

(1982) 01 CAL CK 0012
In the Calcutta High Court
Case No : C.O. No. 2915 of 1981

Ganges River Transport

APPELLANT

Vs

Reliance Jute and Industries Ltd. and Others

RESPONDENT

Date of Decision : 28-01-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 149, 151

Citation : AIR 1982 Cal 290 : 86 CWN 443

Hon'ble Judges : B.C. Chakrabarti, J; Anil K. Sen, J

Bench : Division Bench

Advocate : Sudhis Das Gupta and Kedar Nath Sen, for the Appellant; S.K. Lahiri, Amal Sahu and S.S. Roy, for the Respondent

Final Decision : Allowed

Judgement

Anil K. Sen, J.—Defendant No. 1 in Money Suit No. 47 of 1979 of the 8th Court of the learned Subordinate Judge at Alipore is the petitioner before us. The order challenged is the one dated June 18, 1981 passed by the learned Subordinate Judge dismissing an application filed by the defendant No. 1 on Mar. 23, 1981 for reconsideration of an order dated Mar. 22, 1980. It will be necessary to refer to the facts shortly in the background in order to appreciate the real dispute between the parties.

2. The plaintiff opposite party, namely, the Reliance Jute and industries Limited, a company incorporated under the Companies Act instituted the aforesaid Money Suit No. 47 of 1979 for a decree for a sum of Rs. 1,03,257.11 p. by way of compensation and in the alternative for damages. This suit was filed on Oct. 23, 1979 with deficit court fee paid on the plaint. The court directed the plaintiff to put in the balance court-fee on or before Nov. 17, 1979 on which date the balance court-fee not having been paid further time was granted till Dec. 4, 1979. Since the balance court-fee was not paid even on that date, on Dec. 4, 1979, the Court issued a show cause notice upon the plaintiff calling upon the plaintiff to show cause why the plaint should not be rejected. The notice was

made returnable on Dec. 22, 1979 on which date an application was filed by the plaintiff for further time to put in the deficit court-fee. The Court allowed the prayer and directed the plaintiff to put in the deficit court-fee on or before Jan. 15, 1980. On the date fixed deficit court-fee was not put in but again a prayer was made for time to put in the deficit court-fee which prayer being refused the court issued a fresh show cause notice calling upon the plaintiff to show cause why the plaint should not be rejected. The notice was made returnable on Jan. 28, 1980 on which date the cause shown by the plaintiff was considered unsatisfactory and the plaint was rejected.

3. On Feb. 25, 1980 the plaintiff filed an application u/s 151 of the Civil P. C, for recalling the order dated Jan, 28, 1980 whereby the plaint was rejected. Therein the plaintiff further prayed for time to put in the balance court-fee payable on the plaint. This application was allowed ex parte by the learned Judge who observed that he is satisfied that the plaintiff could not pay the deficit court-fee within time. There is no indication in the order as to the reason why it could not be so put in and what exactly was the satisfaction of the court as regards such reasons. Be that as it may, the order dated Jan. 28, 1980 being recalled the Court granted the plaintiff time till April. 17, 1980 to put in the deficit court-fee. The deficit court-fee this time being put in summons was issued upon the defendants.

4. Once the service of the summons upon the defendants was effected the defendants appeared and after appearance defendant No. 1 filed an application out of which the present revisional application arises. This was an application made u/s 151 of the Code by defendant No. 1 filed on Mar. 23, 1981. He made a grievance that the Court should not have recalled the order dated Jan. 28, 1980 ex parte without notice to the defendants and without giving them any opportunity to contest the prayer made therein. In particular it was claimed by defendant No. 1 that the plaintiff's plaint having been rejected on Jan. 28, 1980, his claim became barred by limitation so that a valuable right accrued in favour of the defendant and such a right could not have been taken away by an ex parte order without giving the defendants an opportunity to contest the application on which such an ex parte order was passed,

5. This application being heard the learned Judge disposed of the application by observing "In the instant case the petition u/s 151 C. P. C. was already allowed. So this Court cannot revoke his own order but it be made clear that the question whether the suit shall be deemed to have been filed afresh or not after the petition u/s 151 was filed is kept open and to be determined at the time of trial of the suit. At this stage I however find no ground for rejection of the plaint again under Order 7 Rule 11 C. P. C." Feeling aggrieved defendant No. 1 has preferred the present revisional application. The revisional application is being heard upon notice to and on contest by the plaintiff opposite party.

6. Mr. Sen, appearing in support of this revisional application, has contended that the learned Judge had in substance rejected the prayer of the defendant upon a

clear misconception of the legal position. According to Mr. Sen, when the plaint was rejected the plaintiff's claim, according to the defendant, came to be barred by limitation and in such a situation the learned Judge could not have restored the plaint by an ex parte order. It was necessary for him to recall the ex parte order and allow the defendants to contest the earlier application filed by the plaintiff u/s 151 of the Code. According to Mr. Sen, if the defendants' claim be correct, namely that the claim of the plaintiff became barred by limitation on the date the plaint was rejected the learned Judge could not have restored the plaint to take away the right which accrued in the meantime in favour of the defendants. Reliance is placed on an earlier judgment of ours in the case of Joy Deb Mukherjee Vs. William Jacks and Co. (India) Ltd., in support of such a contention.

7. Mr. Lahiri, appearing on behalf the plaintiff opposite party, has been fair enough not to dispute the position that the ex parte order allowing the application u/s 151 of the Code should have been recalled and the defendants should have been given an opportunity to contest that application on its merits. He has, however, strongly contested the claim of Mr. Sen that if the claim of the plaintiff gets barred on the date of rejection of the plaint, an application u/s 151 of the Code for restoration of the plaint cannot be entertained so as to deprive the defendants of the right which had accrued in their favour. According to Mr. Lahiri, as and when the default is sufficiently explained the fact that the claim of the plaintiff stood barred by limitation on the date of rejection of the plaint should be no consideration for refusing the prayer for restoration made u/s 151 of the Code. Reliance is placed by Mr. Lahiri on the provision of Section 149 of the C. P. C. and the decision of the Supreme Court in the case of Mahanth Ram Das Vs. Ganga Das, . We have carefully considered the rival contentions put forward before us. We are unable to sustain the order impugned before us or the view expressed by the learned Judge therein. He seems to think that since the plaintiff's application u/s 151 of the Code had already been allowed that order can neither be recalled nor can that application be reheard on its merits on contest by the defendants. We are also unable to agree with the learned Judge that the question of limitation as sought to be raised by the defendants can be relegated for consideration at the trial of the suit. In our view, the learned Judge had failed to appreciate that once the order rejecting the plaint is recalled and the suit is restored to file, it is so restored with reference to the original date of the filing of the plaint. The defendants' objection is not restricted to the position that the claim of the plaintiff is barred on the date of the suit, but that in any event it is so barred on the date when the plaint was rejected. This the defendants are claiming upon the plaint itself. The defendants rely on limitation only in support of their plea that it would not be just and proper for the court to restore a plaint which has once been rejected if such restoration amounts to revival of a barred claim a claim which got barred on the rejection of the plaint. Hence, we are of the view that the learned Judge could not have relegated the point for consideration at the trial of the suit, in such a circumstance it was

necessary for the learned Judge to recall the ex parte order dated Mar, 22, 1980 which the learned Judge has ample power to do and allow the defendants to contest the plaintiff's application dated Feb. 25, 1980 made u/s 151 of the Code. When the learned Judge refused such a prayer made on behalf of the defendants he did so on a clear misconception of the legal position resulting in the order being made in irregular exercise of his jurisdiction. Hence the impugned order, in our view, should be set aside, the application of the defendants being allowed the ex parte order dated Mar. 22, 1980 should be set aside and the plaintiff's application dated Feb. 25, 1980 should be directed to be reheard on contest by the defendants.

8. But before we go on to record the final order of ours in this revisional application, we feel it necessary to consider the other point raised by Mr, Lahiri. According to Mr. Lahiri, we were not correct when in the case of Joydeb Mukherjee v. William Jacks & Co, (India) Ltd., (1981) 85 CWN 671: (AIR 1981 Cal 367), we held that where the claim of the applicant would be barred by limitation on the date the plaint is rejected, it would not be just and proper for the court to exercise its inherent power and recall the order of rejection of the plaint for default. Mr, Lahiri contends that where the plaintiff sufficiently explains his default the fact that restoration of the plaint would deprive the defendant of a right, which has accrued by way of limitation in the meantime, can be no consideration for refusing an application u/s 151. In support of this proposition Mr. Lahiri has placed great reliance on a decision of the Supreme Court in the case of Mahanth Ram Das Vs. Ganga Das, . We have given our anxious consideration to the point thus raised by Mr. Lahiri, We are however, unable to accept a proposition in such a wide term as put forward by Mr. Lahiri. At one time the view that prevailed with this Court was to the effect that once a plaint has been rejected under Order 7 Rule 11 no application u/s 151 of the Code is entertainable for recalling such an order and restoration of the plaint. Somewhat different views were expressed by other High Courts and some of the decisions relied on by Mr. Lahiri are authorities in that regard. We had reviewed the decisions on the point in our earlier decision in the case of Joydeb Mukherjee and in view of the later Full Bench decision of this Court and the decision of the Supreme Court, we have held that the mere fact that the order rejecting a plaint is appealable would not necessarily bar entertainment of an application u/s 151 of the Code. The divergence of views in that regard now stands resolved and really does not arise now before us because it is not the contention of Mr. Sen that the application filed by the plaintiffs was not entertainable at all. The specific point which arises for our consideration is as to whether when such an application is entertained, should the court recall the order of rejection of the plaint and restore the plaint irrespective of the consideration that such an order may result in deprivation of a right which has since accrued in favour of the defendant by limitation? In our view, the fact that the plaintiffs' default has resulted in accrual of a right in favour of the defendant under limitation is certainly a matter of consideration when the court is dealing with an application

u/s 151 of the Code for restoration of a plaint, which had earlier been rejected, because that right would be lost to the defendant as and when the plaintiffs prayer is allowed. It may be that when the court finds that the order of rejection of the plaint was due to any error or default of the court or where the plaintiff himself is not in any way instrumental to the default, the court may allow an application u/s 151 of the Code and recall an order of rejection of the plaint notwithstanding the fact that the same would deprive the defendant of a right which had accrued in the meantime by limitation. But where the default concerns the plaintiff or arises out of his own conduct, whatever the reason, that would not entitle him to have the order of rejection recalled and thus deprive the defendant of a valuable right which has accrued in his favour in the meantime. This view we take because when the court exercises its powers u/s 151 of the Code, it so exercises for doing justice to the parties including the defendant.

9. The decision of the Supreme Court in the case of Mahanth Ram Das Vs. Ganga Das, , in our view, does not support the extreme proposition contended for by Mr. Lahiri. In that case upon the finding of the court there was no final order in substance and again the application for extension of the time was filed even before the expiry of the time followed by another application which was filed after the expiration of the time. In such a situation, the Supreme Court held that an order made u/s 149 of the Code can be modified and the time originally granted can be extended on either of the two applications filed therefore. The Supreme Court itself was making a distinction between peremptory procedural orders and final orders as in the case of conditional decrees. The facts in the present case are totally different because here the plaintiffs not only failed to put in the deficit court-fee within the extended time given by the court u/s 149 but they were called upon to show cause why the plaint should not be rejected in terms of Order 7, Rule 11 of the Code. Cause shown being considered unsatisfactory, the court passed a final order rejecting the plaint and the application filed u/s 151 of the Code is one for recalling the said order and restoration of the plaint. Such being the position, the view we have taken is in no way inconsistent with the above decision of the Supreme Court.

10. In the result, the revisional application succeeds and is allowed. The impugned order being set aside, the application of the defendant No. 1 made u/s 151 of the Code dated Mar. 23, 1981, is allowed. The ex parte order passed by the learned Judge D/- Mar. 22, 1980, being vacated, the plaintiffs' application u/s 151 of the Code dated Feb. 25, 1980, is remanded for reconsideration on its merits upon notice to the defendants in accordance with law.

11. No order is made as to costs in this revisional application.

B. C. Chakervarti J.

12. I agree.