

CALCUTTA HIGH COURT

Basantilata Dhar

Vs.

Amar Nath Haldar

Civil Rule No. 823 of 1949

(Harries, C.J. and Banerjee, J.)

14.03.1950

JUDGMENT

Banerjee, J.

1. This is an application under Section 115, Civil Procedure Code , against a decision of the learned Subordinate Judge, 24 Parganas, whereby he set aside an order of dismissal of a suit made on 11th December 1942, and restored the suit to file for hearing.

2. The only question that arises in this case is a question of limitation and depends on the construction of Sections 10 and 11, Indian Soldiers' (Litigation) Act (IV [4] of 1925). The relevant portions of the sections are as follows : Section 10 : "(1) In any proceeding before a Court in which a decree or order has been passed against any Indian Soldier whilst he was serving under war conditions or at any time after the 1st day of April 1925, whilst he was serving under any special conditions, the soldier may apply to the Court which passed the decree or order for an order to set aside the same, and, if the Court after giving an opportunity to the opposite party of being heard, is satisfied that the interests of justice require that the decree or order should be set aside as against the soldier, the Court shall, subject to such conditions, if any, as it thinks fit to impose, make an order accordingly. 2. No such application shall be entertained unless it is made within two months from the expiry of the first period of thirty days after the date of the decree or order, or where the summons or notice was not duly served on the applicant, after the date on which the applicant had knowledge of the decree or order, during no part of which the soldier was serving under special conditions :

Provided that the provisions of Section 5, Limitation Act, 1908, shall apply to such applications."

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Section 11 : "In computing the period of limitation prescribed by the Indian Limitation Act, 1908, or any other law for the time being in force, for any suit, appeal, or application to any Court any party to which is or has been an Indian Soldier, the time during which the soldier has been serving under war conditions since 4th August 1914, or under any special conditions since 1st April 1925, shall be excluded."

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3. The suit was adjourned several times at the instance of the plaintiff. It was fixed several times peremptorily. The plaintiff did not appear. On 14th December his pleader said that he had no instructions. The suit was dismissed for default.

4. On 15th July 1947 the plaintiff made an application for setting aside the order of dismissal.

5. The plaintiff was a soldier serving under war conditions from 23rd May 1942 to 25th November 1946 when he was discharged.

6. It was alleged in the petition that after his discharge he had an attack of gastritis and suffered from 7th December 1946 to 27th June 1947. But no point has been made before us on the ground of his illness.

7. The learned Subordinate Judge made the order on 1st March 1949 allowing the application for setting aside the dismissal dated 14th December 1948. From this order the present application has been made.

8. The total period, the plaintiff served under war conditions, is 4 years 6 months and 3 days. The question is whether the whole of this period should be excluded in Computing the period of limitation. The Court below has excluded the period. The Judge construed the words in Section 11, "the time during which the soldier has been serving under war conditions" in a literal sense.

9. There seems to be no justification for excluding the period prior to 14th December 1942. During this period the plaintiff was not prevented from making this application by reason of his service. I can understand exclusion of the period he was in service after the order of dismissal. How can the prior period affect the question I do not see.

10. A too literal adherence to the words of the section would produce an absurdity and injustice. Take for example the following case. A soldier who had been serving under war conditions for 6 years prior to an order of dismissal, is discharged a day after that. Is the soldier entitled to get exclusion of the 6 years minus a day, in computing the period of limitation ? That is absurd.

11. The Act was passed to provide for special protection of soldiers and not to grant them license to do whatever they like. It is quite intelligible why time should not run against a soldier if he was serving under war conditions since commencement of limitation, why should the previous period

be excluded ?

12. It is not in dispute that if the time before the order of dismissal is not excluded, the application is out of time.

13. It seems to us that the construction put upon the words by the learned Judge is not correct and he has exercised a jurisdiction under a misconception of the law. In other words, he has exercised a jurisdiction not vested in him by law.

14. Therefore the learned Judge's order should be set aside. The petition is allowed and the Rule is made absolute with costs.

Harries, C.J.

15. I agree.

Rule made absolute.