West Bengal State Co-operative Bank Limited and Another Vs Anita Roy and Others

Court: Calcutta High Court

Date of Decision: March 24, 2006

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 23 Rule 2, Order 7 Rule 6
Constitution of India, 1950 â€" Article 12
Limitation Act, 1908 â€" Article 120, 14, 58
Limitation Act, 1963 â€" Section 14, 15

Citation: (2006) 3 CHN 111 : (2006) 3 LLJ 393

Hon'ble Judges: Pravendu Narayan Sinha, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Jayanta Kumar Mitra, Tarun Kumar Roy and Saikat Banerjee, for the Appellant; Ashok Kumar De, Anit Rakshit, Saptangsu Basu, Sukdev Chatterjee, Partha Sarathi Bhattacharya and Sudakshina Dey, for the Respondent

Judgement

Bhaskar Bhattacharya, J.
This first appeal is at the instance of the defendant Nos. 1 and 2 in a suit for declaration, permanent injunction

and for recovery of money and is directed against the judgment and the decree dated 23rd August, 2004 passed by the Civil Judge, Senior

Division, Alipurduar, Jalpaiguri in Money Suit No. 2 of 2002 thereby passing a decree for recovery of Rs. 17,84,636.79 p. together with interest

to be calculated year by year on the total dues (excepting Provident Fund amount of Rs. 88,528/-) till the date of repayment at the rate of 6 per

cent per annum and also a monthly pension amounting to Rs. 2,559/- from the defendant Nos. 1 and 2.

2. The plaintiffs-respondents, namely, the widow and the children of one Narayan Chandra Roy, since deceased, filed in the Court of the Civil

Judge, Senior Division, Alipurduar, Jalpaiguri, a suit being Money Suit No. 2 of 2002 thereby claiming for the following relief:

(i) For a decree for declaration that the charged officer, namely late Narayan Chandra Roy, Ex-Branch Manager, Alipurduar Branch of West

Bengal State Co-operative Bank Limited was wrongly and illegally suspended.

(ii) A decree for declaration that the aforesaid officer was wrongly and illegally dismissed from service.

(iii) A decree for declaration that the said officer was due to retire in December, 2002.

(iv) A decree for declaration that the plaintiff are entitled to suspension allowance and all service dues from the date of suspension till he expired on

19.12.97.

(v) A money decree for Rs. 25,58,129.00 as per Schedule of claim and for such further amount as Hon''ble Court may determine.

(vi) (a) A decree for declaration that one member of the family of late Narayan Chandra Roy, Ex-Branch Manager, W.B.S.C-op. Bank Ltd.

(Arghya Roy, son) is entitled to a job on compassionate ground/vide death-in-harness.

(b) A decree for family pension.

(c) A decree for another service/retirement benefit.

(vii) Any other relief to which the plaintiffs may be found entitled in equity, justice and good conscience.

(viii) Permanent and temporary injunctions directing the defendants from filing up one suitable post if lying vacant or earmarking a post as and when

vacancy occurs.

AND

Mandatory injunction directing the defendants to provide a job to one family members of the aforesaid deceased officer.

AND

To earmark/keep in reserve an approximate sum for payment to plaintiffs as and when their money claim is decreed.

(ix) Costs of the suit.

3. The case made out by the plaintiffs-respondents may be summed up thus:

(a) One Narayan Chandra Roy, since deceased, served as the Branch Manager of the West Bengal State Co-operative Bank Limited, Alipurduar

Branch, who died on December 19, 1997. His retirement was in normal course due in the month of December, 2002.

(b) Shri Roy had joined the then Cooch Behar Central Co-operative Bank in the year 1967. Subsequently, the bank was merged with the West

Bengal State Co-operative Bank in the year 1972 and become the branch thereof. The said Shri Roy rose to the position of the acting Branch

Manager at Alipurduar Branch by dint of his sincerity, honesty and diligent service.

(c) The General Manager (Operation), West Bengal State Co-operative Bank Limited vide its Memo No. 1/1-3 dated 31st July, 1981 passed an

order of suspension and placed Shri Roy under suspension with immediate effect.

(d) Shri Roy was arrested by the police on 31th July, 1981 and subsequently, released on bail and the criminal case initiated against him terminated

on his death before actual trial.

(e) The General Manager (Operation), West Bengal State Co-operative Bank Limited by an order dated 28th May, 1982 issued a chargesheet

with the proposal to hold an enquiry in terms of the West Bengal Cooperative Societies Act, 1973 and the rules framed thereto and one Mr.

Tinkari Mukherjee, a retired District & Sessions Judge, commenced the enquiry.

(f) Shri Tinkari Mukherjee, the Enquiry Officer so appointed, directed the bank to pay subsistence allowance to the chargesheeted employee in

accordance with the rules observing that if such subsistence allowance was not paid, the enquiry was liable to be vitiated on that ground alone.

(g) The bank authority, however, did not pay any amount whatsoever pursuant to the direction of the Enquiry Officer, as a result, the Enquiry

Officer dropped the proceeding. The employer, however, appointed another Enquiry Officer, one Sri P.C. Bhattacharyya, the then Unit Manager,

24-Parganas North Unit of West Bengal Cooperative Bank and the said second Enquiry Officer submitted enquiry report dated 11th May, 1985.

By the said report he found Shri Roy guilty of serious and gross misconduct and recommended dismissal from service and the Managing

Committee vide its resolution dated 13th June, 1985 decided to impose punishment of dismissal and by a letter dated 14th June, 1985, the said

order of dismissal was communicated to Shri Roy.

(h) The above enquiry and the finding of guilt was made ex parte in gross violation of the rules, procedures and principles of natural justice and as it

appears from the record that the second Enquiry Officer had issued a letter dated 26th April, 1985 fixing 9th May, 1985 as the date of enquiry but

the said letter sent by registered post with acknowledgement due was received by Shri Roy on 22nd May, 1985, thirteen days after the date fixed

for enquiry.

(i) Shri Roy by his letter dated 31th July, 1985 sent by registered post with acknowledgement due asked for the relevant documents and also

challenged the ex parte order dated 14th June, 1985.

(j) The contentious issue relating to the said order of dismissal was pending in different forums i.e. the Labour Commissioner, the High Court etc.

and lastly, the High Court. Calcutta in W.P. No. 1735 (W) of 2001 passed an order of disposal of the writ application without prejudice to the

plaintiffs" right to pursue their claim in the appropriate forum with the observation that the said Co-operative Society was not a State or an

authority within the meaning of Article 12 of the Constitution of India and as such, the writ application was not maintainable.

(k) As Shri Roy was not paid any subsistence allowance and his legitimate dues, the financial crisis, tension, cardiac problems, blood sugar etc.

resulted in his tragic pre-matured death.

(l) In view of the order dropping the disciplinary proceedings by the Enquiry Officer who was a retired District Judge, the subsequent proceedings

initiated by a committed officer of a department of the employer was a nullity and bad in law and the said officer proceeded with the enquiry ex

parte without being satisfied himself whether the letter dated 26th April, 1985 had been really served upon the charged officer. A notice was also

served u/s 80 of the CPC upon the defendants but in spite of service no relief was given. Hence the suit.

4. The suit was contested by the bank authority, the present appellants as well as the respondent Nos. 3 and 4 by filing separate written statements

and the defence taken by the present appellants may be summarised thus:

(i) There was no cause of action for the suit and the same was not maintainable.

(ii) The suit was barred by limitation as the defendant No. 1 dismissed Shri Roy, the predecessor-in-interest of the plaintiffs on 13th June, 1985

and conveyed the said order of dismissal on 16th June, 1985.

(iii) The contact of employment between Shri Roy and defendant No. 1 came to an end from 16th June, 1985 and the said order of dismissal was

not challenged by the said dismissed employee in any competent Court of Law having jurisdiction. In such circumstances, the cause of action, if at

all, arose on 16th June, 1985 and the suit having been filed long after the lapse of 17 years from the date of accrual of the cause of action was

barred by limitation.

(iv) A writ application was filed by Narayan Chandra Roy before the Hon''ble High Court at Calcutta being C.O. No. 12443 (W) of 1986 in

respect of the same matter against the defendants and the said writ application was dismissed on 14th February, 2002.

(v) The suit was not maintainable as no succession certificate had been obtained by the plaintiffs being the legal heirs of the deceased Narayan

Chandra Roy in respect of the ascertained sum as claimed by the plaintiffs.

(vi) After June 16, 1885, the status of Narayan Chandra Roy was that of a dismissed employee and thereafter, he died on 19th December, 1997.

As there was no personal contact of employment between the deceased and the defendant No. 1, the right to sue did not survive upon the plaintiffs

and therefore, the suit was not maintainable.

(vii) The Civil Court could not go into the details of the chargesheet brought against an employee who was dismissed on 16th June, 1985 and died

on 19th December, 1997.

(viii) Shri Roy was placed under suspension due to financial irregularities, advancement of loan to different parties in an irregular manner

disregarding banking norms and on that basis, FIR was lodged being Alipurduar P.S. Case No. 807 of 1981.

(ix) Altogether three criminal cases under Sections 409/120B IPC and 409/420/465/468/120B IPC were initiated by the defendant No. 1 in the

Court of Sub-Divisional Judicial Magistrate, Alipurduar, and all the criminal cases terminated on the death of Shri Roy.

(x) The plaintiffs are estopped by the principles of waiver from raising any dispute as to the validity and legality of the enquiry long after the lapse of

seventeen years from the date of dismissal and that too, long after the death of the delinquent. The delinquent did not challenge the report of

enquiry during his lifetime for long 12 years and only on his death, that even after the lapse of five years, the enquiry report was challenged by the

legal heirs.

(xi) The enquiry proceedings were absolutely lawful and were neither a nullity nor bad in law and as such, the suit was liable to be dismissed.

5. The defendant Nos. 3 and 4 filed separate written statement thereby asserting that the suit was not maintainable and that there was no cause of

action, particularly, against the defendant Nos. 3 and 4.

6. At the time of hearing of the suit three witnesses deposed on behalf of the plaintiffs while one Pulak Kumar Mitra, an employee of the bank

alone appeared in the witness-box on behalf of the present appellants.

7. By the judgment and decree impugned herein, the learned Trial Judge has found that the order of termination of Narayan Chandra Roy was

totally illegal for not following the rules framed for taking disciplinary action against an employee of the bank and thus, it, was declared that such

termination was illegal. The learned Trial Judge, accordingly, granted decree for recovery of dues as if he was in service till his death on 19th

December, 1997. The learned Trial Judge, as indicated above, also passed direction of payment of interest at the rate of 6 per cent per annum to

be counted year by year upon the defendant Nos. 1 and 2.

8. Being dissatisfied, the defendant Nos. 1 and 2 have come up with the present appeal.

9. Mr. Mitra, the learned Senior Advocate appearing on behalf of the appellant has, at the very outset, submitted that the learned Trial Judge erred

in law in entertaining the suit which was on the face of the allegation made in the plaint barred by limitation. According to Mr. Mitra, Shri Narayan

Chandra Roy having been dismissed vide letter dated 14th June, 1985 and the same having been communicated to him on 16th June, 1985, the

cause of action for filing the present suit arose on that date and according to Article 58 of the Limitation Act, the period of limitation for riling such

a suit is three years when the cause of action had first accrued. In support of his contention, Mr. Mitra relied upon a decision of the Apex Court in

the case of S.S. Rathore Vs. State of Madhya Pradesh, . Mr. Mitra submits that against such order of dismissal there being no departmental

appeal preferred by the dismissed employee, there is no scope of even extension of cause of action from the final order of dismissal by such

appellate authority.

10. Mr. Mitra further contends that the dismissed employee himself filed a writ application challenging the order of dismissal in the year 1986 being

C.O. No. 12443 (W) of 1986 but after his death in the month of December, 1997, his heirs and legal representative did not continue with the said

writ application and ultimately, in the year 2002, the said writ application was dismissed for default.

11. According to Mr. Mitra, the plaintiffs herein having decided not to continue with the writ application instituted by their predecessor and the

same having really abated on the death of the dismissed employee, no fresh suit lies on the self-same cause of action. Mr. Mitra further points out

that before the filing of the present suit, the plaintiff No. 1 filed another writ application before this Court claiming the self-same relief as claimed

herein but the said writ application was dismissed as not maintainable and thereafter, the present suit has been filed long seventeen years after the

order of dismissal of the deceased employee. According to Mr. Mitra, from the conduct of the present plaintiffs, they are not even entitled to. get

the benefit of Section 14 of the Limitation Act, inasmuch as, the dismissed employee during his lifetime did not bona fide take steps in the writ

application, as a result, the same was pending before this Court till his death and even after his death, for the next three years and odd, no step was

taken by the heirs and legal representatives of the deceased employee when one of them filed a fresh writ application. In such circumstances, Mr.

Mitra prays for dismissal of the suit simply on the ground that the suit was barred by limitation.

12. Mr. Mitra next contends that as regards the merit of the dismissal order passed by his clients, it was the dismissed employee who was to be

blamed. According to Mr. Mitra, the delinquent did not participate in the proceedings and at the same time, there were serious allegations against

him of defalcation of money, as a result, three different criminal proceedings were initiated. Mr. Mitra submits that for the death of the dismissed

employee, those criminal proceedings could not end in conviction. According to him, no material was placed before the Trial Court to even justify

the conclusion that order of dismissal was bad. Mr. Mitra further contends that mere non-payment of subsistence allowance during the pendency

of the disciplinary proceedings by itself cannot be a ground of setting aside the order of dismissal. In support of his contentions, Mr. Mitra relied

upon the decision of the Supreme Court in the case of Indra Bhanu Gaur Vs. Committee, Management of M.M. Degree College and Others, .

13. Mr. De, the learned Senior Advocate appearing on behalf of the plaintiffs-decree holders has opposed all the aforesaid contentions advanced

by Mr Mitra. According to Mr. De, the dismissal order was on the face of it a nullity as will appear from the fact that his client''s predecessor was

not given subsistence allowance during the disciplinary proceedings when he was placed under suspension. Mr. De further points out that the first

Enquiry Officer appointed by the employer who was a retired District Judge passed specific direction upon the employer to pay subsistence

allowance by recording an explicit order that in the absence of such payment, the disciplinary proceedings itself would be invalid. Strangely enough,

Mr De continues, the employer did not comply with the direction given by the Enquiry Officer and consequently, the disciplinary proceedings were

dropped; but thereafter, the employer without complying with the earlier order of payment of subsistence allowance, appointed one of its loyal

employees who was posted in the district of 24-Parganas as a new Enquiry Officer and the said Enquiry Officer without enforcing the earlier order

passed by his predecessor for payment of subsistence allowance directed the indicted employee to appear in the fresh proceedings for

participation. It appears from the registered letter issued by the second Enquiry Officer, Mr. De proceeded, the same was received by the

deceased employee long after the date fixed for enquiry but the second Enquiry Officer was so much prejudiced that without ascertaining whether

the suspended employee had received such letter, exparte concluded that the charges against employee had been proved and within two days,

recommended order of dismissal which was approved by the Management. Mr. De submits that from the aforesaid fact it is clear that the order of

dismissal was a nullity and once it is held to be nullity, his clients were not required to pray for declaration that such order was a nullity as held by

the Supreme Court in the case of State of Madhya Pradesh v. Sayed Quamar Ali reported in 1967 SLR 228. Mr. De submits that the said

decision was given by a Bench consisting of five Judges and as such, the same is still the law of the land. Mr. De submits that if there was no

necessity of praying for specific declaration that the order of dismissal was wrong, in such a situation, the suit cannot be held to be barred by

limitation simply because the same was filed beyond three years from the date of communication of the order of dismissal as the predecessor of the

plaintiff was due to retire in normal course in the month of December, 2002.

14. Mr. De further submits that assuming for the sake of argument that his clients were required to file such a suit for declaration, they are entitled

to the benefit of Section 14 of the Limitation Act, inasmuch as, immediately after the passing of the order of dismissal, the dismissed employee

himself filed a writ application before this Court but the same was dismissed in the year 2002 for default when by that time the employee had

already died. Mr. De submits that as the relief of reinstatement was not available to the present plaintiffs they were advised to file fresh writ

application claiming monitory relief instead of continuing with the earlier one filed by their predecessor and accordingly, they bona fide filed the

second writ application before this Court which, however, was dismissed on the ground that the respondent was not a ""State"" within the meaning

of Article 12 of the Constitution of India by giving liberty to the plaintiffs to file appropriate suit in accordance with the law. According to Mr. De,

the period during which the original writ application of 1986 was pending should be excluded and at the same time, the second writ application

filed by the plaintiff No. 1 having been initiated bona fide, the period during which she proceeded with such application should also be excluded

and in that event, the suit was very much within the period of limitation even according to Article 58 of the Limitation Act.

15. Mr. De, thus, contends that the order of dismissal being a void order and the suit having been filed within the period of limitation, the learned

Trial Judge did not commit any illegality in passing a decree in favour of his client.

16. Mr. Mitra, the learned Counsel appearing on behalf of the appellant in reply placed before us some other subsequent decisions of the Supreme

Court where the decision of Qumar Ali v. State of Madhya Pradesh (supra), has been explained and it has been pointed out that all that has been

held in the said decision of Qumar Ali (supra), is that there is no necessity of praying for setting aside a void order but that does not mean that even

if apparently an order is a void one, the same is not required to be declared as void by way of institution of appropriate proceedings before the

appropriate forum by the appropriate person. In support of such contention, Mr. Mitra relies upon the decision of the Supreme Court in the case

of Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat, . Mr. Mitra further contends that the first writ application filed by the delinquent having

abated for non-substitution of his heirs and legal representatives, no fresh writ application was even maintainable on the same cause of action. Mr.

Mitra further contends that the suit on the same cause of action, it is needless to mention, is equally barred.

17. Mr. Mitra further contends that at any rate there is no scope of exclusion of any period after the writ application filed by the deceased

employee abated because the moment the writ application abated the same amount to dismissal of the writ application and the subsequent order of

dismissal of the self-same writ application for default is to be ignored for the purpose of giving benefit of Section 14 of the Limitation Act. Mr.

Mitra in support of his contention relies upon a decision of the Supreme Court in the case of Mithailal Dalsangar Singh and Others Vs. Annabai

18. Before entering into the question of limitation, we, however, propose to deal with the question whether the order of dismissal was really a valid

one or not.

19. After going through the materials on record we find that initially an order of suspension was passed by the respondent No. 1 and during the

period of suspension, no subsistence allowance was paid. The first Enquiry Officer, a retired District Judge, by his specific order being Exbt.15

directed the bank authority to deposit the subsistence allowance up-to-date for payment to the arraigned officer within 15lh February, 1984.

Ultimately, it appears from Annexure-''J'' the order dated 30th April, 1984, that the Enquiry Officer dropped the enquiry proceedings as the

employer had not complied with his earlier order of payment of subsistence allowance.

20. After the proceedings were dropped, the bank authority appointed a fresh Enquiry Officer being one P.C. Bhattacharyya on 26th April, 1985

and he sent a letter by registered post with acknowledgement due fixing 9th May, 1985 at 10:00 hours for fresh enquiry. It appears from Exbt.10A

that such letter was received by the deceased employee on 22nd May, 1985. However, in the meantime, the exparte enquiry was held on 9th

May, 1985 and report was given on 11th May, 1985 and the bank management approved such report on 19th May, 1985.

21. From the aforesaid fact it is clear that the Enquiry Officer without ascertaining the fact whether the registered letter sent by him on 22nd April,

had really reached the chargesheeted officer in the meantime decided to conclude enquiry when the period of one month from the date of posting

of the registered envelope had not expired and thus, there was even no scope of drawing presumption of due service. Subsequently, when the

acknowledgement card came back indicating that the envelope was received by the dismissed employee on May 22, 1985, it was definitely the

duty of the bank authority to recall such order of dismissal if they had any bona fide intention.

22. We, therefore, find substance in the contention of Mr. De that the order of dismissal was patently without jurisdiction, first, for non-compliance

of the order passed by the first Enquiry Officer directing payment of subsistence allowance and the consequential order dropping the enquiry

proceedings. Secondly, there was no reason assigned by the bank for starting fresh enquiry proceedings when the earlier Enquiry Officer had

dropped the proceedings and thirdly, the second Enquiry Officer without giving opportunity of hearing to the petitioner before arrival of the return

of service of notice fixing the date of hearing disposed of the proceedings exparte. Those facts indicate that the order of the authority was patently

illegal and without jurisdiction and tainted with malice and the learned Trial Judge rightly arrived at such conclusion.

23. The next and the most vital point involved in this appeal is whether notwithstanding such illegal order of dismissal, the heirs of the deceased

employee can get the benefit of payment of money and other consequential benefit in this suit.

24. At this stage, it may not be out of place to mention here that if the deceased employee was not dismissed, he would have in normal course

retired in the year 2002 but in the meantime he died on December 19, 1997. It appears from the pleadings of the appellants themselves that they

have admitted that the deceased employee filed a writ application in the year 1986, though, the actual date of filing of the writ application was not

available from the Lower Court Record. Mr. Mitra, the learned Senior Advocate appearing on behalf of the appellant fairly conceded that the

same was initiated sometime in the month of September, 1986. There is also no dispute that the dismissed employee died on 19th December,

1997 and that thereafter no step was taken by the present plaintiffs in the said writ application for being substituted and according to law, the said

writ application should be presumed to have abated three months after the death of the deceased employee. However, in the month of January,

2001, the plaintiff No. 1 filed a fresh writ application being W.P. No. 1735 (W) of 2001 before this Court challenging the said order of dismissal

but by order dated 11th June, 2001, the said writ application was dismissed by a learned Single Judge by accepting the point raised by the bank

that the bank is not a ""State"" within the meaning of Article 12 of the Constitution of India. Subsequently, on 12th August, 2002, the present suit

was filed. It further appears that the appellants in their written statement admitted that the original writ application filed by the Narayan Chandra

Roy in the year 1986 was dismissed by this Court on 14th February, 2002.

25. In our view, from September, 1986, the date of filing of the writ application by the deceased employee till 11th June, 2001 when the second

writ application filed by plaintiff No. 1 was dismissed for want of jurisdiction should be excluded for the purpose of computing the period of

limitation by invoking Section 14 of the Limitation Act. The reason is that Narayan Chandra Roy proceeded bona fide with the writ application

which was entertained by a learned Judge of this Court but he could not see the fate of the writ application during his lifetime for no fault on his

part. We are not at all impressed by the submission of Mr. Mitra that the deceased employee did not bona fide file the writ application or that he

was negligent in taking step in the writ application, as a result, the said writ application was pending till his death. The said writ application, as

mentioned earlier, was entertained by a learned Judge of this Court being prima facie satisfied with the merit and as such, want of bad faith cannot

be imputed to the dismissed employee in instituting the writ application. If the same was summarily dismissed holding that the bank was not a

State"", the deceased employee could at that stage move the civil forum. Similarly, merely because the said writ application was pending till his

death, no mala fides can be inferred. If really he had not taken appropriate step, the same would have been dismissed for non-compliance of the

order passed in lawazima. Such being not the position, we shall presume that he had no fault for non-disposal of the writ application during his

lifetime.

26. It is true that after his death, no application for substitution was filed in the said writ application within the period of limitation but subsequently,

a fresh writ application was filed three years one month after his death, and the said writ application was found to be not maintainable. Although,

there is scope of disputing the correctness of the decision of the learned Single Judge on the question whether the West Bengal State Co-operative

Bank is a ""State"" or not within the meaning of Article 12 of the Constitution of India, since both the parties had accepted the decision by not

challenging the same before higher forum, that decision is binding upon them and the principle of res judicata will be attracted. After the decision of

the learned Single Judge in the second writ application holding that the bank was not a State within the meaning of Article 12, there was no utility of

continuing with the pending writ application instituted by the deceased employee by filing an application for substitution because the same would

also have been dismissed on the self-same ground by reason of the binding decision passed in the subsequent writ application between the parties.

Therefore, no useful purpose could have been served by praying for substitution in the said writ application. We find substance in the contention of

Mr. De that as the relief of reinstatement made in the first writ application became unavailable to the heirs, the widow was advised to file fresh writ

application claiming monetary relief.

27. Although, Mr. Mitra tried to impress upon us that at the most, the period from September, 1986 till three months after the death of Shri

Narayan Chandra Roy could be excluded for the purpose of giving benefit of Section 14 of the Limitation Act, we are not at all impressed by

such-submission because of the Explanation to Section 14 of the Limitation Act. For the purpose of elaborating the said point, we propose to

quote Section 14 of the Limitation Act with the Explanation:

14. Exclusion of time of proceeding bona fide in Court without jurisdiction.- (1) In computing the period of limitation for any suit the time during

which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or of appeal or revision,

against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which,

from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another

civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where

such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in Rule 2 of Order 23 of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of Sub-section (1)

shall apply in relation to fresh suit instituted on permission granted by the Court, under Rule 1 of that order, where such permission is granted on

the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature.

Explanation.-For the purposes of this section,-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which

it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties, or of cause of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

28. From a plain reading of the aforesaid section, if is clear that for the purpose of giving benefit of Section 14 the entire period from the date of

institution till the proceedings ended should be excluded. In the case before us, the first writ proceedings really ended in the year 2002 when the

matter was dismissed for default but we are not prepared to exclude the entire period from September, 1986 till the dismissal for default because

the previous writ application was not really dismissed with a finding that the Court had no jurisdiction. Such finding had already been arrived at on

11th June, 2001 when the second writ application was dismissed on that ground. Therefore, in this case, the plaintiffs should get the benefit of time

spent from September, 1986 till 11th June, 2001 when the second writ application filed by the plaintiff No. 1 was dismissed on the ground of want

of jurisdiction. We are quite conscious that abatement of proceedings automatically occurs and no formal order need be passed, but by automatic

abatement of a suit, the proceedings are never ""ended"" in terms of Section 14 of the Limitation Act. For the purpose of elucidating the point, we

propose to give the following instance:

A suit is filed claiming a certain relief. The plaintiff or the defendant dies, as a result, the suit abates after the expiry of 90 days from the date of

death of either the plaintiff or the defendant. Long two years thereafter, an application for setting aside abatement is filed with a prayer for

condonation of delay and the Court allows such prayer and five years thereafter, the suit is ultimately dismissed holding that the Court had no

jurisdiction.

29. In the above situation, although, for about two years the suit remained in an abated stage, for the purpose of Section 14 of the Limitation Act,

the plaintiff, however, will get the benefit of the entire period right from the date of presentation of the suit till the actual dismissal of the suit on the

ground of want of jurisdiction and the period during which the suit remained at the state of abatement will not be excluded in view of the

Explanation appended to Section 14.

30. Similarly, in the present case, the present plaintiffs should get the benefit of the entire period spent by their predecessor during his lifetime as

well as the subsequent period up to the time when the second writ application was found to be not maintainable for want of jurisdiction; but they

should not get the benefit of the exclusion of the time till the actual dismissal of default because by the earlier order of the dismissal of the second

writ application filed by the plaintiff No. 1, the fate of the first writ application was also impliedly decided and no purpose would have been served

even by getting the abatement of the first writ application set aside at that stage. It should be presumed that the first writ application also would

have been dismissed on the ground of want of jurisdiction and as such, on June 11, 2001, the destiny of the first writ application was also sealed.

31. There is another legal bar in the way of Mr. Mitra''s client in getting the benefit of abatement of the first writ application. It appears that in the

second writ application filed by the widow of the deceased, the appellants could easily take the plea that the earlier writ application filed by the

deceased employee having been abated, without applying for setting aside the abatement, the second writ application on the self-same cause of

action was not maintainable. But instead of taking the said plea, the appellants invited the Writ Court to adjudicate the question whether it was a

State"" within the meaning of Article 12 of the Constitution and the learned Single Judge adjudicated the said question in favour of the appellants

and dismissed the writ application on that ground with liberty to the respondent to approach other forum in accordance with law. However, if the

appellants had taken the plea that because of the abatement of the earlier writ application, the second one was not at all maintainable and even a

suit before a Civil Court was not maintainable, the learned Single Judge would not entertain the writ application on that ground alone and there

would have no occasion for the Court to give liberty to file appropriate proceedings before the appropriate forum. If such plea was taken by the

appellant, the plaintiffs could instead of proceeding with the second writ application, apply for setting aside abatement of the first writ application

on showing sufficient reason. Therefore, the plea of abatement of the first writ application as a bar to the institution of the suit is not available to the

appellant by reason of the principle of constructive resjudicata. It is now a settled law that the principle of constructive resjudicata applies also to

the writ application. As pointed out by the Apex Court in the case of Chaya and Others Vs. Bapusaheb and Others, , if a litigant does not take the

plea of abatement at the relevant point of time and permits the proceedings to be decided on merit, such party should not be permitted to take the

plea of abatement at the appellate stage. Similarly, in this case, the appellant not having raised the plea of maintainability of the second writ

application due to abatement of the first one, they are precluded from taking the plea that the first writ application filed by the deceased employee

really abated and that the plaintiffs would not be entitled to get exclusion of the period after the death of the deceased employee. We shall,

therefore, for all practical purpose presume that at the time of disposal of the second writ application, the first one filed by the employee was still

pending and by virtue of the derision of the second writ application, the first one was also disposed of on the self-same ground on the same day.

32. In the case of Mithailal Dalsangar Singh and Ors. (supra), relied upon by Mr. Mitra, the Supreme Court observed that as the abatement results

in denial of the right of a party of hearing on merit, the provisions of abatement should be construed strictly. In that case, on the death of one of the

plaintiffs as no application for substitution was filed the suit abated as a whole. Subsequently, an application for simple substitution was filed without

the prayer for setting aside abatement and such prayer was allowed by the learned Trial Judge after being satisfied with the cause shown for delay

in filing such application. Before the Appellate Court, the defendant took a point that on the death of one of the plaintiffs, the suit having been

abated as a whole, the learned Trial Judge could not set side abatement in the absence of any application for setting aside abatement of the suit in

its entirety at the instance of the surviving plaintiffs as well as the heirs of the deceased plaintiff and such point was accepted by the Division Bench

of the High Court. In such a situation, the Supreme Court in paragraph 10 of the judgment made the following obser-vation:

In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no

order in writing passed by the Court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in

its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a suspended amimation. And

then it abates. The converse would also logically follow. Once the prayer made by the legal representatives of the deceased plaintiff for setting

aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the

constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even

though there was no specific prayer made and no specific order of the Court passed in that behalf.

33. From the aforesaid observation of the Apex Court it is clear that the approach in the matter of abatement should be liberal and the Court in the

absence of gross inaction and negligence of the parties should not deprive a party of his right of hearing on merit. In the case before us, the plea of

abatement although was available to the appellant was not pressed before the second writ application and as such, this Court gave liberty to the

plaintiffs to move the appropriate forum. If the plea of abatement of the first writ application was pointed out and insisted on, the Court would not

even grant the plaintiffs'' leave to approach the Civil Court in accordance with law as their remedy would have been barred. We have already

pointed out that such plea is barred by the principle of constructive resjudicata. We, thus, find that the aforesaid decision rather supports the

plaintiffs.

34. We are quite conscious that in the plaint the plaintiff did not specifically claim the exclusion of time spent by their predecessor or by the plaintiff

No. 1 by the subsequent writ application, though, there is indication that the subsequent writ application was filed and at the same time the

defendant has admitted the existence of the first writ application filed by the predecessor of the plaintiff in their written statement. Therefore, those

materials are on record. Moreover, by virtue of the proviso added to Order 7 Rule 6 of the Code of Civil Procedure, even if the plaintiff had not

specifically prayed for exclusion of any time for the purpose of limitation, the Court is entitled to give benefit of Section 14 of the Limitation Act, if

such fact is apparent from the pleadings of both the parties and is not inconsistent with the plaint case.

35. We, therefore, propose to exclude the period from September, 1986 till 11th June, 2001 and in that case, the present suit filed on 28th

August, 2002 is well within the period of three years prescribed by Article 58 of the Limitation Act from June 16, 1985, the date of communication

of the order of dismissal.

36. We are, however, of the view that even if a void order is passed by an authority, such order is required to be set aside by filing a suit and we

propose to follow the decisions of the Supreme Court in the case of State of Punjab and Others Vs. Gurdev Singh, , where the decision in the case

of the Quamar Ali (supra), has been properly explained and we are bound by the explanation given in the case of Gurdeu Singh (supra), which is

not apparently in conflict with the decision given in the case of Quamar Ali (supra).

37. We, therefore, find that the suit out of which the present appeal arises is governed by the provisions contained in Article 58 of the Limitation

Act and if we exclude the time spent by the original employee as well as the plaintiff No. 1 bona fide for pursuing the appropriate relief from

September, 1986 till 11th June, 2001, the suit filed on 28th August, 2002 is well within the period of three years and therefore, the learned Trial

Judge did not commit any illegality in entertaining the suit.

38. We now propose to deal with the decisions cited by the learned Advocate for the parties.

39. In the case of Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh, , a Bench consisting of five-Judges held that where a delinquent had

specifically communicated his inability to attend the enquiry due to paucity of funds resulting from non-payment of subsistence allowance, the

enquiry was vitiated for his non-participation. According to the said decision, no adverse inference as to his sources of income could be drawn

from the fact that he did not state them in his affidavit in the writ petition or from the fact that he challenged his dismissal by filing a writ petition

immediately after his dismissal and subsequently, came in appeal before the Supreme Court. In the case before us, the dismissed employee

complained before the first Enquiry Officer about non-payment of subsistence allowance, as a result, the first Enquiry Officer gave specific

direction upon the employer to pay the subsistence allowance and, in default, threatened to drop the proceedings. In spite of such direction, the

employer not having complied with the said direction, the first Enquiry Officer dropped the proceedings. No reason was assigned by the employer

in the present case why subsistence allowance was not paid to the delinquent and also for non-compliance of the order passed by the first Enquiry

Officer. Therefore, mere non-payment of subsistence allowance to the delinquent during the period of suspension in the fact of the present case

made the order of dismissal void.

40. In a subsequent decision of the Supreme Court in the case of Jagdamba Prasad Shukla Vs. State of U.P. and Others, , the same principle has

been reiterated.

41. In this connection Mr. Mitra, the learned Senior Advocate appearing on behalf of the appellant placed strong reliance upon a recent Supreme

Court decision of a Bench consisting of two-Judges in the case of Indra Bhanu Gaur Vs. Committee, Management of M.M. Degree College and

Others, , where it was held that if no stand was taken before authorities that because of non-payment of subsistence allowance the appellant was in

any way incapacitated or any prejudice was caused to him in defending the proceedings, mere non-payment of subsistence allowance could not

ipso facto be a ground to vitiate the proceedings in every case. In the case before us, we have already pointed out that on the prayer of the

delinquent alleging non-payment, even the first Enquiry Officer dropped the proceedings; therefore, in the fact of the present case, the principles

laid down in the case of Indra Bhanu Gaur (supra), cannot have any application. In our view, even the decision rendered therein is in conflict with

the decision of the Supreme Court in the case of Ghanashyam Das Shrivastava (supra), which was delivered by a Bench consisting of five Judges.

We, therefore, find that in this case, for non-payment of subsistence allowance alone, the order of dismissal was liable to be set aside.

42. In the case of State of M.P. v. Syed Quamar Ali, reported in 1967 SLR 228, a Bench consisting of five-Judges in paragraph 20 of the

judgment observed that order of dismissal in that case having been passed in the breach of mandatory rules, it had no existence and it was not

necessary for the respondent to have the order set aside by a Court. Mr. De, the learned Senior Advocate appearing on behalf of the respondents

strongly relied upon the said decision and contended that the order of dismissal being itself void, there is no necessity of seeking a declaration that

the same is void or that the same is not binding on the delinquent.

43. In this connection, Mr. Mitra, has, on the other hand, placed reliance upon a subsequent decision of the Supreme Court in the case of State of

Punjab and Others Vs. Gurdev Singh, , decided by a Bench consisting of three-Judges where the earlier decision in the case of Quamar Ali

(supra), was considered and distinguished. In the said decision, it was held that a suit for declaration that the order of dismissal from service of an

employee was ultra vires, unconsitutional, against the principles of natural justice and void and that the delinquent continued to be in service must

be subject to the limitation period prescribed in the Limitation Act and the period of three years starts running from the date of passing of the

dismissal order or where departmental appeal or revision was filed, from the date of dismissal of such appeal or revision. It was further held that if

the suit is filed after the lapse of the period of three years so computed, it would be liable to be dismissed on the ground of limitation. While

considering the case of State of M.P. v. Syed Quamar Ali (supra), the said Bench pointed out that in the earlier case of Quamar Ali (supra), the

larger Bench only emphasized that since the order of dismissal was invalid being contrary to para 241 of the Police Regulation it was not be set

aside. The aforesaid latter Bench, however, pointed out that Quamar Ali brought the suit within the period of limitation, inasmuch as, he was

dismissed on 22nd December, 1945 and his appeal against the said order of dismissal was rejected by the Provincial Government on 9th April,

1947 and he brought the suit giving rise to appeal before the Supreme Court on 8th December, 1952 and that was within the period of six years in

accordance with the then provision of Article 120 of the Limitation Act, 1908. According to the said decision in the case of Gurdev Singh (supra),

even if an action which is ultra vires and against the principles of natural justice and hence void, it remains operative unless and until it is declared to

be so by a competent Court and consequent upon such declaration, it automatically collapses and there is no further need for the Court to quash it.

It is, therefore, clear that even if a void order of dismissal is passed by the authority, the dismissed employee should pray for declaration that such

void order is not binding upon him. The subsequent Bench of three-Judges having construed the earlier decision of the Supreme Court in the case

of State of M.P. v. Syed Quamar Ali (supra), in our view, we are bound by the subsequent interpretation given by the Apex Court in the case of

Gurdev Singh (supra). The aforesaid view is in no way conflict with the decision of the Larger Bench, and thus, there is no scope of referring the

matter to a larger Bench for explanation of the decision in the case of Quamar Ali (supra), as suggested by Mr. De.

44. We, however, find substance in the contention of Mr. Mitra that in this case in view of the decision of the Supreme Court in the case of R.S.

Rathore v. State of Madhya Pradesh (supra), the appropriate provision of the Limitation Act applicable is the Article 58 and the limitation starts

from the communication of the order of dismissal, namely, 16th July, 1985 and the limitation is three years from that date.

45. In the case of Union of India (UOI) and Others Vs. West Coast Paper Mills Ltd. and Another, , it was held by the Supreme Court that the

phrase ""'other cause of like nature"" appearing in Section 14 of the Limitation Act should be given liberal interpretation and the said phrase is wide

enough to cover cases where the defects are not merely jurisdictional strictly so called but covers any circumstance, legal or factual, which inhibits

entertainment or consideration by the Court of the dispute on merits and institution of a writ petition in respect of money claimed was given benefit

of Section 14 of the Limitation Act in the said case. In the case before us, we have also held that the respondents should get the exclusion of the

period spent by their predecessor as also the period spent by plaintiff No. 1 in filing the second writ application which failed for want of

jurisdiction.

46. We, however, find substance in the contention of Mr. Mitra that the learned Trial Judge could not direct the appellant to pay the provident fund

amount of Rs. 88,528/- because it is the Provident Fund Commissioner who is responsible for such non-payment. We, accordingly, modify the

decree to this extent that the amount of provident fund due to the deceased employee should be excluded.

47. On the basis of undertaking given by the appellants that they would pay interest at the rate of 25% per annum to the respondents if the appeal

fails, a Division Bench of this Court restrained the respondents from withdrawing a part of the decretal amount being a sum of Rs. 15,70,000/-

from their bank account though the decree was fully executed during the pendency of the appeal in the absence of any order of stay. Since this

appeal has succeeded in part to the extent of the provident fund amount of Rs. 88,528/-, the appellant will not be required to pay interest at the

rate of 25% on the aforesaid amount of provident fund money. The appellants are, therefore, directed to pay interest at the rate of 25% per annum

on the basis of their undertaking on the amount of Rs. 15,70,000/- - Rs. 88,528/- = Rs. 14,81,472/- from the date of execution till this day within

one month from today and such interest would be part of the modified decree after deducting the provident fund amount.

48. The appeal is, thus, allowed to the extent indicated above. In the facts and circumstances, there will be, however, no order as to costs.

Pravendu Narayan Sinha, J.

49. I agree.