

(1942) 01 PAT CK 0018
In the Patna High Court

Jagdiswar Prasad Misra

APPELLANT

Vs

Harsaran Rai and Others

RESPONDENT

Date of Decision : 07-01-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 103

Citation : AIR 1942 Patna 270

Hon'ble Judges : Harries, C.J.;Dhavle, J

Bench : Full Bench

Judgement

Harries, C.J.—This is a second appeal from an order of the learned Subordinate Judge of Shahabad setting aside a decision of a learned Munsif on a preliminary point and remanding the case to be heard on its merits.

2. The plaintiff in the suit was an unsuccessful claimant whose application under Order 21, Rule 100, Civil P.C., had been dismissed. He had preferred the suit giving rise to this appeal to challenge the order of dismissal under Order 21, Rule 103, Civil P.C. The period of limitation for such a suit is one year from the date of the order made in proceedings under Order 21, Rule 100, Civil P.C.

3. The application under Order 21, Rule 100, Civil P.C., was dismissed on 31st January 1938, and on 23rd July 1938, the plaintiff filed his plaint in the suit brought under Order 21, Rule 103, Civil P.C. The suit was brought well within the period of one year allowed by the Limitation Act. In that plaint as filed, however, the present appellant the auction-purchaser was impleaded as a major defendant, whereas it is now admitted that he was a minor. Several adjournments were given to the plaintiff to effect service on the appellant, but eventually on 30th January 1939, the appellant was struck out from the suit and his name expunged from the array of defendants and thereafter the suit proceeded in his absence.

4. On 16th June 1939, the plaintiff made an application for adding the appellant as a minor defendant under proper guardianship. In that application it is not

suggested that the dismissal of the appellant from the suit on 30th January 1939, was irregular or wrong, and no complaint is made whatsoever against that order. The application was merely an application to add the appellant as a minor defendant appearing through a guardian. The application was allowed, and the suit came for trial.

5. The appellant pleaded that the suit was barred by limitation, and the learned Munsif accepted this contention and on this point alone dismissed the whole suit. The plaintiff appealed, and the lower appellate Court came to the conclusion that the suit was brought within time and, therefore, set aside the decree of the Court below and remanded the case to that Court to be heard on the merits.

6. The lower appellate Court came to the conclusion that the dismissal of the suit against the appellant or the expunging of his name from the array of parties was done contrary to law. The learned Judge was of opinion that, in the circumstances, the Court could have vacated its order and restored the appellant to the array of defendants. In such a case the learned Subordinate Judge appeared to think that no question of limitation would arise, and the appellant would have to be regarded as having been impleaded throughout the proceedings.

7. Mr. Bhuvaneshwar Prasad Sinha, who has appeared on behalf of the appellant has contended that the suit was clearly barred against the appellant. He was impleaded originally as a major defendant, but on 30th January 1939, his name was struck out from the array of parties, and according to Mr. Sinha that meant that the suit came to an end as against him. The order striking his name out was never challenged, but on 16th June, an application was made to add the appellant once more as a defendant. Mr. Sinha has intended that the effect of the application was precisely the same as if it had been an application to add the appellant as a party for the first time. Mr. Sinha has urged, it matters not, that he was one of the original parties whose name had been struck out.

8. In my judgment, the contention put forward on behalf of the appellant is well-founded. The effect of striking off the appellant's name from the array of the defendants was that the suit as far as he was concerned came to an end. When his name was added at a later date, a new suit must be regarded as having been brought against him, and if such was not brought within time then it was barred by limitation. If the suit must be regarded as having been brought for the first time against the appellant on 16th June 1939, then it was clearly barred by time as the application under Order 21, Rule 100, Civil P.C., was dismissed 18 months previously, namely 31st January 1938. The contention of the appellant in this case is fully supported by the decision of their Lordships of the Privy Council in *Haveli Shah v. Paimda Khan* AIR 1926 PC 88. In that case the names of two defendants who were the appellants before their Lordships were struck out by the Judicial Commissioner who substituted as the only defendants the administrators of the estate of another person. Their Lordships point out that the effect of striking out the names of the appellants was to bring to an end the suit

against them. Later, the Judicial Commissioner reviewed his order and directed that the names of the appellants be restored as defendants, and the plaint was accordingly amended. Their Lordships point out that the effect of reviewing of the order and restoring the appellants as defendants was the institution of a fresh suit against the appellants and as that suit was not within the period of limitation it was bound to fail. It is to be observed that in this case decided by their Lordships of the Privy Council the order removing the appellants from the array of defendants appears to have been made by mistake and was later vacated. In the present case it has been urged that the order expunging the name of the appellant from the array of defendants was made under a mistake but even so, that would not affect the validity of the order. The order still stands and the effect of it was to bring to an end as against the appellant the then proceedings. In the present case the order has never been reviewed or vacated as it was in the case before their Lordships of the Privy Council. In short, the case before this Court is even stronger than the case before their Lordships of the Privy Council.

9. Mr. D.N. Varma, who appears on behalf of the respondents has drawn the attention of the Court to the case in *Kirpa Ram Jhumekram Modia v. Modia Dayalji Jhumekram* (95) 19 Bom. 135 In that case a plaint as originally framed contained the name of Kirparam, stated to be of unsound mind, as first plaintiff and of his wife Nathi as his guardian and second plaintiff. When the plaint was actually filed, Kirparam's name was struck out by the pleader and Nathi. Subsequently, his name was restored on his own application, but the period of limitation prescribed for the suit had then elapsed. The first Court held that u/s 7, Limitation Act, the plaintiff's claim was not barred. On appeal, the Judge dismissed the suit, holding that the order of the first Court restoring Kirparam's name was bad, and that the suit was time-barred at the date of that order. In second appeal the High Court, reversing the decree of the lower appellate Court, held that the pleader and Nathi acted beyond their authority in striking out Kirparam's name, and that therefore the restoration of his name must relate back to the filing of the suit, which was therefore not barred by time. It appears to me that this Bombay case is clearly distinguishable from the case now before the Court. In the Bombay case Kirparam's name was never in the plaint as filed, it having been struck out by persons having no authority before it was actually filed. There were no proceedings of the Court putting an end to the proceedings against Kirparam, and that being so, the case even if rightly decided, cannot possibly affect the decision in the present case. In my view, the present case is clearly governed by the case decided by their Lordships of the Privy Council, to which I have made reference and that being so, the judgment of the learned Subordinate Judge cannot be sustained. The suit was clearly barred as against the appellant.

10. The learned munsif had dismissed the suit as against all the defendants, and the learned Subordinate Judge having set aside that order directed the munsif to hear the suit on its merits. All that I hold is that the suit as against the appellant

is barred by time, and the order of the Subordinate Judge as regards the appellant must be set aside and the suit as against him dismissed. The order of the Subordinate Judge ordering the case to be heard on the merits as against the defendants other than the defendant-appellant will stand, though I express no opinion as to whether the suit can or cannot proceed effectively in the absence of the appellant.

11. The result, therefore, is that this appeal is allowed and the order of the learned Subordinate Judge is set aside and the suit in so far as it is directed against the appellant is dismissed. The appellant is entitled to his costs in this Court and in the Courts below.

Dhavle, J.

I agree.