Makund Lal vs Gopal Das on 10 March, 1950

Equivalent citations: AIR1950ALL536, AIR 1950 ALLAHABAD 536

JUDGMENT

Mushtaq Ahmad, J.

1. This is a defendant's application in revision against an order of the Munsif Haveli Banaras, allowing futher time to the plaintiff opposite party to pay a certain deficiency in court-fee in a partition suit relating to the joint family property of the parties.

2. On 5th July 1947, the Court passed a preliminary decree in the plaintiff's favour, the terms of which are not material for the purposes of this case. The operative portion of the judgment towards the end was this :

> "That the plaintiff's suit for partition of and for recovery of exclusive possession over 1/5th share of the properties detailed and described in schedules A and B appended at the foot of the plaint is decreed against the defendants. The plaintiff shall get his costs of the suit from defendants 2 and 4, The plaintiff shall pay up the deficiency in court-fees within a fortnight. The shares of defendants 1 and 3 in the properties in the suit detailed and described at the foot of the plaint, the extent of each comes to 1/5th, shall be apportioned and their separate lots shall be prepared, if they pay the requisite amounts of court-fees within a fortnight. Defendants 2 and 4 shall bear their own costs of the suit. Let a commission be issued to the Court Anna for preparing lots. The Amin must submit his report by 15th August 1947.

3. The English notes of the learned Munsif of the same date record that "The plaintiff must value his suit for the purposes of payment of court-fee at Rs. 2,620-12-9 3/5. The plaintiff must pay up the deficiency in court-fee within a fortnight."

4. I have quoted the earlier part of the last passage only to indicate that, besides paying the deficiency in court-fee, the plaintiff was also required to do a specific act with regard to the frame of his plaint, a point which would be material to the question mainly arising in this case, namely, whether the Court had still retained control over the case after passing the order first quoted. I shall discuss this mate in detail later.

5. The time given in the decree for payment of the deficit court-fee having expired on 19th July, the defendants applied on 22nd July 1947 that the plaintiff having failed to pay the amount "the suit should be dismissed with costs". The words underlined (here italicised,) would, again, have relevance on the point I have just indicated, and to these also I shall have to advert later.

6. On 30th July 1947, the plaintiff applied for extension of time to pay the court-fee p to 4th August 1917. On 2nd August, the Court fixed 5th August 1947, for the hearing of this application, and on the latter date it ordered that the matter be "put up to-morrow". The same day, the plaintiff made another application for extension up to 13th August 1947, but on the day following, 6th August, 1947, the learned Munsif passed an order that the plain. tiff might pay the amount "within four days". This order also would be relevant to the question whether the Court had intended to retain its control over the case even after 5th July 1947, the date of the preliminary decree. The learned Munsif observed in the order that in his view there having been no default clause in the preliminary decree, namely no words that "in case of non-payment of the court-fee within the time fixed, the suit shall stand dismissed", it was still open to him to extend the time fixed in the decree for payment of the requisite court-fee. At the same time he found that the plaintiff had really had knowledge of the time fixed in the decree, and had even been I negligent in not depositing the court fee, his plea of illness being an after-thought. Nonetheless, he allowed the plaintiff, in the interest of justice, a few days more to pay the amount.

7. An appeal was filed against this order of 6th August 1947, which was dismissed as incompetent on 21st January 1949. Then the present application in revision was filed on 1st February 1949.

8. The main point raised by the applicant's learned counsel was that the time for payment of court-fee having been fixed in a decree, it was not open to the Munsif to extend the same on a subsequent application by the plaintiff. He relied on the provisions of Order 20, Rule 3, under which a judgment, after it had been pronounced and signed in open Court, could not be altered, except under Section 152, Civil P. C. or on review. This is the only point to be considered in this case.

9. Sections 148 and 149 of the Code deal with the matter of extension of time fixed by the Court for certain purposes. The former relates to the fixing of time of an "act prescribed or allowed by the Code", and provides that the Court may, in its discretion, from time to time extend such time, even though the period originally fixed may have expired. The latter refers specifically to deficient court-fee paid on a document and authorises the Court in its discretion at any stage to allow the patty concern, ed to pay the balance.

10. It is obvious that Section 148 being confined to acts "prescribed or allowed by the Code" would not apply to the present case, as the time here was fixed in a decree. The question is whether Section 149 would also not apply. The argument of the learned counsel was that it will not apply, my view being that it will.

11. For the applicant it was contended that Section 149 could be invoked only so long as the Court had seisin of the case and not after it had ceased to have jurisdiction over it, having already passed the final order or decree. The short question, therefore, is whether, having regard to the terms in which the operative portion of the judgment, as quoted by me earlier, was worded, the Court did cease to have any further jurisdiction over the case and became functus officio by having already passed an order which was in every sense final and self-sufficient.

12. To start with, the order, as framed, purporting to decree the suit and at the same time allowing the plaintiff a certain time to deposit the deficit court-fee was legally irregular. The proper order was to require the plaintiff to deposit the court-fee within a certain period and 'then to pass the final order in the suit, decreeing it if the amount was paid but dismissing it if it was not.

13. Referring to the "investigation" mentioned in Section 9, Court-fees Act, Section 10 of it provides that:

> "(i) If in the result of any such investigation the Court finds that nett profits or market value have or hag been wrongly estimated, the Court, if the estimation has been excessive, may in its discretion refund the excess paid as such fee, but "if the estimation has been insufficient, the Court shall require the plaintiff to pay so much additional fee as would have been payable, had the said market-value or the nett profits had been rightly estimated.
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> (ii) In such cases, the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed."

14. Knox A. C. J., in the Full Bench case of Hari Ram v. Akbar Husain, 29 ALL. 749 : (4 A. L. J. 636 F. B.) observed:

> "I hold then that Sections 9 and 10 of Act No. VII of 1870 (Court-fees Act) govern all cases in which a Court may think it necessary to hold an enquiry into the market value of or the annual nett profit arising out of the property, the Subject-matter of the claim, and whether that enquiry be by evidence taken on an issue raised by the defendant or by a legal investigation held in person or by commission or otherwise."

15. Therefore, it would make no difference whether the investigation with regard to proper court-fee was made by the Court itself or through a Commissioner, the procedure prescribed being the same in both the cases.

16. This procedure was emphasised by a Bench of this Court in Jagannath Sahi v. Kamta Prasad, 12 A. L. J. 38: (A. I. R. (1) 1914 ALL. 55) in which Piggot J., observed at p. 40 :

> "The proper order for the learned Subordinate Judge to have passed on 31st March 1913, if he desired to put the applicants to terms in the manner in which he did, would have been an order directing that the applicants should deposit in Court a sum of Rs. 15 on or before 3rd April 1913, and that their application should then be put up for final disposal. In our opinion, the order actually passed can only be dealt with as one having substantially the effect stated above. On the order as passed, the application to have the ex parts decree set aside was not finally disposed of, and a further formal order of some sort or kind remained necessary to be passed after the expiry of the term fixed by the Court."

17. Now the order actually passed was that "the application to set aside the ex parts decree be allowed and the suit restored", but that "the order of restoration will be subject to the payment of Rs. 15 as damages by the applicants within three days to the plaintiff"

there being no penal clause.

18. This case is a clear authority on the point of the real meaning and effect of an order passed in the above terms which are in fact analogous to those in the present case. That is to say, the meaning to be assigned to the order should be that the requisite court fee should first be deposited or the time fixed for it be first allowed to expire and then the Court should pass the final order in accordance with the same having been deposited or not.

19. The same position was affirmed in Harjimal v. Firm Shanti Lal Shakal Chand, A. I. R. (21) 1934 Nag. 109 : (30 N. L. R. 258) in which it was pointed out that a decree of the type "plaintiff should pay deficient court fee on Rs. 470-8-0 within 15 days or suit shall stand dismissed" was undesirable, that the proper course for the Court was to fix a time for payment and wait until it expired, before passing its decree, and that the decree should then be a final one dismissing the suit without embodying any contingent clauses.

20. If this is the effect to be given to the operative order of the learned Munsif in his judgment of 5th July 1947, and, in the consequence of his successor in office allowing the plaintiff further time to deposit the court-fee by his order of 6th August 1947, was to give such an effect to the said earlier order and make it what it should have been, the question would be whether this Court would be justified in interfering with the latter order. I am definitely of the opinion that there would be no such justification in the least. Indeed, the defendants themselves, by their application of 22nd July 1947, asking the Court "to dismiss the suit" as the plaintiff had not deposited the deficiency in court-fee within a fortnight, left no doubt that an order of dismissal of the suit had yet to be passed. This meant that, even the defendants had accepted the position that the earlier order was not a final order dismissing the suit and that even they recognised that a subsequent order dismissing it was necessary, for which they actually applied.

21. The applicant relied, on a number of cases to contend that the said earlier order of 5th July 1947, was final, and that, after it, the Court had ceased to have any jurisdiction over the suit. Apart from the fact that that order only had culminated in what professed to be a preliminary decree in a partition suit in which the final decree had yet to be passed, so that in some sense at least the Court continued to exercise jurisdiction in the case until such a decree was actually passed, in all those oases there was a definite penal clause in the decree that, in case the court-fee was not paid, the suit shall either stand dismissed or will be dismissed. The cases were Beni Prasad v. Om Prakash, 1938 A. L. J. 673 ; (A. I. R. (25) 1938 ALL. 497); Haji Yakub v. Samjan Bibi, A. I. R. (27) 1940 Cal. 275 : (188 I. C. 661); Bal Mukund v. Pearey Lal, 129 I. C. 732; (A.I.R. (18) 1931 ALL. 318) ond Sased Ahmad v. Karam Singh, A.I.R. (36) 1949 Lah. 121. The last was a pre-emption case which need not detain us on the point in question', as it is well-settled that a right of pre-emption being regarded to be a weak right, it can be enforced only with a strict compliance with the terms of the decree. In the second case, it was clearly emphasised that it was only the 'final' order that could terminate the

proceedings involving a termination of the Court's jurisdiction. Other oases of the same class will be found in Sajjadi Begum v. Dilawar Husain, 40 ALL. 579 : (A. I. R. (5) 1918 ALL. 98) and Tribhuan Dut v. Suraj Bali, A. I. R. (11) 1924 Oudh 330: (78 I. C. 387). In the latter case, Wazir Hasan A. C. J. laid particular stress on the fact that "the decree further provided for the contingency of default of payment within the period prescribed by it. It said that in default, the suit was to stand dismissed."

22. Where the Court has actually inserted such a clause in the decree, the order, on the face of it, and in every sense, is a final order, so that, on the contingency happening, it must take the effect mentioned therein, and it would then not be open to the Court to re-assume jurisdiction by reviving the matter, and say anything in modification of that final order.

23. In the present case, it is remarkable that not a single case could be cited by the learned counsel for the opposite party, showing that, even though the Court had not inserted such a penal clause, it had ever been held that it could still have no jurisdiction to grant further time. All that he argued was that the decisions in the cases cited by him had not really turned on the effect of the penal clause but professed to lay down a general law, irrespective of such a clause. This, in my opinion, would be an obvious misreading of those decisions, and I am convinced that the Court below was right in construing them in the only manner possible, namely, that it was really the penal clause that formed the basis of those decisions.

24. I may now turn to cases in which, in the absence of such a clause, and, indeed, as a consequence of such absence, it was definitely laid down that the Court had jurisdiction to extend the time once fixed, as it still continued to exercise control over the case and a final order had yet to be passed.

25. In Collinson v. Jaffrey, (1896) 1 Ch. 644 at p. 647: (65 L. J. Ch. 375), Kekewich J. remarked:

> "It is not the practice to say that the action Is dead, for it is necessary in this and other analogous cases to make a further application in order to obtain the absolute dismissal of the action. There is another form of order available and appropriate where the Court thinks that severe term should be imposed namely, that on the failure to do certain acts within the specified time then 'the action do stand dismissed without further order."

26 Again, in Chandra Goundan v. Palaniappa Goundan, A. I. r. (5) 1918 Mad. 638; (42 I. C. 961), an ex parte decree had been set aside on condition that the defendant paid the plaintiff's coats within a specified time. The time expired without payment, but neither by the original order nor in any order passed subsequently was the application dismissed. Krishnan J. remarked:

> "It does not follow that the petition had been disposed of by the mere non-compliance without a final order of rejection being passed."

27. These two cases were followed in Balakrishna Ayyar v. Parva Thammal, (A. I. R. (15) 1928 Mad. 154: 105 I. C. 124), and the same view was taken.

28. In Surajmal Marwari v. Bhubneshwar Prasad, A. I. R. (27) 1940 pat. 50: (186 I. C. 870), Fazl Ali J. (now a member of the Supreme Court Bench) sitting with Harries C. J., following the first two cases pointed out that, while the Court generally had no jurisdiction to extend the time fixed in a decree, the rule was subject to the qualification that, where the decree or order which fixed the time was not intended to to be final and the Court still retained control over the proceedings, it might extend time. In this case, the order, in fact, was that "the plaintiffs must file the deficit court-fee within a fortnight from today, otherwise they will not be entitled to have the aforesaid decree and the suit will be dismissed."

29. In spite of the last six words, the learned Judges held that some further order had to be passed actually dismissing the suit, and that so long as that had not been done, the Court continued to be seized of the case. In the present case, we have indeed seen that the defendants themselves by their application dated 22nd July 1947, asked the Court "to dismiss the suit", as the plaintiff had not put -in the required court-fee within the time allowed by the preliminary decree. By this, most certainly they acquiesced in the proposition which I am emphasing here. This Court in Sital Din v. Anant Earn, A. I. R. (20) 1933 ALL. 262: (55 ALL. 326 F.B.), held that where time had been fixed in a remand order and the direction given had not been obeyed within the same, it was open to the Court to extend it as the final order had yet to be passed.

30. The same policy appears to underlie the provisions of Order 34, Civil P. C., relating to suits on mortgages. Under Rules 2 (2), 4 (2) and 7 (2) of this Order, relating respectively to suits for fore, closure, sale and redemption, the Court could extend the time, although the period originally fixed may have expired, It is obvious, therefore, that in such suits at least the Court does retain its jurisdiction until the final decree has been passed, and indeed the entire proceedings up to the final decree form part of the suit itself. On principle, I can see no distinction between such cases in which, no doubt, there are these specific provisions authorising the Court to extend time and a suit for partition of property in which also a preliminary and then a final decree have to be passed, but for which there is no specific provision analogous to those in mortgage suits. In this case, however, the reasons in support of the view I have taken stand on other grounds also, with which I have already dealt in detail.

31. I have, therefore, on a survey of the case law relevant to the matter, come to the definite conclusion that the learned Munsif in this case had jurisdiction to extend the time given in the preliminary decree dated 5th July 1947, and allow the plaintiff to pay the deficiency in court-fee.

32. I would, therefore, dismiss this application in revision, but make no order as to costs.

Desai, J.

33. I agree. The whole trouble is caused in this case by the thoughtless order passed by the learned Munsif. He ought to have known how to deal with a case of non-payment of court-fee. The Court-fees Act prohibited him from taking any action on the plaint unless full court-fee was paid on it. If he had referred to that Act or the Civil Procedure Code, he would have found that there is no provision under which he could decide the suit, knowing that sufficient court-fee was not paid on

the plaint, and lay down in the decree that the deficiency in the court-fee should be made good. When the law permits a plaintiff to put down a tentative valuation on the subject-matter of a suit as in a suit for accounts or mesne profits, it authorises the Court to lay down in the decree that the deficiency in the court-fee should be made good by the plaintiff. But the present suit is not a suit of that nature and it was not open to the learned Mnnsif to extend the provisions of Section 11, Court-fees Act to it. When he got the valuation of the suit amended, he should have also ordered the plaintiff to make good the deficiency in the court-fee and suspended all action until it was done. Had he followed the correct procedure, this matter should not have come before us at all. Further, the learned Munsif simply directed the plaintiff to pay the balance of the court-fee; he did not say what would be the consequences of his default. He passed a preliminary decree and a final decree was to come. But surely be did not intend to pass two preliminary decrees (1) the decree actually passed by him, and (2) a decree to be passed on the expiry of the period allowed by him for the payment of the court-fee. If he did not intend to pass an additional preliminary decree after the expiry of that period, he ought to have made provision for the default in the decree passed by him. That decree should have been complete in all respects and should not have left something to be done at a future date. If the learned Munsif had laid down in the decree that if the plaintiff did not pay the court-fee within the time allowed his suit shall stand dismissed, the matter would have been clear, on the default occurring the dismissal of the suit would have been automatic and the plaintiff would have had no occasion for asking for extension of time on a subsequent date. That is why I say that the learned Munsif is responsible for prolongation of this litigation and it is to be deplored that he blundered in such a simple matter.

34. As observed by my brother, the present case is to be distinguished from those cases in which the penalty was provided in the decrees themselves. Those decrees were complete in all respects and nothing remained to be done by the Courts passing them. If what was required to be done was not done, the consequences followed automatically as provided in the decrees. No orders of the Courts were required to deal with the default. So it was held in those cases that it was not open to the Courts to extend the time because to do so would go against the decrees. In the present case some order remained to be passed to deal with the default. The decree passed by the learned Munsif did not contain this order. Therefore, he retained control of the suit and it was open to him to extend the time allowed for the payment of the court-fee. The applicant-judgment-debtor himself understood the learned Munsif to retain control of the suit; on no other basis can his applying to him for an order of dismissal of the suit be explained. If the learned Munsif had the power to pass another decree dismissing the suit, he had also the power to pass another decree or order granting further time. So long as he did not say in the decree that no further time would be granted, an order granting further time could not be said to be varying the decree.

35. I was at first impressed with the judgment-debtor's plea that his right of appeal from the decree has become barred by time now. His argument is that he thought that owing to the decree-holder's default in paying the court-fee within the time, his sail; would stand dismissed. If he erroneously thought that the time could never be extended and that the suit was bound to be dismissed on account of the default and under that idea did not prefer an appeal from the decree, he has to blame himself for the position in which he finds himself now. He cannot blame the decree-holder or the Court for his taking a wrong view of the law. He should have known that so long as an order

dismissing the suit was not pissed, the Court retained control over the suit and was in a position to extend the time for payment of the deficiency in the court fee. Consequently, if he wanted to appeal from the decree, he should have done so before the time ran out.

36. In Rama Chandra v. Randasami, A.I.R. (37) 1950 Mad. 1: (1949.1 M. L. J. 181), a preliminary decree in a suit for partition provided that the plaintiff could recover certain property on payment of a sum of money into Court by a certain date without any provision as to the effect of non-payment, and it was held that the Court had jurisdiction to extend the time for payment. Except that the money in that case was to be paid for a property whereas the money was to be paid in the present case to make good the deficiency in the court-fee, there is no distinction between the facts of the two cases.

37. Though I think that as far as this application is concerned, justice lies with the decree-holder-opposite party, I consider that he did not make out a good case for getting extension of time for payment of the additional court-fee. He was himself the plaintiff and must have gone to Court prepared to pay the full court fee. Owing to the mistake of the learned Munsif he got plenty of time, while the suit remained pending, to pay the additional court-fee. He got further time under the decree. Yet he did not pay within the time allowed under the decree. Even when he applied for the first extension he did not deposit the required court-fee and did not give any satisfactory explanation for not doing so. The lower Court would have exercised its discretion soundly if it had refused to extend the time. Unfortunately we are not dealing with this matter in revision and are unable to interfere with the order passed by it, though I have no doubt that the order challenged is not sound. Therefore this application should be dismissed, but the opposite party should not get its costs.

38. The application in revision is dismissed but without costs.