PATNA HIGH COURT

Dwarka Prasad

Vs

Union of India

Civil Revn. No. 275 of 1952

(Sinha and Choudhary, JJ.)

11.02.1954

JUDGMENT

Sinha, J.

1. The plaintiffs are the petitioners, and the application in revision has been filed, under Section 115, Civil Procedure Code, against an order of the learned Munsif, dated 24-5-1952, allowing an application under Order 9 Rule 13, Civil Procedure Code, for setting aside an 'ex parte' decree dated 30-11-1951.

2. This case was first heard by a single Judge, and it has been referred to a larger Bencn because certain authorities of this Court had held that an erroneous decision of the court below on the question of limitation was not revisable by this Court under Section 115 of the Code.

3. The facts leading to the setting aside of the ex parte decree are as follows: The plaint was filed on 21-6-1951, claiming a certain amount of money as damages from the opposite party on account of non-delivery of a part of the consignment booked from Cawnpur to Monghyr. It appears that summons was served upon the defendant-opposite party some time before 21-8-1951. On 21-8-1951, the order-sheet shows, the defendant did not appear, and, therefore, the case was adjourned to 30-8-1951. On 30th of August, again, there was no appearance on behalf of the defendant, and the case was adjourned to 1-9-1951, for ex parte disposal. On 1-9-1951, the defendant did not appear, and the court fixed 22-9-1951, for ex parte disposal. On that date, again, the defendant was absent, and the date for ex parte disposal had to be extended to 25-9-1951. On 25-9-1951, again, there was no appearance on behalf of the defendant, and 26-9-1951 was fixed for ex parte hearing of the case. It is to be noted that on all these dates the plaintiffs were present. On 26-11-1951, the suit was taken up for ex parte hearing, and the plaintiffs were heard and judgment was given on 30-11-1951, decreeing the suit. On 25-1-1952, an application was made on behalf of the defendants-opposite party under Order 9 Rule 13, Civil Procedure Code, for setting aside the ex parte decree. In that application, it is alleged that the former railway lawyer, one Mr. S. C. Banerji, being ill, Mr. B. N. Chatterji had been appointed as the railway lawyer in the second week of September. On 6-11-1951, the railway law inspector had gone to Monghyr and had informed Mr. B. N. Chatterji that this case had been fixed up for disposal on

26-11-1951. It is said that Mr. B. N. Chatterji, learned lawyer, had asked one Boudhu Lal, railway clerk, to make a note of that fact, and Boudhu Lal, in his turn, so it is said, made a note of the same on some scrap of paper, but did not make mention of the case in the diary, and Boudhu Lal is alleged to have been informed of the ex parte decree on 6-1-1952, and that is the date of knowledge of the defendant about the ex parte decree.

4. The learned Munsif, after hearing the parties, held that, although the application under Order 9 Rule 13, Civil Procedure Code, should have been filed by 30-12-1951, and although on 2-1-1952, the court remained open, no work having been transacted on that date, the application was in time because the court remained closed from the 3rd of January to the 24th of January, 1952. He has also found that Mr. Chatterji was informed of the ex parte decree by Boudhu Lal on 6-1-1952, and in that view of the matter, he has held that the application filed on 25-1-1952, for setting aside the ex parte decree dated 30-11-1951, was filed in time.

5. The relevant article of the Limitation Act is Article 164 which prescribes thirty days for making an application for setting aside a decree passed ex parte by a defendant, from "the date of the decree or, where summons was duly served, when the applicant has knowledge of the decree." In the present case there is no dispute that the defendant was served with summons and, therefore the application had to be filed within thirty days from the date of the decree. There is no dispute again, that 30-11-1951 was the date of the decree. In that view of the matter the application should have been filed latest by 30-12-1951. The courts, toeing closed on account of the Christmas and New Year's holidays, reopened on 2-1-1952. The court below has, however, held that because on 2-1-1952, no work was transacted, therefore, for all practical purposes the court remained closed on that date. In my opinion, the court below was entirely in error in thinking that as no work was transacted on 2-1-1952, the court would be deemed to have remained closed on that date. As I have already mentioned, the court remained open on 2-1-1952, and it did not matter in the least whether any court work was transacted or not. The court remained open on that date and if the litigants wanted to make an application or file a suit, they could have done so on that date. Therefore, I would hold that the application when it was not filed on 2-1-1952, was barred by limitation under Article 164, Limitation Act, when it was filed on

25-1-1952.

6. The question is whether this Court sitting in revision can set aside the order of the court below. Section 115, Civil Procedure Code, which gives power of revision to this Court, runs as follows :

> "The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears-
> (a) to have exercised a jurisdiction not vested in it by law, or
> (b) to have failed to exercise a jurisdiction so vested, or
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit." Mr. Untwalia, learned counsel appearing on behalf of the plaintiffs-petitioners, has submitted that this Court has got ample

power to interfere with the order of the Court below holding that the application for setting aside the ex parte decree was not barred by time inasmuch as by wrongly deciding the question of limitation it has assumed jurisdiction to set aside the ex parte decree.

7. It is now well established that, under this Section, this Court can only interfere if the subordinate Court has usurped jurisdiction or has denied jurisdiction, and also if the Court below, while acting within jurisdiction, has acted illegally or, in other words, has acted in breach of some provision of law, or when it has acted with material irregularity, that is to say, has committed some error of procedure which materially affected the decision on merits.

8. The exercise of jurisdiction by a Court of limited jurisdiction, however, depends upon certain conditions, including conditions which may be termed as preliminary conditions. If the subordinate Court comes to a wrong finding in regard to these preliminary conditions, then it might result in either usurpation of jurisdiction or denial of jurisdiction, and within the expression preliminary conditions must be included matters of procedure laid down by the law as to how jurisdiction has got to be exercised. The question of limitation is one of such matters of procedure. Section 3, Limitation Act, enjoins that, subject to the provisions contained in Sections 4 to 25, every suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defense. It is, therefore, obvious that, if a suit or an appeal or an application has been filed beyond the period of limitation prescribed therefor by the first schedule, the suit or the appeal or the application, as the case might be, has got to be dismissed. If, the subordinate Court wrongly finds that the suit or the appeal or the application is not barred by limitation, that finding upon limitation will lead either to failure to exercise jurisdiction or to wrong assumption of jurisdiction. In either case, the matter will relate to jurisdiction and this Court, under section 115 of the Code, will be entitled to interfere.

9. Mr. Untwalia has placed reliance upon the case of - '*Joy Chand Lal v. Kamalaksha Chaudhury*[1]', The facts of that case were that a debtor had filed an application for relief under Sections 30 and 36 of the Bengal Money Lenders Act (10 of 1940) in respect of a loan. The debtor would be entitled to relief only if it was held that the loan was not a commercial loan. The first Court held that it was a commercial loan, and, therefore, the relief under Sections 30 and 36 of the said Act could not be given to the debtor. On application in revision to the High Court it was held that the loan was not a commercial loan, and, in that view of the matter, the case was remanded, to the first Court for retrial. Against the judgment of the High Court, an appeal was taken to the Privy Council. While dealing with the question whether the High Court was entitled, under Section 115 of the Code, to interfere with the order of the Court of first instance, it was observed as follows:

> "A court has jurisdiction to decide a case wrongly as well as rightly. Mr. Pringle maintained that the learned Subordinate Judge had jurisdiction to decide that the loan was a commercial loan, and in so doing he did not act illegally or with material irregularity, and the High Court had no power to interfere in revision merely because it disagreed with his decision.

So far Mr. Pringle is on safe ground, but the learned Subordinate Judge, having held that this was

a commercial loan, was bound to go to consider what effect that decision had on the respondents' application, and, since the Act in terms does not apply to commercial loans, the learned Judge was bound on his finding, to dismiss the application without determining whether or not the respondents brought themselves within sections 30 and 36 of the Act as they claimed to do. 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-section (b) of Section 115. 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 by 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 cases of - *'Babu Ram v. Munna Lal*[2]*',* and - *"Hari Bhikaii v. Naro Vishvanath*[3]*',* 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. In the present case their Lordships are of opinion that the High Court, on the view which it took that the loan was not a commercial loan, had power to interfere in revision under sub-section (b) of Section 115." That this interpretation of Section 115 reflected the settled view of their Lordships of the Privy Council is clear from the observation of their Lordships in the case of - *'Balakrishna Udayar v. Vasudeva Ayyar*[4]*',* where it is said :

> "It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

It is, therefore, clear that, if the subordinate Court comes to a finding which involves question of jurisdiction, the High Court will be entitled to interfere. Mr. Untwalia has also placed reliance on the case of - *'Basantilata Dhar v. Amamath Haldar*[5]*',* In this case also the Court of first instance had wrongly decided the question of limitation, and it was held that the construction put upon the words by the learned Judge was not
correct, that he had exercised jurisdiction under misconception of the law and that, in other words, he had exercised jurisdiction not vested in him by law. To the like effect is the decision in - *'Mohammad Khan v. Mohammad Salim Khan*[6]*';* where it was held :

> "By a wrong decision upon a question of limitation or a question of res judicata, the Court commits an illegality in the exercise of its jurisdiction with the result that it either fails to consider the case upon its merits or considers it upon its merits when it ought not to have done so. It will be observed that the questions of limitation and res judicata are questions of procedure. In deciding wrongly upon these questions the Court adopts a wrong procedure for the decision of a case and thereby acts illegally in the exercise of its jurisdiction with the result that one of the parties is severely prejudiced."

10. Mr. Bose, on the other hand, has placed before us the case of - *'Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras[7]',* That case, however, is entirely different on facts. There, the question was not one of jurisdiction but of the construction of a will and that was the only point involved in the case on which decision had been given by the Court of first instance. In my opinion, therefore, there is no conflict between this case and the law laid down by the Privy Council in - 'AIR 1949 PC 239'.

11. A Division Bench of this Court - *'Jhotu Lal v. Ganouri Sahu[8]',* which necessitated reference of this case to a larger Bench, had held that an erroneous finding in regard to limitation could not be interfered with by this Court under Section 115, Civil Procedure Code, because this was not an error in exercise of jurisdiction. The earlier case of this Court in - *'Jadulandan v. Jung Bahadur[9]',* which had decided that if the Court below had taken a wrong view of the question of limitation, this Court was entitled to interfere in revision had not been referred to. In subsequent decisions of this Court, one of which need only be mentioned - *'Radhaballabh v. Ramranvijay Prasad Singh[10]',* it was held that, if the Court below had taken a wrong view of the question of limitation, this Court had the power to interfere under Section 115 of the Code. Now, after the decision of the Privy Council, it must be held that the view taken in - 'AIR 1918 Patna 390' is not a good law.

12. I would, accordingly, hold that the Court below, having come to a wrong finding about limitation, assumed jurisdiction in deciding the case on merits and holding that sufficient cause had been made out for setting aside the ex parte decree.

13. In the circumstances stated above, I would allow the application and set aside the order of the Court below dated 24-5-1952, setting aside the ex parte decree passed on 30-11-1951. The petitioners will get their costs with hearing fee of Rs. 32/- (thirty-two only).
Choudhary, J.

14. I agree.

Petition allowed.

Cases Referred.

[1] AIR 1949 PC 239
[2] AIR 1927 All 358
[3] 9 Bom 432
[4] AIR 1917 PC 71 at p. 74
[5] AIR 1950 Cal 411
[6] AIR 1951 All 392
[7] AIR 1949 PC 156
[8] AIR 1918 Pat 390
[9] AIR 1916 Pat 31
[10] AIR 1947 Pat 391