

(1990) 01 MAD CK 0020
In the Madras High Court

N.R. Nainar Mohamed

APPELLANT

Vs

Khaja Mohideen, through his Power Agent, Mohamathu
Fathima Beevi

RESPONDENT

Date of Decision : 18-01-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148

Citation : (1990) 1 LW 242 : (1990) 1 MLJ 185

Hon'ble Judges : A. Abdul Hadi, J

Bench : Division Bench

Judgement

A. Abdul Hadi, J.—This Civil Miscellaneous Petition prays for extending the time to deposit the cost of Rs. 395.50 granted by the order

dated 2.1.1989 in C.M.P. No. 2051 of 1988 in this Second Appeal. By the said Order, interim stay granted already, was made absolute on

condition that the petitioner herein deposited into the trial court the said cost within 4 months from the abovesaid date, 2.1.1989. The said order

also added that failing such compliance, the stay would stand vacated automatically. Thus, the petitioner herein ought to have deposited the cost

before 2.5.1989. But, it was not deposited This petition was filed only on 11.12.1989 for extension of the said time given, by another six weeks

from the date of the order in this petition.

2. Initially when I posed the question whether the present petition is maintainable since the original conditional order dated 2.1.1989 was passed

with a default clause as stated above, the learned Counsel for the petitioner relied on the decision in S. Florance Kasturbai alias Kasturi Sakkain

Vs. Fatima College, where this Court held relying on Section 148 C.P.C. that the court had the power to extend the time where ex parte order

was set aside on condition that the defendant should pay some amount before certain date. But, from the facts gathered from the said judgment, I

do not find similar default clause there, as in the present case.

3. However, in Mahanth Ram Das Vs. Ganga Das, which was relied on in the above referred to S. Florance Kasturbai alias Kasturi Sakkain Vs.

Fatima College, , there was such default clause and yet the Supreme Court extended the time in a case where the application to extend the time

was made before the expiry of the original time fixed. The Supreme Court observed thus. A fortiori, those sections (Sections 148 and 149) could

be invoked by the applicant, when the time had not actually expired"". According to the Supreme Court an order extending time for payment,

though passed after the expiry of the date fixed, could operate from the date on which the time fixed expired.

4. Further in P.K. Sukumaran Vs. Sulaiman Khan, , while interpreting the above referred to Mohanath Ram Das v. Gangadas AIR 1961 S.C.

822, it was also observed as follows:

On a close reading of the above decision i.e. Mahanth Ram Das Vs. Ganga Das, , it is seen that the court was inclined to hold that the applicant

should have the extension of time sought for by him especially when he has moved the court for such a relief before the default clause operated.

5. However, the learned Counsel for the petitioner brought to my notice the decision in Periasami Asari and Another Vs. President, Iluppur

Panchayat Board, Iluppur and Others, . There it was observed, in interpreting the abovesaid decision in Mahanth Ram Das Vs. Ganga Das, (and

after referring to the above said decision in. P.K. Sukumaran Vs. Sulaiman Khan, also) thus:

The above observations of the Supreme Court would show that, the court can grant time, taking note of the events and circumstances which

happened within the time fixed. It is not stated that the petition should be filed within the time fixed. It proceeds to give an example and I quote.

For example, it cannot be said that if the appellant had started with the full money ordered to be paid and came well in time but was set upon and

robbed by thieves the day previous, he could not ask for extension of time, or that the court was powerless to extend it."" This would mean that it is

not necessary that the extension of time should be asked for before the expiry of

the period. It was also observed that the High Court could have exercised its inherent powers u/s 151, Civil P.C. for which petition was filed after the expiry of the time granted by the High Court.

So, the Court held in the abovesaid Periasami Asari and Another Vs. President, Iluppur Panchayat Board, Iluppur and Others, that the application

to extend the time could be filed even after the expiry of the period fixed. While interpreting the above said. Mahanth Ram Das Vs. Ganga Das, it

was also so held by two Full Bench decisions, one by the Allahabad High Court in Gobardhan v. Parsati AIR 1972 All. 276 (F.B.) and Anr. by

the Madhya Pradesh High Court in Budhulal Kasturchand Vs. Chhotelal and Others, .

6. The learned Counsel for the petitioner also pointed out that the order in question in the present case did not dispose of the second appeal but

the court still retained its control over the proceedings before it and so the court could extend the time already granted despite the default clause. It

was so held in the above said decision in Periasami Asari and Another Vs. President, Iluppur Panchayat Board, Iluppur and Others, also. The

relevant observation there was as follows:

The question is whether, because of the default in fulfilling the condition, the order has worked itself out and, therefore, the Court had no power to

extend that time. It has been held that, when the effect of the order, in the event of non-compliance has to operate automatically without further

intervention of the court, Section 148 cannot be applied as the court ceases to be seized of the matter and becomes functus officio. This principle

will apply when the suit is finally disposed of. If the order is not final and the court retains control over it and seized of the matter, it will have power

to make an appropriate order extending the time.

Even in the above said Gobardhan Singh Vs. Barsati, it was observed thus.

When the court had finally disposed of the proceedings before it and it becomes functus officio, no application for extension of time can be

entertained by it, unless the order disposing of the proceedings is set aside and the proceedings are reopened by taking recourse to an appropriate

remedy prescribed by the Code for reopening the proceedings.

7. In the present case, no doubt the above said order dated 2.1.1989 did not dispose of the second appeal and hence the above said Periasami

Asari and Another Vs. President, Iluppur Panchayat Board, Iluppur and Others, and Gobardhan Singh Vs. Barsati, would apply. In a later

decision, namely Chinnamarkathian v. Ayyavoo (1982) 1 M.L.J. (S.C.)¹⁷ arising out of a final conditional order with a default clause, passed by

the Revenue Divisional Officer under the Tamil Nadu Cultivating Tenants Protection Act, the Supreme Court, while holding that such order could

not be passed under the relevant provisions of the said Act, also observed after referring to Section 148, C.P.C. as follows:

The principles of equity is that when 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 re-examine the alteration or modification of circumstances which may necessitate extension of

time. If the court by its own act denies itself the jurisdiction to do so, it would be denying to itself the jurisdiction which in the absence of a negative

provision, it undoubtedly enjoys, conditional orders were held by this Court to be in terrorem so that dilatory litigants might put themselves in order

and avoid delay, but they do not completely stop a court from taking note of events and circumstances which happen within the time fixed.

8. So, so far as the legal point is concerned, I hold that the present Civil Miscellaneous Petition No. 55 of 1990 is maintainable.

9. But the facts do not justify allowing the Said Civil Miscellaneous Petition. The ground alleged in the affidavit in support of the petition for the said

delay is as follows: The counsel on record informed the said order by his letter dated 3.1.1989 to the petitioner, but, since the petitioner ""during

that time for a short while"" had been to Bangalore then to attend to his ""ailing sons"", the said letter did not reach him and he was not aware of the

said letter.

10. But, the said affidavit does not say when actually he subsequently came to know of the said order and whether he made any efforts to know

from his said counsel on record as to what happened to his said C.M.P. No. 2051 of 1988. The affidavit is also vague as to the actual period of

his absence in Bangalore and also the actual ailment of his sons. No medical certificate also has been produced showing the illness of the above

said sons. The delay is more than 7 months even on the date when this petition was filed. Further, the petitioner himself surprisingly requires further

six weeks" time for payment of a small sum of Rs. 395.50. In the circumstances, there is no justification for extending the time and hence this Civil Miscellaneous Petition is dismissed. No costs.