand decreed with costs. The plaintiff failed to pay the court-fee within the time given and applied for extension of time before the time given had run out, but the application came up 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, Civil Procedure Code, in terms, allowed extension of time, even if the original period fixed had expired, and section 149 was equally liberal. It was further held that such procedural orders though peremptory (conditional decrees 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 happened within the time fixed. It was observed that sections 148, 149 and 151 of the CPC clothed the High Court with ample power to do justice to a litigant if sufficient cause was made for extension. The observations of their Lordships of the Supreme Court show that the High Court could have exercised its powers first 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 Code were filed. If the High Court had felt disposed to take action on any of those 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. Although in that particular case, the application for extension of time was made before the time granted to make the payment of additional court-fees had expired, the actual order for extension was made after that period had expired and the observations of the Supreme Court clearly go to suggest that such an application could have been granted even if it had been made after the time granted had expired. Mr. Desai tried to distinguish this case on the ground that it related to the question of payment of court-fee and that in such a case, section 149, CPC gave ample powers to the Court to grant the extension of time sought for by the appellant. Thi3 is true and the provisions of section 149 of the Code have been taken note of by the Supreme Court. However, the further observations of the Supreme Court, although obiter, are binding on me and they clearly show that it is not merely in a case covered by section 149 but in the case of all orders, which are regarded as procedural, that the Court has the power to extend the time granted, in the interests of justice.

6. I propose to come next to the decision of Gatne J. in G. Rite and Co. v. Chandrakant. In that case, an order was made by the Bombay City Civil Court, on a

notice of motion taken out by the defendants to set aside an ex parte decree, to the effect 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 April 22, 1968, the notice of motion was to be made absolute. On the defendants failing to deposit the amount and paying the costs as aforesaid, the notice of motion was to be dismissed with costs. The defendants deposited the amount of Rs. 4,275 before the due date, but due to inadvertence failed to deposit the amount of Rs. 45 for costs. A notice of motion to extend time for depositing the amount of costs was taken out, admittedly after the time granted for making this deposit expired. This notice of motion was dismissed by the learned Judge on the ground that on the passing of the order on the previous notice of motion he had become functus officio as the payment of costs directed by him had not been made within the time fixed. In disposing of the appeal against this order, it was held by Gatne J. that the words "the notice of motion to be dismissed with costs" used in the order lent themselves to the interpretation that a further order of dismissal was contemplated in the case and there was no final order so that the Court retained control over the proceeding and had jurisdiction to enlarge the time for payment. This part of the judgment is not material for the decision of the case before him. It has, however, been further held by Gatne J. that 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 expression "the notice of motion to stand dismissed with costs", the Court has the necessary power u/s 148 of the CPC to extend the time and that apart from the provisions of section 148, the Court is also empowered to use its inherent powers u/s 151 of the Code in a case of this kind where the Court is satisfied that failure to deposit the small amount of costs was not deliberate but more or less accidental. The judgment of Gatne J. shows that he has placed strong reliance on the decision of the Supreme Court in Mahanth Ram Das v. Ganga Das and pointed out that there are observations of the Supreme Court in that decision which show that time could be extended even after the expiry of the original period and these observations, even though in the nature of obiter, are clearly binding on this Court. It has been held by Gatne J. that he was unable to agree with the view taken by S. M. Shah J. in L. P. Jain v. Nandkumar, referred to by me earlier. Gatne J. observes that a plain reading of the provisions of Order IX, rule 13, 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. Hence the order, directing the defendant to pay costs and deposit the amount, 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 with the result that the application for extension of time would fall within the scope of section 148, Civil Procedure Code. Gatne J. has further pointed out that the authority

of the aforesaid decision in L. P. Jain v. Nandkumar has been considerably shaken by the decision of the Supreme Court in Mahanth Ram Das v. Ganga Das. Although in the case before Gatne J. the ex parte decree was set aside and the condition of depositing the amount of Rs. 4,275 and paying the cost of Rs. 45 was imposed under Order IX, rule 13 of the Code, even in the present case, I find that the provisions of Order XXXVII, rule 4 of the Code enable the Court, at the time of setting aside the decree passed in a summary suit, to impose such terms on the defendant as the Court thinks fit. There can, therefore, be no doubt that the condition relating to the deposit of Rs. 4,000 imposed by the learned Judge, Shri Dighe, was a condition which he was authorised to impose under Order XXXVII, rule 4 of the Code, and hence She making of that deposit can certainly be regarded as an act permitted or allowed by the Code and in seeking to comply with that order the defendant must be deemed to be performing an act prescribed or allowed by the Code, with the result that the provisions of section 148 of the Code would clearly come into play. Apart from this, even if it is held that section 148 of the Code is not applicable, then the Court would have ample power u/s 151 of the Code to grant extension of time to make the deposit in a suit of this nature.

7. It was urged by Mr. Desai that the decision in L. P. Jain v. Nandkumar should be preferred to the decision in G. Rite & Co. v. Chandrakant. I am unable to accept this contention, particularly in view of the fact that the authority of the decision in L. P. Jain v. Nandkumar has been considerably undermined by the decision of the Supreme Court in Mahanth Ram Das v. Ganga Das and also in view of certain other decisions to which I shall presently come.

8. In Mulchand Agarwal v. D. N. Chowbay (1956) Civil Revision Application No. 88 of 1956, decided by J. C. Shah J., on August 13, 1956 (Unrep.) an ex parte decree was passed by the Court of Small Causes against the defendant, in his absence, for Rs. 2,900 with costs and professional costs. The defendant applied for setting aside this decree. On November 11, 1955 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". The defendant was unable to deposit the amount of Rs. 1,500 in Court within the period of ten days. On the eleventh day the defendant applied for condoning one day''s delay in depositing the money in Court. This application was rejected by the learned trial Judge. Against this order, Civil Revision Application was preferred to this Court. It was held by J. C. Shah J. that

Section 151 of the CPC enables all Civil Courts to exercise the inherent powers to act ex debito justiciae to do real and substantial justice for the doing of which alone the Court exists or to prevent abuse of the process of Court. Even if there was no provision in the Code the learned Judge should have, u/s 151, passed an order restoring the suit when the defendant showed his willingness to deposit the full amount only one day after the date on which the period provided under the original

order expired.

It is significant that in this case the power was exercised u/s 151 of the Code although the application for extension of time was made after the time granted had expired and the order provided that in default of the deposit of the said amount of Rs. 1,500 within ten days the notice was to stand discharged. It is unfortunate that this decision was not cited before S. M. Shah J. when he decided the case of L. P. Jain v. Nandkumar. It is quite possible that had this decision been cited before S. M. Shah J., he might not have taken the view which he has taken in the said decision.

9. I come next to the judgment of my learned brother Chitale J. in Kalimuddin Mohiuddin Shaikh v. M/s. Auto Credit Corporation (1968) Special Civil Application No. 27C9 of 1968, decided by Chitale J., on December 18, 1968 (Unrep.). In that case a summary suit was filed against the petitioners and the summons for judgment was made absolute. The petitioners took out a notice of motion for setting aside the decree. On that notice of motion an order was made which, inter alia, directed the defendants (petitioners) to deposit in Court a certain sum on or before August 23, 1968 and a further amount of Rs. 3,000 on or before September 26, 1968. The order provided that if either of the amounts was not deposited by the specified dates the notice of motion was to stand dismissed. There was failure to deposit the amount Rs. 3,000 within the time provided and a chamber summons was taken out for extension of time. This chamber summons was admittedly taken out within the time provided for the making of the deposit. The learned Judge, who heard the chamber summons, took the view that the Court had no jurisdiction to extend the time fixed by the aforesaid order. In the Special Civil Application Chitale J. declined to follow the decision in L. P. Jain v. Nandkumar and observed that the point before him was covered by the decision of the Supreme Court in Mahanth Ram Das v. Ganga Das. He further observed that in the case before him, there was no conditional decree but merely a conditional peremptory order. The application for extension of time was granted by Chitale J.

10. It was next urged by Mr. Desai that whatever might be the position as far as the other suits are concerned, as far as summary suits filed under Order XXXVII, rule 2 of the Code are concerned, where the Court in such a suit has set aside an ex parte decree on fulfilment of certain conditions within a particular time, the Court has no power to extend the time granted. In support of this submission, he relied on the decision of Chandrachud J. (as he then was) in Ramaben Bhagubhai Patel Vs. The Hindustan Electric Co. Ltd., . In that case it was held that where a decree is passed in a summary suit under Order XXXVII, rule 2 (2) of the Code of Civil Procedure, on the failure of the defendant to comply with the terms of conditional leave, the decree cannot be set aside by the Court which passed it on the ground that the defendant had sufficient reasons for not complying with the terms of the conditional order. This decision, in my view, is of no relevance at ail in the case before me. There is no question here of setting aside any decree otherwise than under the provisions of

Order XXXVII, rule 4 of the Code as in that case. The ex parte decree passed against the petitioners in the present case was, in fact, set aside by the learned Judge Shri Dighe in exercise of the powers, under Order XXXVII, rule 4 of the Code, and the only question before me is, whether the learned Judge Shri Guttal bad the jurisdiction to extend the time granted by Judge Dighe for depositing the sum of Rs. 4,000 in Court upon which the ex parte decree was to stand set aside. It is true that there is an observation in the judgment of Chandrachud J. to the effect that Order XXXVII of the Code is, in a sense, a self-contained Code. However, the later observations make it quite clear that the learned Judge has used this expression merely to show that the only provisions for setting aside the decrees passed in summary suits are those contained in Order XXXVII, rule 4 of the Code. There is nothing in this judgment to indicate that as far as the other matters are concerned, the provisions of the Code have no application to such suits. Quite apart from this I find that this decision has been overruled by a Division Bench of this Court in Ramchandra Dhondu Dalvi Vs. Vithaldas Gokuldas, . It is significant that in that decision, the Division Bench has gone on to state as follows (p. 252):

... If, therefore, a case arises where conditional leave is granted (in a summary suit) -and the condition is not complied with and the decree follows, and if the Court is satisfied that there are special circumstances which require the setting aside of the decree then it has to set aside the decree, and the only effect would be to enable the Court to extend the time for complying with the condition, which it otherwise has u/s 148 of the Civil Procedure Code, if an application were made before the expiry of the period.

These observations although obiter clearly suggest that in the view of the Division Bench, the Court in such a case would have the power u/s 148 of the Code to extend the time granted for fulfilment of a condition imposed by the order setting aside the ex parte decree passed in a summary suit,

11. In my view, the decision in L. P. Jain v. Nandkumar can no longer be regarded as a good law in view of the decisions to which I have referred above. In a case where an ex parte decree in a summary suit is set aside on certain conditions and a certain time has been granted for the fulfilment of those conditions, it is open to the Court to extend that time, whether the application for such extension is made before or after such time expires. In such a case, the part of order, which prescribes the period within which the condition imposed should be fulfilled, must be regarded as procedural and the Court has ample power to extend such period either u/s 148 or section 151 of the Code. This is not to suggest that merely because an application is made for extension of time the Court would lightly grant the same. It would be for the Court to examine the merits of such an application and grant the extension sought for only if sufficient cause has been made out for not having complied with the condition in time.

[The rest of the judgment is not material to this Report.]