

(2006) 01 PAT CK 0079

In the Patna High Court

Case No : Appeal From Appellate Decree No. 431 of 1986

Gauri Shankar Pandey

APPELLANT

Vs

M/s Rupak Limited

RESPONDENT

Date of Decision : 20-01-2006

Acts Referred:

Companies Act, 1956 — Section 446, 529

Provincial Insolvency Act, 1920 — Section 28, 28(2), 78, 78(2)

Citation : (2006) 2 PLJR 21

Hon'ble Judges : Syed Md. Mahfooz Alam, J

Bench : Single Bench

Advocate : R.C. Sinha and Sushil Kumar, for the Appellant; Veena Rani Prasad and Sandeep Lal Patil, for the Respondent

Final Decision : Dismissed

Judgement

Syed Md. Mahfooz Alam, J.—This second appeal has been preferred against the judgment and decree dated 18th January, 1982, passed in Money Appeal No. 13 of 1978 by Sri R.P. Srivastava, 1st Additional District Judge, Patna, whereby he has been pleased to reverse the findings of the Additional Sub-Judge 1st, Patna, given in money suit No. 164 of 1965/1 of 1978 decreeing the suit of the plaintiff-appellant. Briefly stated the case of the plaintiff is that the plaintiff Gauri Shanker Pandey was the Manager and agent of M/s Rupak Limited, a public limited Company having its office at Rupak Cinema Building, Bakerganj, Patna. According to the plaintiff, he worked as Manager of the Company till 25.4.59 though the defendant wrongly showed his presence and employment as such till 8.2.59 and his salary was Rs. 200/- per month. According to the defendant, the plaintiff worked as Manager of the Company till 8th February, 1959 and his salary was Rs. 150/- per month. The plaintiff has further alleged that his accounts has not been settled and he has not been paid his dues, it was further alleged that the plaintiff was being paid advances and his salary used to be credited with the defendant for which the defendant used to maintain accounts. The defendant in spite of the request by the plaintiff to show and render accounts so that final

adjustment be made refused to do so and he did not offer or agree to pay the money due to the plaintiff, it was claimed that the plaintiff is entitled to receive Rs. 9419/- from the defendant and this figure can be ascertained only on rendition of account on the basis of the registers of the defendant showing advances and adjustments. It was also claimed that the defendant is the plaintiff's agent for the purpose of maintaining the accounts for and on behalf of the plaintiff. The plaintiff further claimed that the defendant-company was under the management of receiver appointed by the Hon'ble High Court of Judicature at Patna from April 1959 to 20.10.63. The plaintiff preferred his claim before the High Court but vide order dated 11.8.59 the Hon'ble court directed that the plaintiff's claim would rank as of an unsecured creditor. Under the above circumstances it was alleged that the plaintiff is entitled to a decree for rendition of accounts against the defendant in respect of his dues, if any, and prayer was made to pass a preliminary decree for accounts and for final decree for such sum as may be ascertained and found due on rendition of accounts with interest at 9% per annum pendente lite and future with costs.

2. The defendant in his written statement alleged that the suit as framed was not maintainable and the plaintiff had no cause of action for the same. The suit was barred by limitation. In Pauper Misc. Case No. 28/66 the plaintiff himself stated that his salary was Rs. 150/- per month. The plaintiff was in service of the defendant at this rate till the period written in the Register (8th February 1959). It was also alleged that the plaintiff took regular advances on account of his salary, his account was squared, paid up and closed up long back and nothing was due to him. With such allegation it was alleged that the plaintiff has got no cause of action for the suit which is fit to be dismissed with costs.

3. On the basis of the pleadings of both the parties, the learned trial court had framed as many as six issues which are as follows:

"1. Is the suit as framed maintainable?

2. Has the plaintiff any cause of action for the Suit?

3. Is the suit barred by limitation?

4. Is there relationship of principal and agent between the parties and is the plaintiff entitled to get a decree for accounts against the defendant?

5. Is the plaintiff entitled to get a decree for the amount claimed?

6. To what other relief or reliefs, if any, is the plaintiff entitled?

4. From the perusal of the judgment of the trial court it appears that after making full discussion on the above mentioned issues the trial court decreed the suit of the plaintiff-appellant by judgment dated 30.3.78. Against the said judgment, the defendant-respondent preferred appeal which was numbered as Money Appeal No. 13 of 1978. The said appeal was decided on 18th January, 1982, by Sri R. P. Srivastava, 1st Additional District Judge, Patna, who by his

judgment and order set aside the judgment of the trial court and dismissed the suit of the plaintiff-appellant. Against the said judgment, this second appeal has been preferred by the plaintiff-appellant.

5. From the perusal of the record of this second appeal it appears that at the time of admission only one substantial question of law was framed which is as follows:

"As to whether the court of appeal below has rightly held the suit to be barred by limitation?"

6. Thus, before me there is only one substantial question of law which is to be decided in this second appeal. From the perusal of the judgment of the trial court it appears that on the point of limitation the trial court has framed issue No. III and raised question as to whether the suit is barred by limitation. It transpires that at para 6, 7 and 8 of the judgment of the trial court the trial court has made elaborate discussion on the point of limitation and after making discussion the trial court held that the plaintiff's suit is not barred by limitation. I would like to quote para 6, 7 and 8 of the judgment of the trial court which are as follows:

"6. Issue No. 3: The learned lawyer appearing on behalf of the defendant very vehemently challenged the suit on the ground of limitation. His contention was that the suit has been filed much after the expiry of the period of limitation prescribed under law and as such it is fit to be dismissed on this score alone. Elaborating his point he contended that admittedly the plaintiff was not in service from 26.4.59. The period of limitation will begin from 26.4.59 and the suit ought to have been filed within three years from that date. But actually it has been filed on 1.11.65, much after the period of limitation. He further contended that even assuming that there was relationship of principal and agent between the plaintiff and the defendant and the plaintiff demanded accounts but the defendant refused, even then the period of limitation for filing the suit would commence from the date when the agency came to an end. In this case the agency ended on 26.4.59 and suit ought to have been filed within three years from the aforesaid date, which has not been filed. In support of his aforesaid contention, he cited a ruling reported in Vishun Prasad Bhadani Vs. Union of India (UOI), . His further contention was that the entry in the balance sheets (Exts 1 and 1/a) showing in the liability column salary of the Manager, will not save the period of limitation. In support of his contention, he has cited ruling reported in T. Vinayaka Mudaliar Vs. Mindala Pottiamma, . His last contention in this regard was that the plaintiff made claim also before the High Court which was turned down on 11.8.59. If this date is taken to be for consideration, the period for filing the suit would be three years from the aforesaid date I.e. till 10.8.62. But the suit has not been filed during this period.

7. In this connection the contention made on behalf of the plaintiff is that there is no denial of the fact that the defendant company was in liquidation and was in possession of the Receiver from 24.4.59 to 20.10.63 and this fact has also been

clearly stated by P.W.2 at para 6. According to the provisions of section 78 clause 2 of the Provincial Insolvency Act, the aforesaid period i.e. from 24.4.59 to 20.10.63 should be excluded in computing the period of limitation prescribed for filing the suit under such cases and in this view the suit is not time barred.

8. In my opinion, the contention made on behalf of the plaintiff is well-founded. There is no denial of the fact that the defendant company was in liquidation and in that process under the charge of Receiver. It has been corroborated by the P.Ws. that the defendant company was in possession of the Receiver from 24.4.59 to 20.10.63. According to the provisions of Section 78 clause 2 of the Insolvency Act read with Section 28(2) of the said Act, the aforesaid period should be excluded in computing the period of limitation. If that period is excluded, the suit must be filed within three years from 21.10.63. As the suit has been filed on 1.11.65, it is well within the time prescribed under law. Thus, this issue is decided in favour of the plaintiff and against the defendant."

7. From the above discussion of the trial court it appears that the trial court has held that u/s 78(2) of the Provincial Insolvency Act read with section 28 of the said Act, the plaintiff is entitled to exclude the period within which the company was under liquidation in commuting the period of limitation and after excluding the said period the suit was filed within time.

8. From the perusal of the judgment of first appellate court it appears that on the point of limitation the first appellate court has made discussion at para 9 of his judgment and after making full discussion the first appellate court reversed the findings of the learned trial court and held that the suit is clearly barred by limitation. The finding recorded by the first appellate court at para 9 of his judgment is as follows:

"As regards the question of limitation, the defendant claimed that he worked under the plaintiff up to 25.4.59. It is not necessary to enter into the discussion on the question whether the plaintiff's salary was Rs. 200/- per month or Rs. 150/- per month as also on the question whether he worked as Manager up to 8.2.59 or up to 24.5.59. The findings of the learned Sub Judge on these questions appear to be correct. Normally the suit for unpaid wages should have been filed within three years after the wages accrued due under Article 7 of the Limitation Act. The suit by the principal against his agent for moveable property received by the latter and not accounted for could be filed within three years after the account is, during the continuance of the agency, demanded and refused or whether no such demand when made the agency terminate. In the present case so called agency must be deemed to have terminated at least on 25.4.59. The present suit having been filed on 1.11.65 was apparently barred by limitation. The plaintiff has not alleged in the plaint any reason due to which the apparent bar of limitation could be condoned or the suit could be held to be filed within the period of limitation. It was alleged in para 9 of the plaint that the defendant company was managed by receiver appointed by the Hon"ble High Court from April 1959 to 20.10.63. The plaintiff preferred claim before the High

Court but by order dated 11.8.59 the High Court directed that the plaintiff would rank as unsecured creditor. The plaintiff did not allege in so many words that he is entitled to exclude the period of 1959 to 20.10.63 in calculating the period of limitation. The materials on record show that there was company case No. 1 of 1959 pending before the High Court of Judicature at Patna, but from the documents on record the nature of this case cannot be ascertained and it is not possible to say that this case in which the receiver was appointed was a case for winding up the company or for its liquidation. Therefore, with the materials placed on record the findings of the learned Sub-Judge on issue No. 3 cannot be said to be justified. Here it is necessary to quote what the learned Sub Judge has written in para 7 of his judgment. Para 7 reads "In this connection the contention made on behalf of the plaintiff is that there is no denial of the fact that the defendant company was in liquidation and was in possession of the receiver from 24.5.59 to 20.10.63 and this fact has also been clearly stated by P.W. 2. According to the provisions of Section 78(2) of the Provincial Insolvency Act the aforesaid period i.e. from 24.5.59 to 20.10.63 should be excluded in computing the period of limitation prescribed for filing the suit under such cases, and in this view the suit is not time barred". It must be noted that there was no averment in the plaint or written statement or in the evidence of any of the four witnesses examined by both the parties that the company was under liquidation and in para 6 the plaintiff P.W 2 did not state that the company was under liquidation. He simply stated that on 24th April 1959 receiver was appointed for the Cinema and he worked till 20.10.63. Therefore, in absence of any evidence to show that the company was under liquidation there was no justification to call in aid the provisions of Section 28(2) of the Provincial Insolvency Act. Ext. 1 is the balance sheet of the company as on 30th November, 1963, alongwith the Director's report. In the Director's report filed by the plaintiff himself there is a sentence that the company went under the receivership from May 1959 primarily for liquidating the creditor's dues. The receiver could not do anything substantial and on the prayer of the directors to discharge the receiver a compromise was effected. This shows that the company was not to be wound up or liquidated in the aforesaid Company's Act Case No. 1 of 1959. My attention has been drawn to Section 529 of the Company's Act which provides for application of Insolvency Rules in winding up of insolvent company and to Section 446 of the same Act which provides that "when a winding up order has been made or the official liquidator has been appointed as provisional liquidator no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with against the company, except by leave of the Court and subject to such terms as the Court may impose. Relying upon these two provisions of the Company's Act, attempt was made to show that the learned lower Court was justified in excluding the period April 1959 to 20.10.63 in computing the period of limitation. I am unable to agree with the submissions of the learned advocate of the respondent because Section 529 of the Company's Act could not be utilized in this case since there was no evidence on record to show that the Company was an insolvent company and hence the provisions of

the Insolvency Act could not help the respondent. Section 446 of the Company's Act could also be not operate as a bar to the plaintiff-respondent in filing his suit within the period of limitation, because there is nothing on record to show that any winding up order was made by the Hon"ble Court or that the Official Liquidator was appointed as a provisional liquidator. In view of the above provisions, I find that the suit was clearly barred by limitation and the finding of the learned Addl. Sub Judge on the question of limitation were clearly erroneous."

9. The question is that which of the finding is correct and in accordance with law. From the perusal of the judgment of the trial court it appears that the findings of the trial court is based merely on assumption that the defendant company was under liquidation and was under the control of Receiver and therefore, u/s 28(2) of the Provincial Insolvency Act no suit against the company was maintainable and u/s 78(2) of the Provincial Insolvency Act the period during which the company was under liquidation has to be deducted in computing the period of limitation but the view of the appellate court is that there is nothing on record to show that the company had gone under liquidation and any liquidation proceeding was pending against the company. I am of the opinion that the view taken by the learned appellate court is correct as there is nothing to show that Company Case No. 1 of 1959 was filed under the provision of Provincial Insolvency Act in which Receiver was appointed as provisional Liquidator. The plaintiff has also not pleaded this fact in his plaint and there is no averment in the plaint that since the defendant-company was under liquidation from April 1959 to 20.10.63, as such, under the provision of section 78(2) of the Provincial Insolvency Act he is entitled for exclusion of the said period in calculating the period of limitation. In such view of the matter, I hold that the plaintiff is not entitled to get the benefit of Section 78(2) of the Provincial Insolvency Act and, therefore, the plaintiff's suit is barred by limitation. I, therefore, hold that the 1st appellate court has rightly held the suit to be barred by limitation. Accordingly, this substantial question of law is answered. In the result, I find no merit in this second appeal and hence the same is hereby dismissed but without cost. The judgment and decree passed by the 1st appellate court is hereby confirmed.