

(2005) 12 CAL CK 0041
In the Calcutta High Court

Case No : C.O. No. 13088 (W) of 1998 (An application for modification, being C.A.N. 3120 of 2005)

Snehendu Chowdhury and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 02-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141, 148, 149
Constitution of India, 1950 — Article 226

Citation : (2005) 12 CAL CK 0041

Hon'ble Judges : Pratap Kumar Ray, J

Bench : Single Bench

Advocate : Partha Sarathi Bhattacharjee, for the Appellant; Joydeep Kar, P. Ch. Paul Chowdhury and Mr. Sakhya Sen, for the Respondent

Final Decision : Allowed

Judgement

P.K. Ray, J.—Heard the learned advocates appearing for the parties.

2. This application has been filed praying for modification of the order dated 6th July, 2004 passed by Barin Ghosh, J. (as His lordship then was) in the writ petition, being C.O.13088(W) of 1998, whereby and whereunder it was directed that the pending departmental proceeding should be completed as expeditiously as possible but not later than seven months from the date of service of the copy of the order upon the disciplinary authority. The modification, as prayed for, is extension of the time limit to conclude the departmental proceeding. The petitioner of the writ application who is an employee of the present applicant, West Bengal State Food Processing & Horticulture Development Corporation Ltd., an undertaking of the State Government, was charged under four counts of charges which reads to this effect.

Article - I

That he unauthorisedly went to the Project Office of the Company at Jalpaiguri

and tried to decamp with bottles and other articles of the Company worth several lacs of rupees stored therein, in a truck on 25.11.89 at about 11 A.M. accompanied by two unidentified person.

Article - II

That on being resisted in that not by guards of the Company posted at the project office he threatened them with dismissal from service.

Article - III

That on 25.11.89 although he was in Jalpaiguri yet he falsely stated that he visited the office of the Company's supplied W/s Neeta Fruit Products at Kankinara and on the basis of the aforesaid false statement succeeded in obtaining the Traveling allowance for out station visit on that date.

Article - IV

That he traveled to Bhagalpur on 20.4.89 by 33 Up Benaras Express on some Company's business, although he did not travel in first class from Calcutta to Bhagalpur by Mail yet on his return he submitted a bill claiming to have traveled in 1st class by Mail and got the advance taken by him early for the purpose, adjusted.

The aforesaid acts of Shri S. Chowdhury, if proved, will amount to criminal offence of very serious nature involving moral turpitude.

3. The departmental proceeding became the subject matter of the challenge in the said writ application praying for quashing of the entire departmental proceeding. Barin Ghosh, J. as His Lordship then was, disposed of the writ application by not entertaining the prayer for quashing of the departmental proceeding, but directed finality of the said proceeding within certain period, namely, seven months, as already stated. The order dated 6th July, 2004 passed by Barin Ghosh, J. reads to this effect.

It is unfortunate that this writ petition is pending since 1990 where the main grievance of the petitioner is that a disciplinary proceeding which has been initiated against him has not yet been concluded and as a result although the petitioner has been found to be eligible for a higher posting, he has not received the benefit of such decision, for the same has been kept in abeyance awaiting conclusion in the disciplinary proceeding. Mr. Kar, appearing on behalf of the respondent-employer, has submitted that there is no just reason for keeping this disciplinary proceeding pending for ages. He has been candid to the court that it should be the earnest endeavour on the part of the disciplinary authority to complete the disciplinary proceeding as quickly as possible. He has submitted that for some reason or the other, this could not be done but given a little more time, the disciplinary authority will complete the disciplinary proceeding in accordance with law at an early date. In such view of the matter, this writ petition is disposed of by directing the disciplinary authority to see to it that the

disciplinary proceedings reach final conclusion in the form of final order to be passed in the disciplinary proceedings as quickly as possible but not later than seven months from the date of service of copy of this order upon the disciplinary authority. In the event the disciplinary authority is required to take any step for the purpose of completion of the disciplinary proceedings including appointment of a fresh Enquiry Officer, the same must be done, including all other things, within the time mentioned above. This time limit, goes without saying, shall automatically stand extended in the event the petitioner does not co-operate with the disciplinary proceedings.

It is further made clear that if the disciplinary authority ultimately concludes that there is no necessity of disciplining the petitioner, it goes without saying that the petitioner shall be given everything which has not been given to him in view of the pendency of the disciplinary proceedings.

4. In this application for modification, the West Bengal State Food Processing & Horticulture Development Corporation Limited, hereinafter referred to as "the Corporation" for brevity, has prayed for extension of the time so that departmental proceeding could be completed within a period of twelve weeks from the date of the order as to be passed. In support of such prayer, it has been contended that since the said Corporation is a State Government undertaking, there was a necessity of appointing the Enquiry Officer and the Presenting Officer on approval of the State Government for which communication was made, but the State Government delayed placement of the Enquiry Officer and the Presenting Officer which was placed exactly before the expiry of the time limit and accordingly the departmental proceeding could not be completed as in the meantime time limit lapsed.

5. This application has been opposed by the writ petitioner who is the opposite party, contending inter alia that this Court became functus officio as soon as writ application was disposed of and accordingly by modification application, the time limit to complete the departmental proceeding should not be extended. It is further submitted that there was no application filed, praying modification of the order so far on the issue in respect of the time limit before expiry of such time limit which admittedly expired on 17th March, 2005 whereas the instant application for modification was affirmed on 4th April, 2005.

6. Learned Advocate for the applicant of this application for modification has strongly relied upon section 148 and section 149 of the Code of Civil Procedure, 1908 which are applicable in a writ proceeding in view of Rule 53 of the Writ Rules as framed by this High Court. Section 148 of the Code of Civil Procedure, 1908 for effective adjudication of the matter, is quoted below.

148. Enlargement of time. - 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 [not exceeding thirty days in total], even though the period originally fixed or granted may have expired.

Rule 53 of the Rules under Article 226 of the Constitution of India is quoted below.

53. Save and except as provided by these Rules and subject thereto, the provisions of the CPC (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 and nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

7. Therefore there is no doubt that the provisions of the CPC could be considered by the Court while disposing of the writ matter and on the strength of the Appellate Side Rules, the provision contained in section 148 of the Code of Civil Procedure, 1908 is quite applicable here in this case. Learned Advocate for the applicant, however, submitted relying upon the Judgment passed in the case of Babulal Parate Vs. State of Maharashtra and Others, corresponding to to contend that when there is no prayer for modification of the substantive question of the Judgment but the procedural portion of the Judgment, the doctrine of functious officio is not applicable. Following that Judgment, Calcutta High Court also passed a Judgment in the case of Anandi Nath Roychowdhury v. Sudhangshu Kumar Bhattacharjee, reported in 1987(1) Cal LJ 370 wherein the Court clarified the legal position about the doctrine of functious officio vis-a-vis the applicability of the provision of section 148 of the Code of Civil Procedure, 1908 on the reflection of Order XXII Rule 3 of the CPC laying down the embargo to file or modify the Judgment after the same is pronounced.

8. Learned Advocate for the opposite party, the delinquent employee, has referred the Judgment passed in the case of Nikhil Kumar Saha v. Hedayet Ali Molla & Anr., reported in 1983(1) CHCN 237 to contend that even if the doctrine of functious officio is not applicable so far as the procedural part of the Judgment is concerned, but still this application is not maintainable as it was filed not before the expiry of time limit as fixed by Barin Ghosh, J. while disposing of the writ application.

9. Considering the rival contention of the parties, now this point has cropped up whether this application praying for modification could be entertained by this Court or not. As already quoted hereinabove, section 148 of the CPC is quite applicable in the writ proceeding in view of the Appellate Side Rules regulating the writ application by incorporation of the said provision, though u/s 141 of the CPC it provides that the expression "proceedings as mentioned in this section does not include any proceeding under Article 226 of the Constitution of India. The CPC accordingly ipso facto has no applicability in a proceeding under Article 226 of the Constitution of India, but in view of the incorporation of the CPC in Rule 53 of the Rules under Article 226 of the Constitution of India, as framed by this Calcutta High Court, whereby and whereunder the provisions of the CPC were directed to be followed in all proceedings under Article 226 of the Constitution of India, this Court is of the view that on a statutory interpretation

of the said Rule, the CPC was brought within the proceeding of Article 226 of the Constitution of India about its applicability by incorporation, section 148 of the said Code stipulates that enlargement of time could be made by any Court at its discretion even though the period originally fixed or granted have already expired. The part of the sentence of the said Code "even though the period originally fixed or granted may have expired" does not reflect its applicability only in the contingency whether the application for enlargement of time is made before the expiry of the time. It is the Court's discretion to consider about the extension of time. There is no doubt that substantive portion of a Judgment cannot be modified, changed or varied by filing any application for modification or miscellaneous application save and except the application for review. There is no dispute for such legal proposition and that proposition is also reflected in the Judgment as cited by both sides. So far the procedural part of the Judgment whether it could be varied or modified by any miscellaneous application, this point has been settled by the Apex Court in the Judgment passed in the case of Mahanath Ram Das (supra) and in paragraph 5 thereof it is held that "the order though passed after expiry of the time fixed by the original Judgment, would have been operated from July 8, 1954. How undesirable it is to fix the time peremptorily for a future happening which leaves the Court powerless to deal with the events that might arise in between, it is not necessary to decide in this appeal." Ultimately the Court allowed the prayer about extension of the time limit. Following that Judgment, A.M. Bhattacharjee, J., as His Lordship then was, in the case of Anadi Nath Roychowdhury (supra) accordingly held that despite Order XXII Rule 3 of the CPC laying down an embargo to modify a Judgment once pronounced, but the Court is not helpless to extend the procedural part of the Judgment, but not the substantive part of the Judgment, on an application u/s 148 of the Code of Civil Procedure.

10. Having regard to the aforesaid legal proposition, this Court is of the view that the time limit as fixed by the Court earlier, being a procedural part of the Judgment, could be extended by exercising the Court discretionary power if the Court considers that there is justification of such on the basis of the application as filed, it appears that already the Presenting Officer and the Enquiry Officer have been appointed, though belatedly by the State Government and the said Corporation had no hand in the matter of such appointment. Now if the Court does not extend the time limit to complete the departmental proceedings, the resultant effect would be that the delinquent who has suffered a charge sheet in a departmental proceeding on the issue of defalcation of the property of the Company and also on the issue of production of the forged documents, as alleged, the delinquent will get a premium, being a, scot-free person, irrespective of the proper initiation of the departmental proceedings. It is true that the alleged charge of defalcation of the property of the Company could not reach its finality and its adjudication is required for the purpose of realisation, if any, from the delinquent concerned who ultimately has caused injury to different customers. Hence, for the interest of justice, the conduct of the delinquent with

reference to the departmental proceedings as required to be finally settled on conclusion of the departmental proceedings is the ultimate view of this Court. In that angle, there are supporting contentions in the application for satisfaction of the Court to exercise such discretionary power about extension of time of the procedural portion of the order and the Court is satisfied with those contentions.

11. Having regard to such state of affairs, this application for modification is accordingly allowed.

12. The prayer to complete the departmental proceedings in terms of the Judgment and order dated 6th July, 2004 is extended to three months from this date.

13. The Judgment and order dated 6th July, 2004 passed by Barin Ghosh, J. accordingly stands modified so far as procedural portion of the time limit to complete the departmental proceeding is concerned.

Xerox certified copy of this order, if applied for, be given.

Application for modification is allowed