Mahanth Ram Das

Vs

Ganga Das

Civil Appeal No. 432 of 1957

(J. L. Kapur, M. Hidyatullah, J. C. Shah JJ)

07.02.1961

JUDGMENT

HIDAYATULLAH, J. -

The appellant who was plaintiff in a title suit in the Court of the Subordinate Judge II, Gaya, has appealed against the dismissal of his suit by the High Court at Patna, with a certificate from that Court. In the suit he had asked for a declaration that he was nominated Mahant of Moghal Juan Sangat by his Guru, Mahanth Gulab Das, by a registered deed dated October 21, 1944, and that he had thus the right to manage the Sangat and other off-shoots thereof. His 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 was decided in his favour on condition that he paid court fee on 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. V. Ramaswami, J. and C. P. Sinha, J. (as they then were) held that the valuation for the purpose of the suit was Rs. 12,178-4-0, and that ad valorem court fee was payable on it. They, therefore, made a direction as follows :

> "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 the 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 be computed 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 declaring...."

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. It appears that the appellant's advocate in the High Court asked the case to be 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. This application was placed before a Division Bench consisting of Ramaswami and Ahmad, JJ., when 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 under s. 151, which was rejected by Imam, C.J. and Narayan, J., on September 2, 1954. They, however, felt that the proper remedy was review. The appellant then filed another petition under s. 151, read with O. 47, R. 1 of the Code of Civil Procedure, setting out the reasons why he was unable to find the money. He stated that he was seriously ill, and though he had attempted to raise a loan, he was unable to get sufficient money, as the grain market had slumped suddenly, and people were unable to advance money. He offered to pay the deficit court fee within such further time as the High Court might fix.

This application for review was heard on September 27, 1955, by Ramaswami and Sinha, JJ. They first considered it from the viewpoint of O. 47, R. 1 of the Code of Civil Procedure, and held that the application did not fall within the Order. The argument of counsel that time could have been extended under s. 148 or s. 149 of the Code of Civil Procedure was also not accepted. The learned Judges held that these sections applied only to cases which were not finally disposed of, and that time under them could be extended only before the final order was actually made. The request to extend the time under the inherent powers of the Court was also rejected for the same reason. Ramaswami, J., concluded his order by saying :

> "I have considerable sympathy towards the plaintiff petitioner who has placed himself in an unfortunate position, but we must be careful not to allow our sympathy to affect our judgment. To quote the language of Farwell, J. in another context 'sentiment is a dangerous will-o-the wisp to take as a guide in the search for legal principles' (Latham v. Johnson [[1913] 1 K.B. 398])."

In the result, the petition was dismissed, but without costs.

The appellant then moved the High Court for a certificate, and the case was heard by K. K. Banerji and R. K. Chaudhary, JJ. Though the decree was one of affirmance, the learned Judges fortunately found it possible to grant a certificate, and the present appeal has been filed.

The case is an unfortunate and unusual one. The application for extension of time was made before the time fixed by the High Court for payment of deficit court fee had actually run out. That application appears not to have been considered at all, in view of the peremptory order which had been passed earlier by the Division Bench hearing the appeal, mainly because on the date of the hearing of the petition for extension of time, the period had expired. The short question is whether the High Court, in the circumstances of the case, was powerless to enlarge the time, even though it had peremptorily fixed the period for payment. If the Court had considered the application and rejected it on merits, other considerations might have arisen; but the High Court in the order quoted, went by the letter of the original order under which time for payment had been fixed. Section 148 of the Code, in terms, allows extension of time, even if the original period fixed has expired, and s. 149 is equally liberal. A fortiori, those sections could be invoked by the applicant, when the time had not actually expired. That the application was filed in the vacation when a Division Bench was not sitting should have been considered in dealing with it even on July 13, 1954, when it was actually heard. The order, though passed after the expiry of the time fixed by the original judgment, would have operated from July 8, 1954. How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not

necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. 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 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 on 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 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. Balmakund Marwari [(1925) I.L.R. 4 Patna 61 (P.C.)]. 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, and more than did the Privy Council. 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 under s. 151 of the Code of Civil Procedure were filed. If the High Court had felt disposed to take action on any of these occasions, ss. 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.

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 13, 1954, and the orders made sub-sequently. We need not send the case back for the trial of the petition made on July 8, 1954, because that would be only productive of more delay. None has appeared to contest the appeal in this Court. We have perused the application and the affidavit, and we are satisfied that sufficient cause had been made out for extension of time. We, accordingly, set aside the dismissal of the appeal and the suit, and grant the appellant two months' time from today for payment of the deficit court fee. We only hope that, after the lesson which the appellant has learnt, he will not ask the Court perhaps vainly, to show him any more indulgence. There will be no order about costs in this Court as the appeal was heard ex parte.

Appeal allowed.

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