SUREME COURT OF INDIA

Pandit Sadayatan Pandey

Vs.

Motilal Bandhu Sahu

(Shah, Ramaswami and Grover JJ.)

11.09.1969

JUDGMENT

GROVER, J.

1. These appeals by special leave from a judgment of the Allahabad High Court arise out of proceedings which started as far back as the year 1936.

2. The relevant facts may be stated. The appellant and his two brothers Shrish Chandra Pandey and Shrikar Pandy were members of a joint Hindu family. In 1936 there was a disruption of the joint family but the properties were not divided by metes and bounds. On September 30, 1936 the two brothers of the appellant made an application under Section 4 of the U. P. Encumbered Estates Act 1934, hereinafter called the Act, praying that its provisions by applied to them. This application was forwarded by the Collector to the Special Judge under Section 6 of the Act. The applicants filed what is called a written statement under Section 8 of the Act giving particulars of the debts which were payable by the quondam joint family. As the appellant was not an applicant in these proceedings he was made a proforma defendant. On May 7, 1937 Ramdev Sahu whose name was substituted by the first respondent Shiv Narain Sahu in C. A. 1184/66 instituted a suit against the appellant for recovery of a sum of Rs. 22,000/- odd out of a debt which was said to be due from the three brothers in the sum of Rs. 67,000/- odd. This suit was dismissed on August 26, 1937 by the trial court. On September 12, 1938 another creditor Motilal Bandhu Sahu who is respondent No. 1 in C. A. 1183/66 instituted a suit being suit No. 12 of 1938 for recovery of Rs. 13,000/-, on the allegation that this amount was due from the appellant as his 1/3rd share of the debt due from the three brothers on the basis of Sarkhatbahi The appellant filed a written statement in the suit raising various defences.

3. After the dismissal of the first suit filed by Ramdev Sahu the matter was taken to the High Court and as important questions were involved they were referred to a full bench whose judgment is reported in Ramdev v. Sri Sadaitan Pande. (1) The Full Bench in view of certain amendments made in Section 9 of the Act by Act 11 of 1939 made the following order :

"The record will be returned to the Court of the learned Civil Judge with the direction that the plaint be treated as an application under Section 11 of Act 11 of 1939. This application will be disposed of according to law after the amount due by the defendant has been determined by the Civil Judge in the proceedings under the Encumbered Estates Act".

On December 14, 1943 the Special Judge after holding proceedings under the Act passed orders granting decrees against the appellant as well as brothers. One decree against the appellant was for 1/3 of Rs. 37687-13-6 and the other was for 1/3 of Rs. 22,645/- together with interest at the rate of 3%. It was further directed that a copy of the judgment should be placed on the file of the civil suit in each case which had been stayed and was pending in the court of Civil Judge, Mirzapur. It may be mentioned that subsequently Ramdev Sahu assigned his interest in favour of Shiv Narain Sahu and the name of the latter was substituted in place of the former by an order dated May 12, 1949.

4. The appellant filed appeals in the High Court which were dismissed inter alia on the ground that even if there had been some procedural irregularity in making a separate order in each of the suits such an irregularity was curable under Section 99 of the Civil Procedure Code.

5. Before us only two points have been agitated. The first is that the Special Judge acting under the Act had no jurisdiction to pass decrees against the appellant. Secondly the appellant was entitled to have his defences tried on the merits in the two suits which had been filed by the creditors but which had never proceeded to trial. On the first point reliance has been placed on the provisions of Section 9(5) of the Act. It is urged that on a correct interpretation of the various clauses of this provision the Special judge could only determine the amount of joint debt due by the applicants and by the non-applicants and after such determination the creditors could obtain a decree from the civil court against the non-applicant. But in the suit the defendant would be entitled to put forward all the defences available to him which mast be tried in a proper way according to the procedure prescribed by the CPC. The main grievance of the appellant, therefore, is that no decrees could have been passed by the Special Judge against the appellant against whom suits had been filed by the two creditors which were pending and in which alone the decrees could have been passed although in the proceedings under the Act, at the instance of the brothers of the appellant, the special Judge could determine the extent of the liability of the appellant and his brothers which determination would be binding on the civil courts. But the defence like the plea of limitation could be determined only by the civil courts in the suits pending before them. No such argument appears to have been addressed to the High Court. It was mainly on the procedural irregularity that emphasis seems to have been laid before the High Court. However the High Court has said in its judgment that the learned Special Judge was seized of both the matters namely, proceedings under the Act and the two regular suits which were also pending before him in his capacity us a Civil Judge. These matters were tried together. The Special Judge had directed that a copy of his judgment in the proceedings under the Act would be placed on the file of each suit and would govern the decision of that suit also. The learned Judges of the High Court observed that counsel for the appellant was not able to show any provision of law which prohibited the making of such orders. Nor had it been shown that these orders were illegal or unjustified. In these circumstances we do not consider that it is open to the appellant to agitate points which were not raised before the High Court.

6. It is not worthy that before the Special Judge the appellant had practically admitted the claim of the creditor Motilal Bandhu Sahu. This is what the learned Judge states in his order:

"The claim is practically admitted. The account tiled by the firm will go to show the amount due to the firm in Samvat 1992 was Rs. 35973-2. Calculating interest on this amount upto the date of the application a sum of Rs. 37681-13-6 was found due against all the three brothers. In apportioning this debt the Liability of the applicants comes to two-third. It appears that this firm filed a Suit No. 12 of 1938 against the non-applicant. Sri Sadayataa Pandev claiming one-third of the whole amount due to them. Due to the Encumbered Estates Act proceedings in this suit was stayed. Now the firm

is entitled to a decree against Sri Sadayatan Pandey also for his one-third liability in the debt".

Similarly with regard to the claim of the other creditor Ramdev Sahu it was stated by the Special Judge that all the three brothers had executed a Sarkhatbahi on June 17, 1934 admitting their liability for a sum of Rs. 63,337-11-6. The applicants, namely the appellant's brothers and the appellant had not contested a the correctness of the Sarkhat in their written statement. It had been satisfactorily proved that the applicants and the non-applicant had signed the Sarkhat. After considering the evidence which was produced before him he held that the applicant were liable for two third of the amount and the non-applicant, namely, the appellant was liable for one-third of the total amount. It would thus appear that in the case of both the creditors the Special Judge had either proceeded on admissions or on the evidence which had been produced before him. 'Under Section 9(5) (a) of the Act when the Special judge makes joint debtors who are non-applicants parties to the proceedings he has to hear any objection that they may make before recording his finding. It was open to the appellant to raise such objections as he desired to agitate at that stage. It does not appear and no authority has been shown to this effect that even after a finding has been given by the Special Judge under the aforesaid provisions of the Act it is still open to the defendant in a suit which has been filed to have his defences retried. At any rate, we do not propose to express any final opinion on this point be cause we are of the view that the appellant wholly failed to raised any contention before the High Court of the nature which has been sought to be taken before us. We see no reason or justification for allowing new points of law and fact to be raised for the first time before this court in the present appeals which are by special leave.

For all these reasons the appeals are dismissed with costs.

One set of hearing fee.