

(1968) 04 OHC CK 0016
In the Orissa High Court
Case No : Civil Revision No. 80 of 1966

Kanhua Charan Behera and Another	Vs	APPELLANT
Jagabandhu Behera and Others		RESPONDENT

Date of Decision : 09-04-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 3, 11, 148, 152

Citation : AIR 1969 Ori 7 : (1968) 34 CLT 930

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : B.K. Pal, D.P. Mohapatra and G.B. Patnaik, for the Appellant; P.C. Misra, for Opposite Party 1, for the Respondent

Final Decision : Partly Allowed

Judgement

1. The petitioners (plaintiffs) filed Title Suit No. 57/197 of 1960/1957 in the court of the Additional Munsif, Kendrapara, for partition and re-purchase of the homestead against the opposite parties (defendants). Opp. party 5 had sold his undivided dwelling house and homestead to opp. parties 1 to 4, who are strangers to the family of the plaintiffs and opp. party 5. The trial court decreed the suit in respect of the Bari land and dismissed it in respect of the house. The decretal order dated 11-2-61 runs thus--

The defendants 1 to 4 are directed to sell share of the bari land to the plaintiffs for Rs. 92/- within two weeks of the plaintiffs depositing Rs. 92/- into Court for payment to the defendants 1 to 4.

The plaintiffs to deposit the money within three weeks hence. On failure of the defendants 1 to 4 to execute the sale deed in the time limited the plaintiffs are entitled to apply to get a sale deed executed by the court in their favour. Plaintiffs deposited Rs. 92/- in court on, 25-2-61. Against the judgment of the trial court, opposite party 1 preferred Title Appeal No. 70/1961 in respect of the Bari land. The petitioners preferred cross-objection against the dismissal of the

suit for purchase of the house. On 31-7-63 the Additional Subordinate Judge dismissed T. A. No. 70/61. Thus plaintiffs' right to purchase Bari land was confirmed. The cross-objection filed by the petitioners was allowed with the following direction--

The judgment and decree of the learned Munsif are set aside and the plaintiffs suit is decreed in full with costs. He is permitted to repurchase the undivided share of defendant-5 from defendants 1 to 4. Defendant-1 and others be directed to sell the share of defendant-5 to plaintiffs for the amount mentioned in the sale deed. Plaintiffs are directed to deposit the said amount into the court of Munsif, Kendrapara within two months hence for payment to defendants 1 to 4 and defendants 1 to 4 are further directed to sell the property within one month from the date of deposit and on failure the plaintiffs are entitled to apply for getting a sale deed executed by court in their favour.

The petitioners did not deposit the amount within two months. On 5-12-63 they filed a petition in Misc. Case No. 53/63 before the appellate court for extension of time to deposit the purchase-money. On 2-1-65 the petition for extension of time was rejected. The petitioners filed Civil Revision No. 78 of 1965, which was not admitted. On 20-2-65 the petitioners filed a petition before the trial court for permission to deposit the purchase money of Rs. 1000/-. On 16-9-65 the Addl. Munsif passed the chalan for Rs. 1000/- and directed the chalan to be produced by 28-9-65. The chalan was filed on 27-9-65 showing payment. On 20-1-66 the Addl. Munsif rejected the petition for final decree, as Rs. 1000/- had been deposited beyond the time granted by the appellate court. Against this order the civil revision has been filed.

2. The learned Additional Munsif exercised his jurisdiction illegally in refusing to direct execution of a sale deed in respect of the Bari land for which the purchase-money of Rs. 92/- had been deposited in time on 25-2-61. The final decree should have been passed in respect of Bari land.

3. The main question for consideration is whether the learned Additional Munsif was justified in refusing to extend time for deposit of the purchase-money in respect of the house. To answer it, the following questions require examination:

(i) Had the appellate court powers to extend time for deposit of the purchase-money in respect of the house? Was the order dated 2-1-65 passed by the appellate court refusing to extend time proper?

(ii) Has the trial court power to extend time after expiry of the time, given by the appellate court in Title Appeal No. 70/61?

(iii) Has the trial court power to extend time after refusal by the appellate court to extend time?

4. The aforesaid questions necessitate examination of the powers of the court u/s 148, C .P.C. S. 148 runs thus --

Where any period is fixed or granted by the Court for 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 question is whether time can be extended under this Section where a period is fixed or granted by a decree. Order 20, Rule 3, C. P.C. lays down that once a judgment or decree is signed, it shall not afterwards be altered or added to, save as provided by Section 152, C. P.C. or on review. It has accordingly been held in many cases that Section 148, C. P.C. cannot be allowed to take away the effect of this rule, though if the decree is varied or reversed by the appellate court, it can fix a period different from the one fixed by the lower court. This doctrine has, however, an important exception. Where the decree fixing the time is not intended to be final and the court still retains control over proceeding, the court may extend the time granted under the decree under this section. For instance, in a suit for accounts, a Commissioner might be appointed by court to go into accounts. The preliminary decree gives a direction to the Commissioner to report within a stipulated time. Even though an appeal might be pending from the preliminary decree, the trial court retains power to extend time for filing the report by the Commissioner: (See *National Textiles Vs. Premraj Ganpatraj*, . Where the preliminary decree also does not state what would be the effect of non-payment of a deposit in time, the court retains power to extend time. It has been held by the Supreme Court that this theory does not apply to suits for pre-emption as under the CPC the time is to be fixed for payment. In a suit for specific performance of contract, where no default clause has been attached, the time can be extended. See *Rajan Patro Vs. Akur Sahu and Others*, . This principle has been well expressed by Kekowich, J in (1896) 1 CHD 644, *Collinson v. Jeffery* thus--

It appears to me that this action is not dead. x x x x But a final stroke is required to effect death. That final stroke has not been delivered and therefore, in my opinion, the application is properly made and the matter asked for may be granted. x x x x There is another form of order available and appropriate where the court thinks that severe terms should be imposed, namely, that on failure to do certain act within the specified time, then "the action do stand dismissed without further order".

5. Thus distinction is to be drawn between a case, where the proceeding has come to a close, and another case, where it has not terminated and the Court still retains control over it. Whether a proceeding has come to a close; or is, still alive, would again depend upon the nature of the proceeding and the order passed thereon. If the order is a final order, the court is *functus officio*, otherwise the court can enlarge time. The same view was taken in *Surajmal Marwari and Another Vs. Bhubaneshwar Prasad and Others*, .

6. In this case, the final order passed by the appellate court in Title Appeal No. 70/61 only granted time of two months for deposit of the purchase-money. It did not say that on failure to make such a deposit, plaintiffs' suit for repurchase of

the house would stand dismissed. The decree was not final in respect of that relief and the court still retained control over the proceeding and the power to extend time. The appellate court's order dated 2-1-65 in saying that it was functus officio for extending the time was contrary to law. The legal position was not correctly brought to the notice of this Court in Civil Revision No. 78 of 1965, and accordingly the revision was not admitted.

7. After the appellate court decree in Title Appeal No. 70/61, the trial court had also the power to extend time. Both the appellate court and the trial court had concurrent jurisdiction in the matter of extension of time in the facts and circumstances of this case. The appellate court's power to modify its own decree and grant extension of time is unquestionable. The trial court had also power to extend time granted by the appellate court as time was not the essence of the decree and the period prescribed in the decree was not final and the court had the control over the proceeding to further extend the time. This view is fully supported by Mareddi Venkata Rami Reddy Vs. Mareddi Adinarayana Reddy and Others, which has reviewed the relevant decisions on the point.

The result of the aforesaid discussion is that both the trial court and the appellate court had power to extend time in the facts and circumstances of this case.

8. The next question for consideration is whether the trial court had still power to extend time after the appellate court refused the same on 2-1-65. The answer must be in the negative. The refusal of time by the appellate court was not without jurisdiction. It had jurisdiction either to extend time or to refuse it. The existence of power does not affect the discretion vested in the court to refuse extension of time. The observation of the appellate court that after the passing of the decree it was functus officio was undoubtedly contrary to law; but it was not without jurisdiction. Its observation that it was functus officio was an illegal exercise of jurisdiction. But the matter became final after the High Court refused to admit Civil Revision No. 78/65. The order of the High Court gave a final seal to the appellate court's order that its jurisdiction was not exercised either illegally or with material irregularity.

When over the same matter both the appellate court and the trial court had concurrent jurisdiction to extend time, and an adverse order was passed by the appellate court, the same matter cannot be reagitated before the trial court, though it had power to extend the same if the appellate court had not been moved in the matter. As between the parties, appellate court's order constituted *res judicata*.

9. Mr. Pal placed reliance on *State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others*, and *Amireddi Rajagopala Rao and Others Vs. Amireddi Sitharamamma and Others*, in contending that as the appellate court had observed that it was functus officio, its order was without jurisdiction and, as such, a nullity, and would not constitute as a bar ousting the jurisdiction of the

learned Munsif to pass an order extending the time. This argument is based in confusion of thought. As has already been said, the order of the appellate court that it was functus officio is not without jurisdiction. It had the power to extend time. In exercise of jurisdiction it passed an order which might be either right or wrong. A wrong order passed in exercise of jurisdiction is not a nullity. The aforesaid Supreme Court decisions have no application to the facts of this case.

10. In the result, the order of the learned Additional Munsif refusing to get a sale deed executed in respect of the Bari land is set aside and that refusing to extend time in respect of the house is confirmed. The Civil Revision is allowed in part. Parties to bear their own costs.