Manindra Land and Building Corporation Ltd.

Vs

Bhutnath Banerjee and Others

Civil Appeal No. 524/62

(K. Subha Rao, Raghuvar Dayal, J. Mudholkar JJ)

02.05.1963

JUDGMENT

RAGHUBAR DAYAL J. –

This appeal, by special leave, is directed against the order of the Calcutta High Court disallowing the application of the appellant under sub-r. (2) of r. 9 of Order XXII of the Code of Civil Procedure, hereinafter called the Code, for the setting aside of the abatement of the suit it had instituted against the father of the respondents.

The suit was instituted on April 29, 1952, by the appellant corporation against Kalosashi Banerji, father of the respondents, to recover a sum of money due on a mortgage by deposit of title-deeds. The defendant contested the suit. Ultimately, a preliminary decree in the suit was passed ex parte on February 8, 1955. On an application presented on June 11, 1955, final decree was passed on June 23, 1955.

The first application for execution of the decree presented on August 30, 1955, was dismissed for default on October 4, 1955, on account of the decree-holder not taking any steps as a result of the report of the process-server dated September 14, 1955, stating that the defendant Kalosashi Banerji had died.

The second application for execution of the decree against the defendant's legal representatives was presented on September 20, 1956. On January 30, 1957, the respondents filed an objection under s. 47 of the Code and on March 1, 1957, they disclosed the date of death of Kalosashi to be July 20, 1954, by producing a certified copy of the death register showing the date.

Thereafter, the appellant filed the application for substitution, on setting aside the abatement. The respondents opposed this application and the learned Subordinate Judge, however, held that the appellant had established that it was prevented by sufficient cause from continuing the suit and, allowing the application, set aside the abatement of the suit. The respondents then went up in revision to the High Court. The High Court disagreed with the Subordinate Judge and held that the appellant had entirely failed to make out any good cause for the delay in applying for the setting aside of the abatement and for applying for substitution much later then the period allowed by law.

Kalosashi, the defendant, died on July 20, 1954. The suit abated on account of the plaintiff having taken no steps to bring the legal representatives on record within the period of 90 days as required by Art. 176 of I Schedule to the Limitation Act. The appellant could have applied for the setting aside of the abatement within the next 60 days in view of Art. 171. Thus the application of the

appellant presented on March 27, 1957, was a very belated application. The appellant therefore had to satisfy the Court in two respects. Firstly it had to satisfy the Court, in order to obtain advantage of the provisions of s. 5 of the Limitation Act which applies to applications under r. 9(2) of O. XXII in view of sub-r. (3) of r. 9 of that Order, that it had sufficient cause for not making the application within the period of limitation prescribed for an application to set aside the abatement of the suit and, secondly, it had to establish that it was prevented by any sufficient cause from continuing the suit by making an application under r. 4 of O. XXII for the legal representatives of the deceased defendant to be made parties to the suit within the prescribed period of limitation. To satisfy the Court in these respects, the appellant had to show when it learnt that the defendant had died prior to the passing of the decree, that it was necessary to implead legal representatives of the deceased in the suit and that the delay in knowing of this fact and in its applying for the setting aside of the abatement of the suit was not due to laches on its part. On these two questions of fact of findings of the trial Court were in its favour.

It is not necessary for the purpose of this appeal to state the reasons which were urged as a justifiable excuse for the inability of the appellant to take the necessary steps earlier. It is not open to the High Court to question the findings of fact recorded by a Subordinate Court in the exercise of its revisional jurisdiction under s. 115 of the Code which, it is well-settled, applies to cases involving questions of jurisdiction, i.e., questions regarding the irregular exercise or non-exercise of jurisdiction or the illegal assumption of jurisdiction by a Court and is not directed against conclusion of law or fact in which questions of jurisdiction are not involved : See Bala Krishna Udayar v. Vasudeva Aiyar ((1917) L.R. 44 I.A. 261, 267.); M/s A. Batchamian Sahib and Co. v. A. N. Channiah (C.As 452 and 487/62 decided on 19.10.1962.). This legal position is not disputed for the respondents.

It is however contended for the respondent that a decision on a question of limitation involves the question of jurisdiction and in support of this contention reliance is placed on the case reported as Joy Chand Lal Babu v. Kamalaksha Chaudhury ((1949) L.R. 76 I.A. 131, 142.). This case laid down no different principle of law. What it said in that connection was quoted with approval in Keshardeo Chamria v. Radha Kissen Chamria ([1953] S.C.R. 136, 152.) and those observations are :

> "There have been a very large number of decisions of Indian High Courts on section 115 to many of which their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not itself involve that the subordinate court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored."

The further observations in that case on which learned counsel for the respondents mainly relies are :

> "The cases of Babu Ram v. Munna Lal ((1927) I.L.R. 49 All. 454.) and Hari Bhikaji v. Naro Vishvanath ((1885) I.L.R. 9 Bom. 432.) may be mentioned as cases in which a subordinate court by its own erroneous decision (erroneous, that is, in the view of the High Court), in the one case on a point of limitation and in the other on a question of res judicata, invested itself with a jurisdiction which in law it did not

> possess and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

These remarks are not applicable to the facts of the present case. They apply to cases in which the law definitely ousts the jurisdiction of the Court to try a certain dispute between the parties and not to cases in which there is no such ouster of jurisdiction under the provisions of any law, but where it is left to the Court itself to determine certain matters as a result of which determination the Court has to pass a certain order and may, if necessary, proceed to decide the dispute between the parties. The distinction between the two classes of cases is this. In one, the Court decides a question of law pertaining to jurisdiction. By a wrong decision it clutches at jurisdiction or refuses to exercise jurisdiction. In the other, it decides a question within its jurisdiction. In the present case, the question whether there was a sufficient cause was exclusively within the jurisdiction of the Court and the Court could decide it rightly or wrongly.

Section 3 of the Limitation Act enjoins a Court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribe therefor by the I Schedule irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the Sub-ordinate Court comes to an erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter.

Section 5 of the Limitation Act, on the other hand, empowers the Court to admit an application, to which its provisions are made applicable, even when presented after the expiry of the specified period of limitation if it is satisfied that the applicant had sufficient cause for not presenting it within time. The Court therefore had jurisdiction to determine whether there was sufficient cause for the appellants not making the application for the setting aside of the abatement of the suit in time and, if so satisfied, to admit it.

Babu Ram's case ((1927) I.L.R. 49 All. 454.), referred to in the observations relied on for the respondent was a case, which according to the reports, was a case in which the application for setting aside the ex parte decree passed on December 15, 1925, was made on April 19, 1926, much beyond the period of one month prescribed for making such applications from the date of the decree. The question of limitation was simply ignored by the trial Court which restored the suit. The High Court held that the mere fact of the appellate Court's granting the application for restoration amounted to a decision in law that the application had been presented within time and that such a decision, even if wrong, did not fall under either cl. (a), (b) or (c) of s. 115 C.P.C. It was this view of the Court which was held by the Privy Council to be wrong. The case does not relate to the Trial Court's finding that there was sufficient cause for not making the application within the period prescribed.

The other case referred to viz., Hari Bhikaji's Case ((1885) I.L.R. 9 Bom. 432.), was where the Trial Court had gone wrong on the question of res judicata. Section 11 of the Code prohibits any Court from trying any suit or issue which would be covered by the various provisions of that section. There is no option in the Court to try such a suit in any circumstance. Similar was the Joy Chand Case ((1949) L.R. 76 I.A. 131, 142.), in which the judicial Committee had made those observations. In that case the judgment debtors, in a decree passed in a suit for the recovery of the amount of

money lent, applied under ss. 30 and 36 of the Bengal Money Lenders Act for relief. The provisions of the Act applied to suits for recovery of loans other than commercial loan as defined in that Act. If the loan to recover which a suit was instituted was a commercial loan, relief claimed by the judgment debtors could not have been granted to them as the Act did not apply to commercial loans and as the Court had no jurisdiction to give the necessary relief. The trial Court held that the loan in that suit was a commercial loan and therefore did not come within the terms of the Act. The High Court disagreed with that view and held that the loan was not a commercial loan. The High Court had therefore set aside the order of the Subordinate Judge in the exercise of its revisional jurisdiction. The Judicial Committee considered whether the High Court was right in doing so and said at p. 142 :

> "In so doing, on the assumption that his decision that the loan was a commercial loan was erroneous, he refused to exercise a jurisdiction vested in him by law, and it was open to the High Court to act in revision under sub-s. (b) of s. 115."

and then followed the observations already quoted above. It is clear that on the decision of the question the Subordinate Court had to determine in that case depended its very jurisdiction to take action under that particular Act. It had the jurisdiction to decide the question, but it could not give jurisdiction to itself or give up the exercise of its jurisdiction in the matter on the basis of its finding if that be erroneous. Neither the facts of that case are comparable to the facts of the present case nor the observations relied on the learned counsel for the respondents can be applicable to this case, as here the Subordinate Judge had jurisdiction to decide both the questions of fact viz., whether the appellant had sufficient cause for not making an application for setting aside the abatement of the suit within the period prescribed and therefore had sufficient cause for the Court's exercising its discretion in extending the period of limitation in view of the provisions of s. 5 of the Limitation Act and also the fact whether the appellant was prevented from sufficient cause from not making an application for the substitution of the legal representatives within the prescribed period of limitation and thus continuing with the suit. The Court had the jurisdiction to decide both the questions of fact and also to proceed with the suit as a result of its decision.

We may refer to two cases relied on for the respondents. In Dwarka v. Union of India ((1954) I.L.R. 33 Pat. 176.), an application for setting aside an ex parte decree dated November 30, 1951 was made on January 25, 1952. Though made after the expiry of the period of limitation, it was held to be within time on the view that the Court, though open on January 2, 1952 must be treated as closed as no substantive work was transacted on that day. The High Court held that the trial Court was wrong in its view about the Court being taken as closed on January 2, and therefore the High Court interfered in revision. The trial Court mis-applied the provisions of s. 4 of the Limitation Act which allows the making of an application on the day on which the court reopens after the day on which the period of limitation prescribed for making the application expires and on which day the Court happens to be closed. The trial Court had gone absolutely against the provisions of this section in ignoring the fact that the Court reopened on January 2, and not on January 25, 1952. The High Court, in coming to its conclusion, relied on the provisions of s. 3 of the Limitation Act. Section 5 of the Limitation Act is not applicable to applications for setting aside ex parte decrees under O. IX, r. 13 of the Code. This case does not decide that the finding about the Court being satisfied about the existence of sufficient cause was such a finding as involved jurisdiction and therefore could be interfered with by the High Court.

In the case reported as Basantilata v. Amar Nath (A.I.R. 1950 Cal. 411.) the High Court interfered as the Trial Court had mis-construed and mis-applied the provisions of ss. 10 and 11 of the Indian

Soldiers (Litigation) Act 1925 (Act IV of 1925). The suit was dismissed on December 4, 1942. An application for the setting aside of the order of dismissal was made on July 15, 1947. The plaintiff, who was a soldier, served under war conditions from May 23, 1942 to November 25, 1946 when he was discharged. Thus the total period the plaintiff served under war conditions was 4 years 6 months and 3 days. The question was whether this entire period had to be excluded in computing the period of limitation for making the application for setting aside the dismissal of the suit. The Sub-ordinate Judge excluded it and the High Court considered it unjustifiable to exclude the period prior to December 14, 1942, the date of the decree, as that period could not have in any way prevented the plaintiffs in making the application for the setting aside of the dismissal order. Here again, the error committed by the Trial Court was not in coming to a finding of fact in connection with the provisions of s. 5 of the Limitation Act which applied to such applications, but on the Court's deciding the question of limitation in connection with which sub-s. (2) of s. 10 followed practically the language of s. 3 of the Limitation Act as it said that no such application would be entertained unless it was made within a certain time.

We are therefore of opinion that the High Court fell in error in interfering with the finding of fact arrived at by the Subordinate Judge with respect to the appellants having sufficient cause for not making an application for bringing the respondents on record within time and for not applying for the setting aside of the abatement within time. We allow the appeal with costs throughout, set aside the order of the Court below and restore that of the Trial Court. It will now proceed according to law with the further execution of the decree on the second application presented by the appellant for the purpose.

Appeal allowed.

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