

Muniammal Vs. Sakkubai and anr.

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Court : Chennai

Decided On : Sep-11-1987

Reported in : AIR1988Mad241

Judge : M.N. Chandurkar, C.J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 148 and 151

Appeal No. : C.R.P. No. 2926 of 1987

Appellant : Muniammal

Respondent : Sakkubai and anr.

Advocate for Def. : T. Dhanya Kumar, Adv.

Advocate for Pet/Ap. : K.T. Paul Pandian, Adv.

Judgement :

ORDER

1. The question which has been argued vehemently by the parties in this revision petition is, whether there is jurisdiction in the Civil Court to extend the time for payment of costs where a conditional order is made by the Court allowing a petition on payment of costs with a direction that otherwise the petition will stand dismissed. We are really not concerned with the merits, of the application which was made by the petitioner-defendant for setting aside an ex parte decree.

2. The Writ in question is a writ for possession filed on 17-8-1982. An ex parte decree was passed against the petitioner on 15-12-1983. Two of the defendants, being defendants Nos. 2 and 3 filed an application to set aside the ex parte decree passed on 16-7-1985. That application came to be dismissed for default on 3-12-1985. The defendants, therefore, filed I A. 1183 of 1986 to set aside the dismissal of the application for setting aside the ex parte decree on 20-12-1985. This application remained pending. Ultimately, on 23-1-1987, an order came to be made on this application allowing it on payment of costs on or before 2-2-1987, with a direction that, otherwise the petition will stand dismissed. The further order is called on 13-2-1987. Now admittedly no costs were paid on or before 2-2-1987, as directed by the court by the order dated 23-1-1987. When the application was called out on 3-2-1987 order passed by the learned Judge was payment of costs called on 23-2-1987, On 23-2-1987, the order was made payment of costs called on 12-3-1987. A similar order was made upon 2-3-1987, requiring the application to be called on 2-4-1987. In the meantime on 18-3-1987 the petitioner and the other defendants filed I A-5455 of 1987 for stay. On this application, an order came to be made granting stay till 2-4-1987 on condition that the costs ordered be deposited by 19-3-1987. The decree holder was given notice to appear on 24-3-1987. It is not in dispute that on 17-3-1987 another application came to be made being IA 5454 of 1987 for extension of time and costs came to be deposited on 17-3-1987. Now the prayer in IA 5454 of 1987 was that time for payment of costs should be extended. The application purported to be one under S. 151 C.P.C. and S. 148 of the Code. This application came to be disposed of on 15-5-1987. The learned VIII Assistant Judge, City Civil Court, Madras held that the defendants had not complied with the conditional order. In as much as they had not paid costs on or before 2-2-1987. He took the view that the petition for extension of time for payment of costs having been filed after the period for payment of costs had expired, the court had become functus officio, and the application was, therefore, dismissed. The learned Judge also expressed the view that It is different matter if the application for extension of time had been filed before 2-3-1987, the deadline. It is not the law. It is this order which is challenged, by the second defendant, who in the plaint has alleged to be a tenant of the plaintiff.

3. The learned counsel appearing on behalf of the second defendant has contended that, having regard to the order made from time to time by the learned Judge and especially the order dated 15-3-1987, by which the learned Judge further directed the costs to be deposited in court on 19-3-1987, he was in error in rejecting the application No, 5454 of 1987. The argument is that the series of orders commencing from 3-2-1987 indicated that time was extended from time to time for payment of cost and, since costs have been deposited on 17-3-1987, that is, even before the court made the order on 18-3-1987, on IA 545 of 1987, the court could not have rejected the application I.A. 5454 of 1987 on the ground that it was made prior to 2-2-1987.

4. The learned counsel appearing on behalf of the plaintiff vehemently contended that all orders made after 2-2-1987, which according to the learned counsel for the defendant No. 2, have the effect of extending the time for making the payment of costs of Rs. 25, must be considered as being without jurisdiction, because the court having made the conditional order on 23-1-1987, specifically directing that the petition will stand dismissed, if payment is not made on or before 2-2-1987, the court was functus officio and could not have therefore extended the time for payment of the costs of Rs. 25. It is also argued that, in any case, defendant No. 2 should have made an application before the time for payment of costs had expired and the application having been made after 2-2-1987, the order rejecting the said application should not be interfered with. The learned counsel for the plaintiff wanted to canvass the merits of the application for setting aside the ex parte decree. That however is not the subject matter of this revision petition, because the revision petition is restricted to the correctness of the order dated 15-5-1987 in I.A. 5454, of 1987 apart from the fact that the court had already passed a conditional order allowing it.

5. Now it is well established that under S. 148 C.P.C. the court has power to extend the period which is fixed by it for doing any act prescribed or allowed by the Civil Procedure Code, though the period originally fixed or granted may have expired. As a matter of fact, S. 148 itself specifies that, even though the period originally fixed or granted may have expired the court may in its discretion, from time to time, enlarge such period, which is fixed or granted by the Court for the doing of

any act prescribed or allowed by the Code. The argument of the learned counsel for the plaintiff, however, is that the court must be treated as having become functus officio, having regard to the nature of the conditional order which was made by the Court on 23-1-1987. Now it is also well settled that, where a Court is functus officio and does not have seisin of the suit or a proceeding, then it cannot invoke the provisions of S. 148 of the Civil Procedure Code. In other words, before the power under S. 148 is exercised by a Civil Court on the date on which the application is made and the date on which the order is made, the court must have seisin and control over the matter in which the order is to be made.

6. This position appears to be settled now beyond controversy. A reference may usefully be made to the decision of a Full Bench of the Madhya Pradesh High Court in Bhudulal Kasturchand v. Chhotelal, : AIR 1977 MP1 in which the court, while dealing with the scope, of S. 148 C.P.C. had put the proposition thus -

'So long as the court does not record a formal order disposing of the suit or proceedings, it continues to have the jurisdiction to extend the time granted to a party for performing an act, notwithstanding it' having already expired (the only exception being a conditional decree) (see para 23)'.

In dealing with the effect of a conditional order the Full Bench observed in paragraph 10 as follows -

In our opinion, the language of S. 148 C.P.C. is wide enough to vest the Court with undoubted jurisdiction to enlarge the time from time to time, and this jurisdiction extends even to a case where the period fixed had

already expired Even if in the initial order the court may have said that if costs are not paid before a certain date fixed for it, the suit shall stand dismissed, the court does not lose seisin of the case after the expiry of such' period notwithstanding a default. Such directions are in terrorism so that-dilatory litigants put them selves in order. The court does not cease to have jurisdiction on the happening of the default. There are no such words in S. 148 to confine it to cases in which extension is sought before the period fixed by the court expire The court does not cease to have jurisdiction until it makes an order finalbrzdisp6sing of, the

proceeding before it'.

The Full Bench further pointed out that in a given case, it was for the Court to, exercise the discretion which was vested in it one way or the other, but rejecting an application in exercise of the discretion is one thing and it is quite another to say that the court ceases to have jurisdiction over the matter just because the period originally fixed has expired.

7. A similar view had been taken by a Full Bench of the Allahabad High Court in *Gobardhan v. Barsati*, : AIR1972 All246 of the judgment it is observed as follows:-

'Even in cases where an order is made by for doing a thing within a particular time, and the order further provides that the application, suit or appeal shall stand dismissed if the thing is not done within the time fixed, the court has jurisdiction, if sufficient cause is made out to extend that time even when the application for extension of time is made after the expiry of the time fixed. It is not the application for grant of further time, whether made before or after the expiry of the time granted which confers jurisdiction on the court. the court possesses the jurisdiction under S. 148 C.P.C. to enlarge the time and the application merely invokes that jurisdiction '.

We may also usefully refer to the decision of the Supreme Court in *Mahanth Ramdas v. Gangada* : [1961]3SCR763 , where, with reference to procedural orders except in conditional decrees, the Supreme Court pointed out the procedural orders though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay and they do not however completely stop a court from taking note of events and circumstances which happen within the time fixed. In para 5 of the judgment the Supreme Court pointed out that S. 148 of the Code in terms. &Vows; extension of time even if the original period fixed has expired and Sec. 149 is 'equally liberal. It was then observed as follows -

'How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with facts that might arise in between it is not necessary to decide in this appeal. The order turned out, often enough to be

inexpedient, Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorism, so that dilatory litigants might put themselves In order and avoid delay. They do not, however, completely stop court from taking note of events and circumstances which. happen within the time fixed. 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 Modes and the Persians. Cases are known in which courts have moulded 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. We need cite only one such case, and that is Lachmi Narain Marwari v. Balmukund Marwari, 4 Pat 61: AIR 1924 PC 198. No doubt, as observed by Lord Phillimore, we do not wish to place an, impediment in the way of courts in enforcing prompt obedience and avoidance of delay. Any more than did the Privy Council.'

In Ponnaiya v. Muthayya. 1981 TLNJ 332, Ratnavel Pandian, J. has referred to the decision of the Full Bench of the Allahabad High- Court cited : AIR1972 All1 (supra) and has taken the view that, if sufficient cause is shown to extend the time, even when the application for extension of time is made after the expiry of the time originally fixed. The court has got ample power under S. 148 C.P.C. to enlarge the time and it cannot be said that the court has lost soisin over the matter merely because the final order has been passed.

8. As already pointed out the learned counsel for the plaintiff has vehemently contended that the court had lost seisin of application I.A. 1183 of 1986 and that the court was not required to-do anything further after 2-2-1987 which was the date fixed for payment. It is not possible to accept this argument. It is obvious that when the court directed application I.A. 1183 of 1986 to be called on 3-2-1987 that was obviously done in order to enable the court to make a order on that application. The order dated 23-1-1987, But it was actually kept pending for orders on 3-2-1987, and thereafter adjourned from time to time and, it the words payment of costs have to be given any meaning. The meaning was the adjournment was for verification of the fact of payment. They could a be construing its permitting

payment of costs to be made by the next date of hearing to which the hearing of the application was, adjourned . The application was, therefore pending all the time after 2-2-1987. The Court, therefore had clearly socisin of the proceeding initiated by application. I.A.1183 of 1987 until a final order, was made on that application. As a matter of fact, the application has been regarded as pending even by the court, and the court has specifically directed on 18-3-1987 that costs should be deposited by 19-3-1987. It is, therefore, difficult to see how the court can now the take the view that the time for deposit of costs could not be extended. The order dated 18-31-1987 by which costs were ordered to be deposited on 19-3-1987 is not challenged by the plaintiff. That order, right or wrong, has become final between the parties, and, as a matter of fact having regard to the order dated 18-3-1987, the only order which could be-properly made on application I.A. 5454 of 1987 was a formal order of allowing that application as costs have been deposited within the time granted afresh as a condition of the order of stay. It is also not possible to accept the contention of the learned counsel appearing on behalf of the plaintiff that all the orders passed after 2-2-1987 are without jurisdiction. This contention has been advanced by the learned counsel on the basis of certain authorities which unfortunately do not seem to deal with a matter like the one involved in this revision petition.

9. In Sukumaranv. Stilaiman Khan. : AIR1971 Mad454 on which reliance is placed on behalf of the respondent, Ramanujam ,J, was dealing with an application purported to be made under S. 148 C.P.C, or S,149 of the code for extension of time to pay a certain amount in a conditional decree. In that case, the suit had been disposed of after trail and the plaintiff was time for payment, the suit was directed to be dismissed. The learned Judge held that the time fixed under the conditional decree cannot be extended by the court after the default clause had operated and that the remedy for the petitioner there in can only be way of review or appeal. According to the learned Judge, the court had passed a final order in the suit And the court does not retain control over the suit any further and, therefore, neither S. 148 nor S. 149 C.P.C. could be invoked. There can hardly be any quarrel with the proposition laid down by the learned Judge. The suit had been finally disposed of in that case. In the instant case, we are dealing with an application which was still kept pending till 15-5-1987. Ramanujam,j decision

cannot be of any assistance to the case of the plaintiff.

10. In *Venugopal v. The Triplicate Urban Co-operative Society Ltd.* by its secretary, (1960) 2 Mad 136, a Division Bench of this court has held that, where a court passes an order under Order 9, Rule 8 C.P.C. directing the restoration of a suit dismissed for default on condition of payment of costs to the opposite party before specified date and provides that in default of such payment the application will stand dismissed, the court no longer remains seized of the application but he comes functus officio. A reading of the judgment which is very short shows that in that case it was not disputed before the Division Bench that when the default occurred by not making the deposit, the consequence was that the petition itself stood dismissed after the expiry of the period fixed for deposit. This is clear from the following observations -

'It is not denied before us that default was made in this deposit and that, in consequence the petition itself stood dismissed after the expiry of the period fixed for the deposit'

These observations would, therefore, indicate that it was not disputed before the Division Bench that the consequence of non-deposit was that the petition stood dismissed. That is how the Division Bench took the view that the court had become functus officio. In the instant case, as I have pointed out, the application is still kept pending and there is no question of the court becoming functus officio.

11. In *Sitarainan v. Pattabhiraman*, : AIR 1958 Mad 453 Balakrishna Ayyar, J., applied the principle and, with respect, correctly, that where the proceedings cease to exist, consequently.

a default clause provided in the order itself, S. 148 C.P.C. can have no application. The learned judge in that case pointed out that the petitioner may file either a fresh application for stay or a petition for a review of the orders. The whole decision thus turns on the question whether, as a result of the conditional order, the application was disposed of or not. Reference was made to a decision of the Division Bench in *Balakrishna Ayyar v. Parvathammal*, : (1927) 53 MLJ 494. In that case, pending an appeal in the High Court against the decree in a suit for administration of the

estate of a deceased person stay of proceeding was ordered on the condition of the petitioners there in furnished security for Rs.44000 with in three months with a further direction that otherwise the petition to stand dismissed with costs. This order was made on 3-9-1926. On 3-12-1926 the petitioner put in an application for extension of time for furnishing secretariats but this was dismissed on 17-12-1926 on the ground-that the lower court had found the security to be insufficient and therefore the order of 3-9-1926 had become effective and the proper remedy of the petitioner was to apply for a review of that order or to apply to review the lower court's finding that the security was insufficient. An appeal was filed against this order and the appeal was dismissed on the ground that the order dated 17-12-1926 was not a Judgment within the meaning of Cl. 15 of the Letters Patent, and consequently, no appeal lay against that order. Obiter observations were made that the court had no power to extend the time in such a case and the proper remedy was to apply to review that order or to revise the lower court order, that the security was insufficient. It is, however, important to point out that, on the facts of that case, the Division Bench held that S. 148 C.P.C. could not be invoked at all because there was no previous order which was operative. At page 501, the Division Bench observed as follows -

'The position is, in fact, precisely the same as though the order had never been passed, and the power to extend time given by S. 148 C.P.C cannot be invoked, because not only had the period originally fixed or since expired but there is no previous order still current upon which an order extending time could operate'

This observation would indicate that the Division Bench took the views on the peculiar facts of that case that the security furnished was insufficient and there was no order in respect of which an order of extension of time could be made.

12. The last decision relied upon on behalf of the plaintiff is in *Must, Dagri v. Kera Kachari*, AIR 1976 Gau 16, The learned Chief Justice of the Gauhati High Court on the facts of that case has held that the conditional order setting aside the ex parte decree on payment of costs which also provided that, if the costs are not deposited by the fixed date. The application would stand dismissed, was self-operative and that no further order dismissing the application was necessary and

therefore, Extension of time to pay costs under S. 151 C.P.C. WAS ILLEGAL. In paragraph 13 of the judgement, the learned Judge after referring to the terms of the decree observed as follows:-

'If the order is couched in such words, then no further order regarding the dismissal, of the case for not complying with the mandatory direction of the court regarding the payment of costs need be passed.'

Having taken the above view, the learned Chief Justice proceeded to point out. that, though in that case the time was granted to pay costs by 20-12-1967, an order was also passed on 21-12-1967, dismissing. the application for restoring the suit and therefore the court was not in seisin of the suit.,

13. The authorities thus indicate that the question as to whether the exercise of jurisdiction under S. 148 C.P.C. is proper or not will depend on whether at the time when I the application was made, the Court was or was not functus officio and whether it had seisin of the case.

14. As already pointed out in the instant case, I.A. 1183 of 1986 was not dismissed and was still kept pending and, therefore, there was clearly jurisdiction in the court to extend the time on being satisfied that defendant No. 2 had made out a case for extension of

15. Consequently, the order rejecting the application I.A. 5454 of 1987 and the consequent order rejecting the application I.A. 1183 of 1986 will, therefore, have to be set aside.

16. The revision petition is accordingly allowed. Since costs have been paid as directed by the conditional order on I.A. 1183 of 1986, that application must stand allowed. The result is that the original application for setting aside the ex parte decree, namely, 1. A. 12642 of 1985 will stand restored to file. The same is directed to be disposed of according to law, expeditiously. There will be no order as to costs.

17. Revision allowed.

