Pt. Chandi Prasad vs Pt. Sadanand Pathak And Ors. on 4 April, 1952

Equivalent citations: AIR1952ALL974, AIR 1952 ALLAHABAD 974

JUDGMENT

Mushtaq Ahmad, J.

1. Both these appeals are by the decree-holder, each arising out of proceedings relating to a separate decree. The decree out of which the appeal first mentioned arose was No. 2331 of 1933 of the Court of Judge Small Causes, Gorakhpur, and the decree out of which the other appeal arose was No. 2128 of the same year and of the same Court. I propose to deal with these appeals together.

2. It is necessary, for introducing the points in controversy, to set forth a few facts.

3. On 30th August 1933, the decree No. 2331 of 1933 was passed by the Court already mentioned. On 16th October 1933, the decree-holder made his first application for execution to the Small Cause Court, and on the same date an order was passed transferring the execution case to the Court of Munsif, Bansgaon, where an execution case relating to another decree No. 1142 of 1933 of the Court of Small Causes Gorakhpur was already pending. On 17th September 1941 the appellant made a statement before the Munsif, Bansgaon, in the execution case just mentioned that his applica-tion for execution might be struck off. It is curious that he also added in his statement that the attachment might continue. The learned Munsif accordingly passed an order that the application might be struck off, although equally curiously he also said that the attachment might subsist. On the same date (l7th September 1941) he passed another order in the execution case relating to the decree No. 2331 of 1933 referred to above that the application for execution in that case also should be struck off.

4. When the records in the two cases came back to the Small Cause Court at Gorakhpur an order was passed under the signature of the Munsarim and perhaps it would be more correct to say that a note was recorded by him, on the record of each of these two cases that it should be struck off and the file consigned to the Record Room.

5. On 14-10-1944, the decree-holder made his second application for execution in each of the two decrees. These in their turn were also transferred to the Court of the Munsif, Bansgaon, and there the proceedings somehow or other came to an end on some date or dates which it is not necessary to mention.

6. On 4-4-1946, the decree-holder made his third application for execution in each of the two cases. The judgment-debtors objected that the applications were time-barred. Before the execution Court, the decree-holder sought an amendment of his applications for execution by introducing the information that Ram Narain Pathak, one of the judgment-debtors, had been away on Military service, so that the period during which he had been on such service might be excluded in computing the period of limitation.

7. There is no doubt that the second application for execution dated 14-10-1944, had been made within three years of 16-10-1941, the date of the order of the Munsarim of the Small Cause Court Gorakhpur but beyond three years from 17-9-1941, the date of the order of the Munsif, Bansgaon, striking off the execution proceedings in each of the two cases. If the relevant date from which the period of limitation for the said application of 14-10-1944, was to be computed was 16-10-1941, the application was obviously within time. If that date was, however, the earlier date of 17-9-1941, on which the Munsif, Bansgaon, had struck off the execution cases, the said application was on the face of it beyond time. The question, therefore, was which of the two orders prior to the application of 14-10-1941, was to be taken as the final order passed on a previous application within the meaning of Clause 5 of Article 182, Limitation Act.

8. The execution Court, holding that the final order was really the order of the Munsarim, of 16-10-1941, disallowed the objection of the judgment-debtors, although at the same time it refused to allow the decree-holder to amend his application claiming an exclusion of the period during which Ram Narain, judgment-debtor, had been in Military service under Section 11, Soldiers (Litigation) Act IV of 1925, this on the ground that the decree-holder had not desired such amendment at the proper stage.

9. The lower appellate Court reversed this order and allowed the judgment-debtors' objection, at the same time refusing to entertain the decree-holder's contention that he was entitled to exclude the said period under the said Act. On the question of limitation, the learned Judge took the view that the final order on the previous application within the meaning of Clause 5 of Article 182, Limitation Act was the order of the Munsif, Bansgaon, dated 17-9-1941, and that, as the second application for execution dated 14-10-1944, had been made more than three years from the date of that order, it was beyond time so that the next application for execution dated 4-4-1946, could also carry no effect. On the question of the applicability of the Indian Soldiers (Litigation) Act, invoked by the decree-holder, the learned Judge held that, in view of the decree-holder having failed to mention in this application for execution the fact of Ram Narain being in Military service and in view of the provisions of Clause (b) of the Proviso to Section 6 of the Act, the decree-holder was not entitled to have any period excluded under Section 11 of that Act.

10. Mr. Kanhaiya Lal Misra, appearing for the appellant in these appeals, raised three points before me :

> (1) that the date of the final order from which the period of limitation for the second application for execution could be computed was really 16-10-1941 and not the earlier date of 17-9-1941, (2) that, under Section 11, Soldiers (Litigation) Act IV of 1925, the

decree-holder was entitled to have the period during which Ram Narain Pathak had been in Military service, namely that from July 1944 to 30-11-1946, excluded in computing the period of limitation for the applications made for execution, and (3) that Section 4 of the Act relied upon by the lower appellate Court was only directory and did not have the effect of controlling the provisions of Section 11 thereof.

11. As regards the first contention, I am not inclined to endorse it at all. The order which can be taken as the final order within the meaning of Clause 5 of Article 182, Limitation Act, must be an order of the Court. The orders of 16-10-1941, in the two cases were orders not by the Small Cause Court, but by the Munsarim, inasmuch as they do not bear the signature of the Judge. On the other hand, the only order by the Court which could be deemed as the final order on an application previously made was the one passed by the Munsif, Bansgaon, on 17-9-1941, in the two cases. There can thus be no doubt that this was the order from which only the period of limitation for the decree-holder's second application for execution dated 14-10-1944, could be computed. I must, therefore, reject the learned counsel's contention on this point.

12. As regards the second contention, it is necessary first of all to indicate the relationships inter se of the judgment-debtors. A short pedigree will serve the purpose.

"RAM DIHAL PATHAK | _____|_____ | | Chander Dev Sada Nand | _____|_____ | | | Ram Narain Prem Narain Rameshwar"

13. The two sons of ram Dihal Pathak were the original judgment-debtors, and on the death of Chander Dev, one of them, the names of his three sons in the above pedigree were brought on the record. One of these three sons, Ram Narain, it was admitted by Sada Nand, judgment-debtor, in a statement (paper 22e), had taken service in the Army in July 1944, where he was still, till the date of that statement, serving. There was also on the record a letter (paper 17c) from the Officer Commanding, South Poona, dated 9-1-1947, to the effect that Ram Narain Pathak had been dismissed from Military service with effect from 3-1-1945. On the basis of these materials it appears to have been contended in the lower appellate Court and it was urged before mo also by the decree-holder's counsel that Ram Narain Pathak had been serving as a soldier "under special conditions" within the meaning of Section 11, Indian Soldiers (Litigation) Act, IV of 1925, and that, therefore, the decree-holder was entitled to have the entire period of such service excluded in computing the period of limitation for his applications for execution.

The learned Civil Judge repelled this argument on the ground, as already stated, that the decree-holder had not in the first place stated in his application for execution the fact of Ram Narain having been in Military service and the ground that he had been fully represented by the other judgment-debtors whose interests were in every sense identical with those of Ram Narain. I may say here at once that the learned counsel for the decree-holder has frankly conceded before me today that, so far as this identity of interests and the consequent representation of Ram Narain by the other judgment-debtors are concerned, he was not prepared to deny the same. Nonetheless, he contended, that the provisions of Section 11 of the Act were absolute and could in no sense be taken

as modified even in cases where the provisions of Section 6, proviso (b) were applied.

14. Before I enter into this last question I may briefly notice a point raised by the learned, counsel for the respondents. Whatever may have been the assumption underlying the discussion of the point by the lower appellate Court, he urged that there were no materials on the record on which Ram Narain Pathak could be deemed as a soldier serving "under special conditions" within the meaning of Section 11 of the said Act. He said that the only materials bearing on the point were the statement (paper 22c) of Sada Nand and the letter (paper 17c) of the Officer Commanding, South Poona and that from neither of these could it be suggested that Ram Narain was serving "under special conditions" within the meaning of Section 3 of the Act. In one view this contention may admit of an easy answer, namely that Ram Narain could at least be regarded as "serving under war conditions" within the meaning of Clause (b) of the section just mentioned. The period of the man's service synchronised with a portion of the period of the last world war. The entire Indian Army, understand, was during that period formed of Mobilised Units, and this obviously on account of the war. I cannot see how Ram Narain, though serving in the Army in India, could not be regarded as "serving under war conditions" within the meaning of the said clause. I need not enter into any further details in regard to this point as I have come to the conclusion that the decree-holder's contention based on Section 11 of the Act cannot be accepted in view of Clause (b) of the Proviso to Section 6 thereof. I would consider this point now. Section 11 of the Act, without unnecessary words, provides:

> "In computing the period of limitation ... for any suit, appeal or application to a Court, any party to, which is or has been an Indian soldier . . . the period during which the soldier has been serving under any special conditions shall be excluded."

As the language of this section stands, there can be no doubt that the rule of exclusion of the period during which a party has been serving as a soldier under special conditions is absolute, and to this extent the learned counsel for the decree-

holder is perfectly right. An exception, however, is furnished to my mind by the class of cases in which the provisions of Clause (b) of the Proviso to Section 6 of the Act are applied. This section and the Pro-

viso, leaving unnecessary words, enact:

> "…. if the Court has reason to believe, that an Indian soldier, who is a party to any proceeding pending before it, is unable to appear therein, and if the soldier is not represented by any person duly authorised to appear, plead or act on his behalf, the Court shall suspend the procee- dings, and shall give notice thereof in the prescribed manner to the prescribed authority:
>
> Provided that the Court may refrain from suspending the proceeding and issuing the notice if-
>
> (a) * * *

> (b) the interests of the soldier in the proceeding are, in the opinion of the Court, either identical with those of any other party to the proceeding and adequately represented by such other party or merely o a formal nature."

On the words of this section, it is no doubt clear that it applies to a pending proceeding by or against a person who is a soldier either not represented or unable to plead before the Court. To this extent it may again be conceded that the rule contained in Section 11, which ex facie appears to be inflexible, remains unaffected in the sense, that, while that rule is one of exclusion, the rule in Section 6 is one of suspension of a pending proceeding, and the two may hardly be imagined as indicating the same conception. The exception to that rule of Section 11 still however comes in a certain alternative, namely where the Court has chosen to regard the absent party as duly represented by those who are present or where it regards the interest of the latter and the former absolutely identical. Where such is the position, the Court is empowered not to issue the notice required by this section but to proceed in the normal way as if the absentee party was as much before it as the others. Such a position can be deemed as consistent only with one hypothesis, namely that, in spite of the man being bodily absent under the conditions mentioned in Section 11 of the Act, the proceedings against him can be legally carried on, or, in other words, the plaintiff or the decree-holder, as the case may be, is not entitled to an extended period of limitation by eliminating the period during which that particular man had served or was serving as a soldier under those conditions. It is this particular alternative which to my mind presents a departure from the apparently absolute rule embodied in Section 11 of the Act, and to this extent it furnishes an exception to that rule.

The learned Judge in this case found as a fact, and, as I have already said, even the learned counsel for the decree-holder conceded, that the interests of the other judgment-debtors were identical with those of Ram Narain who was duly represented by them. In Sreenivasa Chariar v. Seshadri Iyengar, A. I. R. 1946 Mad 460 a Bench of that Court held that, where a mortgagee had obtained a mortgage decree against A and B, these two being members of a joint family of which A was the Manager, and in execution the family property was sold, B who was in the Army Overseas serving as a clerk, later on applying to set aside the sale, the interests of justice did not require that the sale should be set aside. It was further observed that A being the Manager of the family was clearly the proper person to oppose, if necessary, the execution of the decree against the family property and that, unless B was able to show that, despite the fact that his brother A was the manager of the family, he did not adequately represent him or had done some act to prejudice him, he could not succeed in the application to set aside the sale. In this case also, the rule in Clause (b) of the Proviso to Section 6 was applied.

15. As regards the bearing of Section 4 of the Act, learned counsel for the decree-holder argued that this section only laid down certain rules of guidance which a plaintiff in his plaint or an applicant in his application had to observe, the object merely being of apprising the Court on the one hand and warning the opposite party on the other of the true nature of the claim made, as well as the background in which it was made. Learned counsel is perfectly right so far as this argument is concerned. But the point of the decree-holder in this case not having mentioned the fact of Ram Narain Pathak being employed in Military service carries another implication on which emphasis has been laid by the learned counsel for the judgment-debtors. This is that even the decree-holder

deemed it unnecessary to mention the fact under the belief that Ram Narain's brother Sada Nand and brothers Rameshwar Pathak and Prem Narain were already there to represent him in the execution proceedings. This only takes us back to the question of such representation, on which I have already said there is now no contest. Thus it is not necessary to accord any independent consideration to the effect of Section 4 of this particular Act on the appellant's right to execute the decrees.

16. For all these reasons, I have come to the conclusion that the judgments of the Courts below in the two cases are perfectly correct and that there is no substance in these two appeals. I therefore, dismiss them with costs.

17. Leave to appeal to a Division Bench is granted.