
AIR 1921 Cal 393 : 75 Ind. Cas. 262

Calcutta High Court

Case No: None

Srimati Haimabati Devi

APPELLANT

Vs

Pran Krishna Banerjee
and Others

RESPONDENT

Date of Decision: Aug. 3, 1921

Acts Referred:

- Soldiers (Litigation) Act, 1918 - Section 10

Citation: AIR 1921 Cal 393 : 75 Ind. Cas. 262

Hon'ble Judges: N.R. Chatterjea, J; Chotzner, J

Bench: Division Bench

Judgement

1. This appeal arises out of an application u/s 10 of the Indian Soldiers (Litigation) Act (IX of 1918) and also for a review of a decree said to have been passed by consent.

2. It appears that the plaintiff-appellant brought a suit against a certain lady for partition and that on her death six persons were substituted in her place, one of them being Pran Krishna Banerji. Pran Krishna left India to serve in Mesopotamia in August 1918 and returned to India towards the end of October 1919. The suit was disposed of on the 28th of July 1919 upon a petition of compromise filed on behalf of all the defendants. Pran Krishna before his departure from India executed an am mukhtarnama in favour of his four brothers, three of whom signed this petition of compromise, the name of the fourth brother having been signed by the attorney of the latter. In November 1919 the present application was made by Pran Krishna on the ground, amongst others, that the compromise had been affected without his knowledge and authority and that the suit ought not to have been proceeded with in his absence; that his interests were not properly looked after although he had left a power-of-attorney in favour of his brothers before he left India. The Court allowed the application and set aside the decree. The plaintiff has appealed to this Court.

3. The order was passed not only u/s 10 of Act IX of 1918 but also upon, an application for review. The review having been granted an appeal would lie only on the ground specified in Order XLVII, Rule 7 (c), no other clauses of that rule being applicable to the case. Clause (c) would apply if the application for review was admitted after the prescribed period and without sufficient cause. u/s 10 of the Indian Soldiers (Litigation) Act an application can be made within three months from the date on which a soldier ceases to serve under War conditions. It is contended by the learned Pleader for the appellant that the War conditions ceased in November 1918 and that, therefore, the application was out of time. On the other hand, it is contended on behalf of the respondents that the War conditions in Mesopotamia have not yet ceased. However that may be, there is a certificate by the Adjutant-General that Pran Krishna served under War conditions from 25th July 1918 to 5th November 1919. The application was made on 3rd December 1919, i.e., within a short time after he ceased to serve under War conditions. Apart from the proviso (a) to Section 10 of the Act, the Adjutant-General's certificate that Pran Krishna was serving under War conditions would be a sufficient ground for admitting the application for review after the period of limitation, and we are not inclined to hold that there was any unreasonable delay in making the application after his return to his place of residence. That being so, the appeal must fail.

4. It is contended, however, that we ought to interfere u/s 115 of the Civil Procedure Code. The main ground on which we are asked to do so, is that the learned Subordinate Judge was in error in holding that there was no compliance with the provisions of Section 6 of Act IX of 1918. Section 6 of that Act lays down.

5. "If the Collector has certified u/s 5, or 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 thereon, and if such soldier is not represented by any person duly authorised to appear, plead or act on his behalf, such Court shall suspend the proceeding and shall give notice thereof in the prescribed manner to the prescribed authority." It is pointed out that, as a matter of fact, the learned Subordinate Judge did write to the Collector of 24-Pergunnahs, who at that time was the prescribed authority in this matter, and that the latter refused to certify and left it to the discretion of the Subordinate Judge to act in the way he thought proper. Reference was made on behalf of the respondent to certain rules published in the Calcutta Gazette in December 1918 to show that the Adjutant-General was the prescribed authority under Act IX of 1918 in place of the Collector of the 24-Pergunnahs who was the prescribed authority under the former Act of 1915. But the correspondence between the Subordinate Judge and the Collector took place before the rules were published, and although the suit did not terminate until July 1919 it does not appear that these rules were brought to the notice of the Subordinate Judge.

6. But, assuming that there was no default made in complying with the provisions of Section 6, the Court under the latter part of Section 10 of Act IX of 1918 may make an order setting aside a decree or order against a soldiers "if the interests of justice require such a course in any other case." In the present case, the am mukhtearnama executed

by Pran Krishna was in favour of his four brothers. It as a joint power given to them and there was no power given to them to act separately. Admittedly, the petition of compromise was not signed by all the four. It is contended on behalf of the appellant that the fourth brother Sarat, although he did not sign the petition, took part in the deliberations and agreed to the terms of the compromise, though he was not present at the time of signing the petition of compromise. But he was at Shillong at the time and the learned Subordinate Judge finds that "there is no satisfactory evidence to show that Sarat himself agreed to all the terms embodied in Exhibit 5." In these circumstances, the signing of the petition of compromise by an am mukhtear of Sarat would not bind Pran Krishna.

7. Then, again, it apperas that the Pleader for Pran Krishna informed the Court by a petition in August 1918 that he had no instructions from Pran Krishna and was unable to act on his behalf. Another petition was presented on behalf of the four brothers in which they stated that the interests of Pran Krishna were not being properly looked after, that they could not properly look after his interests, and prayed that the trial of the suit might be stayed until his return. We have already stated that Pran Krishna did not return to India until October 1919. Under these circumstances, we think that the learned Judge was justified in setting aside the decree either under the latter part of Section 10 of the Act or, under the general powers of review contained in Order XLVII, Rule 1, Civil Procedure Code.

8. The last point is, whether the Court Was right in setting aside the decreoe not only as against Pran Krishna hut against the other defendants also. But where the decree or order is of such a nature that it cannot be set aside as against such a soldier only it may be set aside as against all or any of the parties against whom it is made. Here it was a suit for partition including the family dwelling house and evidently the Court below held that, in these circumstances, the entire decree should be set aside. We are unable to hold that the Court was wrong in doing so.

9. The learned pleader for the petitioner endeavoured to show that the compromise was a far one; but we have no power to go into the evidence on the point, and it is unnecessary to consider that question as the decree must be set aside upon the grounds stated above.

10. The result is that the appeal must fail and is accordingly dismissed with costs; hearing fee one gold mohur.

11. The Rule is discharged. We make no order as to costs in the Rule.

12. Let the record be sent down as soon as the decree is signed.