

(1983) 09 BOM CK 0063

In the Bombay High Court

Case No : Chamber Summons No. 535 of 1983 In Summary Suit No. 729 of 1982

Durga Mhoan Hoshi

APPELLANT

Vs

International Metal Industries and Others

RESPONDENT

Date of Decision : 23-09-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11, Order 20 Rule 11(2), 148, 151

Citation : (1985) MhLj 276

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : J.I. Mehta with S.A. Gandhi, for the Appellant; F.E Devitre, for the Respondent

Judgement

1. The plaintiff has filed this suit against the defendants for recovery of a sum of Rs. 4,35.181|- with interest at the rate of 18% per annum on Rupees 4,28,750|- from the date of the suit till payment and for costs of the suit,. The suit was filed as a Summary Suit by the plaintiff under O, 37 of the Civil P.c. In the suit decree on admission as prayed was granted the in favour or the plaintiff and against the defendants. The minutes of the decree however, which were filed by the parties provided that if the defendants pay to the plaintiff a sum of Rs. 4,21.00|- with interest at the rate of 6% per annum by monthly instalments as detailed therunder, the decree was to be marked as fully satisfied. The amount was to be paid by monthly instalments which were set out in the minutes and it was provided that if the defendants committed a default in payment of any two installments the plaintiff was entitled to execute the decree forthwith the and recover the entire decretal amount or the balance then unpaid. The defendants also undertook not to dispose of their factory premises specified there in till the entire amount of the decree decree was satisfeid. The decree on admission was obtained on 26th JULY 1982. In terms of the decree the defendants paid monthly instalments up to March 1983. Thereafter they have not paid any further monthly instalments. They have taken for out the present chamber summons on 8th Sept. 1983 asking for extension of time for payment of the monthly instalments

under the said decree as from April 1983 onwards. They have asked for an extension of six months for payment of each of the instalments due under the decree from April 1983 onwards. They have also prayed that all further proceedings on execution of the decree be stayed on such terms and conditions as may be fixed. The latter prayer has been asked for because in view of the defaulters committed by the defendants the plaintiff has attached certain properties of the defendants. Under an interim order dt. 9th Sept. 1983 passed in the Chamber Summons the defendants have deposited a further amount of Rs. 40,000/- which is equivalent to 2 monthly instalments in court.

2. This Chamber Summons being opposed by the plaintiff. The plaintiff has submitted that in view of the decree which has been passed by this court on 26th July 1982 the Court is now functus officio and it has no power to grant any extension of time for payment of any instalments as specified in the said decree. In order to examine this contention it is necessary to look at the provisions of the Civil Procedure Code. Under O. XX . R. 11, sub-rules (1) and (2) it is provided as follows :

Order XX :

"Rule 11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason incorporated in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgement, make an order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

After the passing of any such decree the Court may on the application of the judgement debtor and with the consent of the decree- holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment interest, the attachment of the property of the judgement debtor or the taking of security from him, or otherwise, as it thinks fit".

3. Thus when the decree is for the payment of money the court may at the time of passing of the decree provided for payment of the decree amount by instalments . This power is required to be exercised by the court at the time of the passing of the decree. Under sub-rule (2) power is given to the court to grant instalments at a date subsequent to the passing of the decree, but only if the decree-holder consents to such an order being passed. This provision indicates that once a decree for payment of money is passed by the court, the court cannot afterwards grant any decree holder. It was submitted before me by Mr. Devitre, learned counsel for the defendants that the provisions of sub-rule (2) would apply in the case of those money decrees where no order has been made for payment of the decretal amounts by instalments at the time of the passing of the decree. In the other words, he submitted that if the final decree provided for

instalments then sub-rule (2) would have appear to be correct. Order XX, r. 11 applies I terms to all money decrees. Under sub-rule (1) power is given to the court to grant instalments without the consent of the decree holder at the time when the decree is passed; while under sub-rule (2) such power can be exercised by the court at a subsequent date only with the consent of the decree holder. There is nothing in the language of sub-rule (2) which would indicate that sub-rule (2) will be applicable only to those money decrees in which instalments have not been granted at the time of the passing of the decree. Sub-rule (2) applies to all money decrees and a money decree as a money decrees and a money decree for payment of which installments have been granted is a such a money decree as a money decree simpliciter. Thus under O. XX, R. 11 sub-rule (2) it is not open to me to grant any further instalment or to prescribe a different period for the payment of installments without the consent of the decree holder. In fact it was precisely on account of this limitation on the powers of the Courts under sub-rule (2) that some High Court R. 11 , C.P.C. in this regard. Thus the High Court of Andhra Pradesh and Madras had amended on O, XX. R. 11 sub-rule (2) to read as follows :

"After the passing of any such decree the court may, on the application of the judgement debtor and after notice to the decree holder order that payment of the amount decreed shall be postponed or shall be made by installments on such terms as to the payment of interest, the attachment of the property of the judgement debtor or the taking of security from him, or otherwise as it thinks fit". In the absence of any such provision it is not possible to grant instalment or vary the time for payment of instalments at a date subsequent to the passing of the decree without the consent of the decree holder.

4. Once a decree is passed in a suit the court cannot pass any further orders. There is only one exception in equity to this rule. In the case of consent decrees or decrees in invitum , if there are any provisions for penalty or forfeiture in the event of the judgement debtor committing any default, then in equity the court has jurisdiction to give relief against penalty or forfeiture. Cases of relief against forfeiture usually are cases of decrees between landlord and tenant, where there is a provision that on the tenant failure to pay rent, his tenancy is to be forfeited. Penal provisions in a decree were discussed in the case of *WaTukaram* reported in : (1948)50BOMLR688 , by a Full Bench of this High Court. It held that in a decree which is passed wither by consent or in invitum, if there is any provision for payment of the decretal amount in instalments and there is also a provision that on failure to pay one or more instalments the whole amount of the decree becomes payable at once, the Court are bound, in the event of such failure, to execute the decree in according with its terms and are not at liberty to relieve thee judgement debtor against the consequences of failure on equitable considerations. Chagla, C.J. held that such a provision for the decree could not be considered as a penal prosion. On the contrary, a provision for payment of the decree by instalments was a concession which was granted to the judgement debtor by the decree holder. There a was no question therefore, of the

judgement debtor being granted relief against any penal provision in the decree. In this judgement the High Court has cited with approval a decision of the Division Bench Shapurji v. madhavlal Jesinghbai (reported in (1934) LR 58 Bom 610 : AIR 1934 Bom 370 . In this judgement a distinction drawn between a concession to and of a penalty. "If there is an agreement to pay a sum of money by a particular date with a condition is in the nature of a penalty against which a court of equity can grant relief . But if on the other hand there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession for example, the payment of a lesser sum or payment of a by instalment, by a particular date or dates, then the party seeking to take advantage of the condition on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing". (See in this connection also Gajanan Govind Pathak Vs. Pandurang Keshav Puntambekar, and Doshi Kantilal Kanaiyalal and Another Vs. Modiya Chandulal Chhotalal Ranchhoddas and Another, . The provision in the present decree is for the payment of a lesser and not a penalty. There is can be therefore, no room for intervention on equitable grounds.

5. It was next submitted by the defendants that under s. 148 of the C.P.C. there is power in the court to grant an extension of time for time for payment of instalments under the decree. Under S. 148 : 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." Provision of S. 148 are attracted when under an order of the Court any time is fixed for the doing of any act prescribed or allowed by the code. This provision enables a court which is seized of the matter and has control over it to enlarge time for the doing of any act which is prescribed or allowed by the Code. Section 148 applies only to orders is passed by a court controlling its task qua that matter . It does not retain any further control over the proceedings . Hence the provision of S. 148 cannot apply to final decrees of any court. Any time for payment which is laid down in a decree cannot be enlarged by resorting to Section 148. The only case where the provisions of S. 148 can be applied to a decree is the case where the decree is of a preliminary nature and the court has retained control over the court proceedings for the purpose of passing a final decree. Hence under S. 148 there is no power in the court to extend the time for payment under a decree S. 148 there is no power in the court to extend the time for payment under a decree as in the present case. The cases cited before me where s. 148 was applied were all case of orders and not of decrees,. Thus in G. Rite and Co. Vs. Chandrakant Harilal Shah, , in a notice of motion to set aside an ex parte decree, an order was passed directing the defendants to deposit Rupees 4,275/- in court and pay the costs of the notice of motion fixed at Rs. 45/- before a specified date. On such deposit motion was made absolute and on failure to deposit the motion was to be dismissed. The defendants deposited Rs. 4,275/- but omitted to pay the costs by inadvertence. The court was required to consider

whether it had power to extend time for payment of costs. The learned Judge who heard the matter held that the order was not a self-operative order and the court was not functus officio. u/s 148 of the C. P. C. time could be extended. IN the alternative, he held that even assuming that the order was a self-operative order, such procedural orders though peremptory, are in essence, n terrorem, so that dilatory litigants might avoid delay. He relied upon a decision of the Supreme court in the case of Mahanth Ram Das Vs. Ganga Das, in connection with such self-operative orders. He therefore, held that the court retained control over the matter and in any event under S. 151, it could extend the time. This decision cannot help the defendants. It deals with an order of the court where the court retained control over the proceedings. Its ratio cannot apply to a final decree as in the present case.

6. Learned counsel for the defendants relied upon a decision in the Madras High Court in the case of G. Fernada v. Ratnasmi Nadar reported in (1951) 1 Mad LJ 425 where the court gave a short stay of execution of an eviction decree, exercising powers under S. 151. Since, no reasoning is given in the judgement, it is difficult to rely upon it in the judgement present proceedings. He also cited before the Supreme Court in the case of Chinnamarkathian alias Muthu Gounder and Others Vs. Ayyavoo alias Periana Gounder and others, . That was a case arising under Tamil Nadu Cultivating Tenants Protection Act (25 of 1955). In that case the "Revenue Divisional Officer allowed time to a tenant who was in arrears of rent to make payment and passed an order that in default he would be evicted. This was clearly a case of forfeiture. The Supreme Court construed the provisions of Sec. 3(4)(b) of the said Act and held that the officer ought not to have passed a conditional order. He had the power to grant time for the payment of rent and he also had inherent power (on principles analogous to s. 148) of extending the time for payment. He ought not to have deprived himself of his power to extend time by passing a conditional order. The Supreme Court said that under the provisions of the said Act two stages of making an order were contemplated and the Revenue divisional Officer could not have passed a composite order. In connection with the Officer could not have passed a composite order. In connection with the Officers power to grant time for payment of rent by an order, the Supreme Court observed that "the principle of equity is that even some circumstances are to be taken into account for fixing a length of time within which a certain action is to be taken, the court retains to itself the jurisdiction to reexamine the alteration or modification of circumstances which may necessitate extension of time". These observations cannot apply to final decrees passed by a court. The decision of the Supreme Court turned on the provisions of the Tamil Nadu Cultivating Tenants Protection Act. It has no application to the present case.

7. The next decision relied upon was in the case of Smt. Periyakkal and Others Vs. Smt. Dakshyani, . The case before the Supreme Court dealt with an application under O. XXI, R 90 of the C. P. C. for setting aside a sale into execution of a decree. A consent order was taken in the proceedings to set aside

the sale under which time was granted to the judgement debtor to deposit certain amounts in court. It was also provided that on the judgement debtors failure to deposit the amount, the application for setting aside the sale would stand dismissed. The Supreme Court in that case held that the court had the power to extend to the time for the deposit of the amount under the consent order. It observed :

"Time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True, the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; and where the contract of the parties has merged in the order of the court the courts freedom to act to further the ends of justice would surely not stand curtailed".

8. This was a case of an order passed under O, XXI, R, 90 of the C. P. C. and the Supreme Court held that the time could be granted in order to prevent manifest injustice and to give relief against forfeiture. The case before the Supreme Court was in respect of a consent order in execution proceedings not a final decree. The Court intervened to relieve the judgement debtor from forfeiture under the consent order and granted an extension of time for payment. The ratio of this decision cannot apply to the present case which is governed by O. XX. R.11.

9. These decision therefore, do not support the proposition that provisions of S. 148 or principles of equity can be applied to the provisions of a decree (except a preliminary decree). The only instance where a decree can be altered by the court on grounds of equity are instance where relief is sought against penalty or forfeiture.

10. It is also not possible to invoke the inherent power of the court under s. 151 of the C. P. c. because the power under s. 151 cannot be resorted to in order to achieve a result which is not permitted by the express provisions of the Code. In view of the provision of O. XX, R. 11 sub-rule (2) of the C. P. c. the court cannot grant any further extension of time after the passing of the decree without the consent of the decree-holder. The provision of s. 151 cannot be resorted to for the purpose of overcoming the bar of O. XX R 11 (2).

11. Even otherwise on merits the defendants have not made out a case which would require any intervention of the court. The only reason set out in the .. for asking for extension of time is financial difficulty of the defendants and their inability to pay. This ground itself is not sufficient for granting any further extension of time to the defendant. It is true of that the defendants have deposited a sum of Rs. 40,000/- in Court at the stage. They are also agreeable to pay the full decretal amount to the plaintiff and are willing to forgo the concession granted to them for the payment of a lesser amount, if the time is extended by six months for payments of each instalment after April 1982. Nevertheless, in view of the provisions of the CPC discussed earlier it is not possible for me, once the decree is passed to grant any further time without the

decree holders consent. In the premises the Chamber Summons dismissed. There will be, however, no order as to costs in the circumstances of the case.

12. On the application of the defendants... order will continue for a period of two weeks.

13. Chamber summons dismissed.