

(1910) 03 BOM CK 0001
In the Bombay High Court
Case No : O.C.J. Suit No. 708 of 1897

Abdool Hoosein Essufally

APPELLANT

Vs

Esmailji Abdool Hoosein

RESPONDENT

Date of Decision : 21-03-1910

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 16, 79
Limitation Act, 1963 — Section 12

Citation : (1910) 12 BOMLR 462

Hon'ble Judges : Beaman, J

Bench : Single Bench

Judgement

Beaman, J.—This is a rule taken out by defendant No. 3 in suit No. 708 of 1897 to have an ex parte decree passed against her on the 22nd of March, 1898, set aside.

2. The defendant asks for this relief on the ground that no notice was served upon her, and incidentally sets forth certain facts which in substance would, if believed, show that the claim so far as it touched her was essentially false and should not have been decreed against her.

3. Cause is shown against the rule on two grounds: (1) that there was a good service, and (2) even if there was no good service the application is time-barred.

4. Upon the merits, disclosed in the affidavits laid before the Court, I have very little doubt that defendant No. 3 ought to succeed and that this is a case in which if the rule is to be discharged upon technical grounds there is a very great danger, to say no more, of real and serious injury being done to the defendant. But the plaintiff, who has opposed this rule, has insisted upon the Court adhering strictly to the letter of the law and laying all other considerations outside the determination of this rule. Therefore, it becomes necessary to scrutinize with particular care what the letter of the law is in so far as the law governs the rights of the parties in the matter of service and such reliefs as ought to be given, on the ground of inadequate service.

5. Accepting as true all the facts stated in the plaintiff's counter-affidavits upon this rule, it still appears to me that if we apply the section with rigid literalism there has been a failure, and a material failure, to comply with one of the conditions of good and lawful service. The question with which I am directly concerned falls within the scope of Section 79 of the old Code, now Order V, Rule 16, which runs :-

Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered.

6. And reading all the sections which deal with service in their proper sequence and connection, I am inclined to think that there was considerable force in the contention and in the reasoning, upon which that contention was based, of Mr. Dastur. In all strictness I think we must regard Section 79 as contemplating three distinct classes of service : (1) on the party in person, (2) on that party's duly appointed agent, (3) upon any other person on behalf of that party. Then, if we turn to the sections which have preceded, we shall see that the third class of service is contemplated by the law only when the party cannot himself be found. Here it is the plaintiff's own contention that defendant No. 3 was actually present and that the service was effected upon her in person. But the plaintiff seeks to evade the literal difficulty by arguing that the husband of defendant No. 3 was likewise present and that although the service was no doubt effected on defendant No. 3 in person the signature of the husband taken on her behalf would fulfill all the requirements of the latter portion of Order V, Rule 16. But as I have been asked by the plaintiff to adopt the most rigid view of the letter of the law when he thought by so doing it would serve his own purpose, it certainly seems to me that that letter of the law is clearly against the extension which he wishes to give to the face meaning of the words I have quoted from Section 79. I have very little doubt that, if the facts alleged by the plaintiff in his affidavits are true, there was in fact very good service to which no exception would ordinarily be taken; but in spite of that I cannot shut my eyes to the fact that there would be a technical defect inasmuch as though the service was effected upon the party in person, neither that party's mark or signature was taken upon the paper; and it is, therefore, open to defendant No. 3 now to contend, and I think contend successfully, that the service was bad. Then, unless the plaintiff could succeed upon the second ground of limitation, defendant No. 3 would surely be entitled to have this rule made absolute.

7. It is unnecessary for me to go into the various considerations which have been suggested in the course of the arguments as arising out of the case law authority upon the powers of the Courts to set aside ex parte decrees, for while those cases show that the Courts have occasionally taken the most ample view of their powers and have gone so far as to say that the inherent powers of the Court enable it to set aside ex parte decrees of its own upon any sufficient ground or when it appears that failure to do so would result in an abuse of its own

processes, none of those cases in India at any rate have gone the length of saying that those powers inherent in the Courts can override the provisions of statutory limitations. One case to which I was referred, namely, *Beale v. Macgregor* (1886) 2 T.L.R. 311 appears to indicate that the English Judges have even gone so far, but I apprehend that what their Lordships were dealing with was a rule of their own making which they felt themselves, therefore, at liberty to unmake upon a proper occasion. If indeed the decision really meant that, an ex parte judgment could be set aside upon an application which was in any sense time-barred, the case would be altogether different where a prohibition was created by Statute; for I do not believe that any authority could be cited either in England or in India for the proposition that the inherent powers of Courts extend to overriding or abrogating statutory law and in this country the statutory limitation provides that the application to have an ex parte decree set aside must be brought where there has been no service of summons, within thirty days of the party aggrieved having knowledge of the decree. In the present case defendant No. 3 admits that she received notice on the 26th of January and this application was filed on the 26th of February. When, therefore, she has received all the time to which she is entitled u/s 12 of the Limitation Act her present application is still one day out of time, and it does" not appear that this delay can be excused u/s 5. I am not aware that that section has yet been extended by any enactment to applications to have ex parte decrees set aside, nor has the Court been asked to excuse delay if delay there has been in making this application. Defendant No. 3 rather contends that there is no bar of limitation because she only obtained knowledge of the decree within the meaning of Article 164 of the second Schedule of Act IX of 1908 or about the 3rd of February. In support of this contention I am referred to the recent decision of *Davar J.*, in *Pundlick Rawji v. Vasantrao Madhavrao* (1909) 11 Bom. L.R. 1296, the only decision, I believe, which has as yet been given upon this new Article 164. I agree entirely with what that learned Judge has said, namely, that in every case whether or not a party seeking this kind of relief has knowledge of the decree, must be a question of fact. Although my sympathies have been throughout with defendant No. 3, although I should be very glad if I could see my way under cover of any of the passages in *Davar J.*'s judgment to extend the meaning of the simple words used in Article 164 so as to bring the defendant's case within them, I confess that those words present no difficulty whatever to my own mind and that the facts of the present case seem to me to admit of no dispute or question. Defendant No. 3 received the notice of this Court in the ordinary form apprising her of the number and date of the decree and I find it impossible to hold that, from the moment of the receipt of such notice, the recipient had no knowledge of the decree within the meaning and intention of Article 164. I understand the words there used to mean no more than knowledge of the fact that a decree of the kind is in existence. I do not understand that they can be extended one inch further so as to let in the possibility of embracing knowledge of the contents and general effects of the decree. If I were to adopt the view which defendant No. 3 has pressed upon me relying on the judgment of *Davar J.*,

it seems to me that no consistent effect could ever be given to Article 164. 11 would be open to every person, who received notice in however solemn a form of the existence of a decree, to reply that he was not aware of the particulars and details and that, therefore time could not be made to run against him until he had made inquiries ample enough to satisfy himself upon all these points In other words, that he might reserve to himself the power o extending the period of limitation practically in prosecution of inquiries however dilatory in every minute particular of the decree of which he was notified. That is a practical extension of the section which must necessarily follow upon any tentative extension of the ordinary meaning of the language used in it. And it certainly appears to me that the only result would be to make that Article either a dead letter or an absurdity.

8. With very great reluctance, therefore, I come to the conclusion that although defendant No. 3 has succeeded in showing that the service was defective, and, therefore, bad, she is upon her own admission one day beyond the period of limitation, and is, therefore, debarred from obtaining the relief I should otherwise have been only too glad to extend to her.

9. In these circumstances, I must discharge this rule, but having regard to what I believe to be at any rate the probability underlying it, I shall not allow the plaintiff any costs.

10. The rule will, therefore, be discharged. Parties to bear their own costs of it.