
(2010) 04 CAL CK 0080

In the Calcutta High Court

Case No : G.A. No. 1024 of 2010 and A.P.O.T. No. 181 of 2010

National Bank Ltd.

APPELLANT

Vs

Dulal Kanti Chowdhury and Others

RESPONDENT

Date of Decision : 30-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21, Order 21 Rule 11, Order 41 Rule 11, Order 41 Rule 27, Order 8 Rule 1

Citation : (2010) 3 CALLT 349

Hon'ble Judges : Mohit S. Shah, C.J; Harish Tandon, J

Bench : Division Bench

Advocate : Sabyasachi Chowdhury and Rupak Ghosh, for the Appellant; Abhrajit Mitra and Jishnu Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Mohit S. Shah, C.J.—This appeal is directed against the judgment dated 1st March, 2010 of the Learned Single Judge allowing the application for modification of the orders dated 8th April and 4th September, 2008 in Civil Suit No. 217 of 2006.

2. The suit was filed by respondent No. 1 herein "plaintiff" against the present appellant, "appellant" or "defendant No. 2" and three other defendants claiming money decree and other consequential reliefs. Defendant No. 2 in the suit (appellant herein) filed its written statement and, on the ground that the plaintiff was not taking any steps in expediting hearing of the suit, defendant No. 2 made application being G.A. No. 990 of 2008 seeking directions upon the plaintiff to file affidavit of documents and in default the suit be dismissed. The Learned Single Judge passed order dated 8th April, 2008 disposing of the application in the following terms:

This is an application for peremptory order of discovery. The plaintiff has been served but is not represented. Documents should be discovered within a period of four weeks from date failing which the suit will stand dismissed for default.

Inspection will be taken forthwith upon documents being discovered and the parties will take the suit ready for hearing within a period of six weeks from date.

3. The plaintiff, thereafter, made application being G.A. No. 2839 of 2008 on 12th August, 2001 seeking restoration of the suit and for recalling the order dated 8th April, 2008 on the ground that the plaintiff did not know about the said order. By order dated 4th September, 2008, the Learned Single Judge allowed the application and extended the time for filing affidavit of documents till 10th September, 2008. Learned Single Judge also awarded costs assessed at Rs. 50 GMs. The order read as under :

The delay in filing the application is condoned. By the order dated April 8, 2008, a direction was given for documents to be discovered within a period of four weeks from that date. The order provided that failing documents being discovered within such time, the suit will stand dismissed.

The affidavit of documents has been kept prepared by the plaintiff. The order dated April 8, 2008 is modified by extending the time for affidavit of documents to be filed till September 10, 2008. Inspection forthwith thereupon. In the event documents are not disclosed by the extended time, the default clause in the order dated April 8, 2008 will become operative.

4. The plaintiff, thereafter, filed application being G.A. No. 499 of 2010 through another advocate for recalling the orders dated 8th April and 4th September, 2008 and prayed that fresh direction be issued to the extent that the Court had directed dismissal of the suit for fresh filing of the affidavit of documents within such time and on such terms as the Court may deem just and proper. The plaintiff also prayed for such further order or orders as the Court may deem fit and proper. By the impugned order dated 1st March, 2010 the Learned Single Judge recalled the orders dated 8th April and 4th September, 2008 insofar as the Court had directed dismissal of the suit upon failure of the plaintiff to file affidavit of documents within the time limits specified earlier and the Learned Single Judge also directed the plaintiff to file his affidavit of documents within 10 days from the date of receipt of the order upon payment of costs assessed at 100 GMs to the defendant No. 2. Learned Single Judge specifically observed that the order was passed as in the event the suit was dismissed, a substantive right of the plaintiff would be lost and all for laches and negligence on the part of its advocate.

5. Defendant No. 2 has filed the present appeal for challenging the above judgment and order dated 1st March, 2010 of the Learned Single Judge. Mr. Sabyasachi Chowdhury, learned Counsel for the appellant, has assailed the order mainly on the following grounds:

(i) The plaintiff having failed to comply with the directions contained in the order dated 4th September, 2008 read with the order dated 8th April, 2008 and having failed to file affidavit of documents till September 10, 2008, the suit stood dismissed for default and, thereafter, G.A. No. 499 of 2010 filed by the plaintiff

without any prayer for restoration of the suit was not maintainable.

(ii) Remedy available to the plaintiff was to file an appeal against the impugned order which was passed under Order 21, Rule 11. Since the above remedy specifically provided by the CPC was not availed of by the plaintiff, the Learned Single Judge had no power or jurisdiction to grant any relief u/s 151 C.P.C.

(iii) Even, on merits the explanation given by the plaintiff for the delay in filing the application was not satisfactory. The so-called explanation attributed laches on part of the plaintiff's advocate was not borne out by any affidavit on part of the said advocate.

(iv) In any view of the matter, the trial Judge had no jurisdiction to extend the time limit for filing the affidavit of documents beyond 30 days as provided in Section 148 of the CPC as amended w.e.f. 1st July, 2002 and, therefore, also the impugned judgment dated 1st March, 2010 was beyond the jurisdiction and power of the learned Trial Judge.

6. On the other hand, Mr. Abhrajit Mitra, learned Counsel for the plaintiff, has contested the appeal and submitted that filing of appeal against the orders dated 8th April and 4th September, 2008 would have been of no avail to the plaintiff as the explanation for his inability to file the affidavit of documents earlier was not on record of the learned Trial Court and, therefore, the appellate Court could have not granted any relief to the plaintiff without the plaintiff first going to Trial Court and placing the necessary facts before the trial Judge. In view of the provisions of Chapter 38 Rule 46 of the Original Side Rules of this Court, there is no outer time limit for complying with the previous directions of the Court. It has been held in *Iridium India Telecom Ltd. Vs. Motorola Inc.*, that in case of inconsistency between the provisions of the CPC and the Original Side Rules of a chartered High Court, the latter prevail.

Mr. Mitra further submitted that the Learned Single Judge rightly relied upon the decision in *Rafiq v. Munshilal* AIR 1981 Supreme Court 1400. The Trial Court rightly held that the plaintiff was not required to be made to suffer for the inaction or laches on the part of his advocate who was required to be changed in the circumstances which were already explained in detail in the memo of application No. 499 of 2010. Reliance is placed on the decisions of the Apex Court on the controversy about the powers of the Court to extend the time limit for filing written statement beyond 90 days as stipulated in order 8 Rule 1 C.P.C., even after coming into force of the amendment w.e.f. 1st July, 2002.

7. We deal with the first contention that by virtue of operation of the default clause the suit stood dismissed upon failure of the plaintiff to file the affidavit of documents by 10th September, 2008 and, therefore, the learned trial Judge had no jurisdiction to entertain the application of the plaintiff for recalling the orders dated 8th April and 4th September, 2008.

The Courts have held that the trial Court does not become functus officio after

expiry of the time limit stipulated in its previous orders with a default clause. In Mahanth Ram Das Vs. Ganga Das, the Apex Court made the following observations:

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 happened within the time fixed.

(emphasis supplied)

Again in Chinnamarkathian alias Muthu Gounder and Others Vs. Ayyavoo alias Periana Gounder and others, the Apex Court held as under:

The true purport of conditional order is that such orders merely create something like a guarantee or sanction for obedience of the court's order but would not take away the Court's jurisdiction to act according to the mandate of the statute or on relevant equitable considerations if the statute does not deny such consideration. (emphasis supplied)

The above decisions were followed by a Division Bench of this Court in Shethia Mining and Manufacturing Corporation Ltd. Vs. Khas Dharmaband Colliery Company Pvt. Ltd., with reference to Rule 46 of Chapter 38 of the Original Side Rules of this Court.

The Full Bench of the Madhya Pradesh High Court in Budhulal Kasturchand Vs. Chhotelal and Others, also dealt with this question while dealing with the scope of Section 148 of the CPC and held that so long as the trial Court does not record a formal order disposing of the suit, it continues to have the jurisdiction to extend the time granted to a party for performing an act, notwithstanding the previous order with such a default clause. The Full Bench expressed the following view:

In our opinion, the language of Section 148 CPC is wide enough to vest the Court with undoubted jurisdiction to enlarge the time from time to time, and this jurisdiction extends even to a case where the period fixed had already been expired. Even if in the initial order the Court may have said that if costs are not paid before a certain date fixed for it, the suit shall stand dismissed, the Court does not lose seisin of the case after the expiry of such period notwithstanding a default. Such directions are in terrorem so that dilatory litigants puts themselves in order.

(emphasis supplied)

The Full Bench further pointed out that in a given case, it is for the Court to exercise the discretion which is vested in it one way or the other, but rejecting an application in exercise of the discretion is one thing and it is quite another to say that the Court ceases to have jurisdiction in the matter just because the period originally fixed has expired.

In view of the above legal position and the fact that no formal orders were passed by the trial Court dismissing the suit after 10th September, 2008, in our view, the trial Court did not lose seisin of the case and, therefore, did not cease to have jurisdiction to entertain the application of the appellant/plaintiff in recalling default clause in the orders dated 8th April and 4th September, 2008.

8. We will now deal with the contention urged by the learned Counsel for the appellant/defendant No. 2 that when the CPC provides for an appeal against the order under Order 11 Rule 21, the learned Trial Judge could not have invoked powers u/s 151 C.P.C.

On the one hand, learned Counsel for the appellant/defendant No. 2 has relied upon the decision of the Division Bench of this Court in *Asutosh Ghosh and Another Vs. Indu Bhusan Ghose*, taking the view that where the plaintiff's suit has been dismissed under order 11 Rule 21, the Court has no power to review the order u/s 151, the order being appealable. Similarly, reliance is placed on the judgment in *Balmer Lawrie and Company Ltd. Vs. Assam Brook Estates Ltd. and Another*, rendered by a learned Single Judge of this Court wherein also similar view was taken.

On the other hand, learned Counsel for the plaintiff relied on the decision of a Division Bench of this Court in *Balaram Ojha Vs. Star Trading and Investment Ltd.*, in support of the submission that the remedy of appeal against an order passed under Order 11 Rule 21 C.P.C. can not be said to be an effective remedy because in absence of any material, it will be difficult for the appellant to challenge the order in an appeal therefrom.

9. The view taken by the Division Bench of this Court in *Balaram Ojha Vs. Star Trading and Investment Ltd.*, and the view taken by a Division Bench of this Court in *Asutosh Ghosh and Another Vs. Indu Bhusan Ghose*, may prima facie appear to be inconsistent.

Although technically learned Counsel for the appellant (defendant No. 2) is right in contending that an appeal would lie against the order of the Trial Court under Order 11 Rule 21, the reasoning of the Division Bench in *Balaram Ojha Vs. Star Trading and Investment Ltd.*, particularly in paragraph 5 thereof commends to us. Though an appeal lies against an order passed under Order 11 Rule 21 striking out the defence of the defendant, the remedy provided by such an appeal will be a formality and the defendant may not have any relief in substance. Such a remedy by way of appeal is illusory because the appellate court would have to go by the record of the trial court and it would be obvious that the appellate court would have no material on record to render a decision on the sufficiency of the cause for not filing the affidavit of documents earlier. If the Court is satisfied that the specific provisions of the Code do not meet the necessities of the case, the Court can exercise the inherent power u/s 151. Merely because the plaintiff can file an appeal u/s 104 C.P.C. and also move an application for additional evidence under Order 41 Rule 27, it does not mean that

the appellant can invoke Order 41 Rule 27 as a matter of right. When the appeal will come up for admission hearing under Order 41 Rule 11, there will be nothing for the appellate Court to satisfy prima facie against the propriety of the order.

10. Coming to the contention about merits of the matter, we have gone through the correspondence between the learned advocate who was initially appearing for the plaintiff, the learned senior advocate with whom the said learned advocate was practicing and the learned advocate who presented application No. 499 of 2010 before the Learned Single Judge, and we have also gone through the contents of the application of the plaintiff seeking recall of the order dated 8th April and 4th September, 2008 in so far as the same provides for the default consequence of dismissal of the suit. Having gone through the above material, we are satisfied that the plaintiff was not at fault for not having filed the affidavit of documents within the time limit of 10th September, 2008 as stipulated in the order dated 4th September, 2008 of the Learned Single Judge. After suit was filed by the plaintiff through his erstwhile advocate, the said learned advocate had informed the plaintiff by letter dated 17th November, 2008 that leave under Clause 12 of the Letters Patent, 1865, had been granted, the plaint had been admitted, the writ of summons had been issued and delivered to the defendant No. 3 and defendant No. 2 had waived service of the same and had filed its written statement, that the plaintiff was required to file his affidavit of documents but the erstwhile advocate had assured the plaintiff that subsequent steps to be taken in the matter would be duly communicated to the plaintiff. There is no material to doubt the statements made by the plaintiff in its application No. G. A. 499 of 2010 that between November, 2008 and November 2009 at short intervals, the plaintiff had made regular visits to the office of the erstwhile learned advocate, made phone calls and requested for expediting hearing of the suit. The erstwhile advocate was junior of a learned senior solicitor and advocate. It was only when the plaintiff was dissatisfied on account of no progress being made in the suit that the plaintiff took away the papers from the erstwhile advocate and took change from him on 25th November, 2009 and appointed another advocate, who filed his Vakalatnama on 27th November, 2009. Whatever documents the erstwhile advocate had handed over to the plaintiff for the suit in question, were haphazard and incomplete. It was only on going through the papers received by the present learned advocate of the plaintiff that it was realized that affidavit of documents was required to be filed on 10th September, 2008 and that the failure would be treated by a default clause.

11. At this stage, we may refer to the decision of the Apex Court in AIR 1981 Supreme Court 1359, wherein the following observations were made:

The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things.....

After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest....

12. We also find considerable substance in the submission made by the learned Counsel for the plaintiff based on Rule 46 in Chapter 38 of the Original Side Rules which reads as under:

46. Power to enlarge or abridge time. - The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

No such amendment as is made to the provisions of Section 148 CPC w.e.f. 1-7-2002 is made to the above Rule in the Original Side Rules.

It has been held in *Iridium India Telecom Ltd. Vs. Motorola Inc.*, that the Original Side Rules of a chartered High Court prevail over the provisions of the Code of Civil Procedure. The Apex Court has quoted with approval the view of the Full Bench of this Court in *Manickchand Durgaprasad Vs. Pratabmull Rameswar and Another*, that if any rule framed by the High Court under Clause 37 of the Letters Patent be inconsistent with or confers any additional power besides what is granted by the Code of Civil Procedure, the rule framed under Clause 37 will prevail over the corresponding provisions of the Code of Civil Procedure. We are, therefore, of the view that the time limit specified in Section 148 of the Code Civil Procedure as amended w.e.f. 1st July, 2002 would not apply to the Original Side suit proceedings before this Court.

13. Even where Section 148 C.P.C. applies, the Apex Court has considered whether the time limit specified in Order 8 Rule 1 read with Section 148 as amended w.e.f. 1st July, 2002 is mandatory or whether the trial Court has power to extend the time limit in such cases even beyond the limits specified in the above provisions. The Apex Court has held that time limit of 90 days for filing written statement cannot be considered to be so sacrosanct and mandatory that Court cannot subsequently extend the time limit vide *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI)*, , 2008 (17) SCC 117 (*Sambhaji v. Gangabai*) and *Zolba Vs. Keshao and Others*, .

In *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI)*, it has been held that the provisions in CPC including the proviso to Order 8 Rule 1 are not mandatory but directory. The delay can be condoned and the written statement can be accepted within even after the expiry of 90 days from the date of service of summons in exceptionally hard cases.

The Three Judge Bench of the Apex Court in terms observed in the *Salem* case that the rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and

prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress.

Again in *Zolba Vs. Keshao and Others*, the Apex Court in terms held that in an adversarial system, no party should ordinarily be denied opportunity of participating in a process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, any procedural enactment should not be construed in a manner, which would leave the Court helpless to meet extraordinary situations in the ends of justice.

14. Applying the above principles to the facts of the present case, we have no hesitation in affirming the judgment and order of the learned Single Judge recalling the default clause in the previous orders and granting extensions for filing the affidavit of documents. The time limit granted by the trial Court for filing the affidavit of documents is extended up to two weeks from today. Subject to the above extension, the appeal is dismissed and the order of the Learned Single Judge is affirmed.

Urgent certified photostat copy of this judgment shall be given within one week from the date of application.

Later

At this stage, after the judgment is pronounced, the learned Counsel for the appellant/defendant No. 2 prays for stay of the suit proceedings for a period of four weeks from today.

In the facts and circumstances of the case, the prayer is rejected.

Harish Tandon, J.

I agree