
(1982) 05 DEL CK 0052

In the Delhi High Court

Case No : S.A.O. No. 29 of 1979

Balraj Khanna (represented by his legal representatives H.R. Khanna and Others)

APPELLANT

Vs

Krishan Wanti and Others

RESPONDENT

Date of Decision : 18-05-1982

Acts Referred:

Citation : (1982) 22 DLT 165

Hon'ble Judges : Sultan Singh, J

Bench : Single Bench

Advocate : S.K. Tiwari, for the Appellant; S.L. Mehta and Virendra Mehta, for the Respondent

Final Decision : Allowed

Judgement

Sultan Singh, J.—The question in this second appeal is : Whether the order of eviction passed ex parte against the appellant is liable to be set aside? Briefly the facts are that on 2nd January, 1974 the respondents filed an application for eviction of. Bal Raj Khanna, appellant on grounds mentioned in Section 14(1) (b) (d) and (e) of the Delhi Rent Control Act, 1958 (hereinafter referred to as "the Act"). Summons was sent to him for 14th February, 1974 but it was not received back by the Controller and Therefore fresh summons was ordered to be issued for 19th March, 1974. Again it was not served and was received back with the remark that the appellant was out of station. The reports were made on 27th February, 1974 and 15th March, 1974. On 19th March, 1974 the Controller again ordered for the issue of summons in the ordinary manner as well as by Registered A.D. post for 6th May, 1974. Neither process fee nor registered cover was filed by the respondents. On 23rd March, 1974 an application under Order 5 Rule 20 of the CPC was made alleging that neither the appellant nor any member of his family was residing for the last more than 10 months, that the appellant was avoiding service of notice and he could not be served by ordinary process. The appellant was ordered to be served by publication in Jagat Weekly and by

beat of drums for the date fixed i.e. 6th May, 1974. Summons was thus published in Jagat Weekly dated 24th April, 1974 for 6th May, 1974. The appellant was also served by the beat of drums. There was no appearance on behalf of the appellant and ex parte proceedings were taken against him. The eviction order was passed on 31st May, 1974. It appears that in October, 1974 the respondents took out warrants of possession to execute the order of eviction but they were resisted by the occupants of the suit premises. The occupants were the brothers of the appellant. On 23rd April, 1975 the appellant filed the application dated 19th April, 1975 under Order 9 Rule 13 of the CPC supported by his affidavit for setting aside the order of eviction passed ex parte, alleging that on 19th April, 1975 he came to know about the respondents having obtained the order of eviction ex parte against him, that he was never served, that he was not in Delhi when the service is said to have been effected on him. The application was dismissed by the Additional Controller on 3rd July, 1978. The appellant's appeal was also dismissed by the Rent Control Tribunal on 8th January, 1979 holding that the application for setting aside the ex parte order of eviction was barred by time. The Tribunal however held that proper services on the appellant was not affected. The appellant has filed this second appeal u/s 39 of the Act. The question involved in this second appeal is whether the application for setting aside the order of eviction passed ex-parte is within time. Article 123 of the Limitation Act of 1963 provides a period of 30 days for an application to set aside a decree passed ex parte from the date of decree. In cases where the summons was not duly served an application may be filed within 30 days when the applicant had the knowledge of the decree. Explanation to this Article further provides that substituted service under Order 5 Rule 20 of the CPC shall not be deemed to be due service for purposes of the said Article. In Lachhman Dass Vs. Veer Finance Co. and Others, , it has been held that the Explanation to Article 123 of the Limitation Act, 1963 makes it clear that substituted service under Order 5 Rule 20 of the CPC shall not be deemed to be due service. Thus limitation for setting aside the ex parte eviction order is to be calculated from the date of the knowledge.

2. Summons was sent to the appellant for 14th February, 1974 but it was not received back by the Controller. Another attempt was made for 19th March, 1974 but the summons was returned with the remark that the appellant was out of station. No other attempt was made to effect personal service. The appellant however was served by substituted service by beat of drums and also by publication in the paper "Jagat Weekly" for 6th May, 1974. The respondents had filed the eviction case on the ground that the appellant had not been using the premises as residence for more than six months prior to the filing of the eviction application. In other words, the respondents were aware at all relevant times that the appellant was not in occupation of the suit premises i.e. 18 Pusa Road, New Delhi and no other address for his service was provided by the respondents. No effort was made to find out the address of the appellant to get him served. Under Article 123 of the Limitation Act it has to be determined whether the

appellant filed the application for setting aside the ex parte order of eviction within the period of 30 days from the date of knowledge. In his application dated 19th April, 1975 for setting aside the ex-parte order of eviction the appellant has alleged that he came to know of the ex parte order on 19th April, 1975. The respondent in reply submitted that the persons in occupation of the premises related to the appellant, came to know of the ex-parte eviction order on 21st October, 1974 when the bailiff went to take possession of the premises. The respondents-decree-holders did not plead whether the appellant had knowledge of the eviction order and if so when he got the knowledge of the same. The appellant got himself examined on commission at Bombay in support of his application. His two brothers at Delhi were examined as witnesses by the Controller. No evidence was led by the respondents. It is in evidence that the brothers of the appellant have been in occupation of the suit premises, that they came to know the eviction order in October, 1974 when the respondents tried to of execute the warrants of possession. From the summons sent at the suit premises it is further clear that one of the brothers of the appellant made a report that the appellant was out of station. These reports were made on 27th February, 1974 and 15th March, 1974. From the evidence it is also established that the appellant came to know of the ex-parte order of eviction in April, 1975. One of the brothers of the appellant had deposed that after October, 1974 he contacted another brother at Poona and told him to inform the appellant at Bombay that there was an eviction case against him, that his brother at Poona could not contact the appellant at Bombay and Therefore no information was passed to him, that it was on 1st April, 1975 when the appellant contacted his brother on phone at Delhi that he was informed about the eviction order and thereafter steps were taken to move the Controller for setting aside the eviction order. The appellant thus came to know of the ex parte eviction order on 1st April, 1975 at the earliest. He sworn an affidavit in support of the application under Order 9 Rule 13 of the CPC on 19th April, 1975 at Bombay. The application and the affidavit were filed before the Additional Controller on 23rd April, 1975. The Controller and the Tribunal have held that as the brothers of the appellant were aware of the eviction order in October, 1974 the appellant must be deemed to have knowledge of the same. The application filed in April, 1975 was thus held to be barred by time. The approach of the Controller and the Tribunal is contrary to law. The period of 30 days is to be counted from the date of knowledge of the appellant-judgment debtor and not of somebody else. Knowledge not of any eviction order but particular eviction order passed against him must be imputed and proved. From the application under Order 9 Rule 13 of the CPC it is that the appellant never had knowledge of the eviction order passed on 31st may, 1974. Knowledge of the brothers of the appellant cannot be held to be the knowledge of the appellant. There is unrebutted evidence to prove that the appellant came to know about ex parte order of eviction in April, 1975. The finding of the Tribunal that the appellant came to know in October, 1974 is not based on any evidence but only on conjectures. The respondents-decree-holders neither led any evidence that the appellant had knowledge of the decree at any time prior to

April, 1975 nor pleaded to that effect. In *Kumud Nath Ray Chowdhury v. Jogindra Nath Chowdhury* 2nd 38 Calcutta 394(403) it has been observed that the period of limitation runs from the date when the defendant has knowledge of the particular decree which is sought to be set aside. It has been further observed as follows :

"The petitioner asserts that he first became aware of the ex parte decree on the 1st June, 1909, and made the application to set it aside on 26th June following. The learned Subordinate Judge, however, has held, that as his brothers had knowledge of the ex parte decree, the inference may reasonably be drawn that he had a similar knowledge of it. We are unable to accept this conclusion so based on a correct appreciation of the evidence. As pointed out by Mr. Justice Davar in *Pundlick v. Vasant Rao*, (1909) 11 Bom Law Rep 1296, the term "knowledge" in Article 164 of the Limitation Act, 1908 means a certain and clear perception of a fact, the fact being the decree in the suit; the expression "knowledge of the decree" means knowledge not of a decree but of the particular decree which is sought to be set aside. Now, in the case before us, there is no direct evidence on the record that the petitioner had knowledge of the decree before the 1st June, 1909. The circumstances, upon which reliance has been placed in support of the contrary view, are entirely inconclusive".

3. In *Charan Das v. Firm Puran Lal Gobind Pershad*, AIR 1929 Lah 235 it has been held that it is necessary for the court setting aside an ex parte decree to find definitely that in cases in which the summons was not duly served the applicant did not have knowledge of the decree more than 30 days before the application was made. In *Panna Lal v. Murari Lal*, AIR 1967 S.C. 1384 while dealing with Article 164 of the Limitation Act, 1908 corresponding to Article 123 of the Limitation Act, 1963 the Supreme Court observed, "The onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before date of the application.....the expression "knowledge of the decree" in Article 164 means knowledge not of a decree but of the particular decree which is sought to be set aside, a certain and clear perception of the fact that the particular decree had been passed against him". In the instant case the appellant produced evidence to show that his application was within time as he proved that he came to know of the ex parte eviction order only in April, 1975. He was not cross-examined on this aspect of the case. The Supreme Court in the said case has also observed that the plaintiff was to establish satisfactorily that the defendant had knowledge more than 30 days of the date of the application. There is un rebutted evidence to hold that the application for setting aside ex parte decree was made within 30 days of obtaining the knowledge of the passing of the ex parte eviction order. It has been contended on behalf of the respondents that from the report on the summons on 27th February, 1974 and 15th March, 1974 it is established that the appellant

was aware of the eviction proceedings. It may be. But mere knowledge of the eviction proceedings is not knowledge of the eviction order. In *Pichai Ammal Vs. Vellayya Thevar alias Ochu Thevar*, it has been held that mere knowledge of the date of the suit would not be enough for purposes of an application for setting aside the ex parte decree. Again in the instant case there is nothing on the record to hold that the appellant ever had knowledge of the eviction proceedings or ex parte order of eviction prior to April, 1975. Neither there is any plea nor any evidence to that effect on behalf of the respondents.

4. Learned counsel for the respondents further submits that the Controller and the Tribunal have concurrently held that the appellant had knowledge of the eviction order in October, 1974 and this finding cannot be interfered with in second appeal. The Tribunal has held that the brothers of the appellant became aware of the eviction order in October, 1974. Knowledge of the brothers cannot be knowledge of the appellant, unless, there is evidence that the brothers communicated their knowledge to the appellant. Learned counsel submits that the finding about the knowledge of the eviction order is a finding of fact. This finding is not based on any evidence and Therefore the same can be interfered with in second appeal. In *Mattulal Vs. Radhe Lal*, it has been held that a finding of fact cannot be interfered with by the High Court in second appeal unless it is shown that in reaching it a mistake of law is committed or it is based on no evidence.

5. From the record of this case it is clear that the respondents never made any effort to effect service of the eviction application upon the appellant. The summons was sent at the said address, though the respondents landlords, were aware that the appellant had not been occupying the premises. The summons sent to the appellant at the said address was never refused or avoided by him. The respondents filed an application dated 23rd March, 1974 alleging that the appellant was avoiding service of notice. The application for substituted service in the instant case was not called for. In *Veena v. Pran Nath Trehan*, 1977 Raj. Law Rep 44 it has been held that if the defendant was not reported to have refused or avoided service, then seeking service by proclamation in newspaper is improper. I am thus of the view that the appellant was never served with the summons of the eviction application that he came to know of the ex parte eviction order only in April, 1975 and the application for setting aside the same was moved within 30 days from the date of knowledge. I, Therefore accept this appeal and set aside the order of the Rent Control Tribunal dated 8th January, 1979 and the order of the Additional Controller dated 3rd July, 1978 dismissing the appellant's application under Order 9 Rule 13 of the Code of Civil Procedure. The eviction order dated 31st May, 1974 passed against the appellant is hereby set aside and the eviction application is remanded to the Additional Controller for decision in accordance with law. No order as to costs. The parties are directed to appear before the Additional Controller on 20th July, 1982.