

ALLAHABAD HIGH COURT

Gobardhan Singh

Vs.

Barsati

Civil Revn. No. 1558 of 1969. against order of S.K. Agarwal Munsif, Mirzapur
(G.C. Mathur, A.K. Kirty and R.B. Misra, JJ.)

02.06.1969. 16.12.1971

JUDGMENT

G.C. MATHUR, J.

1. This revision has been referred to this Bench for consideration of the question whether the decision of a Division Bench of this Court in *Gaya Din v. Lalta Prasad*¹, is still good law. Doubts have been cast on the correctness of this decision on account of the decision of the Supreme Court in *Mahanth Ram Das v. Ganga Das*²,

2. Since the entire revision has been referred for decision, it is necessary to set out the relevant facts. The suit, out of which this revision arises, was filed on July 4, 1966, by the applicant in the court of the Munsif, Mirzapur. Some amendments in the plaint were allowed by the Munsif by his order dated April 11, 1967. Consequent to these amendments, there was a deficiency in the court-fees by Rs. 249.50 as reported by the Munsarim on August 4, 1967. The deficiency in court-fees was not made good within the time allowed and on October 4, 1967, the plaint was rejected as insufficiently stamped. On October 19, 1967, the applicant made an application for restoration and on December 7, 1968, the application was allowed. The operative portion of the order of the Munsif reads:

"I allow the application and restore the plaint on payment of Rs. 6/- as costs and payment of entire court-fee by 11-12-1968. In case of any default, the application shall stand rejected."

It appears that the matter was put up before the Munsif on December 11, 1968, on which date he passed an order for consigning the record. From the record of the case it appears that the deficiency in court-fees was made good on December 11, 1968, possibly, after the order consigning the record had been made. The amount of Rs. 6/-, which had been ordered to be paid as costs, was actually deposited by tender in the court on December 12, 1968. When the applicant came to know of the order about consigning the record, he made an application on December 17, 1968, under Section

151 of the Code of Civil Procedure praying that the order of December 11, 1968,

1 AIR 1936 All 477

2 AIR 1961 SC 882

consigning the record be set aside and the suit be proceeded with. This application was treated as an application for extension of time. This application was rejected by the Munsif on Sept. 2, 1969, on the ground that, since the earlier application for restoration stood rejected on December 11, 1968, the court had no power either to extend the period or to pass any further order restoring the plaint. The Munsif relied upon the decision of this Court in AIR 1936 Allahabad 477 (supra). It may here be mentioned that, though this order states that the applicant did not pay the necessary court-fees on December 11, 1968, there is no dispute that the court-fees had in fact been paid on that date. It is this order of the Munsif which is challenged in this revision.

3. The question, which arises in the case, is whether the Munsif could, after the expiry of the period for paying costs, extend time therefor. As already stated above, the Munsif, in holding that he could not extend the time, followed the decision of a Division Bench of this Court in AIR 1936 Allahabad 477 (supra). It is contended by learned counsel for the applicant that this decision is no longer good law as the Supreme Court has, in Mahanth Ram Das's case, AIR 1961 Supreme Court 882 taken a contrary view.

4. In Gaya Din's case, AIR 1936 Allahabad 477 the suit, which had been dismissed for default, was restored on the application of the plaintiff on the condition that he paid Rs. 8/- for costs to the defendant on or before 27-10-1934. In case of default, the application was to stand dismissed. Rs. 4/- were paid on 15-9-1934 but the balance was not paid upto 27-10-1934. On 29-10-1934 the plaintiff made an application for permission to pay the balance and for a direction to the defendant to receive it. The Munsif dismissed the application on the ground that he had no power to extend the time. In the revision before this Court, the plaintiff contended that the time should have been extended under Section 148 of the Code of Civil Procedure . This section 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".

The Division Bench, which heard the revision, held that, on the expiry of the time fixed in the order, the application stood dismissed, the court no longer remained seized of the application and could not grant any extension of time. It observed:-

"The application of Section 148, Civil Procedure Code, depends on the question whether the matter has been finally disposed of by the Court and the Court is seized of the matter and has control over it or not. If the order is not final and the Court retains its control over

and is seized of the matter, it has full power to make any just and necessary order therein, including in appropriate cases the extension of time and Section 148, Civil Procedure Code can be applied. On the other hand, if the effect of the order is that in the event of non-compliance it operates automatically and without further intervention of the Court, the section cannot be applied for the obvious reason that the Court ceases to be seized of the matter and becomes *functus officio*".

The view of the Division Bench was that, but for that part of the order which provided for the automatic dismissal of the application in default of payment within time, time could have been extended even after its expiry.

5. Now let us examine the decision of the Supreme Court. In this case, the appeal of the plaintiff against the dismissal of his suit was allowed by the High Court of Patna on the condition that he paid court-fees on the amended relief of possession. It was provided that, if the court-fee was not paid within the time given, the appeal would stand dismissed. The amount of court-fees, which the plaintiff was required to pay, was Rs. 1987/8/- and the time for payment was to expire on 8-7-1954. The plaintiff, on 8-7-1954, made an application to the High Court, requesting that he be allowed to pay Rs. 1,400/- immediately and the balance within one month. This application was dismissed on 13-7-1954 on the ground that the appeal already stood dismissed as the amount was not paid within the time given. The plaintiff then moved an application under Section 151, Civil Procedure Code which was rejected on 2-9-1954. He then filed a third application under Section 151 and Order 47 Rule 1, Civil Procedure Code setting out the reasons why he was unable to find money and offering to pay the court-fees within such further time as the High Court might fix. This application was also rejected. The High Court held that Order 47 Rule 1 was not applicable and that time could not be extended under Sections 148, 149 or 151, Civil Procedure Code as these sections apply only to cases which were not finally disposed of. As a result of these orders, the appeal of the plaintiff stood dismissed. On appeal to the Supreme Court, it was held that the High Court had power to extend time and should have done so. Considering first the application dated 8-7-1954, the Supreme Court posed the question: "Whether the High Court was powerless to enlarge the time even though it had peremptorily fixed the period for payment?" It then observed that both Sections 148 and 149 allowed extension of time even though the original period fixed had expired. With respect to the peremptory nature of the original order, it said:-

"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".

These observations clearly show that the peremptory nature of the order did not make the Court powerless, in suitable cases, to enlarge the time even after the expiry of the period fixed. This is made further clear by the following words of the Supreme Court which contain its actual decision in the case:-

"But we are of opinion that in this case the Court could have exercised its power 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 Section 151 of the Code of Civil Procedure 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.

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". What is important to note is that, even with respect to the applications under Section 151, Civil Procedure Code which were filed after the expiry of the period fixed by the order, the Supreme Court has said that the High Court could have, on those applications, extended the time under Sections 148 and 149 of the Code of Civil Procedure.

6. Thus the view, which the Supreme Court has taken is this: The Court has power under Section 148, Civil Procedure Code to extend the time for doing an act even after the time given has expired; a peremptory order providing for the automatic dismissal of the application or appeal or suit on failure to do the act within the time fixed does not take away the power and jurisdiction of the Court to extend the time in appropriate cases; such peremptory orders are made "n terrorem" in order that dilatory litigants might avoid negligence and delay. The view taken by the Division Bench of this Court in AIR 1936 Allahabad 477 (supra) is directly opposed to the view now taken by the Supreme Court.

7. Three decisions have been brought to our notice which have interpreted the Supreme Court's decision in AIR 1961 Supreme Court 882 (supra) differently. In *Mohan Lal v. Ladli Prasad*³, Jagmohan Lal, J., referring to the Supreme Court decision, observed:

"On those facts it was held that even after the original time had run out, the Court was not powerless to extend the time on the basis of the application that had been made prior to the fixed time running out and that in such a case the order so passed would be deemed to take effect from the date on which the application had been made for further extension of time".

In the *Usha Sales (P) Ltd. v. Basdeo Narain Singh*⁴, Trivedi, J., distinguished the decision of the Supreme Court thus:-

"In that case, the application for extension of time was made before the time fixed had run out and it was in that context that their Lordships of the Supreme Court remarked that where an application for extension of time has been made before the time fixed had run out, the Court was competent to extend the period for payment even though the order may

³ AIR 1971 All 519

⁴ Civil Revn. No.656 of 1967 decided on 26-4-1968 (All)

be passed after the expiry of the time fixed".

In *Tarapada Sarkar v. Nepal Gazi*⁵ a learned Single Judge of the Calcutta High Court said regarding the decision of the Supreme Court: -

"The Supreme Court held that in such a case the High Court had jurisdiction to extend time on the application which had been filed before the time fixed by the High Court for payment of deficit Court-fee and also in the exercise of the inherent power of the Court under Section 151 of the Code of Civil procedure".

The cases interpret the Supreme Court decision as laying down that the power to extend time under Sections 148, 149 or 151 Civil Procedure Code can only be exercised upon an application made before the expiry of the time and not upon an application made after the expiry of the time. With great respect to the learned Judges who decided these cases, we think that this is not a correct reading of the decision of the Supreme Court. It appears to us that their attention was not drawn to the passage in the Judgment of the Supreme Court quoted above in which it has been clearly stated that, even on the applications filed under Section 151 Civil Procedure Code which were filed after the expiry of the period fixed, the High Court had ample power under Sections 148 and 149 of the Code of Civil procedure to extend the time. A Division Bench of the Calcutta High Court, in *Bokaro and Ramgur Ltd. v. State of Bihar*⁶ has correctly interpreted the Supreme Court decision thus: -

"Where an order is made for payment of deficit court fees accompanied by the further order that if the deficit court fee be not paid, within the time allowed, the suit or the appeal would stand dismissed. In such a case, if sufficient cause in explanation of the default, be made out, Courts may allow extension of time even after the period originally fixed has expired. (Vide AIR 1961 Supreme Court 882)".

In our opinion, in view of the decision of the Supreme Court, the decision of the Division Bench of this Court in AIR 1936 Allahabad 477 (supra) is no longer good law. Even in cases where an order is made by the Court 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 the 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 Section 148 Civil Procedure Code to enlarge the time and the application merely invokes that jurisdiction.

8. In the case before us, the Munsif has dismissed the application for extension of time only on the ground that there was a peremptory order providing that the

⁵ AIR 1965 Cal 354

⁶ AIR 1965 Cal 308

application shall stand rejected in case the amounts were not paid by 11-12-1968 and that the application for extension of time was made after the time had expired. The

Munsif was in error in dismissing the application on this ground. It is not necessary to remand the case for deciding whether the extension of time should be granted or not. In the application filed by the applicant, on December 17, 1968, and the affidavit filed in support thereof, it is stated that the applicant had deposited the entire amount of court-fees and costs with the clerk of his lawyer and that the clerk had deposited the court-fees but he, by inadvertence failed to pay the costs to the counsel for the opposite-party. It further appears there from that on the very next date, i.e. December 12, the clerk of the applicant's lawyer attempted to pay the amount of costs to the lawyer for the opposite-party but he refused to accept the same. The amount of costs was deposited in court on that very date. In the objections filed by the opposite-party to this application, the fact is admitted that costs were offered to be paid to the opposite-party's counsel on December 12 and that he refused to take the same. But it is asserted that the applicant had deliberately not paid the amount of costs only to harass the opposite-party and that the costs were sought to be paid by the applicant's lawyer's clerk himself to avoid loss to the applicant. Considering the fact that the applicant had deposited about Rs. 250/- towards the deficiency in court-fees, we are not prepared to believe that he would deliberately not pay Rs. 6/- towards costs. We are satisfied that the explanation of the applicant is correct and that he had paid the amount of costs to his lawyer's clerk and the clerk forgot to pay the same to the counsel for the opposite-party on December 11 but tried to do so on December 12. In these circumstances, the application for extension of time should have been allowed.

9. We accordingly allowed the revision with costs. The application for extension of time is allowed and the amount of costs will be deemed to have been deposited within the extended time. The order of the Munsif consigning the records is set aside. The order dated December 7, 1968, allowing the application for restoration of the plaint shall stand. The Munsif will proceed with the suit in accordance with law.

Revision allowed.